JUDICIAL COMPENSATION AND BENEFITS COMMISSION

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CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

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OVERVIEW

1. This Joint Reply Submission of the Canadian Superior Courts Judges Association ("**Association**") and the Canadian Judicial Council ("**Council**") addresses the main arguments made by the Government of Canada in its submission dated March 29, 2021 ("**Government's Submission**"). The Reply Submission will be complemented by counsel's oral argument at the public hearings.

2. The thrust of this Reply Submission is that

   (i) the Government has failed to justify its proposed recommendation that the annual adjustments to judicial salaries prescribed by the *Judges Act* should, for this quadrennial cycle, be capped at a maximum four-year cumulative increase of 10% from the judicial salaries in 2020; and

   (ii) the judiciary's proposed increase in judicial salaries articulated in the joint submission of the Association and Council filed on March 29, 2021 ("**Judiciary's Submission**") is justified in light of the factors set out at s. 26(1.1) of the *Judges Act*, the total average compensation of DM-3s and the prevailing income of self-employed lawyers.

3. The mandate of the Commission under s. 26 of the *Judges Act* is to inquire into the adequacy of judicial compensation and benefits. The Government's Submission provides little assistance to the Commission to accomplish that mandate. Instead, the Government has again chosen to devote a significant part of its Submission (and the expert evidence in support of its Submission) to re-litigate issues that were resolved more than twenty years ago, going back to the Drouin Commission of 1999-2000. This approach, which is supplemented by an all-encompassing expert opinion unconstrained by the precedents set by this Commission over a 20-year period, undermines the constitutional requirements of the Quadrennial Commission.

4. Equally misconceived from a constitutional point of view is the Government's submission that the judiciary should be made to shoulder its share of the economic burden imposed on other Canadians by reason of the Covid-19 pandemic. The justification offered in support of this submission is an extract of a Supreme Court of Canada judgment making it clear that this refers to judges sharing in a government measure applicable to all persons being paid from the public purse. The reality is that there is no such measure, in

place or proposed, and thus the Government's position amounts to singling out judges to bear a share of a non-existing measure.

5. The Judiciary's Submission and the present Reply Submission seek to be responsive to the Commission in the execution of its mandate under s. 26 of the *Judges Act*. To address some of the issues raised in the Government's Submission, namely the proposal to impose a cap on annual IAI adjustments, the appropriate filters in the analysis of CRA data, and the value of the judicial annuity, the Association and Council have included with this Reply expert reports from Ms. Sandra Haydon (comparison with other positions, filters in analysis of CRA data), Mr. Dean Newell (value of the judicial annuity), Messrs. Stéphane Leblanc and André Pickler (vehicles available to self-employed lawyers for retirement savings), and Prof. Doug Hyatt (low-income cut-off in CRA data, the IAI, and economic conditions).

I. THE GOVERNMENT'S ATTEMPT AT RE-LITIGATING ISSUES

6. Most of the issues raised in the Government's Submission in connection with judicial salaries and benefits have been addressed by past Commissions. The implicit message to this Commission is that whatever it decides on the various analytical issues leading to its substantive recommendations, the Government will, if those decisions are not to its liking, re-litigate them in the next quadrennial cycle.

7. As they have in the past, the Association and Council reject in the strongest possible terms the Government's attempt, in the absence of demonstrated change, at re-litigating issues that are the subject of consensus among past Commissions. This entails wasted time and resources for all concerned. As the Block Commission and the Levitt Commission recommended in Recommendation 14 and Recommendation 10 respectively:

> The Commission recommends that: Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus should be taken into account by the Commission, and reflected in the submissions of the parties.

8. Such attempts at re-litigation strain the relationship between the judiciary and the Government. They are contrary to Recommendation 11 of the Levitt Commission:

> The Commission recommends that: The Government and the judiciary examine methods whereby the Commission process can be made less adversarial and more effective.

9. The Government, on multiple occasions, refers in its Submission to certain conclusions of the McLennan Commission to continue to justify its attempt at re-litigating various issues.[1] For example, it relies on the McLennan Commission's comments on the DM-3 comparator to seek to justify a departure from this traditional comparator.[2] What the Government fails to mention, still less to reconcile with its reliance on the McLennan Report, is the fact that the salary recommendation of the McLennan Commission was rejected by the Government, through its unconstitutional Second Response.[3]

10. In its Second Response, the Government said that it had "concerns about the validity of the methodology and assumptions on which the Commission has relied."[4] It criticized the McLennan Commission for its inclusion of at-risk pay when considering the income of Deputy Ministers, and for its exclusion of income in the CRA data below $60,000. Before this Commission, safe from the McLennan Commission's actual recommendations, the Government extolls the virtues of the McLennan Commission's reasoning.

11. There is simply no credibility to the Government's selective references to the conclusions of the McLennan Commission. It would be one thing if the Government had actually accepted the salary recommendation that resulted from that Commission's application of the various comparative factors. The fact that it did not accept it highlights the reality that the Government is simply relying on those elements of the McLennan Commission's analysis that are convenient for it, all the while ignoring the larger picture drawn by the McLennan Commission using those elements; and all the while contradicting the clear consensus emerging from the reports of past Commissions considered as a whole.

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1 See e.g. the Government's Submission at paras. 108, 114, 116, 125.

2 *Ibid*. at para. 108, 114, 116.

3 Second response of the Government of Canada to the 2003 Judicial compensation and Benefits Commission, May 29, 2006 ("**Second Response**") [Joint Book of Documents ("**JBD**") at tab 10(b)]. As to the invalidity of the Second Response, see paragraphs 32-35 of Appendix A to the Judiciary's Submission.

4 Second Response at 9 [JBD at tab 10(b)].

12. The Government's attempt to re-litigate points that previous Commissions have rejected is illustrated by the content of the report of the Government's expert, Mr. Peter Gorham.

13. Mr. Gorham proposes, among other things, the following filters or non-filters for the analysis of the CRA data on self-employed lawyers:

- an age-weighted approach utilizing all ages instead of the 44-56 age bracket which, as acknowledged by Mr. Gorham, accounts for over two-thirds of all appointments;
- including self-employed lawyers with an income below $60,000; and
- excluding self-employed lawyers with an income above $650,000 if a low-income exclusion is applied.

He also proposes the inclusion of disability benefits in the valuation of the judicial annuity as well as a further gross-up representing the purported additional cost a self-employed lawyer would face in replicating the judicial annuity.

14. As discussed in more detail below, past Commissions have declined to adopt many of these proposals, while others are unprecedented and unprincipled. For example, the McLennan Commission, on which the Government chooses selectively to place reliance, considered that the 75th percentile, calculated with a low-income exclusion, "strikes a reasonable balance between the largest self-employed income earners and those in lower brackets, given the criteria that we must apply."[5]

15. It is simply unacceptable that the Government should put forward the ideas of Mr. Gorham without having him engage with the conclusions of past Commissions, or the reasoning supporting these conclusions. Indeed, Mr. Gorham's report reads as if these previous contrary conclusions did not exist. The Commission should also exercise caution in relying on Mr. Gorham's evidence given that his report's wide ranging scope and muscular positions essentially constitute an advocacy submission rather than an expert opinion.

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[5] McLennan Report (2004) at 43 [JBD at tab 10].

16. As for the DM-3 comparator, the Government has been making the same points about its alleged weaknesses since the 1999-2000 Drouin Commission, as shown by the following excerpts from the Government's submission to the Drouin Commission:

- "In adding s. 26(1.1) of the *Judges Act*, Parliament did not direct the Commission to consider such a comparison."[6]

- "Furthermore, deputy ministers are a poor comparator. Unlike judges, they do not have tenure, they are appointed at pleasure. Unlike judges, their salaries are not indexed. A significant portion of deputy ministers' earnings depends upon an annual evaluation of their performance and is at risk. Unlike judges, deputy ministers are a very small cadre, with only 10 individuals who have risen to the DM-3 level."[7]

17. The Drouin Commission rejected the Government's arguments, relying on reasoning that goes back to the anterior Triennial Commissions:

- "This concept of rough equivalence expressly recognizes that while DM-3s and judges do not perform the same work, there is a basis for approximate remuneration parity."[8]

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6 Submission of the Government of Canada to the Judicial Compensation and Benefits Commission (December 20, 1999) at para. 32 [Supplemental Book of Exhibits and Documents of the Association and Council ("**Reply BED**") at tab 1].

7 *Ibid.* at para. 33 [Reply BED at tab 1].

8 Drouin Report (2000) at 29 [JBD at tab 9].

- "More particularly, we have concluded that the important aspect of the DM-3 comparator, for the purposes of our inquiry, is the maintenance of a relationship between judges' salaries and the remuneration of those senior federal public servants whose skills, experience and levels of responsibilities most closely parallel those of the Judiciary. We agree with the substance of the observation by both the Courtois and Scott Commissions (1990 and 1996) that the relationship between the remuneration of DM-3s and judges should be maintained, not as a precise measure of 'value' but as a reflection of '*what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges.*'"[9]

18. Other Quadrennial Commissions have since rejected the Government's arguments and applied the DM-3 comparator. The DM-3 comparator is appropriate because there is a principled and historical basis for it, and the comparator has withstood the test of time. This is discussed further below.

II. REPLY TO THE GOVERNMENT'S POINTS ON RE-LITIGATED ISSUES

19. The Association and Council address below each of the points that the Government seeks to re-litigate: the DM-3 comparator, consideration of new comparators other than the two traditional comparators, filters to analyze CRA self-employed lawyers data, and supernumerary status.

A. DM-3 comparator

20. The Government argues that the DM-3 compensation "is not itself a comparator" but only "one factor among many to be considered by the Commission when examining the public sector comparator as a whole".[10] It calls on the Commission to instead "consider public sector compensation trends"[11] (a position it took before past Commissions, going

9 *Ibid*. at 31 [italics in original, JBD at tab 9].
10 Government's Submission at para. 51.
11 *Ibid*.

back to the 1999-2000 Drouin Commission[12]), as well as "other compensation levels for senior professionals in the economy as a whole".[13]

21. As the Association and Council observed in the Judiciary's Submission, it is the Government itself that proposed to the Crawford Commission (whose report was released in 1993) that there should be rough equivalence to the DM-3 midpoint.[14] The Block Report recounts the subsequent application of this comparator which, from at least the advent of the Triennial Commission right up to the Rémillard Commission (with the possible exception of the McLennan Commission), has been used to ascertain the adequacy of judicial salaries.[15] Hence, with time, what started as a benchmark matured into the principle that there should be rough equivalence between the salaries of federally appointed *puisne* judges and the remuneration of the DM-3s.

22. The Government has not provided any justification for deemphasizing the comparator that it had itself proposed during the time of the Triennial Commission, and that has systematically been applied since. The onus of establishing the need for change lies on the party seeking it.[16] The Government has not discharged that burden. As the Rémillard Commission recently reaffirmed, "the DM-3 comparator remains worthwhile for its long-term use, consistency, and objectivity."[17] The Association and Council reiterate the points made in the Judiciary's Submission about the importance of the DM-3 comparator.[18]

23. The Government refers to the following points to seek to undermine the DM-3 comparator: 1) the small size of the DM-3 group; 2) differences in tenure between the respective positions; and 3) differences in considerations concerning DM-3 compensation.[19] Each one of these issues was unsuccessfully raised by the Government before past Commissions. The Government also relies on the "need to look

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12 Submission of the Government of Canada to the Judicial Compensation and Benefits Commission (December 20, 1999) at para. 36 [Reply BED at tab 1].
13 Government's Submission at para. 51.
14 See Judiciary's Submission at paras. 88-89.
15 Block Report (2008) at paras. 94-111 [JBD at tab 11].
16 Levitt Report (2012) at para. 31 [JBD at tab 12].
17 Rémillard Report (2016) at para. 52 [JBD at tab 13]
18 Judiciary's Submission at paras. 85-96.
19 Government's Submission at para. 113.

at general trends" in DM-3 compensation.[20] As set out in the Judiciary's Submission, these trends actually support reliance on the total average compensation of DM-3s as a measure of the compensation of the most senior deputy ministers, as opposed to the midpoint of their salary range.[21]

1. DM-3 size

24. The Government refers to the disparity between the size of the DM-3 group and the number of federally appointed judges. However, that disparity has always existed, including when the Government proposed rough equivalence of the judicial salary of *puisne* judges with DM-3s.

25. DM-3s are senior public servants in the executive branch. Their number is irrelevant to the rationale behind the use of the DM-3s as a comparator. The DM-3 comparator "reflects what the market place expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges."[22] Rough equivalence between the salary of federally appointed judges and the compensation of DM-3s, regardless of their number, serves to reinforce judicial independence. As stated conclusively by the Levitt Commission, "the seniority of the group and the functions its members discharge make it the best choice as a public sector comparator group for the judiciary".[23] Moreover, it is important that the executive branch, through significantly higher salaries for senior deputy ministers, not place itself above the judicial branch in the three-way constitutional equilibrium between the executive, judicial, and legislative branches of the state.

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20 *Ibid*.

21 Judiciary's Submission at paras. 103-113.

22 Block Report (2008) at para. 103 [JBD at tab 11].

23 The Levitt Commission rejected the idea that the small number of DM-3s made them an inappropriate comparator group. See Levitt Report (2012) at para. 27 ("While the Commission recognizes that the choice of the DM-3 group may not be regarded as ideal due to its small sample size and other comparability issues such as tenure in position, this Commission, like the Drouin and Block Commissions, focused on the purpose of the analysis as articulated above and concluded that the seniority of the group and the functions its members discharge make it the best choice as a public sector comparator group for the judiciary.") [JBD at tab 12].

2. Tenure

26. The Government states that deputy ministers do not have the kind of security of tenure accorded to judges. This argument is a red herring since none of the other groups from the public sector proposed by the Government, nor self-employed lawyers, enjoy the kind of security of tenure that is constitutionally required for judges.

