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*Judicial Compensation  
and Benefits Commission*



*Commission d'examen de  
la rémunération des juges*



**REPORT  
AND  
RECOMMENDATIONS**

**SUBMITTED TO  
the Minister of Justice of Canada**

**August 30, 2021**

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***Judicial Compensation  
and Benefits Commission***



***Commission d'examen de la  
rémunération des juges***

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August 30, 2021

The Honourable David Lametti, PC, QC, MP  
Minister of Justice and Attorney General of Canada  
284 Wellington Street  
Ottawa, Ontario  
K1A 0H8

Dear Minister Lametti:

Pursuant to subsection 26(2) of the *Judges Act*, I am pleased to submit the report of the sixth Judicial Compensation and Benefits Commission.

Respectfully,

A handwritten signature in blue ink that reads "Martine Turcotte". The signature is stylized and includes a large flourish at the end.

Martine Turcotte, Ad. E., B.C.L., LL.B., MBA  
Chair

Encl.

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## CHAPTER 1 – INTRODUCTION

### A. THE COMMISSION’S HISTORY AND MANDATE

- [1] This is the Report of the Sixth Quadrennial Judicial Compensation and Benefits Commission (“Quadrennial Commission” or “Commission”) established under section 26 of the *Judges Act*<sup>1</sup> to inquire into the adequacy of salaries and benefits payable to federally-appointed judges and prothonotaries.
- [2] Orders in Council were issued on May 31, 2020 appointing Martine Turcotte as chairperson of the Commission and Margaret Bloodworth and Peter Griffin as members. These were announced on June 17, 2020 by the Honourable David Lametti, Minister of Justice and Attorney General of Canada.<sup>2</sup>
- [3] This Report is delivered to the Minister of Justice within the nine-month period specified in section 26(2) of the *Judges Act*, given the commencement of the inquiry on December 1, 2020.<sup>3</sup>
- [4] In accordance with section 26(7) of the *Judges Act*, the Minister of Justice must respond to the Commission’s Report within four months after receiving it and thereafter, where applicable, and within a reasonable period, initiate any legislation to implement the response.
- [5] Section 100 of the *Constitution Act, 1867* authorizes Parliament to set compensation for the judiciary.<sup>4</sup>
- [6] The Quadrennial Commission process was initiated by amendments to the *Judges Act* in 1998 after the Supreme Court of Canada’s decision in *Re Remuneration of Judges of the Provincial Court of Prince Edward Island*.<sup>5</sup>
- [7] That case and subsequent jurisprudence emphasize that the constitutional guarantee of judicial independence is a cornerstone of constitutional government.<sup>6</sup> These cases affirm the three elements of judicial independence as: security of tenure, administrative

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<sup>1</sup> R.S.C., 1985, c. J-1, as amended [*Judges Act*].

<sup>2</sup> Department of Justice, “Appointments to the Judicial Compensation and Benefits Commission” (June 17, 2020), Appendix A to this Report.

<sup>3</sup> News Release and Notice of the Judicial Compensation and Benefits Commission “Quadrennial Judicial Compensation and Benefits Commission begins Inquiry” (December 16, 2020), Appendix B to this Report.

<sup>4</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in R.S.C., 1985, Appendix II, No 5 [*Constitution Act*].

<sup>5</sup> *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 S.C.R. 3 [*PEI Reference*].

<sup>6</sup> *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405, para 116.

independence, and financial security.<sup>7</sup> They establish the requirements of a process to address the compensation of the judiciary while preserving its independence.<sup>8</sup>

- [8] In examining judicial compensation, section 26(1.1) of the *Judges Act* requires Quadrennial Commissions to consider the following factors:
- (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.<sup>9</sup>
- [9] The Quadrennial Commission process has resulted in five previous Reports:
- (a) the Drouin Commission Report (2000) (“Drouin Report”)
  - (b) the McLennan Commission Report (2004) (“McLennan Report”)
  - (c) the Block Commission Report (2008) (“Block Report”)
  - (d) the Levitt Commission Report (2012) (“Levitt Report”)
  - (e) the Rémillard Commission Report (2016) (“Rémillard Report”)<sup>10</sup>
- [10] The compensation-setting process of the Quadrennial Commissions applies to all judges appointed pursuant to section 96 of the *Constitution Act*. These are the judges of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court of Canada, the Court Martial Appeal Court of Canada, the Tax Court of Canada, and the courts of appeal and the superior courts of each province and territory.<sup>11</sup>
- [11] Prothonotaries are judicial officers of the Federal Court of Canada. Their office attracts a constitutional guarantee of judicial independence. Prothonotaries’ compensation was added to the Quadrennial Commission’s scope of review in 2014 by amendments to the *Judges Act* that extended the definition of “Judiciary” to include these officers.<sup>12</sup>
- [12] The Rémillard Commission was the first Commission to address the compensation of prothonotaries following the 2014 amendments to the *Judges Act*.

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<sup>7</sup> *PEI Reference*, para 115; *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] 2 S.C.R. 286 [*Bodner*], para 7.

<sup>8</sup> *PEI Reference*, paras.167-175; *Bodner*, paras 13-21.

<sup>9</sup> *Judges Act*.

<sup>10</sup> Joint Book of Documents, tabs 9 to 13.

<sup>11</sup> Sections 9-22 of the *Judges Act*.

<sup>12</sup> *Judges Act*, section 26.11.

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**B. THE COMMISSION'S PROCEEDINGS**

- [13] The Commission dealt with one preliminary matter before the commencement date of December 1, 2020.
- [14] By way of letter dated June 1, 2020 from counsel for the Canadian Superior Courts Judges Association, written with the concurrence and support of counsel for the Government and counsel for the prothonotaries (“the Prothonotaries”), the Commission was asked to defer the commencement date for the Commission’s inquiry from June 1, 2020 to December 1, 2020 based on the uncertainty created by the COVID-19 pandemic, its ramifications through Canadian society and the economy and its effect on certain deadlines necessary between the parties for the exchange of information relevant to their respective positions before the Commission.
- [15] The Commission delivered a ruling on June 10, 2020<sup>13</sup> granting the request and deferring the commencement date to December 1, 2020.
- [16] The Commission’s December 16, 2020 Notice,<sup>14</sup> inviting parties to comment and setting out the deadlines for the filing of written submissions, was widely distributed as a news release, and through email. Our website [https://www.quadcom.gc.ca/pg\\_JcJc\\_QC\\_01-eng.php](https://www.quadcom.gc.ca/pg_JcJc_QC_01-eng.php) was updated regularly with all submissions received.
- [17] Due to the COVID-19 pandemic, the May 10 and 11, 2021 public hearing, with transcription and simultaneous interpretation, was held virtually. We very much appreciated the cooperation of all participants in this regard. Most parties spoke to their filed briefs at the hearing, though some preferred to rely solely on their written submissions. A list of hearing participants is set out in Appendix D to this Report and a list of documents received is set out in Appendix E.
- [18] The Commission benefited from the filing of expert evidence by both the Canadian Superior Courts Judges Association and the Canadian Judicial Council (“the Judiciary”) and the Government on certain key issues.
- [19] In light of the nature of the expert evidence received, and the issues before us, we did not consider it necessary to engage our own compensation expert in order to conclude our deliberations.
- [20] The Commission did inquire during and after the oral hearing as to the availability of certain additional data and appreciates the parties’ prompt responses to our questions.

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<sup>13</sup> Ruling respecting request for deferral of commencement date of June 1, 2020 (June 10, 2020), Appendix C to this Report.

<sup>14</sup> Appendix B to this Report.

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### C. THE COMMISSION'S APPROACH

- [21] The Commission benefited from the comprehensive oral hearing reflecting the high quality of both the written submissions and the oral presentations. Counsel who had previously participated in the Quadrennial Commission process assisted us with their knowledge and experience.
- [22] The Commission also had the benefit of reading the reports of the five previous Quadrennial Commissions, the earlier five Triennial Commissions and the two Special Advisors on Prothonotaries' Compensation.<sup>15</sup>
- [23] The Commission received submissions on the role of consistency and "continuity" in respect of prior Quadrennial Commissions' determinations and recommendations and the scope of each Quadrennial Commission to arrive at its own conclusions on the evidence before it. Depending on the issue, we heard arguments both for consistency and "continuity" and against applying a previous Commission's recommendation without further inquiry.
- [24] The Supreme Court of Canada identified the starting point for a judicial compensation commission as the date of the previous Commission's report.<sup>16</sup> Each Commission must make its own assessment in its own context. As the Rémillard Commission noted, this does not mean that each new Commission operates in a void, disregarding the work and recommendations of its predecessors. A new Quadrennial Commission has the flexibility to assess whether in its view a previous Commission had arrived at recommendations which ought to be adjusted or reviewed in the current context.<sup>17</sup>
- [25] In light of that, we have tried to follow the common sense approach applied by the Rémillard Commission by giving careful consideration to the reasoning of previous Commissions as well as to the evidence before us. If valid reasons exist to change an approach, be it a change in circumstances, additional new evidence or developments to date, we took them into consideration in our deliberations before arriving at our recommendations. We believe that we have brought a fair and objective approach to any competing considerations.

### D. ACKNOWLEDGMENTS

- [26] It is an honour and a privilege to play such an important role in the constitutional processes of this country. For two of us it has been the second opportunity to do so.
- [27] This process would not have proceeded as smoothly and efficiently as it did without the steady hand and wisdom of Louise Meagher, our experienced and effective Executive Director, as ably supported by Natalie Duranleau.

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<sup>15</sup> Joint Book of Documents, tabs 9 to 15 and Judiciary Book of Exhibits and Documents, tabs 20 to 24.

<sup>16</sup> *Bodner*, at para 14.

<sup>17</sup> Rémillard Report, paras 23, 24, 26.

[28] The pandemic required that the Commission's proceedings be entirely virtual. It was a tribute to Ms. Meagher and Ms. Duranleau that this was achieved without a hitch.

## **E. THE REPORT STRUCTURE**

[29] This Report will address the issues before the Commission in the following order:

Chapter 2 – Judges' Salaries

Chapter 3 – Prothonotaries' Salaries and other Benefits

Chapter 4 – Other Issues

Chapter 5 – Future Data Collection

Chapter 6 – Conclusion

Chapter 7 – List of all Recommendations

Appendices

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## CHAPTER 2 - JUDGES' SALARIES

### A. ADEQUACY OF THE DATA AVAILABLE TO THE COMMISSION

#### 1. Private Practice Income Levels

- [30] Having adequate and reliable data is essential for the Commission to conduct its inquiry into the adequacy of judges' salaries and benefits, taking into account the criteria prescribed in section 26(1.1) of the *Judges Act*.
- [31] As in previous Quadrennial Commission inquiries, the parties obtained a base file of data from the Canada Revenue Agency ("CRA") for use before the Commission.
- [32] That data focused on the reported compensation levels of self-employed lawyers over the years 2015-2019.
- [33] The available data shows that there has been a decrease in the reported numbers of self-employed lawyers from 18,740 in 2015 to 15,510 by 2019 (before any filters are applied to the data) but a substantial increase in the use of professional corporations by practising lawyers across Canada. In 2019, there were 17,871 such corporations, representing a threefold increase in the use of professional corporations by practising lawyers since 2010. In 2018, this group comprised 27% of practising and insured law society members.<sup>18</sup>
- [34] The professional income earned through these professional corporations is not reflected in the available CRA data.
- [35] As far back as the 2004 McLennan Commission, it was recognized that those lawyers who have established personal corporations and are no longer reporting self-employed professional income "are probably those with the higher incomes".<sup>19</sup>
- [36] Expert evidence before this Commission suggests that the use of a professional corporation is tax advantageous to lawyers in private practice earning an income of \$200,000-\$300,000 or more, although there are within the reported CRA data self-employed lawyers earning in excess of both \$200,000 and \$300,000 per annum.<sup>20</sup>
- [37] We were advised that the CRA faces limitations on the data that it is able to extract from professional corporation tax filing information because a) there is a two-step process to determine whether a professional corporation belongs to a lawyer; b) questions then arise from the data based on the number of employees of the corporation as to which employee

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<sup>18</sup> Judiciary Submission, table 6 and paras 137-138.

<sup>19</sup> McLennan Report at 42-43.

<sup>20</sup> Report of Stéphane Leblanc and André Pickler, Judiciary Submission, Exhibit B, at 2; letter from Christopher Rupar dated May 14, 2020 [sic].

is the lawyer who constituted the corporation; and c) it is difficult to know whether the figures were before or after expenses.

- [38] The CRA advises that this is a labour-intensive task and could not confirm that it would be possible for it to do so.
- [39] In short, the CRA is not able to confirm that any data it could provide to the Commission on professional corporations would be accurate and complete. The Government and the Judiciary concluded that it would not be possible for them to obtain more information on professional corporations in time for this Commission to meet its statutory deadlines.<sup>21</sup>
- [40] As a result, this Commission is left with a lack of complete data as to the professional income level of lawyers in private practice.
- [41] The implication, however, of the CRA data under-reporting the income of higher-earning private sector lawyers is inescapable.
- [42] As the Government observed, “if this trend continues, the CRA data may become less and less reflective of practicing lawyers’ incomes.”<sup>22</sup>

## **2. Tax Advantages of Professional Corporations**

- [43] In the expert evidence before the Commission there is theoretical, but not concrete, reference to the benefits of tax deferral and potential tax savings in the future where the lawyer does not spend all of the professional income earned through the professional corporation in that taxation year.<sup>23</sup>
- [44] This benefit, which may be material depending on income level, is difficult to quantify, given that the lifestyle requirements, and spending habits, of a given professional would be highly subjective and likely vary widely.
- [45] Accordingly, there is no hard evidence upon which to quantify this potential advantage.
- [46] We were advised that there is also the opportunity to create an individual pension plan within a professional corporation.<sup>24</sup> We have no evidence as to the degree to which this is actually utilized, let alone to compare it in any effective way with the judicial annuity.

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<sup>21</sup> Letter from Christopher Rugar dated May 14, 2020 [sic].

<sup>22</sup> Government Submission, para 61.

<sup>23</sup> Report of Stéphane Leblanc and André Pickler, Judiciary Submission, Exhibit B.

<sup>24</sup> Second Report of Stéphane Leblanc and André Pickler, Judiciary Reply, Exhibit B.

### 3. Sample Size Within the CRA Self-employed Professional Income Data

- [47] Given the reducing number of lawyers in the self-employed professional income category in the CRA data, when applying filters to that data, the sample size becomes increasingly smaller.<sup>25</sup>
- [48] This, in conjunction with the under-reporting of private practice lawyer income in the CRA data due to the increasing use of professional corporations, is a further area of concern to this Commission.

### 4. Lack of Movement of DM-3 Salary Brackets

- [49] The Block Comparator, established in the Block Report and applied by subsequent Commissions, is defined as the midpoint of the DM-3 salary range, plus one half of available at-risk pay.<sup>26</sup>
- [50] Historically, the salary ranges have increased on a relatively consistent basis until more recently when, since 2017, the salary range has remained unchanged while the average salary of the existing DM-3s has generally increased within those ranges.<sup>27</sup>
- [51] We were advised that the salary ranges in the information provided to us with respect to the DM-3 category reflect retroactive increases approved on May 18, 2018 for each of April 1, 2014, 2015, 2016 and 2017.<sup>28</sup>
- [52] Given these retroactive increases and no evidence as to the explanation for the lack of movement of the DM-3 salary ranges, the Commission requested and received information from the Government as to what the DM-3 salary ranges would be if they were to reflect the most recent increases for the rest of the Public Service of Canada.<sup>29</sup>

### 5. Evidence with Respect to Source Groups of Applicants for Judicial Office

- [53] In considering the need to attract outstanding candidates to the judiciary, the Commission had before it studies from other jurisdictions, some anecdotal evidence and statistical evidence of a decreasing proportion of judicial appointments from private practice. We had little evidence before us about the lawyers in the applicant pools.

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<sup>25</sup> See for example the chart at para 87 of the Government Submission where, for the 2019 taxation year and applying certain filters, the target group of all self-employed lawyers in the CRA data set is reduced to only 19%, or 2,990 of the original 15,510. Using different filters, the target group is reduced to 6%, see letter dated May 26, 2021 from Kirk G. Shannon.

<sup>26</sup> Block Report, paras 108, 111.

<sup>27</sup> Judiciary Submission, see table following para 105.

<sup>28</sup> Letter dated May 26, 2021 from Kirk G. Shannon.

<sup>29</sup> Letter dated May 26, 2021 from Kirk G. Shannon.

- [54] The Judiciary attribute the downward trend in the percentage of appointments from private practice to the judicial salary as an obstacle to attracting lawyers in private practice to the Bench.<sup>30</sup>
- [55] The Government suggests that there is no evidence of a reduction in high quality candidates for the Bench, including those from private practice, as the number of private law firm partners (as opposed to non-partners) appointed to the Bench has generally increased over the years.<sup>31</sup>
- [56] The Commission inquired of the Judiciary and the Government whether statistics existed that would detail the prior employment of applicants (as opposed to appointees) and whether they come from the public or private sectors or other sectors such as academic, corporate or non-profit organizations. The Commission was informed that such data is not available.
- [57] Additionally, the system maintained by the Office of the Commissioner for Federal Judicial Affairs (“FJA”) does not track the source of candidates by regions within a province other than in Ontario and Quebec where there are multiple Judicial Advisory Committees. We have been told that to create more data would require a manual review of the actual applications.<sup>32</sup>

## 6. Conclusion

- [58] In our view, the next Quadrennial Commission will require more robust data in these areas, both from the CRA and the FJA, in order to address the criteria under section 26(1.1) of the *Judges Act*. This will be addressed further in our Recommendations in Chapter 5.