27. The nature of the security of tenure of judges, and the reasons for it, are *sui generis*. It is incongruous that the Government should submit that security of tenure, a core constitutional principle that goes to the very heart of judicial independence in a liberal democracy, defeats the application of the key comparator to determine judicial salaries. The Block Commission explicitly rejected this hollow argument.[24]

3. Compensation measures

28. The Government refers to differences in compensation measures to argue against comparisons between judges and DM-3s. More specifically, the Government states that the individualized nature of the compensation for deputy ministers and the availability of performance pay are two reasons militating against the comparison with DM-3s.

29. Compensation is individualized for almost every group being proposed by the Government. This is yet another factor that is of no consequence in the Government's arguments.

30. As for performance pay, if the Government's arguments about compensation measures militating against the DM-3 comparison were accepted, it would mean that the only public sector comparators from the examples it gives would be the GCQ-9 and GCQ-10 categories, which are attached to specific posts and do not involve performance pay.[25] This would be a novel approach, and a radical break with the past. The Government itself does not propose it, yet the logical application of its argument is to that effect. Moreover, the GCQ-9 and GCQ-10 categories, at present comprising six individuals collectively, would themselves be vulnerable to the Government's argument based on the small size of the group.

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24 Block Report (2008) at para. 108 [JBD at Tab 11].

25 Government's Submission at paras. 127-128.

31. Far from rejecting DM-3s as a comparator group because of variable compensation, past Commissions have held that variable compensation should be considered as part of the appropriate public sector comparator group. For example, the Levitt Commission justifiably used the following strong language to reject the Government's submission that it would be appropriate to compare the salary of a judge with the salary of a deputy minister to the exclusion of the latter's performance pay:

> The Commission found this position to be inconsistent with the approach adopted by past Commissions, with customary compensation practice, and with common sense.[26]

4. Trends in DM-3 compensation

32. The Government attempts to rely on the fact that it has not increased the salary ranges of deputy ministers since 2017 to establish the adequacy of judicial compensation.

33. As set out in the Judiciary's Submission (and contrary to the Government's inaccurate subtitle at p. 45 of its Submission), the actual compensation of DM-3s has not stayed constant since 2017. The reality is that actual compensation has continued to increase steadily since that time. The range of DM-3 salaries, and consequently the Block Comparator, no longer reflects "what the marketplace expects to pay individuals of outstanding character and ability". As set out in the Judiciary's Submission, the Commission must look to the total average compensation of DM-3s for an indication of the compensation of the most senior deputy ministers.[27] Judicial salaries continue to fall short of the total average compensation of DM-3s and, as shown further below in Table 2 (at page 36), they would fall further behind if the Government's proposed cap on annual adjustments were adopted.

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26 Levitt Report (2012) at para. 25 [JBD at tab 12]. See also Block Report (2008) at paras. 108-109 ("We were not persuaded that performance pay should be excluded from our considerations because deputy ministers do not enjoy the same security of tenure as judges or because performance pay must be earned each year. Performance pay is an integral component of deputy ministers' cash compensation […]. The Government, itself, recognizes the importance of including performance pay in its calculations when determining the salaries of other federal office holders such as members of the GCQ group (which includes heads and members of administrative tribunals), for whom, like judges, performance pay would be inappropriate.") [JBD at tab 11].

27 Judiciary's Submission at paras. 103-113.

B. Expanding beyond the traditional comparators: other positions in the legal world, other professions

34. The Government attempts to distract from the gap between the actual compensation of DM-3s and the judicial salary by seeking to compare the judicial salary to the compensation of a plethora of other positions. Through its expert, Mr. Mark Szekely, the Government seeks to rely on the salaries of medical doctors, government lawyers, law professors and law school deans, and judges in other jurisdictions.

35. The Government's selective approach is unprincipled and unwieldy, and should be rejected in favour of the traditional comparators which have guided the Commission over the course of 20 years.

36. Ms. Sandra Haydon, a compensation expert with more than 25 years of experience in this field, explains that "[o]ne of the foundations of compensation research is a degree of consistency over time in the use of comparators in order to maintain confidence in the data collection and related analytical process" and that a helpful comparator for the purpose of setting compensation capable of attracting candidates for a particular position is one where there are "underlying principles in common".[28] It is well established that the DM-3 comparator reflects what the marketplace expects to pay individuals of outstanding character and ability. As for the incomes of self-employed lawyers, they reflect the statutory imperative to "attract outstanding candidates to the judiciary", since lawyers in private practice have long been the primary source of candidates to the Bench.

37. There is no principled reason to consider any of the disparate comparators proposed by Government.

38. While government lawyers, law professors and law school deans form part of the pool of candidates that may be appointed to the judiciary, as their salaries have traditionally been lower than those of judges, there is no concern that the judicial salary would be an obstacle to attracting outstanding candidates from these sectors. Their compensation is, therefore, not relevant to the factor set out at s. 26(1.1)(c) of the *Judges Act*.

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[28] Report of Sandra Haydon dated April 30, 2021 ("**Haydon Report**") at 2-3 [Exhibit C].

39. The compensation of medical doctors is simply of no relevance to this Commission's inquiry into the salary and benefits of federally appointed judges.[29] Their inclusion contributes to the unwieldy nature of the Government's proposed comparative lens.

40. Finally, the Government's reliance on the salaries of members of the judiciaries in other countries is unhelpful. As the Government itself observes, "[t]here is no direct comparison" as "[t]he jurisdiction, history, responsibilities and role in the legal landscape are unique for each country."[30]

41. Nonetheless, the Government puts forward the expert report of Mr. Szekely, who engages in this novel comparative exercise. Having cited the two questions that the Government put to this expert, Ms. Haydon observes:

> I recognize that this was the mandate given to Mr. Szekely. However, if a compensation professional were asked to comment on the above questions, necessity and relevance would be the governing considerations.
>
> The first order of business would be to ask what need there is to disrupt the existing comparators, and if there is a need, the second step would be to determine the relevance of the proposed additional comparators.[31]

42. On the question of relevance, Ms. Haydon points out:

> a compensation professional would consider physicians to be an irrelevant comparator in the exercise at hand. Cross-occupational comparisons as an input to compensation determination would not be considered a defensible compensation methodology, unless there are underlying principles in common like there are for DM-3s and judges.[32]

43. Regarding the comparison with foreign judges, Ms. Haydon opines that this category would not be part of a compensation professional's analysis:

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29 *Ibid.* [Exhibit C].
30 Government Submission at para. 132.
31 Haydon Report at 2 [Exhibit C].
32 *Ibid*. 2-3 [Exhibit C].

> inter-country comparisons would also be rejected as an appropriate methodology. One of the challenges with comparing the Canadian judiciary with judges in other countries is the number of unknowns related to the comparability and commonality of the work, compounded by the lack of knowledge related to other forms of compensation to allow for a calculation of total compensation. In addition, there is no information about, for example, incomes of private-practice lawyers. In my opinion, the presentation of raw compensation data from other countries is of little value to the Commission's more robust and rigorous inquiry.[33]

44. On this issue regarding judicial compensation in foreign jurisdictions, not only is there uncertainty arising from the fact of different jurisdictions and responsibilities across the various judiciaries, Mr. Szekely has not explained whether the compensation figures presented include allowances and whether these other judges receive non-monetary benefits that Canadian judges would have to pay for from their salaries. For example, federally appointed judges in Australia have access to a "Commonwealth car-with-driver service" and are also entitled to either the lease of a vehicle or reimbursement for private vehicle running costs.[34] Some judges may also be assisted in their work by a full-time judicial clerk.[35]

45. In addition, the relationship between judicial salaries and the incomes of self-employed lawyers in these other jurisdictions is unknown. As Ms. Haydon confirms, the proposed comparison is of little value to a rigorous compensation exercise such as the Commission's inquiry.[36] The Commission has never relied on such a comparison, and for good reason.

46. In any event, even assuming that such a comparison is worthwhile, the 2020 judicial salary of Canadian *puisne* judges is at the bottom end of the spectrum of judicial salaries reported in Australia, and well below judicial salaries in New Zealand.[37] Indeed, the

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33 *Ibid*. at 3 [Exhibit C].

34 Australian Government, Office of Parliamentary Counsel, Remuneration Tribunal (Judicial and Related Offices—Remuneration and Allowances) Determination 2020, Part 2, Division 3, Section 13 [Reply BED at tab 2].

35 Our understanding is that this is the case for federally appointed judges in the United States and Australia.

36 Haydon Report at 3 [Exhibit C].

37 Applying purchasing power parity exchange rates, the Government reports the following (all in Canadian dollars): in Australia, Federal Circuit Court Judges earn $323,772 and Family and Federal Court Judges earn $383,644; in the United Kingdom, Group 4 Judges earn $322,292 and

salaries of federally appointed Canadian judges are only above those of the American judiciary, without considering the fact that American judges continue to receive their full salary throughout their retirement.[38] Moreover, it is well known that the United States and the United Kingdom are two jurisdictions that face significant recruitment issues because of inadequate compensation.

47. In 2007, the American College of Trial Lawyers (the "**ACTL**"), issued a report that concluded that the United States does not compensate its federal judges adequately.[39] The ACTL reported that inadequate judicial salaries had led to a regrettable decrease in appointees from the private sector, a trend that can be observed in Canada as well:

> During the Eisenhower administration, approximately 65% of federal judicial appointments were filled from the private sector, 35% from the public sector. Since then, the percentages have gradually inverted: currently, more than 60% of judicial appointments come from the public sector. There is nothing wrong with having former prosecutors populate the bench. But too much of a good thing ceases to be a good thing. A bench heavily weighted with former prosecutors is one which may lose its appearance of impartiality and objectivity; and appearances aside, it may actually suffer that loss. It is an undeniable fact that some of the best and brightest lawyers are found in the private sector, and it is a regrettable fact that fewer and fewer of those persons are seeking appointment to the bench.[40]

48. Although the situation in the U.S. has improved somewhat since the ACTL reported on this issue in 2007, it has recently confirmed that "the level of [federal judicial] compensation still requires those willing to serve in the judiciary, and their families, to sacrifice the financial benefits they likely would enjoy in the private sector."[41]

49. In 2018, Lady Hale, the President of the United Kingdom's Supreme Court, commented on trends emerging from the 2016 Judicial Attitude Survey. In that survey, almost two-

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Group 3 Judges earn $366,982; in New Zealand, High Court judges earn $386,824 and Court of Appeal judges earn $405,217; and in the United States, Federal District Court judges earn $259,266 and Federal Circuit Court of Appeal judges earn $274,961. Government Submission at para. 134.

38 28 U.S. Code § 371.

39 American College of Trial Lawyers, "Judicial Compensation: Our Federal Judges Must Be Fairly Paid", March 2007 at 1 [Reply BED at tab 3].

40 *Ibid.* at 5 [Reply BED at tab 3].

41 American College of Trial Lawyers, "The Need to Promote and Defend Fair and Impartial Courts", March 2019 at 6 [Reply BED at tab 4].

third of judges reported that the judicial salary was affecting their morale.[42] Moreover, according to Lady Hale, recruitment issues in that jurisdiction have reached a crisis level:

> All this has had its effect. First, there is a growing crisis in recruitment, especially to the High Court bench, but beginning to affect other tiers as well. It has not proved possible to fill all the vacancies in recent competitions with suitably qualified candidates. […] Worryingly, over a quarter (27%) of High Court judges said that they would not encourage suitably qualified people to apply to be a judge.[43]

In June 2019, the United Kingdom announced "[i]mmediate steps to tackle emerging and unprecedented recruitment issues in the senior judiciary."[44]

50. Far from justifying a cap on increases to judicial salaries, the example of foreign judiciaries only serves to reinforce the need for this Commission's continued vigilance and willingness to act speedily to maintain adequate levels of judicial compensation at the earliest opportunity. As set out in the Judiciary's Submission, the first indicators of similar issues have emerged in Canada. Immediate action is required.

C. Filters to analyze CRA self-employed lawyers data

51. The issue of the filters to be applied to the analysis of the CRA data on self-employed lawyers has been addressed before past Commissions. Ms. Haydon states that consistency in methodology is important in the process of compensation analysis.[45] The Association and Council address each of the filters in turn below.

1. Age exclusion and the issue of age weighting

52. Mr. Gorham proposes an age-weighted approach using the entire range of ages of appointees between 2011 and 2020. In contrast, the Association and Council apply the age range of 44-56, which has consistently been the age range of the majority of appointees. The Association and Council's approach accords with the findings of the

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42 UCL Judicial Institute, "2016 UK Judicial Attitude Survey", 7 February 2017 at 4 [Reply BED at tab 5].

43 Lady Hale of Richmond, *Can We Keep Pretending That Judicial Wellness is Not a Problem?*, Remarks presented to the CMJA 18th Triennial Conference, Brisbane, Australia, September 2018 at 182 [emphasis added, Reply BED at tab 6].

44 UK Ministry of Justice, Press Release, "Government acts urgently to protect judicial recruitment", 5 June 2019 [Reply BED at tab 7].

45 Haydon Report at 2 [Exhibit C].

Drouin and McLennan Commissions, as well as the Rémillard Commission, which opted not to employ the Government's age-weighted approach and instead found that "focusing on the age group from which the majority of judges is appointed is a useful starting point" (neither the Block Commission nor the Levitt Commission made a pronouncement on this point).[46]

53. Further, in talking about the usefulness of the 44-56 age range, Ms. Haydon notes that this is the range from which the majority of appointments are made and that it is "the target population that justifies its use."[47] She goes on to say that "[e]qually important to guard against is the tendency to add too many irrelevant observations to the database, which can distort the data and provide an outcome that will be of limited assistance to the Commission".[48] Ms. Haydon considers the most important factor on the question of the age range to be the fact that "past Commissions have accepted and used the age filter of 44-56. Continuing to use that age filter ensures comparability across the reports. While there are many reasons to not change the filter, Mr. Gorham has not offered a compelling reason to expand it."[49]

54. The Government observes that the application of the 44-56 age range to the CRA data excludes 64% of the lawyers in the CRA data.[50] This is a red herring. The objective is to capture the age range of the majority of appointees, not the majority of lawyers in the CRA data. Moreover, the Government's observation does not consider the effect of professional corporations on the declining number of lawyers at the higher-earning ages in the CRA data.

55. In any event, Mr. Gorham and the Government's advocacy in favour of an age-weighted approach appears to be a segue to the true objective, which is to rely on the CRA data for all self-employed lawyers, without regard for age, income or region. Both Mr. Gorham's report and the Government's Submission, after arguing in favour of an age-weighted approach, go on to compare the judicial salary to the CRA data without any

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46 Rémillard Report (2016) at para. 61 [JBD at tab 13]. The Rémillard Commission did state that it "considered" the fact that 33% of appointments were outside the 44-56 age range.

47 Haydon Report at 4 [Exhibit C].

48 *Ibid.* [Exhibit C].

49 *Ibid.* [Exhibit C].

50 Government Submission at para. 64.

age-weighting at all.[51] The judiciary recalls that the age range for the CRA data is 35-69. Yet the actual age range for appointees is 40 to 68, and 71% of appointees are between 44-56, the age range relied upon by past Commissions. As discussed below, the approach advocated by the Government is inconsistent with the standards of compensation benchmarking.

2. Income exclusions, percentiles

56. Mr. Gorham calls for the inclusion of all incomes, as opposed to the exclusion of low incomes applied by all past Commissions. The McLennan Commission raised the low-income exclusion from $50,000 applied by the Drouin Commission to $60,000 when analyzing CRA data from 2000.[52] The Association and Council have been applying that $60,000 cut-off ever since. They now propose an adjusted cut-off of $80,000 to account for evolving market conditions as well as inflation since 2004, and rely for that purpose on the expert evidence of both Mr. Hyatt and Ms. Haydon.[53]

57. The Government notes that "the impact of applying a salary exclusion has increased over time".[54] As Professor Hyatt notes, this is consistent with the increasing number of high-earning lawyers using professional corporations. As a result, he opines that the CRA data "is increasingly reflecting the earnings of lower income self-employed lawyers, in particular, those earning less than $200,0000 per year".[55] In his view, this provides a new and distinct justification for the application of a low-income cut-off of $80,000:

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51 See Government Submission at paras. 78-79; Gorham Report at para. 202 ("For the balance of the body of this report, I will look at net income amounts with no exclusions – either for age or income.") [Government's Book of Documents ("**GBD**") at tab 4]

52 McLennan Report (2004) at 43 [JBD at tab 10].

53 Judiciary's Submission at paras. 128-131.

54 Government Submission at para. 74.

55 Second Report of Professor Doug Hyatt dated April 30, 2021 ("**Second Hyatt Report**") at 5 [Exhibit A].

> The absence of data that is better representative of the true earnings of self-employed lawyers, particularly the earnings of higher earning lawyers who benefit from incorporation, provides a new and distinct justification for a low-income cut-off. Further, and as noted in my first report, inflation alone would justify an adjustment to the low-income cut-off from $60,000 to $79,200 (based on the CPI) or $87,000 (based on the IAI).[56]

58. It should be noted that the application of a low-income cut-off does not negate the effect of the absence of higher incomes earned through professional corporations in the CRA data.

59. Ms. Haydon also supports the application of the $80,000 cut-off, which she considers to be conservative.[57]

60. Mr. Gorham suggests that a corresponding high-income exclusion should be considered on the basis that "[i]n many situations, high income more likely implies business success (as opposed to legal acumen), a willingness to hustle to obtain clients and a focus on financial rewards rather than implying qualities commensurate with a judicial appointment."[58] It is unclear on what basis Mr. Gorham makes this set of assumptions, which are not germane to his field of expertise and certainly at odds with the reality that lawyers in private practice with legal acumen attract clients willing to pay high rates. Mr. Gorham's evidence on this point, and the other points canvassed in his report, resembles the argument of an advocate rather than the opinion of an independent expert. His opinion should be viewed with great caution.

61. Ms. Haydon explains that in her experience, clients are "willing to pay a premium when warranted by results".[59] She points out that it is more likely the case that "high income reflects results and outcomes based on expertise and skill".[60]

62. With respect to the use of the 75th percentile, the Government states that "focusing on a specific percentile risks creating an artificial measure that is not a true reflection of any

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56 *Ibid.* at 6 [Exhibit A].
57 Haydon Report at 4 [Exhibit C].
58 Gorham Report at para. 186 [GBD at tab 4].
59 Haydon Report at 5 [Exhibit C].
60 *Ibid.* [Exhibit C].

particular group of lawyer who would comprise potential outstanding candidates".[61] This position is not supported by the Government's own expert, Mr. Gorham, who himself uses percentiles in advocating for what he believes would be an appropriate compensation level for Canadian judges.[62]

63. It is the Government that proposed the 75th percentile before the Drouin Commission.[63] Notwithstanding that Commission's acceptance of this benchmark 20 years ago, the Government has since that time repeatedly attempted to re-litigate this issue. As observed by the compensation specialist retained by the Association and Council, Ms. Haydon, in her experience the 75th percentile tends to be the "bottom target where the goal is the attraction of exceptional or outstanding individuals."[64] Indeed, she considers that use of a higher percentile would be justified.[65]

64. The importance of filters applied to the CRA data needs also to be considered in light of the use of professional corporations by self-employed lawyers. The large and increasing number of professional corporations used by self-employed lawyers and the resulting gaps in the CRA data reinforces the need not to dilute the relevant comparator group within the private-sector data.

3. The need for age, income, regional filters to compare income of outstanding candidates

65. At paragraph 88 of its submissions, the Government claims that age, income and regional filters "distort the data and risk rendering the resulting analysis dubious". As set out above, the Government's analysis, comparing the judicial salary and the CRA data on self-employed lawyers relies on the entire CRA data set (15,510 self-employed lawyers in 2019) without any filters at all.[66] This approach is advocated by Mr. Gorham, who after discussing each traditional filter, proceeds to set them aside notwithstanding

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61 Government Submission at para. 79.
62 Gorham Report at para. 177 [GBD at tab 4].
63 Drouin Report (2000) at 40 [JBD at tab 9].
64 Haydon Report at 5 [Exhibit C].
65 *Ibid.* [Exhibit C].
66 See Government Submission at para. 78-79.

their use by past Commissions: "For the balance of the body of this report, I will look at net income amounts with no exclusions – either for age or income."[67]

66. Ms. Haydon, a compensation specialist, confirms that the Government's rejection of age, income and regional filters is inconsistent with the standards of compensation benchmarking. In Ms. Haydon's professional opinion, reliance on unfiltered data from 15,510 self-employed lawyers "is neither relevant nor useful" and "may be detrimental" for the purposes of setting compensation levels to attract outstanding candidates to the judiciary.[68] According to Ms. Haydon, the age, income and regional filters proposed by the judiciary are necessary if the CRA data is to have any meaningful role in informing the Commission with respect to the private sector comparator.[69]

67. It is important to keep in mind the distinct expertise of a compensation expert. As Ms. Haydon describes it,

> Compensation research is not simply the application of statistical methods of weighted averages and percentiles. It is, rather, the application of judgment, context and filters to ensure that data is the best available data, not simply all available data. The analysis is a holistic one rather than a series of single observations.[70]

68. Mr. Gorham's main area of expertise is "the design, financing, administration and governance of pension and benefit plans".[71] It does not include advising clients in the area of compensation research. Again, Mr. Gorham's analysis should be viewed with caution.

D. Supernumerary status as incentive

69. As in 2016, the Government once again points to the option to elect supernumerary status as being of significant value to prospective judicial candidates.[72] The Government and its former expert, Mr. Pannu, made this point before past Commissions.

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67 Gorham Report at para. 202 [emphasis added, GBD at tab 4].
68 Haydon Report at 4 [Exhibit C].
69 *Ibid.* at 3-5 [Exhibit C].
70 *Ibid.* at 4 [Exhibit C].
71 Gorham Report at Appendix 1 [GBD at tab 4].
72 Government Submission at paras. 95-98.

70. The Government provides the Commission with an incomplete assessment of this benefit. Supernumerary status, while undeniably a benefit to individual judges, is also beneficial to the Government. Thus, it is a mutual benefit. As noted by the Supreme Court of Canada, supernumerary status enables "the government to benefit from the expertise of experienced judges while paying only the difference between a full salary and the pension that would in any event have been paid to a judge who had elected to retire."[73] The Government's expert, Mr. Gorham, recognizes that "the average cost of a supernumerary judge is about 38% of the full compensation while the supernumerary judge carries about 50% of a full caseload."[74]

71. In sum, while the availability of supernumerary status is a benefit, it is not one to which a dollar value can be assigned. Even Mr. Gorham admits that the financial value of the option to elect supernumerary status is intangible.[75] Accordingly, this benefit must properly be considered in a holistic analysis of judicial compensation and benefits.

E. Objectivity as overarching reason to reject attempts to re-litigate

72. In the *PEI Reference*, the Supreme Court of Canada held that judicial compensation commissions must be independent, objective and effective.[76] That the Government's repeated attempts at re-litigating settled issues undermines the effectiveness of the Commission process is self-evident: it suffices to observe the resources deployed by the parties and their experts before this Commission simply to address issues long-settled by past Commissions.

73. The greater danger in being distracted by the reconsideration of settled issues is to miss out on the more pernicious threat to objectivity that is inherent to the Government's approach to the Commission process. In the *PEI Reference*, Lamer C.J. explained that the objectivity requirement means that compensation commissions "must make recommendations on judges' remuneration by reference to objective criteria, not political expediencies."[77] He went on to explain that in order to ensure objectivity, the enabling legislation should list relevant factors to guide the Commission's deliberations. In sum,

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73 *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13 at para. 63 [JBD at tab 5].

74 Gorham Report at para. 61 [GBD at tab 4].

75 *Ibid.* at para. 68 [GBD at tab 4].

76 *Reference Re Provincial Court Judges*, [1997] 3 SCR 3 ("***PEI Reference***") at para. 169 [JBD at tab 4].

77 *Ibid.* at para. 173.

objectivity is about the task of compensation commissions being approached within a known and predictable framework, in order to guard against arbitrariness and politicization.

74. Allowing a party to disregard the work of past Commissions is to open the door to moving the goal posts every four years, when it suits one's purpose. This necessarily opens the door to arbitrariness and politicization, the very ill that the Commission process is meant to guard against.

III. REPLY TO OTHER ISSUES RAISED BY THE GOVERNMENT

75. The Association and Council address below the other points raised in the Government's Submission.

A. Economic conditions and the Government's attempt to single out the judiciary

76. The Government takes the position that a cap on the cumulative annual adjustments to judicial salaries provided for in the *Judges Act* over the course of the quadrennial cycle ending in 2024 would merely result in the judiciary being made to assume its share of the economic burden brought about by the Covid-19 pandemic.[78] In support of this submission, the Government quotes the following sentence from the *PEI Reference*: "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."[79]

77. However, the Government's argument relies on a misreading of the Supreme Court of Canada's reasons in *PEI Reference*. In that case, the Court explicitly warned of the risk of political interference through economic manipulation when judges are treated <u>differently</u> from other persons paid from the public purse.[80] The Court recognized, however, that constitutional protections did not shield the judiciary <u>from deficit reduction policies of general application</u>:

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78 Government Submission at paras. 4, 22, 34.

79 *PEI Reference* at para. 196 [JBD at tab 4].

80 *PEI Reference* at para. 158 ("What this debate illustrates is that judicial independence can be threatened by measures which treat judges either differently from, or identically to, other persons paid from the public purse. Since s. 100 clearly permits identical treatment (*Beauregard*), I am

> 196 Finally, I want to emphasize that the guarantee of a minimum acceptable level of judicial remuneration is not a device to shield the courts 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. Rather, as I said above, financial security is one of the means whereby the independence of an organ of the Constitution is ensured. Judges are officers of the Constitution, and hence their remuneration must have some constitutional status.[81]

78. The Government has not put forward any evidence that it is pursuing a policy of deficit reduction in general or that it has put in place measures to freeze salaries or reduce statutory or other entitlements accrued by any other person paid by the public purse as part of its response to current economic conditions. In the absence of such measures, the Government's proposal represents an unconstitutional singling out of the judiciary. When the Government says that the judiciary must assume its share of the economic burden, the reality is that there actually is no burden being imposed by the Government, and so as a matter of logic there cannot be a share of that burden to be assumed.

79. As pointed out by Prof. Hyatt in his Second Report, the 2021 Budget is not an austerity budget. To the contrary, extensive spending is announced:

> The initiatives of the Government suggest that, over the budget horizon, it is a growing economy, and not austerity, that will drive the affordability of the fiscal plan.[82]

80. As for general economic conditions, the recent budget reveals that the November 2020 Government forecast turned out to be too pessimistic.

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driven to the conclusion that it is illogical for it to prohibit differential treatment as well. That is not to say, however, that the distinction between differential and identical treatment is a distinction without a difference. In my opinion, the risk of political interference through economic manipulation is clearly greater when judges are treated differently from other persons paid from the public purse.") [JBD at tab 4].

81 *PEI Reference* at para. 196 [emphasis added, JBD at tab 4].

82 Second Hyatt Report at 4 [Exhibit A].

> Notably, the [Government's] consensus projection for 2021 has become more favourable, with real GDP expected to increase by 5.8 percent, up from 4.8 percent in the November 2020 Economic Statement, and closer in-line with the [Policy and Economic Analysis Program] forecast.[83]

The short-term forecast is very positive.

81. As noted in the Judiciary's Submission, the Association and Council acknowledge that the Government finds itself in a challenging fiscal position because of the pandemic. Undoubtedly, this is a relevant factor for the Commission to consider. However, consideration of that factor cannot be at the expense of Canada's ability to continue to attract outstanding candidates to the Bench, and it cannot entail an unconstitutional singling out of the judiciary for a treatment not applied to other persons paid out of the public purse.

B. Attracting outstanding candidates and the required focus on the top 10 CMAs

82. The Government claims there is "no evidence that there is any difficulty in attracting high quality candidates from the private sector."[84] The Association and Council reiterate that the significant gap between the judicial salary and compensation in private practice is considered to be one of the main reasons for a drop in interest among self-employed lawyers in applying for a judicial appointment. This issue is particularly prominent in some of the top 10 CMAs.