## B. CRITERIA UNDER SECTION 26(1.1) OF THE *JUDGES ACT*

### 1. Section 26(1.1)(a) Prevailing Economic Conditions

#### Effect of the pandemic

- [59] One of the factors to be considered by the Commission under section 26(1.1) of the *Judges Act* is the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government.
- [60] The McLennan Commission concluded that this meant a Commission should “consider whether the state of economic affairs in Canada would or should inhibit or restrain us from making the recommendations we otherwise would consider appropriate. ... The

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<sup>30</sup> Judiciary Submission, para 152.

<sup>31</sup> Government Reply, para 53.

<sup>32</sup> Letters dated May 11, 2021 and May 14, 2020 [sic] from Christopher Rupar and May 26, 2021 from Kirk G. Shannon.

consideration to be applied is whether economic conditions dictate restraint from expenditures out of the public purse”.<sup>33</sup> We agree.

- [61] It is important to underline that the inquiry into the adequacy of judicial compensation only occurs every four years.
- [62] The Government recognized this in its response to the Block Report. “The Government is mindful of the unique quadrennial nature of the judicial compensation process which limits the possibility of interim adjustments during the quadrennial period.”<sup>34</sup>
- [63] It is in this context that we must look at the extraordinary and unprecedented times arising out of the COVID-19 pandemic.
- [64] All parties have acknowledged the terrible loss of lives and livelihoods throughout this unprecedented crisis and have been mindful of its impact on their position. Our judiciary has shown its resilience as our justice system has adapted quickly and has continued to function during this difficult time.
- [65] In the Fall Economic Statement 2020, the Government stated that “Canada entered this crisis in a strong fiscal position” and that “the Government’s fiscally expansive approach to fighting the COVID-19 pandemic ... is limited and temporary. ... While this extraordinary spending will cause significant deficits in the short term, on par with the scale of effort required to deal with this once-in-a-century kind of crisis, such deficits are distinct from the structural deficits of the 1990s. ... The COVID-19 recession is unique in the sense that its origin cannot be traced to any fundamental weakness in the economy”.<sup>35</sup>
- [66] Budget 2021, released on April 19, 2021, details the deficit projections as follows: \$354.2 Bn (2020-2021), \$154.7 Bn (2021-2022), \$59.7 Bn (2022-2023), and \$51.0 Bn (2023-2024).<sup>36</sup>
- [67] Other metrics under Budget 2021 were as follows<sup>37</sup>:

	2020	2021	2022	2023	2024
<b>Real GDP Growth<sup>38</sup></b>	(5.4%)	5.8%	4.0%	2.1%	1.9%
<b>CPI</b>	0.7%	2.2%	2.0%	2.1%	2.1%
<b>Unemployment rate</b>	9.6%	8.0%	6.5%	6.2%	6.0%

<sup>33</sup> McLennan Report at 9.

<sup>34</sup> Joint Book of Documents, volume 1, tab 11.

<sup>35</sup> Fall Economic Statement 2020 at 97, Joint Book of Documents, volume 2, tab 25.

<sup>36</sup> Budget 2021, table A1.2, Government Supplemental Book of Documents, tab 3.

<sup>37</sup> Budget 2021, table A1.1, Government Supplemental Book of Documents, tab 3.

<sup>38</sup> The Policy and Economic Analysis Program of the Rotman School of Management forecast of March 19, 2021 attached to the first Report of Professor Douglas E. Hyatt, dated March 29, 2021 while more optimistic is not very different: (5.4%), 6.0%, 3.8%, 2.4% and 2.0% for 2020-2024. See Exhibit A.2 to the Judiciary Submission.

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**Position of the parties**

- [68] The parties do not fundamentally disagree on the facts underlying the current economic conditions.
- [69] The Government’s position is that “the current economic conditions in Canada ... are very challenging ... The short and medium-term outlook for the Canadian economy remains fragile.”<sup>39</sup>
- [70] The Government argues that “it is within the current context of high deficits, a contracted economy, and an ongoing pandemic with millions of Canadians unemployed that we ask the Commission to carefully scrutinize the Judiciary’s request for salary increases of 19.9% over the coming four years. Equally, it is within this context that the Government asks the Commission to consider a recommendation to limit IAI increases to a cumulative maximum of 10% from the 2020 base salary for this quadrennial period.”<sup>40</sup>
- [71] The Judiciary “seeks to balance the exceptional, yet temporary economic circumstances created by the COVID-19 pandemic with the constitutional obligation to provide adequate judicial compensation and the statutory imperative to preserve Canada’s ability to attract outstanding candidates to the Bench”, by delaying their requested salary increase to the last two years of the quadrennial period and limiting their proposed increase to less than half of that which they submit would otherwise be required. They seek an increase of 2.3% in each of the last two years of the current quadrennial cycle, exclusive of IAI indexing.<sup>41</sup>
- [72] Citing the Fall Economic Statement 2020, the Judiciary note that “the Government characterized the “temporary” fiscal deficits that will be incurred fighting the pandemic as being distinct from both structural deficits or recessions that reflect weakness in the economy.”<sup>42</sup>
- [73] Professor Hyatt, expert for the Judiciary, points out that the Budget 2021 is not an austerity budget.<sup>43</sup>
- [74] The Prothonotaries adopt the written submissions of the Judiciary as they relate to this factor.<sup>44</sup>

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<sup>39</sup> Government Submission, para 16.

<sup>40</sup> Government Reply, para 21.

<sup>41</sup> Judiciary Submission, paras 4-5.

<sup>42</sup> Judiciary Submission, para 49.

<sup>43</sup> Judiciary Reply, para 79.

<sup>44</sup> Prothonotaries Submission, para 45.

### Sharing the burden in difficult economic times

- [75] Citing the Supreme Court of Canada in the *PEI Reference* case, the Government states that “the guarantee of a minimum salary is not a device to shield the judiciary from the effects of deficit reduction”: “nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times.”<sup>45</sup>
- [76] The Judiciary however contend that the *PEI Reference* case provides “that constitutional protections did not shield the judiciary from deficit reduction policies of general application”. Paragraph 158 of that case provides that “the risk of political interference through economic manipulation is clearly greater when judges are treated differently from other persons paid from the public purse.”<sup>46</sup> At the hearing, counsel for the Judiciary agreed that “if everyone paid from the federal public purse were in fact faced with freezes or reductions in compensation and benefits, but judges were exempt from this, judges could indeed be said not to be shouldering their share of the burden.”<sup>47</sup>
- [77] We agree with the Canadian Bar Association which states that “the burden is on the government to give compelling evidence that other competing fiscal obligations justify infringing upon a constitutional imperative.”<sup>48</sup> The Government has not presented any such evidence.

### Conclusion

- [78] As argued by the Canadian Bar Association, section 26(1.1) “does not give dominance to any criterion. It suggests that each one must be given due weight and consideration.”<sup>49</sup>
- [79] Given that,
- (a) the temporary fiscal deficits were meant to stimulate the economy rather than being structural deficits;
  - (b) the Budget 2021 is not an austerity budget. Unlike Budget 2009, it did not “outline measures to manage expenditures, including actions to limit discretionary spending by federal departments and agencies”;<sup>50</sup>
  - (c) the Government presented no evidence of deficit reduction policies of general application; and

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<sup>45</sup> Government Submission, para 22.

<sup>46</sup> Judiciary Reply, para 77 and footnote 80.

<sup>47</sup> Hearing Transcript at 33: 7-12.

<sup>48</sup> Canadian Bar Association Submission at 9.

<sup>49</sup> Canadian Bar Association Submission at 6.

<sup>50</sup> Government Response to the Block Report, Joint Book of Documents, volume 1, tab 11.

- (d) statutory indexing was maintained by the Government following each of the Block and Levitt Commissions despite the prevailing economic conditions;<sup>51</sup>

we are of the view that the first criterion under section 26(1.1) of the *Judges Act* should not inhibit or restrain us from making recommendations we would otherwise consider necessary to ensure the adequacy of judicial compensation.

## **2. Section 26(1.1)(b) The Role of Financial Security**

[80] The Supreme Court of Canada has identified three components of financial security underlying judicial independence:

- (a) the requirement of an independent, objective and effective commission;
- (b) the avoidance of negotiations between the judiciary and the executive; and
- (c) the requirement that judicial salaries not fall below a minimum level.<sup>52</sup>

[81] The Commission process contained within the *Judges Act* addresses the first two components.

[82] No party submitted before this Commission that judicial independence is at risk as between the respective positions of the Judiciary and the Government on the question of judicial compensation.

[83] The Commission agrees. We do not consider that current judicial salaries put the financial security of judges, or their independence, at risk.

## **3. Section 26(1.1)(c) The Need to Attract Outstanding Candidates to the Judiciary**

[84] It is beyond debate before the Commission that Canada is blessed with an outstanding judiciary, one that reflects the best of our legal profession committed to judicial excellence.

[85] The question before this Commission is whether the current level of judicial compensation will continue to attract outstanding candidates to the judiciary.

### **Position of the parties**

[86] The Judiciary submit that there has been a declining proportion of appointments from private practice from 1990-1999 (73%) to 2015-2020 (62%) reflecting a drop in interest in judicial appointment among lawyers in private practice. The major cause of that drop in

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<sup>51</sup> Government Response to the Levitt Report, Joint Book of Documents, volume 1, tab 12, at 3.

<sup>52</sup> *PEI Reference*, paras 131-135.

- interest is said to be the income gap between the judicial salary and what outstanding candidates earn in private practice.<sup>53</sup>
- [87] The Commission had the benefit of the views of the Honourable Chief Justice Martel D. Popescul, Chief Justice of the Court of Queen’s Bench for Saskatchewan, who appeared at the hearing in support of the Judiciary’s argument.<sup>54</sup>
- [88] Chief Justice Popescul, with the benefit of his experience as a Chief Justice, as a past member of a Judicial Advisory Committee and in his role on the Trial Courts Committee of the Canadian Judicial Council, expressed the view that in his experience some leading practitioners no longer see judicial appointment, with all its responsibilities and benefits, as being worth the significant reduction in income.
- [89] He referred to discussions with senior practitioners in which they expressed the view that the workload, travel demands, loss of autonomy and increased public scrutiny imposed on federally-appointed judges led to their lack of interest as potential candidates when viewed in light of the reduction in income that they would incur.
- [90] Chief Justice Popescul was specific in not directing his comments to the quality of judicial appointments to date, but highlighted that this is a concern for the future.
- [91] The Judiciary add that the drop in interest by highly qualified lawyers is also borne out in statistics on applicants maintained by the FJA which show that a large percentage of the pool of applicants fall in the “unable to recommend” for appointment category, and that in some provinces the number of applicants assessed as “highly recommended” is very low.<sup>55</sup>
- [92] The Commission notes that on behalf of the Judiciary Chief Justice Popescul accepts that suitable candidates can be drawn from both the “Recommended” and “Highly Recommended” categories from the Judicial Advisory Committees processes, the latter being reflective of only the most outstanding candidates.<sup>56</sup>
- [93] We also note that in the debates in the House of Commons on December 18, 1980 on the introduction of what is now section 25(2) of the *Judges Act*, the then Minister of Justice Jean Chrétien said the following:
- “Some members tell me that I should seek the best minds available to become judges. I agree. However, the best people will not always accept these assignments because it involves many sacrifices”.<sup>57</sup>
- [94] The Government uses the same statistics as the Judiciary to argue that there is no shortage of interested and highly qualified candidates for judicial positions, stating that for every individual appointed to the Bench, there were two other candidates qualified to be

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<sup>53</sup> Judiciary Submission, paras 63-64.

<sup>54</sup> Hearing Transcript at 42-52.

<sup>55</sup> Judiciary Submission, para 66.

<sup>56</sup> Hearing Transcript at 77-78.

<sup>57</sup> Hansard, December 18, 1980 at 5897.

appointed.<sup>58</sup> We note, however, that the number of candidates who are recommended or highly recommended for each judicial appointment by the Judicial Advisory Committees varies significantly, depending on the province or territory.

[95] The Government further argues that there is no evidence to link “unable to recommend” candidates to lower income candidates and that there are many reasons why a candidate may be unacceptable for judicial office.<sup>59</sup>

[96] The Government notes that in the last four years 38% of judges were appointed from sources other than private practice such as federal and provincial government lawyers, legal aid lawyers, professors and judges from other courts.<sup>60</sup>

### **Conclusion**

[97] The Commission appreciates that a number of successful practitioners in private practice may prefer not to accept a judicial appointment for many reasons, not simply the judicial compensation. These reasons could include matters of workload, infrastructure support, interest level in the nature of the work and other more subjective considerations.

[98] Likewise, outstanding candidates for the judiciary can be expected to be found in a broad range of areas of practice, within both the public and private sectors.

[99] Given the lack of information provided to the Commission on applicants, as opposed to appointees, we find we cannot conclude that there is at this time an issue with attracting outstanding candidates to apply for appointment to the judiciary.

[100] The factors affecting decisions made by the Minister of Justice as to who is appointed from the recommended list of candidates undoubtedly play a significant role as well. These could include considerations relating to diversity with respect to gender, language, minority representation, and sexual orientation, as well as questions of personal suitability, writing skills, area of practice expertise and life experience, among others.

[101] The Judiciary filed studies from the United Kingdom and the United States in which concerns were expressed about the ability in those countries to attract outstanding candidates to the judiciary.<sup>61</sup> While we find them informative, they do not directly assist us with assessing circumstances in this country.

[102] Lastly, in our view, it could never be the role of judicial compensation in any realistic way to “match” the compensation earned by the most financially successful private practitioners. What is necessary is a reasonable and appropriate judicial compensation that does not discourage outstanding candidates from seeking judicial office.

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<sup>58</sup> Government Submission, para 42.

<sup>59</sup> Government Reply, paras 56-57.

<sup>60</sup> Government Submission, para 102.

<sup>61</sup> Judiciary Reply, paras 46-49 and Judiciary Supplemental Book of Exhibits and Documents, tabs 2 to 7.

[103] The Commission believes that the judicial salary that it is recommending in this Report does continue to meet the criterion of attracting outstanding candidates to the Bench.

#### **4. Section 26(1.1)(d) Any Other Objective Criteria**

[104] In reviewing the Reports of previous Quadrennial Commissions, we noted that none of them focused specifically on “other objective criteria” as such. For instance, the Rémillard Commission, in addressing criterion 26(1.1)(d), stated that it “did not find any objective criteria other than those already addressed that we considered relevant to our deliberations.”<sup>62</sup>

[105] We were invited by the Government to look outside of the self-employed lawyer comparator to other professionals and other judiciaries.<sup>63</sup> With respect to other judiciaries, we do not have sufficient data or understanding of the economic and role-related factors in those possible comparators to feel comfortable that we can use them. We did not find that this would be a dependable or useful approach. As for other professionals, we do not find them to be relevant as a comparator group.

[106] We note that before this Commission the Government treated the DM-3 comparator as an “other objective criterion” and that the Judiciary considered the importance of the judicial function and the increasing weight of responsibilities imposed on judges as a factor to be considered under section 26(1.1)(d). In turn, the Honourable Jacques Chamberland, in his written and oral submissions as to appellate salary differential, argued that what he termed as “the principle of salary differential” could be considered under this heading.

### **C. SECTION 25(2) OF THE *JUDGES ACT*: INDEXATION**

#### **The Industrial Aggregate**

[107] The Industrial Aggregate measures the number of working Canadians and their average weekly earnings, with some types of occupations such as farming, fishing and the military being excluded. Earnings are tracked and maintained in a data series by Statistics Canada. Judges’ salaries are adjusted annually by the percentage change in the Industrial Aggregate value. The percentage change is referred to as the IAI.<sup>64</sup>

[108] Section 25(2) of the *Judges Act* provides for an annual adjustment of the judicial salary by the IAI or 7%, whichever is less.

[109] The origins of section 25(2) are found in the 1981 amendments to the *Judges Act* which brought forward indexation in its current form.

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<sup>62</sup> Rémillard Report, para 85.

<sup>63</sup> Report of Mark Szekely, Government Book of Documents, tab 5.

<sup>64</sup> Report of Peter Gorham, paras 69-71, Government Book of Documents, tab 4.

- [110] According to the debates in the House of Commons and appearances before the House of Commons Standing Committee on Justice and Legal Affairs, the Minister of Justice introduced the Bill on December 1, 1980 with a view that indexation to a maximum of 7%, given the then current rate of inflation, should provide regular increases to judicial salaries based on increases in the earnings of working Canadians.<sup>65</sup>
- [111] The concept, as explained by the Deputy Minister of Justice to the House of Commons Standing Committee, was that indexation was not to be a substitute for the then triennial review process, but rather an annual automatic increase which would be taken into consideration when the regular review took place.<sup>66</sup>
- [112] Since that time, indexation in accordance with the IAI has been in place and automatically increasing judicial salaries over the last 40 years in line with the increase in the wages of other Canadians.
- [113] It has been subject to consideration before previous Quadrennial Commissions.
- [114] Before the Levitt Commission, the Government submitted that the annual IAI adjustment should be capped at 1.5%. The Levitt Commission rejected that submission as inconsistent with the history and purpose of the IAI adjustment.<sup>67</sup>
- [115] Before the Rémillard Commission, the Government sought the replacement of the IAI by the Consumer Price Index as a “more modern and relevant” measure. The Rémillard Commission rejected that proposed change on the basis that the IAI ensures that the annual earnings of judges keep pace with the annual earnings of average Canadians.<sup>68</sup>

### **Position of the parties**

- [116] The Government now proposes that judicial salaries continue to be adjusted on the basis of the IAI to a maximum of 10% over the four-year quadrennial period, and that should the IAI be a negative number, judicial salaries should remain constant and should not be reduced<sup>69</sup>. It argues that this would take into account the abnormal highs and lows expected in the IAI over the current quadrennial period and would provide overall stability in judicial compensation between now and March 31, 2024.<sup>70</sup>
- [117] Both the Judiciary and the Prothonotaries resist this proposal.
- [118] The Judiciary argue that the annual IAI adjustment plays an important role in safeguarding financial security for the judiciary by providing some protection against inflationary tendencies and that it plays a significant role in ensuring that appointment to the Bench

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<sup>65</sup> Hansard, December 1, 1980 at 5207.