83. The Government selectively presents the available data to avoid this reality. First, at paragraph 47 of its submission, the Government presents the trend in appointments from 2011 to 2020. In isolation, these numbers do not show a significant decline in appointments from private practice. In their historical context, however, they show a significant downward trend. As set out in the Association and Council's submission, between 2011 and 2020 approximately 63% of judicial appointees were from private

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83 The consensus projections in the Government's April 2021 Budget projected 5.8% GDP growth in 2021, 4.0% in 2022, and 2.1% in 2023. The Policy and Economic Analysis Program at the Rotman School of Management, University of Toronto, predicts 6.0% GDP growth in 2021, 3.8% in 2022, and 2.4% in 2023. The Government's forecasts in the 2020 Fall Economic Statement had predicted 4.8% GDP growth in 2021, 3.2% in 2022, and 2.3% in 2023. Second Hyatt Report at 2-3 [Exhibit A].

84 Government Submission at para. 46.

practice, down from a proportion of approximately 75% in the period from 1990 to 2007, and 70% between 2007 and 2011.[85]

84. Second, at paragraph 42 of its submission, the Government focuses exclusively on the national pool of applicants for judicial appointment. In doing so, it ignores concerning regional trends. For example, in British Columbia, only one of 64 assessed applicants was assessed as "highly recommended". Out of a total of 106 assessed applicants in Alberta, the number of highly recommended applicants was 12. The reality is that, in certain regions as of October 23, 2020, the pool of outstanding applicants for judicial appointment was very small indeed.[86]

85. Considering the incomes of self-employed lawyers in the top 10 CMAs is essential to setting a judicial salary capable of attracting outstanding candidates to the judiciary. More than two thirds of appointees are from the top 10 CMAs.[87] Failure to consider the expanding gap between the judicial salary and the income of self-employed lawyers in the top 10 CMAs will only exacerbate the current problems with judicial recruitment from private practice in some of these regions.

C. Annuity valuation and the issue of the disability benefit

86. Past Commissions have determined that it is appropriate to consider the value of the judicial annuity when comparing the income of self-employed lawyers with the salary of judges. The independent actuarial expert retained by the judiciary, Mr. Dean Newell, shares that view.

87. Mr. Gorham in his report to this Commission takes the view that the value of the annuity is 37.84%, this figure being composed of the value of the retirement benefit calculated at 32.74% and the disability benefit calculated at 5.1%.[88]

88. However, in arriving at the figure of 37.84%, Mr. Gorham applies a methodology that was accepted neither by the Levitt Commission's expert, Mr. Sauvé (who also served as

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85 Judiciary's Submission at para. 63.

86 Based on applications and appointments data provided by the Commissioner for Federal Judicial Affairs for March 30, 2017 to October 23, 2020 [JBD at tab 20].

87 Based on data provided by the Commissioner for Federal Judicial Affairs for April 30, 2015 to October 23, 2020 [JBD at tab 21(d)].

88 Gorham Report at para. 133 [GBD at tab 4].

actuarial expert to the Drouin and McLennan Commissions), nor by the judiciary's expert before the Levitt commission, Mr. FitzGerald, in 2012. That methodology consists in including the disability benefit in the valuation of the annuity, an approach which has never been adopted by the Commission. Mr. Sauvé said the following about that methodology: "we agree with the comment made by Mr. FitzGerald [the judiciary's expert] to the effect that the valuation of the disability benefits should be made as part of a broader benchmarking exercise including group insurance benefits."[89]

89. The Association and Council's actuarial expert, Mr. Newell, agrees with Mr. FitzGerald and Mr. Sauvé.[90] The disability benefit should be considered separately and should therefore not be included in the valuation of the judicial annuity.

90. The Commission has not traditionally included the disability benefit in the valuation of the annuity. The Rémillard Commission opted not to consider the value of the disability benefit in its analysis and noted that it had not received any evidence on the value of disability benefits in the private sector.[91] The Government has not produced such evidence before this Commission.

91. In valuing total judicial compensation, Mr. Gorham has further factored in 11.67% as an additional cost for lawyers in private practice to replicate the judicial annuity.[92] This is said to recognize the income tax treatment afforded the judicial annuity.[93] While this cost has been put forward to the Commission by some of the Government's experts in the past, it was always as an alternative and not an approach endorsed by the Commission. Mr. Gorham now prominently features this adjustment in his calculation of total judicial compensation. The Commission has never accepted this cost as part of its valuation of total judicial compensation.

92. In proposing a valuation methodology that involves looking at how much self-employed lawyers would have to save to replicate the judicial annuity, Mr. Gorham did not consider the entire picture of tax tools available to those lawyers. Messrs. Stéphane Leblanc and

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89 Letter of Mr. Sauvé to the Levitt Commission (February 14, 2012) at 3 [Reply BED at tab 8].
90 Report of Dean Newell dated April 29, 2021 ("**Newell Report**") at 5 [Exhibit D].
91 Rémillard Report (2016) at para. 73 [JBD at tab 13].
92 Gorham Report at para. 141 [GBD at tab 4].
93 *Ibid.* at para. 138 [GBD at tab 4].

André Pickler at EY Canada explain in their second report that lawyers with professional corporations—a group that has tripled since 2010 and included 17,871 high-earning lawyers in 2019—can benefit from tax deferral on income left in the corporation such that the lawyer can accumulate a greater amount of wealth for retirement.[94] This would reduce the additional cost estimated by Mr. Gorham for self-employed lawyers to replicate the judicial annuity.

93. Messrs. Leblanc and Pickler also point out that Mr. Gorham seems to have omitted to consider the Individual Pension Plan ("**IPP**").[95] An IPP is a defined-benefit registered pension plan set-up generally for an owner of a corporation. The contribution limit increases with age, and as of age 50, the limit exceeds the 18% limit attached to RRSPs. The use of an IPP could result in greater tax savings and thus a lower additional cost to replicate the judicial annuity.

94. These various elements not considered by Mr. Gorham speak to the perils of straying from established methodology before the Commission. In the Association and Council's submission, it is unacceptable to further gross up the judicial salary with the proposed amount of 11.67%, on top of the valuation of the annuity and the disability benefit, to arrive at the enormous figure of 49.51%, and then to refer to this as the "Total Value of Judicial Annuity".[96] The Commission should reject Mr. Gorham's valuation exercise altogether. The fact that Mr. Gorham's valuation of 49.51% is up by some 19 percentage points from the 30.6% valuation of Mr. Newell, and almost as much from the 32% valuation of Mr. Pannu, both of which the Commission referred to in concluding that they were "remarkably close",[97] fatally undermines the credibility of Mr. Gorham's figure. If the Commission were to accept the assumptions leading to Mr. Gorham's enormous figure, there would be a sudden rupture with its own reasoning to date on the issue of how to value the judicial annuity.

95. Mr. Newell's methodology involves valuing the judicial annuity without consideration of the disability benefit. With that methodology, he arrives at the figure of 34.1% as the

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94 Second Report of Stéphane Leblanc and André Pickler dated April 21, 2021 ("**Second Leblanc and Pickler Report**") at 1 [Exhibit B]

95 *Ibid.* at 1-2 [Exhibit B]

96 Gorham Report at para. 141 [GBD at tab 4].

97 Rémillard Report (2016) at para. 72 [JBD at tab 13].

value of the judicial annuity.[98] It should be noted that before being entitled to an annuity, judges need to meet certain criteria. Therefore, the value of the annuity varies — potentially very significantly — depending on when these criteria are satisfied.

96. When Mr. Newell applies Mr. Gorham's methodology of including the disability benefit in the calculations, he arrives at 36.7%, in contrast to the figure of 37.84% of Mr. Gorham.[99] It is important to note that the retirement benefit of 31.7% included in the total figure of 36.7% arrived at by Mr. Gorham cannot be compared with the figure of 34.1% arrived at using Mr. Newell's methodology. Since the latter does not take the disability benefit into account, the retirement-benefit figures resulting from the two different methodologies are like comparing apples and oranges.[100] The judiciary submits that if a figure is to be used to represent the value of the judicial annuity, it should be 34.1% at most, the updated figure to the percentage range relied upon by the Rémillard Commission.

97. The figure of 34.1% has been taken into account in the following table comparing the judicial salary plus the value of the judicial annuity with the income of self-employed lawyers as reported in the CRA data. In considering this evidence, it must always be borne in mind, in light of the significant use of professional corporations, that the CRA data represents a dramatic underreporting of actual incomes of self-employed lawyers.[101] As recognized in the Government's submission, "starting in 2019 the number of lawyers operating as incorporated entities now outnumbers the number of self-employed lawyers captured by the CRA data set."[102]

98 Newell Report at 7 [Exhibit D].
99 *Ibid*. at 6 [Exhibit D]
100 *Ibid*. at 12 [Exhibit D].
101 Judiciary's Submission at paras. 121-126, 137-145.
102 Government Submission at para. 61.

Table 1

Comparison of salary plus annuity of *puisne* judges

with CRA net professional income of

self-employed lawyers at 75th percentile

(Net professional income ≥ $80,000, Age group - 44-56)

Canada and top ten CMAs, 2015 to 2019

			Salary of Puisne Judges		
Year	**75th Percentile Income**		**$ Includes Annuity valuation of 34.1%**	**Adjustment in the salary of *puisne* judges needed to match the CRA net professional income of self-employed lawyers at 75th Percentile**	
	Canada	**Top ten CMAs**		**Canada**	**Top ten CMAs**
2015	$430,000	$490,000	$413,833	3.9%	18.4%
2016	$400,000	$450,000	$421,208	-5.0%	6.8%
2017	$430,000	$480,000	$422,817	1.7%	13.5%
2018	$490,000	$570,000	$431,266	13.6%	32.2%
2019	$480,000	$550,000	$442,396	8.5%	24.3%

98. It is useful to keep in mind certain observations made by Ms. Haydon about the comparative exercise in compensation analysis. She says that an effective compensation analysis "is a holistic one rather than a series of single observations."[103] In that vein, it would be misguided to focus on the annuity as a form of judicial compensation or benefit without considering certain means at the disposal of self-employed lawyers such as professional corporations, as discussed by Messrs. Leblanc and Pickler in their Second Report.

103 Haydon Report at 4 [Exhibit C].

99. While it is appropriate for the Commission to consider the benefit conferred upon judges by the judicial annuity, and to seek to ascribe a "value" to it, it would be inaccurate simply to gross-up judicial salaries and focus on the grossed-up amount when considering the adequacy of judicial salaries in comparison with the incomes of self-employed lawyers. That is so because the actual value of the judicial annuity to any particular judge is unknown. Moreover, the "value" of that potential benefit is highly subjective, and depends on a host of factors.

D. Proposed cap on the annual adjustments based on the IAI and the self-correcting nature of the compositional impact of the pandemic

1. The appropriate reference period

100. The Association and Council draw attention to the reference period used by the Government for its proposed IAI cap, which is not the appropriate reference period and thus raises a serious jurisdictional issue.

101. Throughout its Submissions, the Government refers to judicial salaries as of April 1, 2020 as the relevant starting point for the inquiry. This reflects the parties' common understanding of the beginning of the quadrennial reference period for this Commission's inquiry, which logically commences at the end of the reference period of the previous Commission. However, in the table at page 13 of its Submission, it appears that the Government's proposed 10% cap on cumulative annual adjustments to the judicial salary would apply to the four fiscal years starting on April 1st of 2021, 2022, 2023 and 2024. In doing so, the Government is effectively asking the Commission to inquire into a five-year period rather than a quadrennial period.

102. The reference period for this Commission's inquiry does not include the fiscal year beginning April 1, 2024. The reference period for this Commission's inquiry runs from April 1, 2020 (beginning of fiscal year 2020/2021) to March 31, 2024 (end of fiscal year 2023/2024). This is necessarily so given that the Rémillard Commission's inquiry covered the quadrennial reference period from April 1, 2016 to March 31, 2020. The Rémillard Commission never inquired into judicial salaries from April 1, 2020 to March 31, 2021. The 2020/2021 fiscal year necessarily falls within this Commission's mandate.

103. The Government's position leads to one of two untenable outcomes. If this Commission's reference period is said to run for four years starting on April 1, 2021, then

no quadrennial commission will have inquired into the judicial salaries and benefits paid during fiscal year 2020/2021. Alternatively, if this Commission's reference period is said to include fiscal year 2020/2021, the Government is effectively asking this Commission to inquire into judicial salaries and benefits spanning over 5 fiscal years (the last one starting on April 1, 2024). This would be contrary to the statutory mandate of the Commission, which provides for an inquiry over a quadrennial period.

104. While the appointments of the members of the Rémillard Commission were extended to May 31, 2020 as part of the amendment of the *Judges Act* setting June 1, 2020 as the start date for this Commission's inquiry, this change had no impact on this Commission's reference period. Extending the term of office of the three members of the Rémillard Commission did not amount to them actually inquiring into the adequacy of judicial compensation during fiscal year 2020/2021. It is an indisputable fact that such an inquiry never took place. The current Commission must undertake this inquiry.

2. Imposing a cap on the annual adjustments based on the IAI undermines an integral part of the Government's social contract with federally appointed judges

105. The Government has proposed that the cumulative annual salary adjustments based on the IAI provided for in the *Judges Act* be capped at 10% over the April 1, 2020 judicial salary until 2024.

106. This is the Government's third attempt in as many Commission cycles to undermine the statutory indexation provided in the *Judges Act* that has been in place since 1981. The Association and Council strenuously object to any proposals that would undermine the existing statutory indexation of judicial salaries.