<sup>66</sup> House of Commons Standing Committee on Justice and Legal Affairs, February 19, 1981 (Issue 14), at 14:29.

<sup>67</sup> Levitt Report, para 46.

<sup>68</sup> Rémillard Report, paras 36-42.

<sup>69</sup> Government Submission, para 32.

<sup>70</sup> Government Submission, para 33.

remains attractive to outstanding candidates. Furthermore, Parliament has already turned its mind to maximum adjustments by setting a cap of 7% on the yearly indexation adjustment.<sup>71</sup>

- [119] The Prothonotaries argue that the proposed 10% cap has the potential to effectively reduce salaries in real terms in the latter part of the quadrennial period, that there is no reason to depart from the 7% cap that Parliament has already decided is appropriate, and that the whole point in using the IAI is that it all evens out over time.<sup>72</sup>

### **IAI self-correcting**

- [120] For the quadrennial period, the IAI figures (actual and projected) provided by the Office of the Chief Actuary are as follows<sup>73</sup>:

April 1, 2020	2.7% applied
April 1, 2021	6.7% (6.6% applied) <sup>74</sup>
April 1, 2022	2.1% (projected)
April 1, 2023	2.6% (projected)

- [121] The unusually large increase at April 1, 2021 is the result, due to the COVID-19 pandemic, of approximately 2.9 million workers losing their jobs or being laid off in the spring of 2020.<sup>75</sup>
- [122] The possibility is raised by the Government that as the economy recovers and lower wage earners re-enter the market *en masse* a negative IAI may arise.<sup>76</sup>
- [123] In light of that possibility, the Commission asked counsel for both the judiciary and the prothonotaries during our hearing to confirm that their clients are content to take the risk of a negative IAI and a potential reduction in salary. We were advised that both the judiciary and the prothonotaries will take that risk.<sup>77</sup>
- [124] This position is consistent with the theory that, over time, the IAI is self-correcting from what might be described as exogenous influences creating short term movements.

<sup>71</sup> Judiciary Reply, paras 117-118.

<sup>72</sup> Prothonotaries Reply, paras 3, 8, 10.

<sup>73</sup> Letter from the Office of the Chief Actuary, Office of the Superintendent of Financial Institutions, February 26, 2021, Joint Book of Documents, volume 2, tab 23.

<sup>74</sup> Though the projection on February 26, 2021 was 6.7%, the actual Industrial Aggregate provided to the FJA by Statistics Canada on March 31, 2021 for the purpose of section 25 of the *Judges Act* was 6.6%, Government Supplemental Book of Documents, tab 1.

<sup>75</sup> Report of Peter Gorham, paras 74-78, Government Book of Documents, tab 4.

<sup>76</sup> Government Submission, para 27.

<sup>77</sup> Hearing Transcript at 273: 17-21 (Prothonotaries) and 343-344 (Judiciary).

- [125] The intent behind the 1981 amendments was to provide automatic yearly adjustments to judicial salaries reflecting overall wage and salary increases in Canada, while giving the then Triennial and now Quadrennial Commissions the mandate to make recommendations for any further salary adjustments in light of prevailing conditions (with the section 26(1.1) criteria being added in the 1998 amendments to the *Judges Act*).
- [126] The Scott Commission as far back as 1996 described the IAI adjustment as an integral part of the “social contract” that the Government and lawyers appointed to the Bench can be considered to have entered into.<sup>78</sup>
- [127] Attempting to fetter its effects by imposing ceilings or floors, other than the annual 7% cap already provided for, is inconsistent with the policy behind indexation and its application over the last 40 years.

### **Conclusion**

- [128] Accordingly, we do not recommend any change to section 25(2) of the *Judges Act* and will consider whether a further salary increase recommendation is warranted, taking into consideration the actual and predicted indexation over the quadrennial period.

### **Recommendation 1**

**Judges’ salaries should continue to be adjusted annually on the basis of increases in the Industrial Aggregate Index, in accordance with section 25(2) of the *Judges Act*.**

## **D. COMPARATORS**

### **1. The Public Sector Comparator – DM-3**

#### **Use of the DM-3 comparator as a reference point**

- [129] The salaries of deputy ministers have been considered in determining the adequacy of judicial salaries since 1975 when Parliament amended the *Judges Act* to make the salary level of superior court puisne judges roughly equivalent to the midpoint of the salary range of DM-3 deputy ministers. As the Guthrie Commission noted, that salary level was “generally regarded ... as satisfying all of the criteria to be considered in determining judicial salaries.”<sup>79</sup> In the intervening years, Triennial and Quadrennial Commissions have continued to consider the DM-3 salary range as a reference point when considering the adequacy of judicial salaries.

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<sup>78</sup> Scott Report at 14, Judiciary Book of Exhibits and Documents, tab 24.

<sup>79</sup> Guthrie Report at 8, Judiciary Book of Exhibits and Documents, tab 21.

- [130] The Block Commission considered that performance pay was an integral component of deputy ministers' cash compensation. It defined the DM-3 comparator as the midpoint of the DM-3 salary range plus one half of available at-risk pay. This has been referred to as the Block Comparator.<sup>80</sup>
- [131] The DM-3 comparator has been used as a reference point against which to test whether judges' salaries have been advancing appropriately in relation to other public sector salaries.<sup>81</sup>

### **Position of the parties**

- [132] The Judiciary submit that there should be a change in the DM-3 comparator. Rather than the midpoint of the salary range plus one half of the available at-risk pay, they propose that the comparator be the total average compensation of DM-3s, a higher amount than the Block Comparator.
- [133] This proposal was raised before the Block and Rémillard Commissions and rejected by both. The circumstances leading the Judiciary to raise this question again are that since 2017 for the first time since this metric was established, the salary range for DM-3s, and as a result the Block Comparator, has remained unchanged while the actual average compensation of DM-3s has steadily increased.<sup>82</sup>
- [134] The flatlining of the Block Comparator since 2017 has increased the gap between the Block Comparator and the actual average DM-3 compensation, a trend that has persisted through the past three quadrennial cycles.<sup>83</sup>
- [135] The Judiciary project that total average DM-3 compensation will reach \$413,725 by April 1, 2023. They reach that number by applying an annual increase of 1.7% to the average base salary of DM-3s (without performance pay) from 2021-2023 (based on the annual growth of the average salary of DM-3s without performance pay from 2000 to 2020) and an annual increase of 4.0% to the average performance pay earned from 2020-2023 (based on the annual growth of the average performance pay earned from 2000 to 2019).<sup>84</sup>
- [136] The Government submits that to ensure that the linkage to the DM-3 group is appropriate the following comparability issues must be kept in mind: (a) the small size of the DM-3 group, (b) differences in tenure between the respective positions, (c) differences in considerations concerning DM-3 compensation and (d) the need to look at general trends in public sector pay increases.<sup>85</sup>

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<sup>80</sup> Block Report, paras 108, 111.

<sup>81</sup> Rémillard Report, para 47.

<sup>82</sup> Judiciary Submission, para 103.

<sup>83</sup> Judiciary Submission, para 104 and graph 1.

<sup>84</sup> Judiciary Submission, para 118 and table 3.

<sup>85</sup> Government Submission, para 113.

[137] The Government notes that both the Block Commission and the Rémillard Commission considered this issue and decided in favour of using the Block Comparator and not total average compensation.<sup>86</sup> The Government further notes that before previous Commissions the Judiciary sought to measure their compensation against that of DM-3s through the Block Comparator. Now that this level has been achieved, they seek the higher reference point of total average compensation. It urges the Commission to decline to follow this approach.<sup>87</sup>

### **Current DM-3 salary ranges**

[138] At the end of the hearing the Commission inquired as to the DM-3 salary ranges as of April 1, 2021, and as to when salary changes were made for DM-3s.

[139] The Government confirmed in a May 26, 2021 letter that retroactive adjustments were made on May 18, 2018 to the salary ranges for each of April 1, 2014 through April 1, 2017. Counsel for the Government, quoting from an answer provided by the Privy Council Office, stated that “[p]ursuant to past practice, we expect rates for senior leadership will eventually increase in-line with the rest of the public service (the most recent agreements have provided for annual salary increases of 2.8% in 2018-2019, 2.2% in 2019-2020, and 1.35% plus 0.15% (1.5%) for 2020-2021). However, at this time no increases in rates have been approved.”<sup>88</sup>

[140] By letter dated May 26, 2021, Counsel for the Government provided the following DM-3 salary ranges if they were to reflect the most recent increases for the balance of the public service:<sup>89</sup>

<u>Date</u>	<u>Minimum</u>	<u>Maximum</u>	<u>Midpoint</u>
1-Apr-17 (current)	\$260,600	\$306,500	\$283,550
1-Apr-18	\$267,897	\$315,082	\$291,489
1-Apr-19	\$273,791	\$322,014	\$297,902
1-Apr-20	\$277,897	\$326,844	\$302,371

### **How to define the comparator**

[141] Virtually all previous Commissions have considered a deputy minister comparator when examining judicial salaries. As at-risk pay has been a factor in DM-3 compensation it has also been considered. The Block Commission defined this comparator with some precision

<sup>86</sup> Government Reply, paras 30, 32.

<sup>87</sup> Government Reply, para 27.

<sup>88</sup> Letter from Christopher Rugar dated May 14, 2020 [sic].

<sup>89</sup> Letter from Kirk G. Shannon dated May 26, 2021.

to be the midpoint of the salary range plus one half of available at-risk pay.<sup>90</sup> As the Rémillard Commission noted the gap between the Block Comparator and judges' salaries has steadily reduced over time. That Commission expected the gap to close during its term,<sup>91</sup> which it did in 2019.<sup>92</sup>

[142] The Block Comparator, as noted in the Judiciary's submissions, has remained at \$330,336 since April 1, 2017 since there has been no adjustment of deputy minister salary ranges since that time.<sup>93</sup>

[143] However, if adjusted by the most recent increases for the rest of the public service (as the Government expects),<sup>94</sup> the Block Comparator would be:

April 1, 2017	\$330,336
April 1, 2018	\$339,585
April 1, 2019	\$347,056
April 1, 2020	\$352,262

[144] The current base judicial salary is \$361,100 so it has now surpassed the Block Comparator. Even with a 1.5% - 2.8% increase in salary range for 2021 (the increases in public service pay over the past 3 years)<sup>95</sup>, the judicial base salary would be higher than the Block Comparator except at 2.8 % where they would be about \$1,000 apart.

[145] The issue put before us by the Judiciary is whether we should change the basis of this comparator from the salary range to that of individual salaries.

[146] The midpoint of the salary range plus one-half of at-risk pay remains, as described by the Block Commission, an objective, consistent measure of year over year changes in DM-3 compensation policy, unaffected by a very few high (or low) performers in a year or turnover in a very small population.<sup>96</sup>

[147] We believe that we should be reluctant to change the fundamentals of a comparator that has been used for 46 years and that has been used in its current form (i.e., with an at-risk pay factor) for many years, particularly when it, along with the IAI indexing, have served to keep judicial salaries in pace with salaries in both the public and industry sectors.

[148] The Government's expert witness Mr. Gorham stated in his report that, based on a slightly greater contribution rate and the time of service required for deputy ministers to obtain a pension equivalent to the judicial annuity, the value of a deputy minister's pension was

<sup>90</sup> Block Report, paras 108, 111.

<sup>91</sup> Rémillard Report, para 55.

<sup>92</sup> Judiciary Submission at 35, graph 1.

<sup>93</sup> Judiciary Submission at 38, table 1.

<sup>94</sup> Letter from Christopher Rupar dated May 14, 2020 [sic].

<sup>95</sup> Letter from Christopher Rupar dated May 14, 2020 [sic].

<sup>96</sup> Block Report, para 106.

17% of salary<sup>97</sup>, considerably below that of the judicial annuity. This was not raised in oral argument with us or dealt with in any depth. We do not come to any conclusion on this matter but it makes us more cautious about changing such a long-standing factor without consideration of other factors that may be relevant.

### **Conclusion**

[149] Accordingly, we conclude that the Block Comparator remains the appropriate measure of comparison with judicial salaries and that there is no basis for further adjustment of judicial salaries based on this comparator.

## **2. The Private Sector Comparator - Self-employed Lawyers**

### **Available data**

[150] The second comparator that the Commission considers is the compensation level of private sector self-employed lawyers.

[151] Each Quadrennial Commission has used this comparator to assist it in its analysis of the adequacy of judicial compensation, taking into consideration the criteria set out in section 26(1.1) of the *Judges Act*, particularly with respect to criterion (c) the need to attract outstanding candidates to the judiciary.

[152] We have commented earlier in this Report as to what data is, and is not, available to assist us in coming to our conclusions.

[153] The available data is the CRA reported incomes of self-employed lawyers.

### **The use of filters**

[154] To better refine the self-employed lawyer data, previous Quadrennial Commissions have applied various filters in order to compare judicial salaries to the relevant self-employed lawyer data.

[155] The questions before us as to the filters are:

- (a) to adhere to the low income cut-off of \$60,000 per annum or increase it to \$80,000 per annum?
- (b) to use a 44-56 age range or an age-weighted approach?
- (c) to look at the 75<sup>th</sup> percentile of self-employed lawyer income or some other figure?
- (d) to use national income figures or those of the top ten Census Metropolitan Areas (“CMAs”)?

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<sup>97</sup> Report of Peter Gorham, paras 219-222, Government Book of Documents, tab 4.

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**Position of the parties**

[156] The Judiciary argue that the filters to be used should be income greater than \$80,000, 44-56 age group, 75<sup>th</sup> percentile and top ten CMAs, telling us that the lack of professional corporation data supports the need for these filters.

[157] The Government's position is that there should be no filters as their application substantially reduces the target group of lawyers. However, if we were to use them, the filters should be income greater than \$60,000, age-weighted, 65<sup>th</sup> percentile and national rather than top ten CMAs.

[158] The Prothonotaries support the position of the Judiciary.

**Deficiencies in data**

[159] The deficiencies in data referred to earlier in this Report make it clear that we do not have a full view of the income of those lawyers in private practice, especially those at the higher levels of professional income.

[160] However, we take into account that:

- (a) self-employed lawyer compensation decreased over 2015-2016 and again, to a lesser degree, over 2018-2019;<sup>98</sup>
- (b) the number of self-employed lawyers reported in the CRA data has decreased over time<sup>99</sup> while the number of registered professional corporations for practicing lawyers has tripled since 2010, accounting for 27% of insured and practicing law society members in 2018;<sup>100</sup>
- (c) we have no data on the cause of decreases in income, but can reasonably conclude that the drop in the number of reporting professionals in the CRA data is likely to be linked to the corresponding increase in the use of professional corporations;
- (d) within the CRA reporting group, there are some earning greater than \$200,000 and greater than \$300,000, being the range which might cause a professional to self-incorporate based on the expert evidence before us.<sup>101</sup>

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<sup>98</sup> Judiciary Reply at 29, table 1, and letter from Kirk G. Shannon dated May 26, 2021. These decreases were noted for income greater than \$80,000 in both the 44-56 and age-weighted groups, and both nationally and in the top ten CMAs.

<sup>99</sup> Government Submission, chart at para 60.

<sup>100</sup> Judiciary Submission at 53, table 6 and para 138.

<sup>101</sup> Report of Stéphane Leblanc and André Pickler where they state that lawyers in private practice earning an income of \$200,000 and \$300,000 or more generally consider it beneficial to incorporate a professional corporation, Judiciary Submission, Exhibit B at 2; letter from Christopher Rupar dated May 14, 2020 [sic].

[161] While it may be tempting to use filters as a proxy for such data deficiencies, in our view it would be inappropriate to do so for that sole purpose.

### **The low income cut-off**

[162] The \$60,000 per annum figure was first selected in 2004 and applied by the McLennan Commission.<sup>102</sup> It has remained in place through to and including the Rémillard Commission which declined to increase it to \$80,000 based on the then calculation that CPI had increased the \$60,000 figure, since 2004, to \$73,000.<sup>103</sup>

[163] The current calculation using CPI from 2004 brings the figure to \$79,200. Using the growth in IAI (up to and including 2019), it would now be \$87,000. Professor Hyatt notes that raising the low income threshold with CPI inflation would be consistent with the approach taken to indexing Canadian personal income tax brackets to inflation.<sup>104</sup>

[164] The Commission agrees that the low income cut-off of \$60,000 per annum should be increased to \$80,000 per annum.

### **Age group**

[165] Past Commissions have for the most part considered the CRA data by focusing on the 44-56 age group.

[166] The Government argues that the 44-56 age group filter excludes 64% of lawyers from the CRA data (with no other filters being applied) and it would be more appropriate to use an age-weighted approach, which factors in that private sector incomes do vary with the lawyer's age and judges are appointed to the Bench at various ages. Accordingly, the Government refers to age-weighted private sector incomes based on the relative number of judges appointed at each age between 2011 and 2020.<sup>105</sup>

[167] The Judiciary argue that it is a red herring to observe that the 44-56 age range filter excludes the majority of lawyers in the CRA data, when the objective should be to capture the majority of appointees. They note that the age range for the CRA data is 35-69, yet the actual age range for appointees is 40 to 68, with 71% of appointees being between 44-56. Their expert, Ms. Haydon, also notes that 44-56 is the range from which the majority of appointments are made and that is the target population that justifies its use. She states that continuing to use the age filter ensures comparability across Commission reports.<sup>106</sup>

[168] While not formally applying a filter, the Rémillard Commission noted that the age group for which the majority of judges is appointed is a useful starting point, but remarked that

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<sup>102</sup> McLennan Report at 43.

<sup>103</sup> Rémillard Report, para 63.

<sup>104</sup> Report of Professor Douglas E. Hyatt at 4, Judiciary Submission, Exhibit A.

<sup>105</sup> Government Submission, paras 64-66.

<sup>106</sup> Judiciary Reply, paras 53-55.