107. The IAI adjustment in s. 25 of the *Judges Act* is, along with the judicial annuity, one of the cornerstones of judicial financial security and, as described by the Scott Commission in the excerpt below, an integral part of the "social contract" between the Government and lawyers appointed to the Bench:

> The provisions of s. 25 of the *Judges Act* are reflective of much more than a mere indexing of judges' salaries. They are, more specifically, a statutory mechanism for ensuring that there will be, to the extent possible, a constant relationship, in terms of degree, between judges' salaries and the incomes of those members of the Bar most suited in experience and ability for appointment to the Bench. The importance of the maintenance of this constant cannot be overstated. It represents, in effect, a social contract between the state and the judiciary. By its statutory terms, the judges, who by acceptance of judicial office close the door, on a permanent basis, to any real prospect of a return to their previous lives at the Bar, can at least be certain that their commitment in accepting a judicial appointment will not result over the years in a less favourable financial situation as between judicial service and practice at the Bar than that which prevailed at the moment of their appointment. [104]

108. This "social contract" includes a statutory 7% cap on the annual IAI adjustment at s. 25(1)(b) of the *Judges Act*.

109. In 2012, the Government asked the Levitt Commission to recommend a lower cap, of 1.5%, on the annual adjustment based on the IAI, for a capped net increase of 6.1% over the quadrennial period.[105] The Association and Council vigorously opposed such a recommendation, going as far as to invite the Levitt Commission not only to decline to recommend a cap on IAI but also positively to recommend maintaining the IAI adjustment as an essential mechanism to ensure financial security and preserve judicial independence.

110. The Levitt Commission declined to recommend lowering the cap on annual adjustments of the IAI. It also noted the special status of the IAI as "a key element in the architecture of the legislative scheme for fixing judicial remuneration", and added that it "should not lightly be tampered with".[106]

111. In 2016, the Government asked the Rémillard Commission to recommend that the IAI be replaced by the CPI as the appropriate measure for annual indexation of judicial salaries. This recommendation was sought by the Government for the obvious reason

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104 Scott Report (1996) at 14-15 [Book of Exhibits and Documents of the Association and Council at tab 24].

105 Levitt Report (2012) at para. 19 [JBD at tab 12].

106 Levitt Report (2012) at para. 46 [JBD at tab 12].

that between 2004 and 2015, the IAI increased by 34.1% while the CPI increased by 20.9%.[107] The Rémillard Commission rejected the Government's proposal, endorsed Parliament's logic in using the IAI for annual salary adjustments and the CPI for annual indexation of pensions,[108] and reiterated the Levitt Commission's strong defence of the IAI.[109]

112. The Government is now once again attacking this key element in the architecture of the scheme for fixing judicial remuneration. The Government argues that its request to cap the IAI adjustment until 2024 provides for stable and predictable increases in unpredictable economic circumstances, and ensures that the judiciary assumes its share of the economic burden. Neither justification has any merit.

113. As set out above, the judiciary can only be made to bear the economic burden of the fiscal deficit incurred by the Government as part of a broadly applicable deficit reduction policy actually in place. The Government has not pointed to any other persons paid from the public purse who have been made to bear reductions to their entitlements, statutory or others.

114. The purported threat to the stability or predictability of increases to the judicial salary is imaginary. While the Government repeatedly relies on the risk of a negative IAI in the near future as some kind of palliative to render more acceptable its proposed cap,[110] neither the Office of the Chief Actuary nor the Government's own expert predicts a negative IAI.

115. In any event, to the extent the risk of a negative IAI can be made out, it reflects the self-correcting nature of the impact of the pandemic on the IAI. Insofar as the Government argues that the 2021 IAI adjustment (6.6%) is an anomaly, it will be offset by any

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107 See the Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated March 29, 2016 at para. 94 [BED at tab 11].

108 *Judges Act* at ss. 42(1), 43.1 [JBD at tab 3] and *Supplementary Retirement Benefits Act*, RSC 1985, c. S-24, ss. 2, 11.

109 Rémillard Report (2016) at para. 38 [JBD at tab 13] ("We agree with the Levitt Commission that the IAI adjustment was intended to be a key element in the legislative architecture governing judges' salaries and should not be lightly tampered with.").

110 Government Submission at paras. 4, 27, 28, 32, 34.

negative or significantly reduced IAI adjustment that the Government itself predicts in the near future.

116. Prof. Hyatt points out in his Second Report that Mr. Gorham's example of lower-earning workers falling out of the labour market will reverse as the pandemic subsides. This would entail a self-correction in the IAI:

> It would be expected that, as the pandemic continues to recede and lower wage workers resume employment, there will be downward pressure on the IAI and that some (or all) of the component of the IAI increase experienced in 2020 attributable to the attrition from employment of lower wage workers would be reversed in the subsequent year (or years).
>
> […]
>
> As low wage workers return to employment now and in the coming years until the business impact of the pandemic has fully subsided, we would expect continuous downward pressure on the IAI.[111]

117. The annual application of the IAI statutory adjustment plays an important role in safeguarding financial security for the judiciary. For those lawyers who accept a judicial appointment and enter into the "social contract" mentioned by the Scott Commission, the IAI adjustment provides some protection against inflationary tendencies (up to a maximum of 7%). For those lawyers considering a judicial appointment, the adjustment, because it helps judicial salaries keep pace with salary increases generally, plays a significant role in ensuring that an appointment to the Bench remains attractive to outstanding candidates.

118. Parliament has already turned its mind to the maximum annual IAI adjustment under the *Judges Act*, and it set a 7% ceiling. Parliament did not set out exclusionary factors that would put a gloss on that 7% ceiling, as the Government now seeks to advocate. This indicates Parliament's acceptance of an annual IAI adjustment that does not exceed 7%.

119. The Government has not put forward sufficient reasons for this Commission to tinker with the IAI adjustment, especially in light of the Levitt and Rémillard Commissions' very recent refusals to undermine the IAI, and their cautionary observation that the IAI is an

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111 Second Hyatt Report at 7 [Exhibit A].

element in the architecture of judicial compensation that should not lightly be tampered with.

120. Far from ensuring the predictability or stability of the judicial salary, imposing a 10% cumulative cap on the annual IAI adjustments until 2024 would cause the existing gap between the judicial salary and the public sector and private sector comparators to further expand, exacerbating current problems in attracting outstanding candidates from private practice.

121. Table 2 below shows:

(i) The actual salaries for puisne judges for 2019 to 2021, and projected salaries from 2022 to 2024, indexed according to the IAI projection provided by the Office of the Chief Actuary,[112] with and without a 10% cap on cumulative increases from the April 1, 2020 judicial salary; and

(ii) The actual total average compensation for DM-3s for 2019, and the projected total average compensation from 2020 to 2024, applying an annual increase of 1.7% to the average base salary of DM-3s (without performance pay) from 2021-2024 and an annual increase of 4.0% to the average performance pay earned from 2020-2024, the former increase based on the annual growth of the average salary of DM-3s without performance pay from 2000 to 2020, and the latter based on the annual growth of the average performance pay earned from 2000-2019.[113]

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112 The Office of the Chief Actuary forecasted IAI as follows: 2021, 6.7%; 2022, 2.1%; 2023, 2.6%; 2024, 2.8%. Letter from François Lemire, Office of the Chief Actuary, Office of the Superintendent of Financial Institutions, dated February 26, 2021 [JBD at tab 23]. The actual IAI on April 1, 2021 was 6.6%. While s. 23 of the *Judges Act* requires the rounding down of judicial salaries to the nearest multiple of one hundred dollars, the projections in this submission rely on the exact projected figures to provide the Commission with the most accurate assessment of the likely gap between the judicial salary and the relevant comparators.

113 The rate of increase is calculated from the 2000-2001 fiscal year because that was the year that the Government fully implemented the Strong Committee's recommended increases to at-risk pay for DM-3s.

Table 2
Comparison of Judicial Salary (with and without 10% cap) and DM-3 Total Average Compensation 2020-2024 (Actual and Projected)

Date	Judicial Salary (with 10% cap)	Judicial Salary (without 10% cap)	DM-3 Total Average Compensation	Difference between Judicial Salary (with cap) and DM-3 Total Average Compensation		Difference between Judicial Salary (without cap) and DM-3 Total Average Compensation	
April 1, 2019	$329,900	$329,900	$383,454	-14.0%	-$53,554	-14.0%	-$53,554
April 1, 2020	$338,800	$338,800	$387,555	-12.6%	-$48,755	-12.6%	-$48,755
April 1, 2021	$361,100	$361,100	$396,055	-8.8%	-$34,955	-8.8%	-$34,955
April 1, 2022	$368,683	$368,683	$404,776	-8.9%	-$36,093	-8.9%	-$36,093
April 1, 2023	$372,680	$378,269	$413,725	-9.9%	-$41,045	-8.6%	-$35,456
April 1, 2024[114]	$372,680	$388,860	$422,908	-11.9%	-$50,228	-8.1%	-$34,048

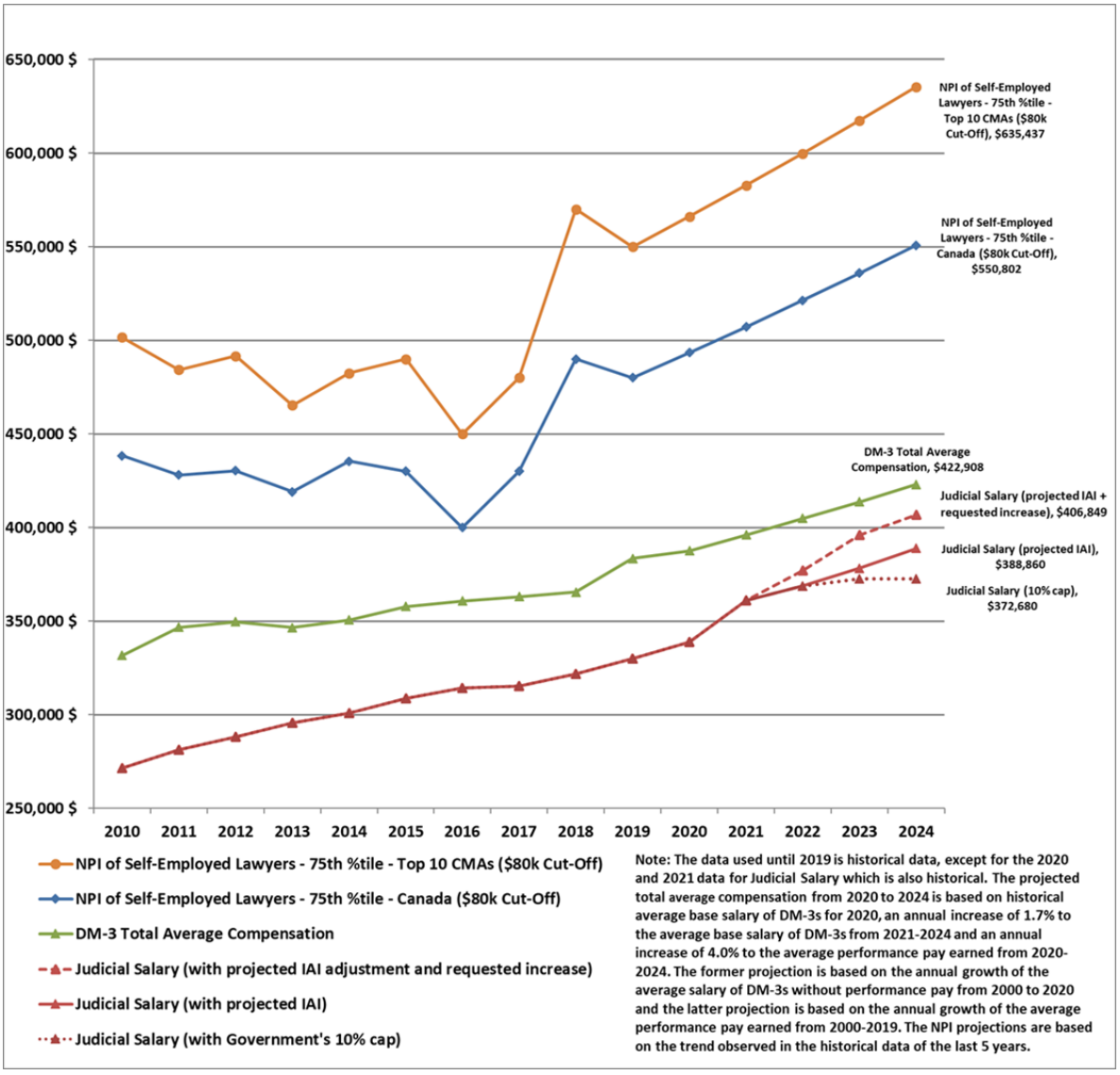
122. If the Government's proposed 10% cap were imposed, the gap between the DM-3 total average compensation would grow to -11.9% (-$50,228) by 2024. The gap would be 3.8 percentage points ($16,180) higher than predicted without a cap.

123. While the judiciary's requested increase would start to close the gap between the judicial salary and public and private sector comparators, the Government's requested cap would have the opposite effect. The following is a graphical representation of the judicial salary with the requested increase until 2024, as compared to the judicial salary with only the projected IAI adjustment, the judicial salary with the Government's requested

[114] See above regarding the Government's problematic inclusion of this year in the analysis.

10% cap, the projected DM-3 total average compensation, and the projected net professional income ("**NPI**") of self-employed lawyers within the 44-56 age band, at the 75th percentile, with $80,000 low-income cut-off, for all of Canada and the top 10 CMAs based on the CRA data.

Graph 1
Comparison of projected Judicial Salary, projected Judicial Salary with requested increase, projected Judicial Salary with Government's 10% cap, projected DM-3 total average compensation, and projected NPI of self-employed lawyers 2010-2024



IV. CONCLUSION

124. Canada's judiciary is second to none. The Canadian Government and the citizenry of Canada would have it no other way. The continued stellar quality of the Canadian

judiciary is dependent on the ability to continue attracting outstanding candidates to the Bench. Even when the country faces a trying financial situation resulting in budgetary deficits, the Commission has a statutory duty of vigilance requiring it to maintain a long-term view so as to preserve the attractiveness of the Bench.

125. The Association and Council reiterate the arguments set out in the Judiciary's Submission filed on March 29, 2021. The Government's request for a cap on judicial salaries up to a maximum four-year cumulative annual adjustments of 10% should be rejected. Instead, the Association and Council request that the salary of *puisne* judges be increased by 2.3% on each of April 1, 2022 and April 1, 2023, exclusive of statutory indexing based on the IAI.

The whole respectfully submitted on behalf of the Canadian Superior Courts Judges Association and the Canadian Judicial Council.

Montréal, April 30, 2021

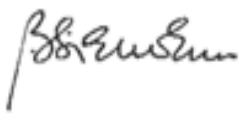


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EXHIBIT A – SECOND REPORT OF PROFESSOR DOUG HYATT

J.E.P. Research Associates Ltd.