33% of the appointments over the past 17 years had come from those younger or older than the 44-56 year age group.<sup>107</sup>

[169] With the trend continuing and approaching 35% of appointments being made from outside the 44-56 age group, we believe that turning to an age-weighted approach would be more consistent with the recognition of greater diversity in the applicant pool and the Government's commitment to ensuring that the judiciary reflects the society in which it operates.<sup>108</sup>

### **Appropriate percentile**

[170] The 75<sup>th</sup> percentile of private lawyer income has been used by previous Quadrennial Commissions.

[171] The Government argues that self-employed lawyers' incomes fluctuate over time, unlike judicial salaries which increase at a steady rate (currently outpacing the 65<sup>th</sup> and 75<sup>th</sup> percentile of all private sector lawyers' income); and that focusing on a specific percentile risks creating an artificial measure that is not a true reflection of any particular group of lawyers that would include potential outstanding candidates.<sup>109</sup>

[172] Most recently, the Rémillard Commission concluded that it was still appropriate to look at the 75<sup>th</sup> percentile, even after the application of filters.<sup>110</sup>

[173] This is consistent with the report of Sandra Haydon in which she opines that the 75<sup>th</sup> percentile tends to be the bottom target where the goal is the attraction of exceptional or outstanding individuals.<sup>111</sup>

[174] While this Commission is not performing a compensation study equivalent to those made in the private sector, we are mindful that salaries must be competitive enough so as not to discourage the most outstanding candidates from seeking judicial office.

[175] Accordingly, this Commission will continue to use the 75<sup>th</sup> percentile filter.

### **Top ten CMAs**

[176] The remaining question is whether to move from the use of national figures to the top ten CMAs.

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<sup>107</sup> Rémillard Report, para 61.

<sup>108</sup> Government Reply, para 58, and Joint Book of Documents, volume 2, tab 21, table 1.

<sup>109</sup> Government Submission, paras 78-79.

<sup>110</sup> Rémillard Report, para 67.

<sup>111</sup> Report of Sandra Haydon & Associates at 5, Judiciary Reply, Exhibit C.

- [177] In support of applying a top ten CMA filter to the CRA self-employed lawyer income data, the Judiciary and the Prothonotaries rely on the fact that 68% of appointees between April 30, 2015 to October 2, 2020 have been drawn from the top ten CMAs.<sup>112</sup>
- [178] This Commission is, however, reluctant to simply use the top ten CMA data as a proxy for the missing and presumably high end professional corporation income data.
- [179] The *Judges Act* applies nationally to a judiciary appointed and sitting across the country. An urban-only focus would not be consistent with a national judiciary.
- [180] Additionally, in assessing the top ten CMA data, we have income data only and not cost of living data, provincial tax level data and the like.
- [181] The Rémillard Commission remarked that if private sector lawyer salaries in the top ten CMAs became so high that attracting qualified applicants from those cities became an issue, consideration of regional allowances might be appropriate.<sup>113</sup> Then, as now, this possibility was not raised by any party.

### **Conclusion on filters**

- [182] With respect to filters, we conclude that applying a low income cut-off of \$80,000 per annum to age-weighted national figures at the 75<sup>th</sup> percentile is appropriate. Using these filters, the judicial compensation (including an annuity valued at 34.1%) for 2019 of \$442,396 comes within 3.2% of the net professional income of self-employed lawyers for that year of \$456,532.<sup>114</sup>

## **E. SALARY VERSUS TOTAL COMPENSATION**

- [183] In its submissions, the Government looks at total compensation, including:
- (a) the judicial annuity;
  - (b) the additional cost to replicate the judicial annuity in the private sector on a tax gross up basis;
  - (c) permanent disability benefits;
  - (d) CPP benefits;
  - (e) supernumerary status; and
  - (f) other benefits such as life insurance, health and dental coverage and the like.<sup>115</sup>

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<sup>112</sup> Judiciary Submission, para 134.

<sup>113</sup> Rémillard Report, para 69.

<sup>114</sup> Letter from Kirk G. Shannon dated May 26, 2021, table 1.

<sup>115</sup> Government Submission, paras 89-100.

- [184] The Judiciary accept that the judicial annuity should be taken into account.<sup>116</sup> The parties agreed to value this at 34.1% of the judicial salary.<sup>117</sup>
- [185] While we were urged by the Government to calculate the cost to self-employed lawyers of replacing the judicial annuity, we are not confident that we have, on a comprehensive basis, a sufficiently robust appreciation of the variables that could affect such a calculation based on the record, and the submissions, before us.
- [186] Previous Commissions have looked at the combination of judicial salary and judicial annuity, but have not engaged in a comparative total compensation exercise including other benefits.
- [187] Given the lack of available data from which to assess the total compensation of those applicants in pools from which judges are drawn, it is difficult to go through a meaningful exercise in any comparison of total compensation.
- [188] As a result, the Commission declines to include such a comparison in our deliberations.

## **F. APPELLATE SALARY DIFFERENTIAL**

### **Defining the issue**

- [189] Written submissions, dated March 10 and April 7, 2021, were filed by the Honourable Jacques Chamberland of the Court of Appeal of Quebec with the unanimous support of his colleagues on that Court. Justice Chamberland augmented his written submissions with oral submissions before us. He contends that the Rémillard Commission inappropriately revisited a question of principle that had already been decided by both the Block and the Levitt Commissions, being the recommendation of a salary differential of 3% between appellate judges and trial judges.
- [190] The Honourable Gordon L. Campbell, Justice of the Supreme Court of Prince Edward Island, filed a written submission on April 29, 2021 in opposition to such a salary differential.
- [191] The Government opposes the salary differential for a number of reasons.<sup>118</sup>
- [192] No other parties intervened on this issue.
- [193] According to Justice Chamberland, “the question as to whether appellate judges should receive a higher salary than trial judges is a question of principle, that the Block Commission decided after an in-depth analysis of the arguments raised by all of the interested parties ... and when questions of principles are decided they must be decided

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<sup>116</sup> Judiciary Reply, para 86.

<sup>117</sup> Hearing Transcript at 109: 16-18.

<sup>118</sup> Government Reply, paras 67-75.

definitively, unless there is a significant change of circumstances.”<sup>119</sup> “Commissioners change but the institution does not.”<sup>120</sup>

- [194] The Judiciary’s position on the “principle of continuity”, although not made in relation to the appellate salary differential issue, was referred to by Justice Chamberland in his own argument. The Judiciary’s view is that a “Commission needs to build on the work of prior Commissions. This Commission must, of course, conduct its own independent inquiry based on the evidence placed before it, and other relevant prevailing circumstances.”<sup>121</sup> A Commission should give due consideration to past Commissions<sup>122</sup>, and “where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change such consensus be taken into account by the Commission”.<sup>123</sup>
- [195] The Rémillard Commission, relying on the direction of the Supreme Court of Canada in *Bodner*, “approached matters decided by previous Commissions and Special Advisors in light of the evidence and arguments made before us. We adopted a common sense approach: careful consideration has been given to the reasoning of previous Commissions as well as to the evidence brought before us. Valid reasons were required – such as a change in current circumstances or additional new evidence – to depart from the conclusions of a previous Commission.”<sup>124</sup> The Government adopts this approach.<sup>125</sup>

### **Section 26(1.1) analysis**

- [196] The Rémillard Commission gave due consideration to the analysis of the Block and Levitt Commissions but performed its own analysis in light of the arguments and evidence before it and in accordance with the section 26(1.1) criteria<sup>126</sup>, concluding that “evaluating in any qualitative way the relative values of the roles played by trial and appellate judges is too subjective an analysis ... to warrant a salary differential recommendation.”<sup>127</sup>
- [197] Past Commissions have noted that the issues of financial security and the ability to attract outstanding candidates did not come into play in relation to the issue of salary differential. Justice Chamberland concurred.
- [198] Justice Chamberland however did not wish to engage in an in-depth analysis of section 26(1.1) given that he believed this to be irrelevant. The only argument he left us with, apart from the question of principle he raised, is that of the hierarchy of Canadian courts.

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<sup>119</sup> Hearing Transcript at 245: 9-20.

<sup>120</sup> Hearing Transcript at 246: 10-11.

<sup>121</sup> Hearing Transcript at 12: 15-20.

<sup>122</sup> Hearing Transcript at 12: 24-25, 13: 1-3.

<sup>123</sup> Hearing Transcript at 13: 24-25, 14: 1-4.

<sup>124</sup> Rémillard Report, paras 26-27.

<sup>125</sup> Government Submission, para 12.

<sup>126</sup> Rémillard Report, para 107.

<sup>127</sup> Rémillard Report, para 105.

- [199] He stated in his March 10, 2021 written submission that “the principle for such a salary differential stems from the existence of a hierarchy within Canadian courts, ... which is already reflected in the higher salary paid to justices of the Supreme Court of Canada and which, logically, should also be reflected in the salary paid to appellate judges compared with that paid to trial judges.” He added that “we find ourselves at a certain echelon in the Canadian judicial hierarchy, which means that we can overturn decisions taken by other judges in courts below ours in the pyramid.”<sup>128</sup>
- [200] A salary differential between Chief Justices and Associate Chief Justices on the one hand and *puisne* judges of the same courts has been a feature of judicial compensation for many years. Likewise, a similar feature has been the historic differential in salary accorded to the Chief Justice and *puisne* judges of the Supreme Court of Canada, in recognition of its unique place in Canada’s judicial and court structure. In contrast, the lack of a salary differential between *puisne* judges of Superior Courts and Courts of Appeal has also been a long-standing feature of judicial compensation in this country.

### **Level of support**

- [201] Justice Chamberland contends that the diminishing level of support amongst appeal court judges argument is a red herring<sup>129</sup>. He refers to the fact that the Block Commission did not base its decision on the level of support but rather on an in-depth analysis based on section 26(1.1)(d). While that is correct, we note however, as a relevant prevailing circumstance, that 99 out of 141 appellate judges (approximately 70%) supported the submission before that Commission.<sup>130</sup>
- [202] We also note that as part of its reasons for recommending a salary differential, the Levitt Commission considered “the importance which a majority of Provincial appellate court judges have attached to this issue”<sup>131</sup>.
- [203] The Rémillard Commission did look at the historical level of support of appellate judges for the salary differential<sup>132</sup>. It specifically requested information from counsel for the Canadian appellate judges as to how many appellate judges across the country approved the submission for a salary differential. The evidence before it showed that only 64 out of 165 appellate judges approved the salary differential. In addition, those approving the salary differential represented only five provinces and territories. The Federal Court of Appeal and the appellate courts of two of the most populous provinces, British Columbia and Ontario, have not supported the differential.<sup>133</sup>

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<sup>128</sup> Hearing Transcript at 341: 9-13.

<sup>129</sup> Hearing Transcript at 336: 21-22.

<sup>130</sup> Block Report, para 131.

<sup>131</sup> Levitt Report, para 65 b).

<sup>132</sup> Rémillard Report, paras 98-102.

<sup>133</sup> Rémillard Report, paras 96-97.

[204] It is noteworthy that all appellate judges in the country were given the opportunity by the Rémillard Commission to weigh in on this issue, and yet the majority did not support such differential, which in our view is a relevant circumstance to be taken into account.

### **Conclusion**

[205] A careful review of the Rémillard Report as well as the hearing transcripts of the Rémillard Commission found on the Quadrennial Commission website shows that:

(a) the Commission gave due consideration to the analysis made by previous Commissions;

(b) while the Commission took note of the additional evidence of the diminishing level of support by appellate judges for the salary differential, as a relevant prevailing circumstance, the Commission undertook an analysis of the arguments made by all the interested parties before it.

[206] As a result, we concur with the Rémillard conclusion that no salary differential is warranted.

[207] As mentioned in the Rémillard Report, “nothing in this decision is to be taken as demonstrating anything other than the utmost respect for and acknowledgement of the important role played by puisne judges of the appeal courts”.<sup>134</sup>

### **Recommendation 2**

**No salary differential should be paid to puisne appellate judges.**

## **G. CONCLUSIONS WITH RESPECT TO JUDGES’ SALARIES**

[208] Given the delay caused by the pandemic, this Commission is considering matters in the second year of the quadrennial period knowing the IAI increases of 2.7% and 6.6% in those first two years.

[209] The Office of the Chief Actuary forecasts IAI increases for 2022 at 2.1% and 2023 at 2.6%.<sup>135</sup>

[210] We are mindful of the fact that judicial salaries are reviewed only every four years and that there has been no salary adjustment, other than the IAI indexation, since 2004.

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<sup>134</sup> Rémillard Report, para 108.

<sup>135</sup> Letter from François Lemire, Office of the Chief Actuary, Office of the Superintendent of Financial Institutions, dated February 26, 2021, Joint Book of Documents, tab 23.

- [211] We also understand the Judiciary’s request that we recommend a 2.3% increase in each of the final two years of the quadrennial period. Their position is that these increases would partially bridge the gap between the judicial salary and a DM-3 comparator based on total average compensation (as opposed to the Block Comparator).<sup>136</sup>
- [212] As discussed earlier in this Report, judicial salaries now exceed the Block Comparator, which comparator this Commission prefers to rely upon. Any change from such a long-standing comparator should involve a detailed consideration of all relevant factors, as noted earlier in this Report.
- [213] Given the effect of yearly IAI increases, particularly in the first two years of this quadrennial period, we have concluded that, using the filters we consider appropriate, and based on the latest data of 2019 judicial salaries taken together with the annuity value, judicial compensation, as compared to the data we have on self-employed lawyers in the private sector, is within the 7.3% differential identified by the Levitt Commission as testing the limits of rough equivalence.<sup>137</sup> While we acknowledge that the differential discussed by the Levitt Commission was between the DM-3 comparator and judicial salaries, it is equally applicable to the private sector comparator.
- [214] In our view, the IAI continues to do its job within the strictures contained in section 25(2) of the *Judges Act* which provides that in any one year the increase cannot be in excess of 7%.
- [215] To recommend any additional increase would be a “stab in the dark” based on incomplete evidence as to the higher end of private practice compensation levels. We do not consider it our mandate as set out in sections 26(1) and 26(1.1) of the *Judges Act* to attempt to match judicial salaries to those levels, but rather to determine whether there is a failure to attract outstanding candidates to the judiciary because of too great a gap between judicial compensation and private practice compensation.
- [216] Based on the evidence and submissions before us, we do not see compelling evidence that there is an inability to attract outstanding candidates to the judiciary. We were reminded in the submissions that there is no suggestion, but that current and past appointments reflect outstanding candidates.
- [217] It is for that reason that we urge that our recommendations with respect to additional evidence to be gathered be acted upon now, not two years from now.

### Recommendation 3

**Taking into account the deferral of the start of our inquiry due to the COVID-19 pandemic, effective April 1, 2021 judges’ salaries have already been set as they should be at the following levels:**

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<sup>136</sup> Judiciary Submission, paras 154-155.

<sup>137</sup> Levitt Report, para 52.

**Supreme Court of Canada:**

Chief Justice	\$464,300
Puisne Judges	\$429,900

**Federal Court of Appeal, Federal Court, Tax Court and Court Martial Appeal Court:**

Chief Justices	\$395,900
Associate Chief Justices	\$395,900
Puisne Judges	\$361,100
Prothonotaries	\$288,800

**Provincial and Territorial Courts of Appeal and Superior Courts:**

Chief Justices	\$395,900
Senior Associate Chief Justices	\$395,900
Associate Chief Justices	\$395,900
Puisne Judges	\$361,100

## CHAPTER 3 - PROTHONOTARIES' SALARIES AND OTHER BENEFITS

### A. PROTHONOTARIES' ROLES AND RESPONSIBILITIES

[218] Prothonotaries are appointed pursuant to section 12 of the *Federal Courts Act*. They are judicial officers who hold office during good behaviour until age 75.<sup>138</sup>

[219] Prothonotaries are front-line judicial officers of the Federal Court. They:

- (a) have the same immunity from liability as a judge of the Federal Court;
- (b) exercise full trial jurisdiction up to \$50,000;
- (c) hear and decide motions on wide-ranging matters;
- (d) decide Charter issues and other general questions of law;
- (e) adjudicate on complex commercial matters;
- (f) conduct references, pre-trial conferences, and case management of proceedings, including class actions;
- (g) are trained mediators and conduct dispute resolution conferences;
- (h) are subject to the same disciplinary process as judges.<sup>139</sup>

[220] There are currently seven prothonotaries, two in Toronto, three in Ottawa, one in Montréal and one in Vancouver. Two positions (one in Toronto and one in Western Canada) are currently vacant. Prothonotaries are assigned to a specific location on appointment but are expected to travel and sit throughout Canada.<sup>140</sup>

### B. PREVIOUS CONSIDERATION OF PROTHONOTARY COMPENSATION

[221] The salaries and benefits of prothonotaries were added to the work of Quadrennial Commissions following an amendment to section 26.4 of the *Judges Act* in 2014.

[222] Prior to this amendment there were reports on prothonotaries' compensation by two Special Advisors: the Honourable George Adams on May 30, 2008, and the Honourable J. Douglas Cunningham on July 31, 2013.

[223] The Rémillard Commission was the first time prothonotaries' compensation was considered in this forum. It recommended that:

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<sup>138</sup> *Federal Courts Act*, R.S.C., 1985, c. F-7.

<sup>139</sup> Prothonotaries Submission, paras 29-31.

<sup>140</sup> Prothonotaries Submission, para 28.

- (a) the salaries of prothonotaries be increased to 80% of Federal Court judges' salaries, effective April 1, 2016;
- (b) the Government of Canada and the Chief Justice of the Federal Court of Canada should consider the possibility of allowing prothonotaries to elect supernumerary status under the *Judges Act* or of creating a senior prothonotary program for those eligible for retirement;
- (c) prothonotaries should receive a non-taxable allowance of \$3,000 annually, effective April 1, 2016, to be used for the payment of expenses related to their duties;
- (d) prothonotaries should be paid 95% of the reasonable full indemnity costs incurred before that Commission.

[224] The Government accepted these recommendations, three of which are now included in legislation in the *Judges Act*.

### C. CURRENT ISSUES

[225] With respect to salaries and annual increases, the Prothonotaries support the position of the Judiciary.<sup>141</sup>

[226] For the purpose of this Commission process only, the Prothonotaries do not seek a change to section 10.1 of the *Judges Act*, whereby their salaries are fixed at 80% of the salaries of Federal Court judges.<sup>142</sup>

[227] Submissions of the Prothonotaries with regard to salaries are considered in this Report along with those of the Judiciary.

[228] In addition to supporting the position of the Judiciary on judicial salaries, the Prothonotaries request the following three recommendations:

- (a) that the Minister of Justice and the Chief Justice of the Federal Court establish a program for prothonotaries, once eligible to retire, to elect supernumerary status;
- (b) that prothonotaries be provided with an allowance equivalent to that of Superior Court judges for costs associated with carrying out their duties; and
- (c) that their title be changed to “Associate Judge/Juge adjoint(e)”.<sup>143</sup>

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<sup>141</sup> Prothonotaries Submission, para 10.

<sup>142</sup> Prothonotaries Submission, para 10.

<sup>143</sup> Prothonotaries Submission, para 7.

## 1. Supernumerary Status for Prothonotaries

- [229] The prothonotaries requested the Rémillard Commission that they be entitled to elect supernumerary status in order to both enhance their financial security and benefit the Court. That Commission recommended that the Government of Canada and the Chief Justice of the Federal Court of Canada consider the possibility of allowing prothonotaries to elect supernumerary status or of creating a senior prothonotary program for those eligible for retirement.<sup>144</sup>
- [230] Since that time the Chief Justice of the Federal Court, officials of the Department of Justice and the prothonotaries have had discussions leading to a mutually agreed-upon proposal for supernumerary status similar to the election available to judges, modified slightly in recognition of the role of prothonotaries.<sup>145</sup>
- [231] The Prothonotaries note before this Commission that as opportunities for retired judicial officers to be employed and earn revenue after retirement are limited, the ability to opt for supernumerary status is a significant benefit of holding judicial office in terms of future financial security.<sup>146</sup>
- [232] The Government and the Prothonotaries agree that the availability of supernumerary judges is also of value to the Courts and the public. Courts retain experienced judicial officers, providing continuity, mentorship to new judicial officers and additional case assignment flexibility to Chief Justices.<sup>147</sup>
- [233] The proposal for a supernumerary program for prothonotaries agreed to by the Government and the Prothonotaries includes the following elements:
- (a) eligibility when eligible for a full *Judges Act* pension (i.e. after at least 15 years in office and age + years in office equal to 80; or upon completing at least 10 years in judicial office and attaining the age of 70);
  - (b) election at the prothonotary's option;
  - (c) duration of supernumerary status for a maximum of 5 years;
  - (d) workload defined in legislation as 50% of that of a non-supernumerary prothonotary.
- [234] We are pleased that the parties were able to come to agreement on a program that will contribute to attracting outstanding candidates to the office of prothonotary, as well as having benefits to the Court as noted above. As we note later in this Report, the decision to implement such a program and its features is a decision for Parliament and outside our jurisdiction.

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<sup>144</sup> Rémillard Report, para 155 and Recommendation 6.

<sup>145</sup> Prothonotaries Submission, para 70 and Government Submission, para 145.

<sup>146</sup> Prothonotaries Submission, para 62.

<sup>147</sup> Prothonotaries Submission, para 65 and Government Submission, para 146.

## 2. Incidental Allowance

- [235] Federally-appointed judges and prothonotaries are entitled to receive a non-taxable allowance, up to an annual maximum of \$5,000 for judges and \$3,000 for prothonotaries, to cover “reasonable incidental expenditures that the fit and proper execution of” their duties may require. This allowance covers such expenditures as memberships in law-related organisations, attendance at conferences or meetings of significance to the legal community served by the court, the purchase of books or subscriptions to publications for the purposes of legal research, the cost of formal judicial attire, the cost of judicial outreach or public education and the tools and amenities (including computers, printers, cellphones, software, office supplies, cellphone and internet costs) that enable them to carry out their duties and that are not otherwise funded under the *Judges Act*.<sup>148</sup>
- [236] To be reimbursable an expenditure must meet the following criteria: (a) the expenditure and its cost is reasonable; (b) the expenditure is an incidental expenditure that the fit and proper execution of the office of judge may require; and (c) the expenditure is not reimbursable under any other provision of the *Judges Act*.
- [237] Both Special Advisors Cunningham and Adams recommended annual non-taxable allowances of \$3,000 for prothonotaries. The Government rejected both these recommendations. Before the Rémillard Commission, the prothonotaries sought an annual allowance of \$5,000. However, that Commission recommended that prothonotaries receive such allowance in the amount recommended by both Special Advisors Cunningham and Adams, that is \$3,000, subject to the amount being revisited in the future in the event it proved to be inadequate.<sup>149</sup> The Government accepted this recommendation.
- [238] The Prothonotaries submit that there is no principled reason why the maximum allowable amount of this allowance should differ between judges and prothonotaries. Both incur similar expenses, something particularly evident during 2020 when they both were required to make expenditures to set up home offices. One of the most significant expenditures in terms of quantum can be those associated with continuing legal education. Prothonotaries are subject to the same continuing legal education requirement as Federal Court judges.<sup>150</sup>
- [239] The Government acknowledges that the expenses for which prothonotaries use this allowance are in line with the expenses incurred by judges, and that the amount available should also be equal.<sup>151</sup>
- [240] We agree with both parties that as necessary eligible expenditures are similar the total amount available for reimbursement of judges and of prothonotaries should be the same.

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<sup>148</sup> *Judges Act* sections 27(1) and (1.1), Guidelines on the Incidental Allowance on the FJA’s website, and Prothonotaries Submission, para 77.

<sup>149</sup> Rémillard Report, paras 156-159 and Recommendation 7.

<sup>150</sup> Prothonotaries Submission, paras 78-79.

<sup>151</sup> Government Reply, para 79.

## Recommendation 4

**That prothonotaries be entitled to be paid, up to the same maximum as a Federal Court judge, for reasonable incidental expenditures that the fit and proper execution of the office of prothonotary may require, to the extent that the prothonotary has actually incurred the expenditures and is not entitled to be reimbursed for them under any other provision of the *Judges Act*.**

### 3. Change in Title

[241] The Prothonotaries submit that the title of a judicial office is an important “benefit” of the office. It is an honour and a benefit to be called a judge. Conversely, they argue it is a distinct burden to carry a title that Canadians do not understand, cannot pronounce and, if they have any awareness of the term, are most likely to associate with ecclesiastical office or a court registry officer.<sup>152</sup>

[242] The proposed change of title has been an issue for some time. In 2005, the Chief Justice of the Federal Court established a committee of judges and prothonotaries to study possible options for renaming the office. On February 15, 2006, the committee issued a report recommending that the title be changed to Associate Judge. That recommendation was adopted by Chief Justice Lutfy and members of the Court. However, the Government has not yet implemented the change by amending the legislation that defines the office of prothonotary.

[243] The Prothonotaries point out a number of issues with the current title:

- (a) “Prothonotary” is an archaic term that is unfamiliar to many and not recognized in popular spell check and translation applications. Many struggle with its pronunciation.
- (b) Several examples, including in the media, Parliament and a Department of Justice news release, were cited where prothonotaries were equated with registry officers. Misunderstanding is heightened in Quebec where the term is equated with “Special Clerk”, a provincially appointed civil servant with limited jurisdiction.
- (c) During the period 1780 to 1834 prothonotaries were the keepers of the registers of slaves and children in Pennsylvania.<sup>153</sup>

[244] While the proposed change in title would have no impact on financial security the Prothonotaries argue it would serve to correct the misunderstanding around the judicial role performed by prothonotaries. They argue this misunderstanding has an adverse impact

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<sup>152</sup> Prothonotaries Submission, paras 82-83.

<sup>153</sup> Prothonotaries Submission, para 87.

on the ability to attract outstanding candidates and on the morale of existing prothonotaries.<sup>154</sup>

- [245] The Government supports this change to the name of the office of prothonotary but submits that court structures, including titles of offices, are policy issues that fall within the mandate of the government rather than compensation issues included within section 26.1 of the *Judges Act* and hence the matter of the name of the office is outside the jurisdiction of this Commission.<sup>155</sup>
- [246] While the Prothonotaries allege that the position title may have an adverse impact on the ability to attract outstanding candidates to the office of prothonotary, no evidence of such difficulty was presented.
- [247] While we are sympathetic with some of the issues raised by the Prothonotaries with regard to the title of this office in particular the former use of the term for keepers of the registers of slaves, we think that it would be stretching the normal meaning of the word “benefit” to include the title of an office.
- [248] Accordingly, we find that we do not have jurisdiction to make a recommendation with regard to the title of the office.
- [249] Since both parties seem to agree with the change proposed we assume it will go ahead without the need for any recommendation on our part.

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<sup>154</sup> Prothonotaries Submission, para 89.

<sup>155</sup> Government Reply, para 80.

## CHAPTER 4 - OTHER ISSUES

### A. THE COURT MARTIAL APPEAL COURT OF CANADA

#### **Requested amendments to the *Judges Act* and the *National Defence Act***

[250] Under section 234 of the *National Defence Act*<sup>156</sup> which establishes the Court Martial Appeal Court of Canada (“CMAC”), judges of the CMAC may be appointed from the Federal Court of Appeal, the Federal Court, or from a superior court of criminal jurisdiction (each a “Source Court”). One of the judges of the CMAC will be designated as the Chief Justice. Judges who are appointed to the CMAC, including the Chief Justice, remain judges of the Source Court from which they are designated.

[251] The Honourable Richard Bell, Chief Justice of the CMAC, in written submissions dated March 26 and May 7, 2021 and in oral submissions delivered in part by Chief Justice Bell, in part by Justice Edward Scanlan and in part by Eugene Meehan, Q.C., seeks the following recommendations from this Commission:

1. amendments to section 31.1 of the *Judges Act* such that if the Chief Justice of the CMAC elects to cease to perform the duties of that office, he or she may remain a judge of the CMAC and an *ex officio* member of the Federal Court of Appeal as opposed to returning to the duties of his or her own Source Court<sup>157</sup>;
2. consequential amendments to section 28 of the *Judges Act* to create a supernumerary structure at the level of the CMAC, but only for the benefit of a former Chief Justice of that Court<sup>158</sup>; and
3. amendments to section 234 of the *National Defence Act* in three respects:
  - (a) removing the requirement that a minimum of four judges be designated from the Federal Court or Federal Court of Appeal;
  - (b) removing the requirement that members of the CMAC also occupy the position of judge on a separate Source Court; and
  - (c) expanding the candidate pool for the position of Chief Justice of the CMAC<sup>159</sup>.

#### **Rationale for the amendments sought**

[252] The amendments sought arise out of essentially two expressed concerns:

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<sup>156</sup> *National Defence Act*, R.S.C., 1985, c. N-5.

<sup>157</sup> Submission of Chief Justice Bell at 9-10.

<sup>158</sup> Submission of Chief Justice Bell at 10-11.

<sup>159</sup> Submission of Chief Justice Bell at 12-14.

- (a) a perceived or real lack of operational independence creating certain conflict issues in relation to the Source Court's demands which may lead to a perceived or real lack of judicial independence of the Chief Justice of the CMAC; and
- (b) equal status among Chief Justices of federal courts.

[253] Chief Justice Bell emphasizes that one of the three core characteristics of judicial independence includes “administrative or (institutional) control”<sup>160</sup>.

[254] Chief Justice Bell requests these amendments in order to reflect the equal status of the Chief Justice of the CMAC to those of the Chief Justices of the Federal Court, Federal Court of Appeal, and the Tax Court<sup>161</sup> who are equally responsible for the judicial and administrative functions of their respective courts under section 8(1) of the *Courts Administration Service Act*<sup>162</sup>. None of these federal courts other than the CMAC are tied to a Source Court.

#### **Position of the parties on jurisdiction**

[255] The Government argues that this Commission lacks jurisdiction to deal with the proposed amendments raised by Chief Justice Bell for the following reasons:

- (a) the mandate of the Commission is limited to issues of compensation for federally-appointed judges and prothonotaries<sup>163</sup>;
- (b) the issue of independence raised is a structural issue tied to the specific and limited statutory jurisdiction of the CMAC and not to the adequacy of salary and benefits paid<sup>164</sup>; and
- (c) while compensation issues of the Chief Justice of the CMAC fall within the Commission's mandate, how the CMAC is structured falls outside the Commission's mandate<sup>165</sup>.

[256] Chief Justice Bell argues that the jurisdiction of this Commission to make the recommendations sought rests in section 26(1) of the *Judges Act* where this Commission “is hereby established to inquire into ... the adequacy of judges' benefits generally”. Section 31.1 of the *Judges Act* is described as involving a “benefit” to the Chief Justice of the CMAC in the sense that it governs the judicial pathway of a Chief Justice upon ceasing to perform the duties of that office.

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<sup>160</sup> Submission of Chief Justice Bell at 22.

<sup>161</sup> Submission of Chief Justice Bell at 5, 6, 9, 10, 12, 13 and 16-18.

<sup>162</sup> *Courts Administration Service Act*, S.C. 2002, c. 8.

<sup>163</sup> Government Reply, para 81.

<sup>164</sup> Government Reply, paras 82-83.

<sup>165</sup> Government Reply, para 84.

[257] Chief Justice Bell goes on to argue that the second and third criteria of section 26(1.1) of the *Judges Act*, namely financial security of the judiciary and the need to attract outstanding candidates, are engaged by amendments to section 28 of the *Judges Act* to create a supernumerary structure for the Chief Justice at the level of the CMAC and that the fourth criterion of any other objective criteria allows for the consideration of the merits of the proposed amendments.

### **Conclusion on jurisdiction**

[258] The Commission agrees with the Government that it does not have jurisdiction to make the types of recommendations sought by Chief Justice Bell. The recommendations sought go to the structuring of the CMAC for the most part, something which this Commission is not in any event equipped to make recommendations on.

[259] As to establishing a supernumerary structure for the CMAC and whether a supernumerary Chief Justice would benefit that Court, we agree with the reasoning of the Rémillard Commission, in its consideration of requested supernumerary status for prothonotaries, that “any decision to implement such a program would be a policy decision. Whether such a structure is put in place and its actual features is a matter for Parliament.”<sup>166</sup>

[260] Chief Justice Bell argues that the fourth criteria under section 26(1.1) of the *Judges Act* would allow the Commission to consider the impact of the recommendations on judicial independence of the Chief Justice of the CMAC. However, the Commission’s mandate is not to inquire into all aspects of judicial independence but rather to consider how compensation adequacy might impact on judicial independence.

[261] The Commission declines to make any of the recommendations sought by Chief Justice Bell.

[262] The Commission notes that the Government stated that it “takes the matters raised by the CMAC ... seriously and these are matters which are of concern.”<sup>167</sup>

## **B. INCIDENTAL ALLOWANCE**

[263] Section 27(1) of the *Judges Act* provides for judges to receive up to a maximum of \$5,000 annually for reasonable incidental expenditures that the fit and proper execution of the office of judge may require, to the extent that the judge has actually incurred the expenditures and is not entitled to be reimbursed under any other provision of that *Act*.

[264] An incidental allowance of \$1,000 per annum per judge was created in 1980, increased to \$2,500 in 1989 and then to \$5,000 in 2000.<sup>168</sup>

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<sup>166</sup> Rémillard Report, paras 151-152.

<sup>167</sup> Hearing Transcript at 276: 14-18.

<sup>168</sup> Judiciary Submission, para 161.

[265] The incidental allowance is not part of judicial compensation. It is an entitlement to the reimbursement of reasonable expenses incurred by a sitting judge. It is administered by the FJA which audits claims pursuant to defined guidelines. Judges do not receive any unused portion of the allowance, nor is there a credit or carry-forward to the following year.

[266] The classes of reimbursable expenses set out in the guidelines<sup>169</sup> include:

- (a) electronic and other office equipment;
- (b) telecommunications;
- (c) memberships in law and judicial related professional associations and legal publications;
- (d) formal court attire;
- (e) judicial education and outreach functions;
- (f) other reasonable expenses, for example home security systems, briefcases and suitcases for judicial travel, parking at the courthouse.

[267] In 2017-2018 nearly half of incidental expenses were related to technology required for the exercise of judicial functions. The Judiciary submit that such usage would have been unimaginable in 2000 when the current level for the allowance was set, and that the share of the incidental allowance spent on technology will only increase in the wake of the pandemic, with remote and flexible working arrangements increasingly becoming a permanent part of the administration of justice.<sup>170</sup> To serve its purpose, the incidental allowance must be responsive to the additional expenses that have been and will continue to be incurred by the judiciary as a result of these trends.<sup>171</sup>

[268] According to Professor Hyatt, adjustment of the incidental allowance in accordance with the increase in the cost of living index since 2000 would bring the amount of the allowance to \$7,245.<sup>172</sup>

[269] The Government in reply notes that approximately half of all judges do not use the full amount of the \$5,000 currently allotted for incidental expenses. Further much of the argument in favour of increasing this allowance appears to be related to an increase in costs associated with technology as a result of the present COVID restrictions. This is a temporary phenomenon and not a systemic deficiency.<sup>173</sup>

[270] We do not find the arguments of the Government in favour of no increase in the allowance to be convincing. The fact that a number of judges do not use all of the allowance currently available would suggest that it is being used judiciously for needed expenses. This view

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<sup>169</sup> The FJA's Guidelines on the Incidental Allowance.

<sup>170</sup> Judiciary Submission, para 166.

<sup>171</sup> Judiciary Submission, para 175.

<sup>172</sup> Report of Professor Douglas E. Hyatt at 5, Judiciary Submission, Exhibit A.

<sup>173</sup> Government Reply, paras 61-62.

is reinforced by the fact that expenses are audited by the FJA. Section 27(1) of the *Judges Act* establishes a maximum so it is not surprising that not all judges use the full amount.