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April 30, 2021

Mr. Pierre Bienvenu, Ad. E.
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Dear Mr. Bienvenu:

Re: Judicial Compensation and Benefits Commission

I enclose my second report in this matter.

Sincerely,

Douglas E. Hyatt
Professor

James E. Pesando
Founder
(1946 to 2021)

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April 30, 2021

Second Report in the Matter of the Judicial Compensation and Benefits Commission

Prepared for Mr. Pierre Bienvenu of Norton Rose Fulbright Canada LLP

by

J.E.P. Research Associates Ltd.*

* Professor Douglas E. Hyatt

I am a Professor in the Joseph L. Rotman School of Management and the Centre for Industrial Relations, both of the University of Toronto. I was the Academic Director of Professional MBA Programs at the Rotman School of Management and was the Associate Chair of Economics for Management Studies in the Division of Management at the University of Toronto at Scarborough. I have a B.A. degree (economics), an M.A. degree (economics), and a Ph.D. (industrial relations), all from the University of Toronto.

I submitted a report dated March 29, 2021 to the Judicial Compensation and Benefits Commission. I was asked to prepare a second report addressing the following questions:

1. What can be said about economic conditions in Canada and the financial position of the federal Government in light of the April 2021 Budget of the Government of Canada, and compared with economic and fiscal conditions described and projected in the November 2020 Economic Statement?

2. What explains the trend of an increased proportion of lawyers found under the $60,000 low-income cut-off in the CRA data?

3. Will there be an impact on the IAI when low-wage workers return to employment as the pandemic subsides?

I have relied on my general knowledge of economics and economic statistics. I have also consulted or reviewed the following:

1. Letter of Mr. Nick Leswick dated December 9, 2020;

2. Letter of François Lemire dated February 26, 2021;

3. Department of Finance Canada, Fall Economic Statement dated November 30, 2020;

4. A Recovery Plan for Jobs, Growth and Resilience. Budget 2021. Her Majesty the Queen in Right of Canada (2021);

5. Statistics Canada, Table 14-10-0223-01, Employment and average weekly earnings (including overtime) for all employees by province and territory, monthly, seasonally adjusted;

6. "Request 2020-375 – Quadrennial Judicial Compensation and Benefits Commission (Quad Comm)" CRA methodological note, undated, and related CRA data;

7. PEAP Memo 2021-3, Policy and Economic Analysis Program (PEAP), Rotman School of Management, University of Toronto dated March 19, 2021;

8. Statistics Canada, "Gross domestic product, income and expenditure, fourth quarter 2020", *The Daily*, Tuesday, March 2, 2021;

9. Consumer Price Index for Canada, Statistics Canada CANSIM series number V41690973;

10. Submissions of the Government of Canada dated March 29, 2021;

11. Reports of Mr. Peter Gorham dated March 26, 2021 and April 16, 2021; and

12. Joint Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council.

To answer the three questions posed above, I organize my report into three corresponding sections:

I THE GOVERNMENT'S UPDATED ECONOMIC AND FISCAL PROJECTIONS
II THE IMPACT OVER TIME OF THE LOW-INCOME CUT-OFF IN THE CRA DATA
III THE IMPACT OF RE-EMPLOYED WORKERS ON THE IAI

I THE GOVERNMENT'S UPDATED ECONOMIC AND FISCAL PROJECTIONS

In my earlier report, I summarized the Government's projections for growth in real Gross Domestic Product (GDP), with those of the Policy and Economic Analysis Program (PEAP) at the Rotman School of Management, University of Toronto (the PEAP forecast is current as at March 19, 2021).

The April 2021 Budget of the Government of Canada presented updated real GDP consensus projections. I have added to consensus projections from the budget to the corresponding table in my previous report, as follows:

Year	Nov. 2020 Consensus/ Gov't	PEAP	2021 Budget
2021	4.8%	6.0%	5.8%
2022	3.2%	3.8%	4.0%
2023	2.3%	2.4%	2.1%
2024	2.1%	2.0%	1.9%
2025	1.9%	2.0%	1.8%

Notably, the consensus projection for 2021 has become more favourable, with real GDP expected to increase by 5.8 percent, up from 4.8 percent in the November 2020 Economic Statement, and closer in-line with the PEAP forecast.

The budget projects a fiscal deficit in 2020-21 of 16.1 percent (17.5 percent in the November Economic Statement), declining by 2025-2026 to 1.1 percent of GDP (up from 0.9 percent of GDP in the November Economic Statement).

The Budget, at page 13, states what the Government has set out to achieve:

> *"This budget addresses three fundamental challenges.*
>
> *First, we need to conquer COVID. That means buying vaccines and supporting provincial healthcare systems. It means enforcing our quarantine rules at the border and within the country. It means providing Canadians and Canadian businesses with the support they need to get through these final, third-wave lockdowns, and to come roaring back when the economy fully reopens.*
>
> *Second, we must punch our way out of the COVID recession. That means ensuring lost jobs are recovered as swiftly as possible, and that hard-hit businesses rebound quickly and are able to flourish.*
>
> *It means providing support where COVID has struck hardest – to women and young people and low-wage workers, and to small and medium-sized businesses, especially in hospitality and tourism.*
>
> *The final challenge is to build a better, fairer, more prosperous, more innovative future. That means investing in Canada's green transition and the green jobs that go with it; in Canada's digital transformation and Canadian innovation; and in building infrastructure for a dynamic, growing country."*

At pages 54 to 55 of the Budget, the Government states:

> ***"Building a stronger and more resilient economy will improve fiscal sustainability***
>
> *In the current low-interest rate environment, growth-enhancing investments can help improve fiscal sustainability by raising GDP growth more than they raise costs in terms of increased debt service over the longer term. Budget 2021 is a plan that uses public investment to address these challenges*

head-on, by making investments in key measures that will drive future growth and prosperity, including:

- ***Building Opportunities and Investing in People:*** *Budget 2021 aims at making it easier for parents to fully participate in the labour market by introducing a National Early Learning and Child Care Plan. The addition of 240,000 workers in the labour force stemming from greater access to high quality day care could raise real GDP by as much as 1.2 per cent over the next two decades, boosting real GDP growth by 0.05 p.p. per year over that period. This is one of the most significant actions taken since the introduction of North American Free Trade Agreements to expand economic opportunity for Canadians.*

- ***Connecting People and Businesses and Unleashing Innovation:*** *Budget 2021 supports investments in infrastructure, including public transit and trade infrastructure, and supports firms, particularly SMEs, in innovating and investing in technology so that they grow and take advantage of the new opportunities. Efforts to boost the productivity of Canadian workers will pay long-term dividends. For instance, working to reduce Canada's productivity gap with the U.S. by just one tenth could raise real GDP by 3 per cent over the next two decades, boosting real GDP growth by 0.15 p.p. per year over that period."*

The initiatives of the Government suggest that, over the budget horizon, it is a growing economy, and not austerity, that will drive the affordability of the fiscal plan.

II THE IMPACT OVER TIME OF THE LOW-INCOME CUT-OFF IN THE CRA DATA

At paragraph 74 of its submissions, the Government of Canada states:

> *"It is worth noting that the impact of applying a salary exclusion has increased over time. Excluding those with salaries under $60,000 in 2019 results in excluding 30% of self-employed lawyers in the CRA data set from consideration. In 2010, it amounted to excluding 28% of those lawyers."*

In their joint submissions, the Canadian Superior Courts Judges Association and the Canadian Judicial Council, at paragraph 123, note:

> *"Unfortunately, the CRA data on self-employed lawyers' incomes is incomplete as a point of comparison by virtue of the fact that a significant*

proportion of lawyers in private practice today constitute professional corporations through which they earn their professional income. There were 17,871 professional corporations among lawyers across Canada in 2019, representing 27% of practising and insured lawyers in Canada. This represents almost a three-fold increase since 2010 in the number of registered professional corporations as a percentage of the total number of practising and insured members of the various law societies in Canada. The income earned through these professional corporations is not reflected in the CRA data, which represents a dramatic underreporting of actual incomes of self-employed lawyers."

In their report of March 26, 2021, at pages 2-3, Stéphane Leblanc and André Pickler conclude:

"In our experience, lawyers in private practice earning an income of $200,000 to $300,000 or more generally consider it beneficial to incorporate a professional corporation. While income data might not reveal this to be high income among self-employed lawyers in Canada, at this income level, many individuals have enough income to cover their personal expenses and can utilize the excess income to invest. If the individual lawyer earns less than $200,000 or, on account of current expenses, is unable to retain income inside the professional corporation, it would reduce the benefit of incorporation. Conversely, in our experience it is unlikely for a lawyer earning an income of less than $200,000 to find it advantageous to incorporate their practice."

The Government's observation that, "... *the impact of applying a salary exclusion has increased over time"* is consistent with the joint submissions of the Association and Council that increasing numbers of lawyers are forming professional corporations and the opinion advanced by Mr. Leblanc and Mr. Pickler that, "...*it is unlikely for a lawyer earning an income of less than $200,000 to find it advantageous to incorporate their practice."*

As higher earning private practice lawyers recognize income through their corporations, the CRA sample upon which average self-employed lawyer earnings is based is increasingly reflecting the earnings of lower income self-employed lawyers, in particular, those earning less than $200,000 per year and are thus less likely to benefit from incorporation.

This is an important compositional change in the CRA data that is likely to be permanent barring significant change in tax regulations.

The absence of data that is better representative of the true earnings of self-employed lawyers, particularly the earnings of higher earning lawyers who benefit from incorporation, provides a new and distinct justification for a low-income cut-off. Further, and as noted in my first report, inflation alone would justify an adjustment to the low-income cut-off from $60,000 to $79,200 (based on the CPI) or $87,000 (based on the IAI).

III THE IMPACT OF RE-EMPLOYED WORKERS ON THE IAI

In February 2020, there were 16,749,864 persons employed in Canada, according to the Survey of Employment, Payrolls and Hours (SEPH). This is the Statistics Canada Survey from which the IAI is calculated. In that same month, the IAI was $1,045.53 per week.

As shown in Table A, since February 2020, employment and the IAI have followed the now familiar pandemic-induced inverse relationship – that is, as employment fell, the IAI generally increased and as employment increased, the IAI generally fell. This reflects the attrition from employment of lower wage workers at the beginning of the pandemic and their gradual re-entry into employment.

Table A[1]
Employment and IAI, January to December 2020

Month	Employment	IAI
January	16,785,486	$1,047.92
February	16,749,864	$1,045.53
March	15,826,509	$1,047.79
April	14,016,162	$1,116.30
May	13,495,079	$1,139.14
June	14,125,825	$1,116.81
July	14,875,252	$1,113.42
August	15,185,020	$1,109.63
September	15,522,214	$1,107.99
October	15,714,183	$1,103.72
November	15,672,497	$1,109.55
December	15,706,629	$1,115.14

[1] The data in this table are seasonally adjusted. Seasonally adjusted data are appropriate because the impact of regular seasonal factors that affect wages and employment, that would have been expected independent of the pandemic, are removed from the data.

As is evident from Table A, compared to employment of 16,749,864 in February 2020, there were [16,749,864 – 15,706,629 =] 1,043,235 fewer Canadians employed in December 2020.

It would be expected that, as the pandemic continues to recede and lower wage workers resume employment, there will be downward pressure on the IAI and that some (or all) of the component of the IAI increase experienced in 2020 attributable to the attrition from employment of lower wage workers would be reversed in the subsequent year (or years).

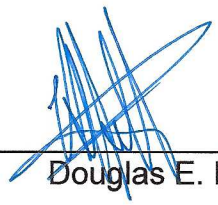
The outstanding issue is the extent to which there will be general increases in wages in 2021. Such wage increases would offset the decline in the IAI associated with re-entering lower wage workers. Forecasts of general wage increases for 2021 are, on their own, of limited assistance. This is because the IAI is a measure of the average weekly wage and depends not only on the wage rate (e.g., dollars per hour) but also the number of hours worked. An increase in the hourly wage rate could, for example, be offset in the calculation of the IAI by a concurrent reduction in hours worked. Consequently, projections of change in the rate of pay must be accompanied by changes in the hours of work to arrive at an estimate of changes in the IAI.

The following two caveats merit emphasis:

- If those who re-enter employment in 2021 earn lower wages than those who returned to work in 2020, then there will be further downward pressure on the IAI in 2021 and possibly beyond. It merits emphasis that the hospitality, food and beverage services, and accommodation industries have been slower to recover and, consequently, to hire workers.

- If those entering employment in 2021 are doing so at higher weekly wages than those in 2020, as might be the case if lower wage jobs are permanently lost or if the recovery from the pandemic is slower in those industries where lower paid workers are concentrated, then there will be upward pressure on the IAI.

As low wage workers return to employment now and in the coming years until the business impact of the pandemic has fully subsided, we would expect continuous downward pressure on the IAI.



Douglas E. Hyatt

EXHIBIT B – SECOND REPORT OF STÉPHANE LEBLANC AND ANDRÉ PICKLER

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21 April 2021

Cost to Replicate the Judicial Annuity

Dear Mtre. Bienvenu,

In connection with the representation of the Canadian Superior Courts Judges Association and the Canadian Judicial Council before the Judicial Compensation and Benefits Commission, you have requested our comments regarding the following question:

At paragraphs 135 to 139 of his report,[1] Mr. Gorham calculates the additional cost to a lawyer to replicate the judicial annuity. Please consider the assumptions made by Mr. Gorham in calculating this additional cost at 11.67%. In reaching this conclusion, has Mr. Gorham considered all available tax planning tools and if not, do those tools have any impact on his valuation.

In the above-mentioned paragraphs of Mr. Gorham's report, he explains that in order to replicate the benefit of the Judicial Annuity, a self-employed lawyer would need a combination of RRSP contributions and contributions to an investment plan. Per paragraph 137 of Mr. Gorham's report "(…) *The tax impact of an RRSP is similar to the tax impact on the Judicial Annuity. But the effect of taxes on an investment plan are very different. Contributions are made with after-tax dollars; any investment income is immediately taxable and withdrawals from the plan are tax-free*"[2]

In the actuarial report prepared by Mr. Gorham, he seeks to calculate the "total value" of the Judicial Annuity. As part of this valuation, he includes the cost for a self-employed lawyer to replicate the Judicial Annuity. Mr. Gorham does not appear to consider the fiscal advantages available to lawyers through incorporation of a professional corporation. As discussed in our previous report entitled "Fiscal Advantages of Incorporation for Lawyers" dated March 26, 2021, there is a possibility of a large tax deferral through the implementation of a professional corporation. The tax deferral is achieved since income left within a professional corporation would be subject to lower tax rates compared to income tax rates if the income was earned directly by a self-employed lawyer. The tax deferral would allow the professional corporation to invest more after-tax income towards a pension than if the income were earned directly by a self-employed lawyer. The tax deferral made available through the professional corporation would result in the lawyer being able to accumulate a greater amount of wealth for their retirement and reduce the additional cost to replicate the Judicial Annuity. The additional cost to replicate the Judicial Annuity, calculated at 11.67% by Mr. Gorham would be overstated due to the fact that the tax deferral available through incorporation of a professional corporation has not been taken into consideration.

Another tax planning tool available to lawyers that Mr. Gorham does not appear to have considered is the benefit of an Individual Pension Plan ("**IPP**"). An IPP is a defined benefit registered pension plan set-up generally for an owner of a corporation. The IPP is sponsored by the employer and funded by actuarially

[1] Peter Gorham, Compensation Review of Federally Appointed Judges for the Department of Justice Canada regarding the 2020 Judicial Compensation and Benefits Commission, 26 March 2021 (the "**Report**").
[2] Paragraph 137 of the Report.

determined employer contributions. An IPP allows higher maximum contribution limits than an RRSP and company contributions are deductible from their taxable income. In an RRSP, contributions are limited to 18% of income. For an IPP, the contribution limit increases with age, and as of age 50, the limit exceeds 18%. The utilization of an IPP by a lawyer through a professional corporation would result in even greater tax savings and would further reduce the additional cost to replicate the Judicial Annuity.

With the increased number of lawyers using professional corporations for tax deferral and other savings opportunities, we believe that the additional cost at 11.67% as stated in Mr. Gorham's report would be overstated and does not reflect the true additional cost for a lawyer to replicate the Judicial Annuity. As we had previously reported, the use of professional corporations most certainly leads to the CRA data on self-employed lawyers understating the income levels of lawyers in private practice. By failing to consider the use of professional corporations in valuing the cost for a lawyer to replicate the Judicial Annuity and overstating this cost, Mr. Gorham has highlighted the problem with the CRA data, in that it omits a significant number of lawyers earning through professional corporations and benefiting from the tax and savings advantages this vehicle provides.

If you have any further questions, please do not hesitate to contact us.

Sincerely,

Ernst & Young LLP

Stéphane Leblanc, CPA, CA / Andre Pickler, CPA, CGA
Partner / Manager
Stephane.Leblanc@ca.ey.com / Andre.Pickler@ca.ey.com

EXHIBIT C – REPORT OF SANDRA HAYDON

SANDRA HAYDON
— & ASSOCIATES —

April 30, 2021

Pierre Bienvenu, Ad. E.
Senior Partner
Norton Rose Fulbright Canada LLP
1 Place Ville Marie, Suite 2500
Montréal, Québec
H3B 1R1

Dear Mr. Bienvenu,

Please find enclosed my observations related to the reports of Mr. Gorham of JDM Actuarial and Mr. Szekely of Columbia Pacific Consulting that have been provided in support of the Government of Canada's submission to the Judicial Compensation and Benefits Commission (the Commission).

Mandate

I have been asked by counsel for the Canadian Superior Courts Judges Association and the Canadian Judicial Council to comment on two issues.

- The use of comparators other than the traditional DM-3 comparator and self-employed lawyer comparator, i.e. physicians, public sector lawyers, law school deans, and judges in other jurisdictions, in the report of Mr. Szekely.

- Mr. Gorham's criticism of the use of filters in the analysis of CRA data on self-employed lawyers.

While my report focuses on these two core issues, my report begins with a short profile of the role and perspective of a compensation professional based on my experience of more than twenty-five years (see also my resume at Appendix A). I highlight a number of methodological concerns with the approach of both Mr. Gorham and Mr. Szekely. I believe, generally, that the differences in our respective approaches and conclusions are in part explained by the differences in our professional experience, areas of expertise and related professional practices and perspectives.

Compensation Research

I have had an opportunity to provide input to the Rémillard Commission and now the present Commission, which has required a detailed reading of past submissions and reports. In my 25+ years of experience, there are few compensation discussions that are as complex as this undertaking.

As a compensation consultant, it is somewhat surprising that every four years, similar debates play out between the parties with respect to market compensation research data. While I appreciate that there are differences of opinion between the parties, in general there is some degree of consistency from past Commissions on the following:

- DM-3s should be considered a comparator in setting judicial compensation. As a compensation professional, I consider the data on DM-3 compensation to be very robust in that each of theoretical ranges, including mid-points, and target levels of

performance-based pay are available, as are the actual average compensation levels based on both base and performance pay. It is atypical to have data that is this fulsome.

- The data available on self-employed lawyer income, the second comparator, comes from the Canada Revenue Agency (CRA). Unlike DM-3 compensation, where the data is complete, the CRA data has major gaps, including the absence of data from professional corporations, which materially reduces the pool of lawyers in the available CRA data. Past Commissions have applied the following filters to the available CRA data:
    - Use of a bracketed age population that reflects the age range of the majority of judicial appointees;
    - Use of a threshold for low-income exclusion; and
    - Use of a percentile of the defined market.

The regional filter of top 10 CMAs was not given much weight by the Rémillard Commission, and this issue will be addressed further below.

One of the foundations of compensation research is a degree of consistency over time in the use of comparators in order to maintain confidence in the data collection and related analytical process. This process is undermined when the comparators are questioned every cycle, without evidence being brought to justify a proposed change.

Report of Mark Szekely, Columbia Pacific Consulting Ltd.

Mr. Szekely notes that he was asked to comment on two matters on behalf of the Department of Justice:

1. How does the salary of a federally appointed judge in Canada compare with that of other high-level professionals in Canada?

2. How does the salary of a federally appointed judge in Canada compare to that of judges in other jurisdictions?

I recognize that this was the mandate given to Mr. Szekely. However, if a compensation professional were asked to comment on the above questions, necessity and relevance would be the governing considerations.

The first order of business would be to ask what need there is to disrupt the existing comparators, and if there is a need, the second step would be to determine the relevance of the proposed additional comparators. In light of the fact that the existing comparators have been consistently confirmed by past Commissions, there is no need to disrupt them from a compensation professional's point of view. A compensation professional seeks to guard against an unwieldy analytical exercise. The broader the comparator data profile, the greater the risk of losing the usefulness of the comparative exercise in that there is too much variation to justify defensible comparisons. The problem with introducing comparators like public-sector lawyers and law-school deans is that it then raises the question of why the analysis should stop at these new comparators. Why not then continue to add more comparators, like the chairs of securities commissions?

As for relevance, a compensation professional would consider physicians to be an irrelevant comparator in the exercise at hand. Cross-occupational comparisons as an input to

compensation determination would not be considered a defensible compensation methodology, unless there are underlying principles in common like there are for DM-3s and judges.

Finally, inter-country comparisons would also be rejected as an appropriate methodology. One of the challenges with comparing the Canadian judiciary with judges in other countries is the number of unknowns related to the comparability and commonality of the work, compounded by the lack of knowledge related to other forms of compensation to allow for a calculation of total compensation. In addition, there is no information about, for example, incomes of private-practice lawyers. In my opinion, the presentation of raw compensation data from other countries is of little value to the Commission's more robust and rigorous inquiry.

Report of Peter Gorham, JDM Actuarial Expert Services Inc.

I was asked to comment on that portion of Mr. Gorham's report relating to the CRA data on self-employed lawyers and the question of the use of filters. From a compensation professional's perspective, the methodology and approach of Mr. Gorham result in an overwhelming amount of data that serves to muddy the waters rather than bringing clarity.

Despite recognizing the need to tailor the market from which data is drawn – not all data is relevant, and the wrong data can be detrimental – Mr. Gorham argues that the full 15,500+ in the CRA database of self-employed lawyers across Canada are relevant for a determination of judicial compensation. He argues this, recognizing that a significant component of data is missing due to the use of professional corporations and the exclusion of this data. According to Mr. Gorham, based on his $509,400 calculation of total judicial compensation, this approximates the 88th percentile of all self-employed lawyers in Canada.

The benchmarking exercise is somewhat more complex than that simple conclusion would suggest.

Mr. Gorham's claim of the 88th percentile disregards past Commissions' general support for age, low-income, and percentile filters. As table 1 below illustrates (borrowing from the Gorham report), the level of compensation can vary dramatically depending on the filters used. Mr. Gorham's report includes this information and it is included in table 1 for comparison.

Table 1 – Market Data, All Canada

Age	>$60k	>$80k	70th – 75th Percentile	75th – 80th Percentile	75th Percentile
All			$252,250	$297,680	
All	√		$334,190	$391,910	
All		√	$362,950	$425,920	
44 - 56					$360,000
44 - 56	√				$460,000
44 - 56		√			$480,000

All the figures need to be understood through the lens that CRA data underreports the actual income of self-employed lawyers given the wide use of professional corporations, as reported by Messrs. Leblanc and Pickler of EY Canada. It should be noted that the above table is for all of Canada, without application of the filter for top 10 CMAs. The dollar figure is $550,000 at the 75th percentile, $80,000 low-income cut-off for the 44 – 56 age range, in the top 10 CMAs. The latter filter is addressed further below. Mr. Gorham expresses concern about the reduction in the size

of the database if filters are used. The use of filters in statistical data analysis is a critical step in framing relevant information and doing so inevitably reduces the size of the sample. The concern should not be focused on the fact that the sample size is reduced, but rather in asking both whether it is the right sample segment and whether the sample is robust such that it can be relied on with confidence.

The Government also expresses concern about the residual sample size once filters are applied. At page 33 of their submission, they provide a graphic where a proportion of 19% of the total 15,500+ observations remains after the judiciary's proposed key filters are applied – the 44 - 56 age range, top 10 CMAs, and $80,000 low-income cut-off. However, this 19% represents 2,990 observations and that is a very large number, and certainly sufficient for a compensation professional to rely upon with confidence.

In my report of 2016 for the Rémillard Commission, my key conclusion, which remains relevant, was that age and income filters serve as reasonable proxies for the missing methodological step of direct quality job matching. Quality job matching, an exercise that can only be indirectly applied to judges given the sui generis nature of the position, is always a first step in compensation research to narrow the field to the most relevant comparators. The relevance of the proxy used for this indirect quality job matching - in this case the CRA data on self-employed lawyers - depends on the use of such filters as age and income, as well as region.

It bears repeating, as I noted in 2016, that transparency, consistency and ease of understanding are important objectives in the presentation of data. Compensation research is not simply the application of statistical methods of weighted averages and percentiles. It is, rather, the application of judgement, context and filters to ensure that data is the best available data, not simply all available data. The analysis is a holistic one rather than a series of single observations. My full 2016 report is included in the judiciary's Book of Exhibits and Documents (at page 325 of the pdf).

The inclusion of all data is a major flaw in market compensation data analysis practice. In compensation analysis, it is neither relevant nor useful to include all data, and it may be detrimental to arriving at the right, or at least, the best answer. By way of comparison, one can take the example of an organization recruiting a chief financial officer (CFO). While it is true that financial analysts are feeder groups for future CFOs, they bring neither the business acumen, experience-based knowledge nor the networks required of a CFO. The case is similar for lawyers in their early career – they are the feeder group, but are years or decades away from having the skills required for judicial appointment. Accordingly, including all 15,500 data points from the CRA data, as Mr. Gorham does in his analysis, creates a distraction. This is especially so since the age range of 35 – 69 does not represent the actual range of the ages of judicial appointees in the demographics data before the Commission.

As the data makes clear, the majority of judicial appointments occur between 44 - 56 years of age. It is the target population that justifies its use. Equally important to guard against is the tendency to add too many irrelevant observations to the database, which can distort the data and provide an outcome that will be of limited assistance to the Commission. Perhaps most importantly, past Commissions have accepted and used the age filter of 44 - 56. Continuing to use that age filter ensures comparability across the reports. While there are many reasons to not change the filter, Mr. Gorham has not offered a compelling reason to expand it.

My 2016 report also included comments related to the use of a low-income cut-off, arguing that the application of a low-income cut-off of $80,000 was conservative and that a cut-off of $100,000 would be more appropriate. Similar to the work performed by the age filter, the

income filter serves to refine the database to more accurately profile the target appointment population.

The use of a low-income filter remains my view and an $80,000 threshold is supported both by the math for an inflation-based adjustment, and also by Robert Half's 2021 legal profession salary guide where they report that $81,000 is the salary of a first-year associate in Canada at the 75th percentile (see page 22). Robert Half's guide defined its 75th percentile as reflecting experience and high calibre talent. The consideration of the 75th percentile in the CRA data is addressed below.

Mr. Gorham further suggests revising the comparator profile by proposing a high-income cut-off of $650,000. In compensation research and analysis, there is no basis for this. Mr. Gorham states that high income in many situations is reflective of personal attributes of "hustle" and a "focus on financial rewards." Moreover, he suggests that these qualities are not commensurate with the requirements for judicial appointment. It may also be the case, in fact it is more likely the case, that high income reflects results and outcomes based on expertise and skill. In short, the market, the client, is willing to pay a premium when warranted by results. Specialization and subject matter expertise are major drivers of compensation differentials in a wide range of occupations and they are a normal component of compensation research. Speculation based on a set of personal attributes in order to dismiss high income earners is not helpful to the question at hand. The determination of compensation levels in order to recruit the best possible talent must include the income data that reflects the monetary recognition of specialization and subject matter expertise - no doubt a reflection of some of Canada's best legal professionals.

As for the application of the 75th percentile to the CRA data, that percentile tends to be the bottom target where the goal is the attraction of exceptional or outstanding individuals. Indeed, use of a higher percentile would be justified but a lower one would certainly not be warranted for the analysis at hand.