- [271] We do not agree that increases in technology expenses will disappear once we are past the current circumstances. The Judiciary point out a number of legislative changes underway to continue remote work in several circumstances, as well as recommendations from the Canadian Bar Association Task Force Report on Judicial Issues Arising from COVID-19 for continuation of remote proceedings in a number of circumstances.<sup>174</sup> While we expect in-person proceedings will return in many instances, there will be other situations in which all parties involved will have found virtual proceedings to be effective and efficient.
- [272] Accordingly, we agree that the maximum amount available for the incidental allowance should be increased. In view of the lengthy time since it was last adjusted and increasing technology expenses, we find the proposal to raise it to a maximum of \$7,500 a year to be reasonable.
- [273] The Judiciary also ask for a change in the French terminology from “faux frais” to “frais de fonction”. While we agree that this seems to be a reasonable change to make, we do not think that adjustments to the terminology of the legislation fall within our mandate under section 26(1) of the *Judges Act* to “inquire into the adequacy of the salaries and other amounts payable under this *Act* and into the adequacy of judges’ benefits generally”.

## Recommendation 5

**The incidental allowance provided under section 27(1) of the *Judges Act* be increased from \$5,000 to \$7,500 per judge per year.**

## C. REPRESENTATIONAL ALLOWANCES

- [274] Section 27(6) of the *Judges Act* provides for certain judges to be paid, as a representational allowance, reasonable travel and other expenses actually incurred by the judge or the spouse of the judge in discharging the special extrajudicial obligations and responsibilities that devolve on the judge, to the extent that those expenses may not be reimbursed under any other provisions of that *Act* up to the maximum amounts set out in that section. The judges in question are the Chief Justices and Associate Chief Justices of the various courts, Regional Senior Judges, and the Chief Justice and other Justices of the Supreme Court of Canada.
- [275] Counsel for the Judiciary notes that the judicial offices named in this section are the leaders of the various branches of the judiciary and as such will incur expenses associated with representing the judicial branch and their courts in discharging special extra-judicial

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<sup>174</sup> Judiciary Submission, paras 168-170.

obligations including holding, arranging and attending events within the courts, the broader legal community, government and the public.<sup>175</sup>

[276] The Judiciary note that the maximum amount for representational allowances has not changed since set in 2000, except for that of regional senior judges which was established in 2004. They submit that an increase in the representational allowances is warranted in light of inflation since that date.<sup>176</sup>

[277] Professor Hyatt notes that the Consumer Price Index (CPI) for Canada has increased by 44.9% since 2000 and by 32% since 2004. The allowance amounts updated by the increase in CPI would be as follows<sup>177</sup>:

	<u>Current</u>	<u>Updated</u>
a. Chief Justice of Canada	\$18,750	\$27,169
b. Appellate Chief Justices	\$12,500	\$18,113
c. First-Instance Chief Justices, and Associate Chief Justices and Puisne Judges of the Supreme Court of Canada	\$10,000	\$14,490
d. Regional Senior Judges	\$5,000	\$6,600

[278] The Government notes in reply that the Judiciary's argument for increasing the representational allowance was based almost exclusively on the rate of inflation since the last increase to this allowance. There is no evidence offered by the Judiciary of an increase in these duties, nor any evidence the actual costs have increased. The passage of time alone is insufficient to support increases to current amounts, especially in view of the multiple other reimbursements available under the *Judges Act*. Furthermore, public reports by the FJA indicate that approximately half of eligible judges do not need to access the allowance and total amounts claimed do not approach the potential maximums.<sup>178</sup>

[279] The argument in favour of an increase is not based on any claim that such duties have increased – but rather that the costs associated have changed in the more than 20 years since maximum amounts were established (or 17 years in the case of regional senior judges). It seems to us that the increase in the CPI itself is evidence of an increase in costs over that time period.

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<sup>175</sup> Judiciary Submission, para 182.

<sup>176</sup> Judiciary Submission, para 180.

<sup>177</sup> Judiciary Submission, para 183 and Exhibit A Report of Professor Douglas E. Hyatt at 5.

<sup>178</sup> Government Reply, paras 63-64.

- [280] We would note that unlike in the case of incidental allowances, the Judiciary do not provide any historical data on usage of the representational allowance – either amounts claimed or percentage of judges claiming the allowance.
- [281] However, this is an entitlement to reimbursement. If no expense is incurred in accordance with what is allowed under the *Judges Act* and further described under the Guidelines established by the FJA, then no allowance is paid. Those judges who do not use the allowance or who only use part of it in any given year have no further access to the unused portion.
- [282] Accordingly, we find it reasonable to increase the maximums allowable under the legislation in line with the increase in the cost of living over the years since the maximums were first set.

### **Recommendation 6**

**The maximum amounts allowable for representational allowance provided for under section 27(6) of the *Judges Act* be established as follows:**

- (a) the Chief Justice of Canada, \$25,000;**
- (b) each puisne judge of the Supreme Court of Canada, \$15,000;**
- (c) the Chief Justice of the Federal Court of Appeal and each Chief Justice described in sections 12 to 21 as the chief of a province, \$17,500 each;**
- (d) each other Chief Justice referred to in sections 10 to 21, \$15,000 each;**
- (e) the Chief Justices of the Court of Appeal of Yukon, the Court of Appeal of the Northwest Territories, the Court of Appeal of Nunavut, the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice, \$15,000 each;**
- (f) the Chief Justice of the Court Martial Appeal Court of Canada, \$15,000;**
- (g) the Senior Judge of the Family Court and each Regional Senior Judge of the Superior Court of Justice in and for the Province of Ontario, \$7,500 each.**

### **D. POST-RETIREMENT LIFE INSURANCE FOR RETIRED CHIEF JUSTICES**

- [283] The Judiciary raise the issue of post-retirement life insurance available to chief justices who elect supernumerary status before retiring. In such cases the former chief justice will receive the salary of a puisne judge while on supernumerary status but will receive an annuity on retirement based on a chief justice salary. However, post-retirement life insurance is based

on the final salary.<sup>179</sup> This insurance decreases by 25% annually to a minimum of 25% of the adjusted final salary in the fourth year of retirement. They submit that this creates a disincentive for chief justices to elect supernumerary status and request that post-retirement life insurance be based on the salary of a chief justice.<sup>180</sup>

[284] The Government notes in reply that the link to financial security is much stronger in respect of an annuity, which also directly benefits former chief justices' survivors. The suggestion that there is disincentive to accept supernumerary status on the basis of this issue is difficult to accept given the other benefits that accompany supernumerary status. It is the Government's view that no changes to the post-retirement life insurance are necessary to ensure ongoing adequacy of the compensation and benefits of chief justices or to secure their independence.<sup>181</sup>

[285] It seems unlikely to us that this issue is a significant factor in deciding on supernumerary status. Nor do we see any evidence that it creates a significant disincentive to accepting supernumerary status. Accordingly, we decline to recommend the requested change.

#### **E. COSTS ASSOCIATED WITH THE JUDICIARY'S PARTICIPATION IN A REFERRAL TO THE COMMISSION UNDER SECTION 26(4) OF THE *JUDGES ACT***

[286] On May 31, 2019, the Minister of Justice referred an inquiry to be undertaken by the Rémillard Commission under section 26(4) of the *Judges Act*. The Minister asked the Commission to undertake an inquiry on the following matter:

[T]he effects on the adequacy of federal judicial compensation and benefits, if any, of an amendment to the *Judges Act* that would stop the accrual of pensionable service for any judge whose removal from office has been recommended by the Canadian Judicial Council.<sup>182</sup>

[287] Section 26(4) of the *Judges Act* allows the Minister, in addition to its quadrennial inquiry, to refer to the Commission other matters related to the adequacy of salaries and other amounts payable under the *Act* and judges' benefits generally. The May 2019 referral was the first time that this referral power has been used.

[288] The Canadian Superior Courts Judges Association ("Association") considers the judiciary has a legal and constitutional duty under the *Judges Act* to participate in the work of the Commission, and to identify considerations relevant to a Commission's inquiry, whatever number of federally-appointed judges the inquiry concerns. It considers that the very legitimacy of an inquiry pursuant to a Minister's referral depends on the judiciary's

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<sup>179</sup> Judiciary Submission, para 186.

<sup>180</sup> Judiciary Submission, para 187.

<sup>181</sup> Government Reply, para 66.

<sup>182</sup> Letter from the Honourable David Lametti to the Rémillard Commission – Annex A to the June 18, 2019 Notice of the Rémillard Commission, posted on the Quadrennial Commission website.

participation. Accordingly, the Association made considered submissions in connection with the May 2019 referral to the Rémillard Commission.<sup>183</sup>

- [289] The Association asked the Commission to recommend reimbursement of its full costs of participation in that inquiry. The Rémillard Commission declined to make such a recommendation, referring to the provision for reimbursement of two-thirds of the judiciary's representational costs set out in section 26.3(2) of the *Judges Act*.<sup>184</sup>
- [290] The Association is a voluntary, non-profit organisation. The financing of its activities entirely depends on the annual membership dues of its members. Participation in the quadrennial inquiry of the Commission is a significant item in its budget which is built on an annual basis to accumulate the funds required to cover the one-third of representational costs not reimbursed under section 26.3(2) of the *Judges Act*.<sup>185</sup>
- [291] In contrast to the predictable expenditures on quadrennial inquiries any given Ministerial referral pursuant to section 26(4) of the *Judges Act* is unexpected and cannot be built into regular annual budgets in the same way. Both the referral and its timing are decisions of the Government.<sup>186</sup>
- [292] The Association, as the representative organisation of the federally-appointed judiciary, is obliged to participate in the inquiry. In such circumstances, the Association submits that fairness requires that the Association be fully reimbursed for its costs.<sup>187</sup>
- [293] The Government in reply submits that the consistent position of the Government has been that full funding is not necessary to facilitate meaningful participation in the process, and that it would discourage parsimony with regard to the use of public resources. It is not in the public interest to give the judiciary unchecked discretion in deciding what legal costs should be incurred. It is the Government's view that two-thirds indemnification of costs is sufficient to assist in defraying legal costs associated with participating with a referral under section 26(4) of the *Judges Act*. Using the example of the only process ever initiated under section 26(4), the amounts paid by the judiciary for legal costs on a per-judge basis are minimal.<sup>188</sup>
- [294] The Ministerial referral in May 2019 is the only time that section 26(4) of the *Judges Act* has ever been used. We do not believe that the limited use of this provision is justification for departing from the standard established in the *Act* of two-thirds funding for the legal costs associated with participation before the Commission. Accordingly, we are not persuaded there is any basis to make a recommendation that costs be payable on a different

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<sup>183</sup> Judiciary Submission, para 191.

<sup>184</sup> Judiciary Submission, para 192.

<sup>185</sup> Judiciary Submission, para 194.

<sup>186</sup> Judiciary Submission, para 195.

<sup>187</sup> Judiciary Submission, para 196.

<sup>188</sup> Government Reply, paras 76-77.

basis than under section 26.3(2) of *the Act*. Should use of this referral power become much more common in the future then this issue can be revisited.

## **F. PROPOSED NEW MEDICAL ASSISTANCE FOR JUDGES WHO RESIDE IN REMOTE LOCATIONS**

[295] The Government proposes creating a new medical assistance provision for judges in receipt of a northern allowance under section 27(2) of the *Judges Act* – i.e. judges of the Supreme Court of Newfoundland and Labrador who are resident in Labrador and each judge of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice.

[296] The proposed new medical assistance would cover reasonable travel expenses incurred when a judge who receives a northern allowance under the *Act* is required to travel for non-elective medical or dental treatment. This has been identified by the FJA as an occasional need.<sup>189</sup>

[297] We agree that this is a reasonable provision for judges living in remote regions where travel may be required in order to receive necessary medical or dental treatment.

### **Recommendation 7**

**Judges in receipt of a northern allowance under section 27(2) of the *Judges Act* be entitled to claim reasonable medical travel expenses actually incurred when the judge is required to travel for non-elective medical or dental treatment.**

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<sup>189</sup> Government Submission, para 138.

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**CHAPTER 5 - FUTURE DATA COLLECTION****Recommendation 8**

The following preparatory work should begin now so that the Seventh Quadrennial Commission has before it adequate and appropriate additional data from which to work:

1. Data from the CRA as to levels of professional income reported through professional corporations on a gross and net professional income basis. Recognizing that this may require manual compilation, a statistically significant sample size within the current 17,871 such corporations should be undertaken in sufficient time to be of use to the Seventh Quadrennial Commission;
2. Where possible, the CRA to report on the extent to which professional corporations are used to retain professional income as opposed to pay out or dividend it to the professional, again on a statistically significant sample size;
3. Where possible, the CRA to report on the use of individual pension plans within a lawyer professional corporation;
4. More detailed data on the differential in value between the pension entitlement in the DM-3 category and the judicial annuity;
5. In addition to the data currently available, the Office of the Commissioner for Federal Judicial Affairs begin preparation now of statistical data for each province and territories as to:
  - (a) total judicial vacancies;
  - (b) a breakdown of applicants (as opposed to appointees) into basic categories such as private sector partner, private sector non partner, public sector, public interest or non-profit sector, other like academic, corporate, etc.;
  - (c) compensation levels of appointees immediately prior to their appointment; and
  - (d) the source of applicants by province, geographic region and where applicable large urban centers;

all during the current quadrennial period and provide data over a sufficient time span to identify material trends.

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**CHAPTER 6 – CONCLUSION**

- [298] The Commission has carefully considered all issues before it. This Report represents our unanimous views, in light of the criteria of section 26(1.1) of the *Judges Act*, as to what best serves the public interest with respect to judicial compensation and benefits for this quadrennial period.
- [299] We are now at a crossroad in terms of the quality of the data upon which a future Quadrennial Commission must rely to make a careful assessment of the criteria set under section 26(1.1) of the *Judges Act*.
- [300] Our judiciary is, with good reason, much admired by all Canadians and is the envy of the world. We can never take for granted such a fundamental institution, even in as democratic a political fabric as we enjoy in Canada.
- [301] The next Quadrennial Commission must be equipped with the most up to date relevant data so that its deliberations can be based on a record that enables it to determine whether trends and risks expressed in the submissions to us can be fully evaluated with current evidence beginning in 2024.
- [302] We urge the parties to this Quadrennial Commission to begin that process immediately.
- [303] We thank all of them for the quality of their contributions and for their responsiveness both of which have been of great assistance to us in the completion of our task.

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**CHAPTER 7 – LIST OF ALL RECOMMENDATIONS**

1. **Judges' salaries should continue to be adjusted annually on the basis of increases in the Industrial Aggregate Index, in accordance with section 25(2) of the *Judges Act*.**
  
2. **No salary differential should be paid to puisne appellate judges.**
  
3. **Taking into account the deferral of the start of our inquiry due to the COVID-19 pandemic, effective April 1, 2021 judges' salaries have already been set as they should be at the following levels:**

**Supreme Court of Canada:**

Chief Justice	\$464,300
Puisne Judges	\$429,900

**Federal Court of Appeal, Federal Court, Tax Court and Court Martial Appeal Court:**

Chief Justices	\$395,900
Associate Chief Justices	\$395,900
Puisne Judges	\$361,100
Prothonotaries	\$288,800

**Provincial and Territorial Courts of Appeal and Superior Courts:**

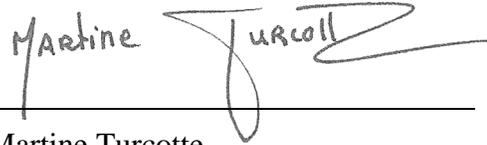
Chief Justices	\$395,900
Senior Associate Chief Justices	\$395,900
Associate Chief Justices	\$395,900
Puisne Judges	\$361,100

4. **That prothonotaries be entitled to be paid, up to the same maximum as a Federal Court judge, for reasonable incidental expenditures that the fit and proper execution of the office of prothonotary may require, to the extent that the prothonotary has actually incurred the expenditures and is not entitled to be reimbursed for them under any other provision of the *Judges Act*.**

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5. **The incidental allowance provided under section 27(1) of the *Judges Act* be increased from \$5,000 to \$7,500 per judge per year.**
  
  6. **That the maximum amounts allowable for representational allowance provided for under section 27(6) of the *Judges Act* be established as follows:**
    - (a) **the Chief Justice of Canada, \$25,000;**
    - (b) **each puisne judge of the Supreme Court of Canada, \$15,000;**
    - (c) **the Chief Justice of the Federal Court of Appeal and each Chief Justice described in sections 12 to 21 as the chief of a province, \$17,500 each;**
    - (d) **Chief Justices referred to in sections 10 to 21 of the *Act*, \$15,000 each;**
    - (e) **the Chief Justices of the Court of Appeal of Yukon, the Court of Appeal of the Northwest Territories, the Court of Appeal of Nunavut, the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice, \$15,000 each;**
    - (f) **the Chief Justice of the Court Martial Appeal Court of Canada, \$15,000;**
    - (g) **the Senior Judge of the Family Court and each Regional Senior Judge of the Superior Court of Justice in and for the Province of Ontario, \$7,500 each.**
  
  7. **Judges in receipt of a northern allowance under section 27(2) of the *Judges Act* be entitled to claim reasonable medical travel expenses actually incurred when the judge is required to travel for non-elective medical or dental treatment.**
  
  8. **The following preparatory work should begin now so that the Seventh Quadrennial Commission has before it adequate and appropriate additional data from which to work:**
    1. **Data from the CRA as to levels of professional income reported through professional corporations on a gross and net professional income basis. Recognizing that this may require manual compilation, a statistically significant sample size within the current 17,871 such corporations should be undertaken in sufficient time to be of use to the Seventh Quadrennial Commission;**
    2. **Where possible, the CRA to report on the extent to which professional corporations are used to retain professional income as opposed to pay out or dividend it to the professional, again on a statistically significant sample size;**

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- 3. Where possible, the CRA to report on the use of individual pension plans within a lawyer professional corporation;**
  - 4. More detailed data on the differential in value between the pension entitlement in the DM-3 category and the judicial annuity;**
  - 5. In addition to the data currently available, the Office of the Commissioner for Federal Judicial Affairs begin preparation now of statistical data for each province and territories as to:**
    - (a) total judicial vacancies;**
    - (b) a breakdown of applicants (as opposed to appointees) into basic categories such as private sector partner, private sector non partner, public sector, public interest or non-profit sector, other like academic, corporate, etc.;**
    - (c) compensation levels of appointees immediately prior to their appointment; and**
    - (d) the source of applicants by province, geographic region and where applicable large urban centers;**

**all during the current quadrennial period and provide data over a sufficient time span to identify material trends.**

A handwritten signature in black ink that reads "Martine Turcotte". The signature is written in a cursive style with a large, stylized "T" and "C".

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Martine Turcotte  
Chair

A handwritten signature in black ink that reads "K. M. Bloodworth". The signature is written in a cursive style with a large, stylized "K" and "B".

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Margaret Bloodworth  
Commissioner

A handwritten signature in black ink that reads "Peter Griffin". The signature is written in a cursive style with a large, stylized "P" and "G".

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Peter Griffin  
Commissioner

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**LIST OF APPENDICES**

**Appendix A.....** Department of Justice, “Appointments to the Judicial Compensation and Benefits Commission” (June 17, 2020)

**Appendix B.....** News Release and Notice, “Quadrennial Judicial Compensation and Benefits Commission begins Inquiry” (December 16, 2020)

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**LIST OF FOOTNOTES**

- [1] R.S.C., 1985, c. J-1, as amended [*Judges Act*].
- [2] Department of Justice, “Appointments to the Judicial Compensation and Benefits Commission” (June 17, 2020), Appendix A to this Report.
- [3] News Release and Notice of the Judicial Compensation and Benefits Commission “Quadrennial Judicial Compensation and Benefits Commission begins Inquiry” (December 16, 2020), Appendix B to this Report.
- [4] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in R.S.C., 1985, Appendix II, No 5. [*Constitution Act*].
- [5] *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3 [*PEI Reference*].
- [6] *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 SCR 405, para 116.
- [7] *PEI Reference*, para 115; *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] 2 SCR 286 [*Bodner*], para 7.
- [8] *PEI Reference*, paras.167-175; *Bodner*, paras 13-21.
- [9] *Judges Act*.
- [10] Joint Book of Documents, tabs 9 to 13.
- [11] Sections 9-22 of the *Judges Act*.
- [12] *Judges Act*, section 26.11.
- [13] Ruling respecting request for deferral of commencement date of June 1, 2020 (June 10, 2020), Appendix C to this Report.
- [14] Appendix B to this Report.
- [15] Joint Book of Documents, tabs 9 to 15 and Judiciary Book of Exhibits and Documents, tabs 20 to 24.
- [16] *Bodner*, at para 14.
- [17] Rémillard Report, paras 23, 24, 26.

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- [18] Judiciary Submission, table 6 and paras 137-138.
- [19] McLennan Report at 42-43.
- [20] Report of Stéphane Leblanc and André Pickler, Judiciary Submission, Exhibit B, at 2; letter from Christopher Rugar dated May 14, 2020 [sic].
- [21] Letter from Christopher Rugar dated May 14, 2020 [sic].
- [22] Government Submission, para 61.
- [23] Report of Stéphane Leblanc and André Pickler, Judiciary Submission, Exhibit B.
- [24] Second Report of Stéphane Leblanc and André Pickler, Judiciary Reply, Exhibit B.
- [25] See for example the chart at para 87 of the Government Submission where, for the 2019 taxation year and applying certain filters, the target group of all self-employed lawyers in the CRA data set is reduced to only 19%, or 2,990 of the original 15,510. Using different filters, the target group is reduced to 6%, see letter dated May 26, 2021 from Kirk G. Shannon.
- [26] Block Report, paras 108, 111.
- [27] Judiciary Submission, see table following para 105.
- [28] Letter dated May 26, 2021 from Kirk G. Shannon.
- [29] Letter dated May 26, 2021 from Kirk G. Shannon.
- [30] Judiciary Submission, para 152.
- [31] Government Reply, para 53.
- [32] Letters dated May 11, 2021 and May 14, 2020 [sic] from Christopher Rugar and May 26, 2021 from Kirk G. Shannon.
- [33] McLennan Report at 9.
- [34] Joint Book of Documents, volume 1, tab 11.
- [35] Fall Economic Statement 2020 at 97, Joint Book of Documents, volume 2, tab 25.
- [36] Budget 2021, table A1.2, Government Supplemental Book of Documents, tab 3.
- [37] Budget 2021, table A1.1, Government Supplemental Book of Documents, tab 3.

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- [38] The Policy and Economic Analysis Program of the Rotman School of Management forecast of March 19, 2021 attached to the first Report of Professor Douglas E. Hyatt, dated March 29, 2021 while more optimistic is not very different: (5.4%), 6.0%, 3.8%, 2.4% and 2.0% for 2020-2024. See Exhibit A.2 to the Judiciary Submission.
- [39] Government Submission, para 16.
- [40] Government Reply, para 21.
- [41] Judiciary Submission, paras 4-5.
- [42] Judiciary Submission, para 49.
- [43] Judiciary Reply, para 79.
- [44] Prothonotaries Submission, para 45.
- [45] Government Submission, para 22.
- [46] Judiciary Reply, para 77 and footnote 80.
- [47] Hearing Transcript at 33: 7-12.
- [48] Canadian Bar Association Submission at 9.
- [49] Canadian Bar Association Submission at 6.
- [50] Government Response to the Block Report, Joint Book of Documents, volume 1, tab 11.
- [51] Government Response to the Levitt Report, Joint Book of Documents, volume 1, tab 12, at 3.
- [52] *PEI Reference*, paras 131-135.
- [53] Judiciary Submission, paras 63-64.
- [54] Hearing Transcript at 42-52.
- [55] Judiciary Submission, para 66.
- [56] Hearing Transcript at 77-78.
- [57] Hansard, December 18, 1980 at 5897.
- [58] Government Submission, para 42.
- [59] Government Reply, paras 56-57.

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- [60] Government Submission, para 102.
- [61] Judiciary Reply, paras 46-49 and Judiciary Supplemental Book of Exhibits and Documents, tabs 2 to 7.
- [62] Rémillard Report, para 85.
- [63] Report of Mark Szekely, Government Book of Documents, tab 5.
- [64] Report of Peter Gorham, paras 69-71, Government Book of Documents, tab 4.
- [65] Hansard, December 1, 1980 at 5207.
- [66] House of Commons Standing Committee on Justice and Legal Affairs, February 19, 1981 (Issue 14), at 14:29.
- [67] Levitt Report, para 46.
- [68] Rémillard Report, paras 36-42.
- [69] Government Submission, para 32.
- [70] Government Submission, para 33.
- [71] Judiciary Reply, paras 117-118.
- [72] Prothonotaries Reply, paras 3, 8, 10.
- [73] Letter from the Office of the Chief Actuary, Office of the Superintendent of Financial Institutions, February 26, 2021, Joint Book of Documents, volume 2, tab 23.
- [74] Though the projection on February 26, 2021 was 6.7%, the actual Industrial Aggregate provided to the FJA by Statistics Canada on March 31, 2021 for the purpose of section 25 of the *Judges Act* was 6.6%, Government Supplemental Book of Documents, tab 1.
- [75] Report of Peter Gorham, paras 74-78, Government Book of Documents, tab 4.
- [76] Government Submission, para 27.
- [77] Hearing Transcript at 273: 17-21 (Prothonotaries) and 343-344 (Judiciary).
- [78] Scott Report at 14, Judiciary Book of Exhibits and Documents, tab 24.
- [79] Guthrie Report at 8, Judiciary Book of Exhibits and Documents, tab 21.
- [80] Block Report, paras 108, 111.
- [81] Rémillard Report, para 47.

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- [82] Judiciary Submission, para 103.
- [83] Judiciary Submission, para 104 and graph 1.
- [84] Judiciary Submission, para 118 and table 3.
- [85] Government Submission, para 113.
- [86] Government Reply, paras 30, 32.
- [87] Government Reply, para 27.
- [88] Letter from Christopher Rupar dated May 14, 2020 [sic].
- [89] Letter from Kirk G. Shannon dated May 26, 2021.
- [90] Block Report, paras 108, 111.
- [91] Rémillard Report, para 55.
- [92] Judiciary Submission at 35, graph 1.
- [93] Judiciary Submission at 38, table 1.
- [94] Letter from Christopher Rupar dated May 14, 2020 [sic].
- [95] Letter from Christopher Rupar dated May 14, 2020 [sic].
- [96] Block Report, para 106.
- [97] Report of Peter Gorham, paras 219-222, Government Book of Documents, tab 4.
- [98] Judiciary Reply at 29, table 1, and letter from Kirk G. Shannon dated May 26, 2021. These decreases were noted for income greater than \$80,000 in both the 44-56 and age-weighted groups, and both nationally and in the top ten CMAs.
- [99] Government Submission, chart at para 60.
- [100] Judiciary Submission at 53, table 6 and para 138.
- [101] Report of Stéphane Leblanc and André Pickler where they state that lawyers in private practice earning an income of \$200,000 and \$300,000 or more generally consider it beneficial to incorporate a professional corporation, Judiciary Submission, Exhibit B at 2; letter from Christopher Rupar dated May 14, 2020 [sic].
- [102] McLennan Report at 43.
- [103] Rémillard Report, para 63.

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- [104] Report of Professor Douglas E. Hyatt at 4, Judiciary Submission, Exhibit A.
- [105] Government Submission, paras 64-66.
- [106] Judiciary Reply, paras 53-55.
- [107] Rémillard Report, para 61.
- [108] Government Reply, para 58, and Joint Book of Documents, volume 2, tab 21, table 1.
- [109] Government Submission, paras 78-79.
- [110] Rémillard Report, para 67.
- [111] Report of Sandra Haydon & Associates at 5, Judiciary Reply, Exhibit C.
- [112] Judiciary Submission, para 134.
- [113] Rémillard Report, para 69.
- [114] Letter from Kirk G. Shannon dated May 26, 2021, table 1.
- [115] Government Submission, paras 89-100.
- [116] Judiciary Reply, para 86.
- [117] Hearing Transcript at 109: 16-18.
- [118] Government Reply, paras 67-75.
- [119] Hearing Transcript at 245: 9-20.
- [120] Hearing Transcript at 246: 10-11.
- [121] Hearing Transcript at 12: 15-20.
- [122] Hearing Transcript at 12: 24-25, 13: 1-3.
- [123] Hearing Transcript at 13: 24-25, 14: 1-4.
- [124] Rémillard Report, paras 26-27.
- [125] Government Submission, para 12.
- [126] Rémillard Report, para 107.
- [127] Rémillard Report, para 105.
- [128] Hearing Transcript at 341: 9-13.

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- [129] Hearing Transcript at 336: 21-22.
- [130] Block Report, para 131.
- [131] Levitt Report, para 65 b).
- [132] Rémillard Report, paras 98-102.
- [133] Rémillard Report, paras 96-97.
- [134] Rémillard Report, para 108.
- [135] Letter from François Lemire, Office of the Chief Actuary, Office of the Superintendent of Financial Institutions, dated February 26, 2021, Joint Book of Documents, tab 23.
- [136] Judiciary Submission, paras 154-155.
- [137] Levitt Report, para 52.
- [138] *Federal Courts Act*, R.S.C., 1985, c. F-7.
- [139] Prothonotaries Submission, paras 29-31.
- [140] Prothonotaries Submission, para 28.
- [141] Prothonotaries Submission, para 10.
- [142] Prothonotaries Submission, para 10.
- [143] Prothonotaries Submission, para 7.
- [144] Rémillard Report, para 155 and Recommendation 6.
- [145] Prothonotaries Submission, para 70 and Government Submission, para 145.
- [146] Prothonotaries Submission, para 62.
- [147] Prothonotaries Submission, para 65 and Government Submission, para 146.
- [148] *Judges Act* sections 27(1) and (1.1), Guidelines on the Incidental Allowance on the FJA's website, and Prothonotaries Submission, para 77.
- [149] Rémillard Report, paras 156-159 and Recommendation 7.
- [150] Prothonotaries Submission, paras 78-79.
- [151] Government Reply, para 79.

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- [152] Prothonotaries Submission, paras 82-83.
- [153] Prothonotaries Submission, para 87.
- [154] Prothonotaries Submission, para 89.
- [155] Government Reply, para 80.
- [156] *National Defence Act*, R.S.C., 1985, c. N-5.
- [157] Submission of Chief Justice Bell at 9-10.
- [158] Submission of Chief Justice Bell at 10-11.
- [159] Submission of Chief Justice Bell at 12-14.
- [160] Submission of Chief Justice Bell at 22.
- [161] Submission of Chief Justice Bell at 5, 6, 9, 10, 12, 13 and 16-18.
- [162] *Courts Administration Service Act*, S.C. 2002, c. 8.
- [163] Government Reply, para 81.
- [164] Government Reply, paras 82-83.
- [165] Government Reply, para 84.
- [166] Rémillard Report, paras 151-152.
- [167] Hearing Transcript at 276: 14-18.
- [168] Judiciary Submission, para 161.
- [169] The FJA's Guidelines on the Incidental Allowance.
- [170] Judiciary Submission, para 166.
- [171] Judiciary Submission, para 175.
- [172] Report of Professor Douglas E. Hyatt at 5, Judiciary Submission, Exhibit A.
- [173] Government Reply, paras 61-62.
- [174] Judiciary Submission, paras 168-170.
- [175] Judiciary Submission, para 182.
- [176] Judiciary Submission, para 180.

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- [177] Judiciary Submission, para 183 and Exhibit A Report of Prof. Douglas E. Hyatt at 5.
- [178] Government Reply, paras 63-64.
- [179] Judiciary Submission, para 186.
- [180] Judiciary Submission, para 187.
- [181] Government Reply, para 66.
- [182] Letter from the Honourable David Lametti to the Rémillard Commission – Annex A to the June 18, 2019 Notice of the Rémillard Commission, posted on the Quadrennial Commission website.
- [183] Judiciary Submission, para 191.
- [184] Judiciary Submission, para 192.
- [185] Judiciary Submission, para 194.
- [186] Judiciary Submission, para 195.
- [187] Judiciary Submission, para 196.
- [188] Government Reply, paras 76-77.
- [189] Government Submission, para 138.

[Canada.ca](#) > [Department of Justice Canada](#)

# Appointments to the Judicial Compensation and Benefits Commission

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From: [Department of Justice Canada](#)

## News release

June 17, 2020 – Ottawa – Department of Justice Canada

The Honourable David Lametti, Minister of Justice and Attorney General of Canada, today announced the re-appointments of Margaret Bloodworth and Peter Griffin, and the appointment of Martine Turcotte as Chair, to the Judicial Compensation and Benefits Commission.

The Judicial Compensation and Benefits Commission, also known as the Quadrennial Commission, is established under the *Judges Act* (the Act) to examine the adequacy of the salaries and benefits of the federally appointed judiciary. Additional information on the Judicial Compensation and Benefits Commission is available at [quadcom.gc.ca](http://quadcom.gc.ca).

## Biographies

**Margaret Bloodworth** of Ottawa is re-appointed as the member nominated by the Minister of Justice and Attorney General of Canada. Ms. Bloodworth, a native of Winnipeg, received her LLB from the University of Ottawa and was called to the bar in 1979. Ms. Bloodworth had a distinguished career with the federal public service that spanned more than 30 years. She held senior positions with several departments, including serving as Deputy Minister at Transport Canada, National Defence, and Public Safety and as Associate Secretary to the Cabinet and National Security Advisor from 2006 until her retirement in 2008. Ms. Bloodworth is a member of the Order of Canada and received the Public Service of Canada Outstanding Achievement Award and the Vanier Medal of the Institute of Public Administration of Canada. She is currently Vice Chair of the Board of the Canada Foundation for Innovation, including Chair of its Nominating and Governance Committee, and Chair of the Canada School of Public Service External Advisory Committee. She has previously served on a number of boards, including the Council of Canadian Academies, where she was Chair, the Ottawa Community Foundation, and Cornerstone Housing for Women.

**Peter Griffin** of Toronto is re-appointed as the member nominated by the judiciary. Mr. Griffin obtained his LLB from Queen's University's Law School in 1977 and was admitted to the bar in 1980. Mr. Griffin is past Managing Partner at Lenczner Slaght and one of the firm's founding partners. He is widely recognized as one of the top litigators in Canada, particularly in the areas of corporate commercial litigation, class actions, securities matters, insolvency, and professional liability. In some 40 years as a member of Ontario's legal community, he has appeared before all levels of court in the province and before the Supreme Court of Canada. A past President of the Advocates' Society, Mr. Griffin is also a Fellow of the American College of Trial Lawyers, where he served as Chair of the Ontario Committee. He is a frequent speaker at conferences and programs on legal issues, including the challenges of cross-border litigation.

**Martine Turcotte** of Montreal is appointed Chair following her nomination by the other two members of the Judicial Compensation and Benefits Commission. Ms. Turcotte has a BCL and LLB from McGill University and an MBA from London Business School. Ms. Turcotte had a distinguished career at BCE Inc. and Bell Canada from August 1988 until January 2020 as corporate and general lawyer, manager, and leader. Rising to the position as Vice-Chair Quebec reporting to the President and Chief Executive Officer, she was responsible for driving the company's business, government and community investment initiatives across Quebec. This followed service as the Executive Vice President Chief Legal and Regulatory Officer. Ms. Turcotte volunteers as a board member with organizations such as McGill

University, Théâtre Espace Go, Empire Company Limited / Sobeys, and CIBC. She was named as Advocatus Emeritus by the Québec Bar (2009) in recognition of career excellence, and is a Top 100 Most Powerful Women in Canada award winner (2005, 2006 and 2007) and Hall of Fame (2008).

## Quick facts

- The first Judicial Compensation and Benefits Commission was established in September 1999 to implement the requirements set out by the Supreme Court of Canada in 1997 to ensure the financial security of the judiciary, which is a core component of the constitutional principle of judicial independence. Subsequent Commissions were established in 2003, 2007, 2011 and 2015.
- The Commission consists of three members appointed by the Governor in Council. One member is nominated by the federal Minister of Justice and the other by the judiciary. These two members then nominate a Chair. The Act allows members to be re-appointed for one additional term.
- Under the Act, a new Commission is established every four years to examine the adequacy of judicial salaries and benefits. The Commission provides a report containing its recommendations to the federal Minister of Justice, who has four months in which to respond.

## Associated links

- [Judicial Compensation and Benefits Commission](#)

## Contacts

### For more information, media may contact:

Rachel Rappaport  
Press Secretary  
Office of the Minister of Justice  
613-992-6568

Media Relations  
Department of Justice Canada  
613-957-4207  
[media@justice.gc.ca](mailto:media@justice.gc.ca)

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**Date modified:**  
2020-06-17



# Quadrennial Judicial Compensation and Benefits Commission Begins Inquiry

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Ottawa, Ont. – December 16, 2020

The quadrennial Judicial Compensation and Benefits Commission, has begun its inquiry into the adequacy of the salaries and benefits paid to federally-appointed judges and to prothonotaries of the Federal Court. The Commission welcomes comments from the public. A Notice setting out filing deadlines and directions for parties wishing to send in submissions can be found on the Commission's Website at [www.quadcom.gc.ca](http://www.quadcom.gc.ca).

## Quick Facts

- The inquiry is held every four years, pursuant to s. 26 of the *Judges Act*.
- The first Quadrennial Commission was established in September 1999, with subsequent Commissions in 2003, 2007, 2011 and 2016. This is the sixth Commission.
- The Commission consists of three members appointed by the Governor in Council. One member is nominated by the judiciary, and in the case of this Commission that member is Peter Griffin. The second member is nominated by the Minister of Justice and Attorney General of Canada. In this instance, that member is Margaret Bloodworth. These two members together nominated Martine Turcotte to act as the Chair of the Commission.
- In conducting its inquiry, the Commission examines the various submissions it receives keeping in mind the following factors:
  1. the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
  2. the role of financial security of the judiciary in ensuring judicial independence;
  3. the need to attract outstanding candidates to the judiciary; and
  4. any other objective criteria that the Commission considers relevant.
- Under the provisions of the *Judges Act* the Commission must submit a report containing its recommendations to the Minister of Justice, who shall respond to the report within four months of receiving it.

# Contact

Louise Meagher  
Executive Director  
Judicial Compensation and Benefits Commission  
T. (613) 995-5140  
[louise.meagher@quadcom.qc.ca](mailto:louise.meagher@quadcom.qc.ca)

Search for related information by keyword

[Judicial Compensation and Benefits Commission Law](#)

Date modified: 2020-12-16

***Judicial Compensation and  
Benefits Commission***



***Commission d'examen de la  
rémunération des juges***

## **NOTICE**

December 16, 2020

The Judicial Compensation and Benefits Commission was established in 1999 to inquire every four years into the adequacy of the salaries and other amounts payable to federally-appointed judges under the *Judges Act* and into the adequacy of judges' benefits generally. In 2014, the *Act* was amended to provide that for the purposes of the inquiry the prothonotaries of the Federal Court be considered as judges. Under the provisions of the *Act*, the Commission must submit a report containing its recommendations to the Minister of Justice within nine months after the date of commencement of its inquiry. The Minister shall respond to the report within four months after receiving it. In its Ruling dated June 10, 2020, the Commission, with the consent of the Minister of Justice and the judiciary, postponed the commencement date of its inquiry from June 1, 2020 to December 1, 2020.

The Commission invites parties wishing to comment on matters within the Commission's mandate to forward their written submissions, in either official language, preferably in electronic format, to: [info@quadcom.gc.ca](mailto:info@quadcom.gc.ca). Paper versions of submissions will also be accepted at the Commission's offices at 99 Metcalfe Street, 8th floor, Ottawa, Ontario, K1A 1E3. Parties wishing to make an oral presentation at the Commission's hearings, which will be held by videoconference, should indicate so when they file their written submission. Details on connecting to the hearings will be posted in due course on the Commission's web site at [www.quadcom.gc.ca](http://www.quadcom.gc.ca).

The following schedule is established:

- 29 March 2021 – deadline for the Government, the judiciary and prothonotaries to file their principal submissions
- 8 April 2021 – deadline for other parties to file their principal submissions
- 30 April 2021 – deadline for filing reply submissions
- 10 and 11 May 2021 – public hearing by videoconference

All submissions will be posted on the Commission's web site.

***Chairperson***  
Martine Turcotte

***Commissioners***  
Margaret Bloodworth  
Peter Griffin

***Executive Director***  
Louise Meagher

*Judicial Compensation  
and Benefits Commission*



*Commission d'examen de la  
rémunération des juges*

**Chairperson / Présidente**  
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**Ruling Respecting Request for Deferral of Commencement Date of  
June 1, 2020**

**June 10, 2020**

**Request for Deferral of Commencement Date:** By way of letter of June 1, 2020 from counsel for the Canadian Superior Court Judges Association written with the concurrence and support of the Government of Canada and the Federal Court Prothonotaries, this Commission has been asked to defer the commencement date for the Commission's inquiry as provided for in s. 26(2) of the *Judges Act* from June 1, 2020, to December 1, 2020, pursuant to the discretion granted to the Commission to postpone the date of commencement of a quadrennial inquiry under s. 26(3) of the *Judges Act*.

The grounds for the request, concurred in by all counsel, are based on the uncertainty created by the COVID-19 pandemic, its ramifications through Canadian society and the economy and its effect on certain deadlines necessary between the parties for the exchange of information relevant to their respective positions before the Commission.

The request letter of June 1, 2020 is attached as **Schedule "A"** to this Ruling.

**Consent:** The federally appointed judiciary (which the *Judges Act* deems to include the Federal Court Prothonotaries) and the Minister of Justice on behalf of the Government of Canada (the "parties") have executed a consent as contemplated by s. 26(3) of the *Judges Act*. The consent is appended to this Ruling as **Schedule "B"**.

It is the expectation of the Commission that a postponement of the commencement date by six months will be adequate to permit the parties to complete their exchange of information and proceed with the inquiry commencing on the postponement date of December 1, 2020.

**Decision:** The Commission accepts as reasonable the request to postpone the commencement date of the inquiry. The disruption within and around the administration of justice and workplaces coupled with the need of the parties to best place their respective positions before the Commission to assist it in its inquiry all support such an order.

Accordingly the Commission orders that:

1. The commencement date of June 1, 2020 provided for in s. 26(2) of the *Judges Act*, is hereby postponed, pursuant to s. 26(3), to December 1, 2020;
2. The parties shall submit a joint report to the Commission by October 31, 2020 as to the status of their information exchange and to confirm their preparedness to proceed with the inquiry commencing December 1, 2020;
3. The parties will establish deadlines between them for the exchange of information consistent with a December 1, 2020 commencement date.

## APPENDIX C



June 1, 2020

*Schedule A*

### **By email**

Ms. Martine Turcotte, Chair  
Ms. Margaret Bloodworth, Member  
Mr. Peter Griffin, Member  
Judicial Compensation and Benefits Commission  
99 Metcalfe Street, 8th Floor  
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Madam Chair, Members of the Commission:

### **2020 Quadrennial Commission—Date of Commencement**

I am writing to you on behalf of both the judiciary (including the Federal Court Prothonotaries) and the Government of Canada.

At the outset, allow me to express the parties' gratitude to each one of you for agreeing to serve on the federal Judicial Compensation and Benefits Commission. Judicial independence is a pillar of our democracy and regular inquiry into the adequacy of judicial compensation and benefits by an independent commission has been recognized to be an essential component of the constitutional requirements to preserve and promote the independence of Canada's judiciary.

The *Judges Act* provides for June 1, 2020 as the start date of the Commission's next inquiry. However, the COVID-19 crisis has forced the parties to reconsider the statutory schedule. On April 16, 2020, I wrote to Ms. Bloodworth and Mr. Griffin advising them of the possibility that the parties would be requesting a postponement of the start date of the inquiry. On April 23, after the nomination of Ms. Turcotte as Chair of the Commission, Mr. Rupar wrote to confirm that the parties intended to request a postponement of the start date. As you know, s. 26(3) of the *Judges Act* allows for the Commission, with the consent of the Minister of Justice and the judiciary, to "postpone the date of commencement of a quadrennial inquiry".

Having discussed the appropriate time period by which the start date should be postponed, the parties have agreed to request a postponement of 6 months, such that the start date would be changed to December 1, 2020. The other quadrennial-inquiry dates provided for in the Act would be changed in accordance with the new start date, and the parties have agreed that certain deadlines discussed among themselves for the exchange of information prior to the start date would likewise be postponed by 6 months. In light of the uncertainty surrounding the COVID-19 pandemic and its ramifications throughout Canadian society and the economy, the parties have agreed that they would re-visit the question of the start date in early Fall to assess whether the December 1 start date appears to remain adequate.

June 1, 2020



We trust that the present joint request for a postponement of the start date of the inquiry to December 1, 2020 will meet with your approval. The parties remain at your disposal should you have any questions. On a personal level for each of you, the parties trust that you and yours are keeping well in these challenging times.

Sincerely,

A handwritten signature in black ink, appearing to read "Pierre Bienvenu".

Pierre Bienvenu, Ad. E.  
Senior Partner

Copy: Ms. Louise Meagher, Executive Director, *Judicial Compensation and Benefits Commission*  
Messrs. Christopher Rupar and Kirk Shannon, *Department of Justice, Government of Canada*  
Mr. Andrew Lokan, *Paliare Roland Rosenberg Rothstein LLP*  
Mr. Azim Hussain, *Norton Rose Fulbright Canada LLP*

# APPENDIX C

## Schedule B

### JUDICIAL COMPENSATION AND BENEFITS COMMISSION

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#### CONSENT OF THE MINISTER OF JUSTICE OF CANADA AND THE JUDICIARY

##### Section 26(3) of the *Judges Act*

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WHEREAS the *Judges Act*, s. 26(2), provides that the Judicial Compensation and Benefits Commission (the "**Commission**") shall commence its inquiry on June 1, 2020;

WHEREAS the COVID-19 pandemic has compelled the federally appointed judiciary (which the *Judges Act* deems to include the Federal Court Prothonotaries) and the Minister of Justice on behalf of the Government of Canada (the "**Parties**") to reconsider the adequacy of the statutory schedule for the Commission's inquiry;

WHEREAS the *Judges Act*, s. 26(3), provides that the Commission may, with the consent of the Minister of Justice and the judiciary, postpone the date of commencement of a quadrennial inquiry;

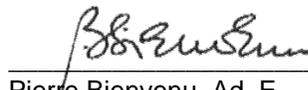
WHEREAS the Parties jointly wrote to the Commission on June 1, 2020 to advise it of their agreement to request the Commission to postpone the commencement date of the inquiry to December 1, 2020, subject to a further adequacy assessment to be made by the Parties in Fall 2020 in light of the social and economic situation prevailing at that time as a consequence of the COVID-19 crisis;

WHEREAS the Commission responded on June 3, 2020, to the Parties' joint correspondence and requested an executed consent instrument upon which the Commission can issue its decision regarding the requested postponement;

NOW THEREFORE the Parties, represented herein by their duly appointed counsel, hereby confirm to the Commission their consent to a postponement of the commencement date of the Commission's quadrennial inquiry from June 1, 2020, to December 1, 2020, that date being subject to a further adequacy assessment by the Parties in Fall 2020.

SIGNED:

Montreal, June 8, 2020



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Pierre Bienvenu, Ad. E.  
*Norton Rose Fulbright Canada LLP*  
Counsel to the Canadian Superior Courts Judges Association and the  
Canadian Judicial Council

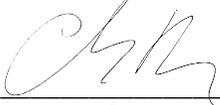
Toronto, June 9, 2020



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Andrew Lokan  
*Paliare Roland Rosenberg Rothstein LLP*  
Counsel to the Prothonotaries of the Federal Court

Ottawa, June 9, 2020



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Christopher Rupar  
Counsel to the Minister of Justice, Department of Justice, Government  
of Canada



**APPENDIX D**

**List of Hearing Participants**

**The Judicial Compensation and Benefits Commission**

**Martine Turcotte, Ad. E.**  
Chair of the Commission

**Margaret Bloodworth, CM**  
Commissioner

**Peter Griffin**  
Commissioner

**Louise Meagher**  
Executive Director

**Representing the Canadian Superior Court Judges Association  
and the Canadian Judicial Council**

**Pierre Bienvenu, Ad. E.**  
Senior Partner  
Norton Rose Fulbright Canada LLP

**Azim Hussain**  
Partner  
NOVAlex

**Jean-Simon Schoenholz**  
Associate  
Norton Rose Fulbright Canada LLP

**The Honourable David H. Jenkins**  
Chief Justice of Prince Edward Island

**The Honourable Robert G. Richards**  
Chief Justice of Saskatchewan

**The Honourable Martel D. Popescul**  
Chief Justice of Her Majesty's Court of Queen's Bench for Saskatchewan

**The Honourable Thomas E. Cyr**  
President of the Canadian Superior Courts Judges Association  
Judge of the Court of Queen's of New Brunswick - Family Division



**APPENDIX D**

**List of Hearing Participants**

**The Honourable Kristine Eidsvik**

Member of the Board of the Canadian Superior Courts Judges Association  
Judge of the Court of Queen's Bench of Alberta

**The Honourable Chantal Châtelain**

Judge of the Superior Court of Quebec  
and Coordinating Judge for the district of Laval

**Stephanie Lockhart**

Executive Director  
Canadian Superior Courts Judges Association

**Representing the Federal Court Prothonotaries**

**Andrew K. Lokan**

Partner  
Paliare Roland Rosenberg Rothstein LLP

**Mandy Aylen**

Prothonotary  
Federal Court

**Representing the Government of Canada**

**Christopher Rupar**

Senior General Counsel  
Office of the Assistant Deputy Attorney General  
Justice Canada

**Kirk G. Shannon**

Counsel  
Civil Litigation  
Justice Canada

**Samar Musallam**

Counsel  
Civil Litigation  
Justice Canada



**APPENDIX D**

**List of Hearing Participants**

**Representing the Court Martial Appeal Court of Canada**

**Eugene Meehan, Q.C.**

Partner  
Supreme Advocacy LLP

**Cory Giordano**

Associate  
Supreme Advocacy LLP

**The Honourable Richard Bell**

Chief Justice  
Court Martial Court of Appeal of Canada

**The Honourable Edward Scanlan**

Judge  
Nova Scotia Court of Appeal

**Representing Quebec Appellate Judges**

**The Honourable Jacques Chamberland**

Judge  
Court of Appeal of Quebec

**Representing the Canadian Bar Association**

**Brad Regehr**

President  
Canadian Bar Association

**Indra Maharaj**

Chair, Judicial Issues Subcommittee  
Canadian Bar Association



**APPENDIX E**

**LIST OF DOCUMENTS RECEIVED**

**From the Government of Canada**

- Main Submission by the Government of Canada (March 29, 2021)
- Government's Book of Documents (March 29, 2021)
- Joint Books of Documents (Volumes 1 and 2) (March 29, 2021)
- Supplemental Book of Documents from the Government of Canada (April 30, 2021)
- Reply Submission by the Government of Canada (April 30, 2021)
- Replacement chart at paragraph 40 of Reply Submission (May 10, 2021)
- Letter from the Government re Responses to Commission Questions (May 11, 2021)
- Letter from Government to Commission re Undertakings (May 14, 2021)
- Letter from Government to Commission re Undertakings (May 26, 2021)
- Government re Undertakings - 1.Legislative History of the IAI (May 26, 2021)
- Government re Undertakings - 2.1.Applications by city (May 26, 2021)
- Government re Undertakings - 2.2.Report by Committees (May 26, 2021)
- Government re Undertakings - Judicial Applications by CMA (May 26, 2021)
- Reply from Government to Questions in Commission's May 17 Letter (May 26, 2021)

**From the Judiciary**

- Joint Main Submission from the CSCJA and the CJC (March 29, 2021)
- Book of Exhibits and Documents from the CSCJA and the CJC (March 29, 2021)
- Joint Reply Submission from the CSCJA and the CJC (April 30, 2021)
- Supplemental Book of Exhibits and Documents from the CSCJA and the CJC (April 30, 2021)

**From the Federal Court Prothonotaries**

- Main Submission from the Prothonotaries (March 29, 2021)
- Reply Submissions from the Prothonotaries (April 30, 2021)
- Book of Documents from the Prothonotaries (April 30, 2021)



**APPENDIX E**

**LIST OF DOCUMENTS RECEIVED**

**From the Court Martial Court of Appeal of Canada**

- Submission on behalf of the Honourable Chief Justice B. Richard Bell (March 26, 2021)
- CMAC Response to Reply Submissions from the Government of Canada (May 7, 2021)
- CMAC Response Book of Documents (May 7, 2021)
- Email from CMAC Lawyer re Documents to Commission (May 11, 2021)
- Letter from CMAC Lawyer to Commission re Submission on Requested Documents (May 14, 2021)

**From the Honourable Jacques Chamberland**

- Submission by the Honourable Jacques Chamberland (March 10, 2021)
- Submission letter from the Honourable Jacques Chamberland (April 7, 2021)
- Presentation notes from the Honourable Jacques Chamberland (May 11, 2021)

**Others**

- Soumission du Barreau du Québec (16 février 2021)
- Submission from the Canadian Bar Association (April 8, 2021)
- Email from Ian Bailey (April 13, 2021)
- Reply Submission Letter from the Honourable Gordon L. Campbell (April 29, 2021)