I would apply the same approach to the regional filter as I do to the age filter. Just as the 44-56 age band represents the age range of the majority of appointees, the top 10 CMA filter represents the areas from which the majority of judges are appointed. Geography should serve as a guide. Salary exclusion and age-cohort modelling provide useful data for the determination of compensation, and geography should be considered on top of that given the predominance of the metropolitan areas of the appointees. When each of the available filters is applied in a reasonable manner, there is a significant gap between the judicial salary in 2019, which was at $329,900, and the income of self-employed lawyers. As I mentioned earlier, the latter income is itself underreported given the use of professional corporations.

Conclusion

Compensation research faces a range of challenges given the unwieldy nature of market data. Data arrives in different forms, measuring different elements, and using a range of different methodologies for analysis and reporting. While variation in approach is expected, there are perhaps two areas where one finds broad agreement in compensation practice.

1. Filters are appropriate, indeed necessary, as a tool for refining a database to provide the best possible information for decision-making.

2. In determining compensation levels, occupation and country are givens – there is no compelling argument to look outside of the key occupation (and level, where available)

for which you are seeking data, and there is no reason in this instance to look beyond Canada.

Introducing new parameters without sufficient justification – different countries, new occupational groups, different data cuts or new filters – undermines the importance of consistency and certainty in broader compensation strategy or design. The reports of the various Commissions speak to a certain consistency in methodology and this lends credibility to the benchmarking process and the ability to discern trends over time, which itself will help the Commission in the future.

The use of filters in compensation analysis is not only a reasonable methodological choice, but is a methodological imperative to ensure that the data that is used is the best the data for the question at hand. The availability of data does not necessarily equate to relevance. Filters are the means for refining the data set to provide the most useful data.

The definition of an appropriate market profile may change but only where there is supporting evidence. Based on my review of the reports of Mr. Szekely and Mr. Gorham, this evidence has not been provided.

Sincerely,

Sandra Haydon
Principal

Appendix A – Sandra Haydon Resume

Profile

Sandra Haydon brings 25 years of experience in developing compensation strategies including determining governing compensation philosophy, assessing market competitiveness and determining levels of pay for both base salary and incentive pay programs. Sandra works with clients in both the public and private sectors.

In addition to client-specific projects to design and implement new compensation models, Sandra has also led a number of broad compensation strategy projects including for the governments of Ontario, Manitoba and Saskatchewan. Sandra has also served as a subject matter expert in compensation, job evaluation and pay equity arbitration.

While with Deloitte, Sandra led a number of national compensation surveys including (i) for the broad Canadian culture sector with a focus on museums and art galleries, (ii) Canadian information technology professionals with a focus on Canadian regional variation, and (iii) core government roles from across different provinces. Sandra has also led dozens of smaller, market compensation research studies with a focus on specific occupations including lawyers.

Sandra was with Deloitte Consulting for 17 years, until 2013, where she served in a number of leadership roles including Human Capital Public Sector Lead (Toronto) and as the National Practice Leader for Compensation Services. Sandra established Sandra Haydon & Associates Inc. in January 2014.

Education and Professional Training

Doctoral studies, Social and Political Theory
York University (1997)

Doctoral studies, Literature
Queen's University (1995)

Master of Arts, Literature
Carleton University (1993)

Bachelor of Arts, Sociology and Literature
Carleton University (1992)

Advanced Program in Human Resources
Rotman School of Management
University of Toronto (2005)

Certificate in Board Governance
Schulich School of Business
York University (2007)

Select Project Profiles

Arnet Panel on Executive Compensation in Ontario's Crown Sector

The Arnet Panel was commissioned by the Province of Ontario to review executive pay within Ontario's crown corporation energy sector. Given the national and international context of the energy sector, market pricing was undertaken provincially, nationally, and globally. Ms. Haydon worked with the Panel to provide subject matter expertise on public sector executive compensation practices. Input from the review was used by Mr. Arnett to provide advice and guidance to the Ontario Minister of Finance and the Minister of Energy.

Province of Ontario, 10 Year Compensation Strategy

Ms. Haydon led a project on behalf of the Secretary of Cabinet to undertake a comprehensive review of the Province's compensation strategy for its, at the time, 60,000 employees. The final report provided recommendations focused on balancing fiscal responsibility (constraint) and public scrutiny with a model that would support a performance based culture. This required harmonizing different sector pressures, varying geographies, as well as working across multi union and non-union workforces.

Manitoba Crown Council

Ms. Haydon was the project director for a comprehensive review of the Province's crown corporation executive compensation strategy leading to a series of recommendations for a tiered approach, balancing the unique operating models of each of the crowns with the ability to attract and retain sector-specific leadership. As with all public sector organizations, designing a model that ensured policy transparency was paramount.

Crown Investment Corporation of Saskatchewan (CIC)

Ms. Haydon has worked on a number of projects for CIC, most notably the design of an executive compensation framework for each of the Province's crown corporations. CIC required an outcome balancing the unique operating environments of each crown organization – energy, telecom, insurance – with the need to have a unified provincial approach. Working with CIC, a tiered model was designed that ensured a balance of sector specific drivers (while meeting the need for public transparency.

Canada Pension Plan Investment Board

Ms. Haydon led a review of CPPIB's compensation strategy, models and levels of pay for the organization's 5 year Special Exam under the direction of the Office of the Auditor General. As with many revenue generating public sector organizations, a key challenge was competitive pay, particularly in light of the organization's location in Canada's financial centre, Toronto.

Additional Clients

- National Defense Morale and Welfare Services
- Export Development Corporation
- Office of the Children's Lawyer of Ontario
- Ontario Lottery and Gaming Corporation
- Office of the Children's Lawyer of Ontario
- Ontario Lottery and Gaming Corporation
- Saskatchewan Worker's Compensation Board
- Carleton University
- Senate of Canada
- National Research Council
- NAV Canada
- City of Regina
- City of London
- Ottawa Police Services
- Public Safety
- Canada Post

EXHIBIT D – REPORT OF DEAN NEWELL

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April 29, 2021

Mr. Pierre Bienvenu, Ad. E.
Senior Partner
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Montréal, QC H3B 1R1

VIA EMAIL

RE: Judicial Compensation and Benefits Commission – Value of the Judicial Annuity – Review of Gorham Report

Dear Mr. Bienvenu:

Introduction

As per your request, I have reviewed the report entitled Compensation Review of Federally Appointed Judges dated March 26, 2021 prepared by Mr. Peter Gorham for the Department of Justice regarding the 2020 Judicial Compensation and Benefits Commission (the "Gorham Report"). In particular, you have asked that I answer the questions related to the Gorham Report that are outlined in the section below.

As you are aware, this is the second time that I have been directly engaged by Norton Rose Fulbright Canada LLP, themselves acting on behalf of the Canadian Superior Courts Judges Association and the Canadian Judicial Council, to calculate the value of the Judicial Annuity for Federally Appointed Judges. In March 2016, I prepared a report (the "2016 Newell Report") regarding the value of the Judicial Annuity for Federally Appointed Judges.

Furthermore, in January 2012, I assisted Brian FitzGerald of Capital G Consulting Inc., himself engaged by Norton Rose Fulbright Canada LLP, themselves acting on behalf of the Canadian Superior Courts Judges Association and the Canadian Judicial Council, in preparing his report (the "2012 FitzGerald Report") regarding the value of the Judicial Annuity for Federally Appointed Judges.

I have been a Fellow of the Canadian Institute of Actuaries since 2005. Since that date, I have continuously practiced as an actuary, primarily in the area of pension plans, providing consulting services on the design, administration, and financing of such plans, and providing advice on the requirements for compliance with applicable legislation and the administrative rules of the pension regulators. Since 2005 I have been directly involved with the preparation of pension plan actuarial valuations, both as signing actuary and internal peer reviewer. I have also been engaged on many occasions to provide an independent review of another actuary's work. Appendix E provides my Curriculum Vitae.

As will be evident from my CV, I have no legal training. However, in the course of my work I am required to read and understand legal documents relating to pension plans. Nevertheless, when I refer to such documents, it is not with any intent to offer any legal opinion as to their meaning, as I defer to legal counsel for such interpretations.

My understanding of the Judicial Annuity provisions is based on my interpretation of the plan provisions outlined in the actuarial report on the Pension Plan for Federally Appointed Judges as at March 31, 2019 prepared by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions (the "2019 OSFI Report"), as well as the relevant provisions of the *Judges Act*. A summary of my understanding of the provisions of the Judicial Annuity is included in Appendix A.

While I have relied upon counsel to provide me with the necessary background information in order to prepare this letter, the opinions contained in this letter are entirely my own. In my opinion, I have been provided with sufficient information to complete this assignment based upon its scope. Appendix D provides a list of the documents that were made available to me for the preparation of this letter.

Background

When comparing the total compensation of federally appointed judges with the total compensation of lawyers in private practice, it is appropriate to consider the value of the benefits received by the judges from the Judicial Annuity.

I understand that the Judicial Annuity is compulsory for all federally appointed judges. The benefits provided by the Judicial Annuity for judges who meet specific eligibility criteria include retirement and disability annuity benefits, and pre-retirement death benefits.

Furthermore, I understand that the Judicial Annuity is financed by contributions by the judges, who are required to contribute 1% of salary to the Supplementary Retirement Benefit Account, and if not eligible for an unreduced annuity, 6% of salary to the Consolidated Revenue Fund. The government deemed contributions are the excess of the plan benefits paid from the Consolidated Revenue Fund over the contributions by the judges thereto. For greater clarity, the Judicial Annuity is financed through the Consolidated Revenue Fund primarily on a pay-as-you-go basis rather than being financed on a pre-funded basis as are the other major pension plans sponsored by the Federal Government.

Questions and Answers on Gorham Report

Question 1

Comment on how Mr. Gorham's opinion on the value of the Judicial Annuity relates to the approach of the Commission in the past.

Answer 1

In determining the total value of the Judicial Annuity, Mr. Gorham first calculates the total value of the pension and disability benefits, net of the judges' contributions, and then adds an additional cost to replicate the Judicial Annuity recognizing the income tax treatment that self-employed lawyers would realize if using a combination of RRSP contributions and contributions to a taxable investment plan. In the Gorham Report, the Weighted Average of the Total Value of the Judicial Annuity is calculated as 49.51% - inclusive of a Weighted Average for the Total Value of Pension and Disability Benefits Net of Judges' Contributions of 37.84%, and a Weighted Average for the Additional Cost to Replicate the Judicial Annuity of 11.67%.

Furthermore, when Mr. Gorham calculates Base Judicial Total Compensation, there is a further adjustment for the fact that Canada Pension Plan Contributions are entirely paid by self-employed lawyers, whereas Judges have half of the Canada Pension Plan Contributions paid by their employer. This adjustment increases the Base Judicial Total Compensation by $3,166 in the Gorham Report.

Using the calculations above, Mr. Gorham has calculated the Weighted Average Base Judicial Total Compensation as $509,400 for the period April 1, 2020 to March 31, 2021.

The report of the fifth Judicial Compensation and Benefits Commission, the Rémillard Commission, addresses the value of the Judicial Annuity. As noted in that report, both the Government and the Association and Council retained experts to value the Judicial Annuity. The value calculated by Mr. Pannu, the Government's expert, concluded that the value of the annuity was 32.0%, plus 4.5% for the disability benefit, of a judge's annual income (see the 2016 Pannu Report); whereas the value I calculated in the 2016 Newell Report was 30.6%.

It is my understanding that the Weighted Average for the Total Value of Pension and Disability Benefits Net of Judges' Contributions calculation of 37.84% by Mr. Gorham noted above - itself which has a Weighted Average Pension Value Net of Judges' Contributions of 32.74% and a Disability Value of 5.10% - uses a similar methodology to the value of the Judicial Annuity of 32.0%, plus 4.5% for the disability benefit, calculated by Mr. Pannu in 2016. My calculation of the Judicial Annuity of 30.6% in the 2016 Newell Report is also comparable to these calculations, even though my calculation did not use a disability assumption, and value a distinct disability benefit, as part of the Judicial Annuity.

For greater clarity, the value of the Judicial Annuity noted in the report of the fifth Judicial Compensation and Benefits Commission did not include an additional cost to replicate the Judicial Annuity recognizing the income tax treatment that self-employed lawyers would realize if using a combination of RRSP contributions and contributions to a taxable investment plan – which Mr. Gorham has valued with a Weighted Average value of 11.67%; nor did it include an adjustment for the Canada Pension Plan Contributions – which Mr. Gorham has valued as an adjustment to Base Judicial Total Compensation of $3,166. In fact, to my knowledge, no past Commission has included these adjustments in calculating the value of the Judicial Annuity.

More specifically, the report of the fifth Judicial Compensation and Benefits Commission increased the Judicial Salary by the 30.6% value of the Judicial Annuity that I had calculated in the 2016 Newell Report, and also increased the Judicial Salary by the 32% value of the Judicial Annuity calculated by Mr. Pannu without the disability assumption, and then compared these amounts against the 75th percentile of average private sector income for self-employed lawyers between the ages of 44 and 56.

It is interesting to note that the 2016 Pannu Report included an alternative calculation of the Judicial Annuity which considered the cost for a self-employed lawyer to fund a similar benefit using a combination of RRSP contributions and contributions to a taxable investment plan. This alternative calculation produced a weighted average value of 43.7% of pay for a self-employed lawyer to fund an equivalent benefit to the Judicial Annuity. However, this calculation was not addressed in the report of the fifth Judicial Compensation and Benefits Commission

Nevertheless, this report did state:

> We agree with the Levitt Commission regarding the superiority of the judicial annuity to alternatives available to private sector lawyers. This must be taken into account in arriving at a comparison between private sector lawyers and the judiciary. However we did not have any evidence placed before us on the value of various other benefits, including disability, in the private sector.

I have not seen, in either Mr. Gorham's report or the Government's submission to this Commission, any reference to evidence of the benefits, including disability benefits, available in the private sector.

In short, Mr. Gorham's opinion on the value of the Judicial Annuity differs from the approach of the Commission in the past.

Question 1a)

What has the Commission's approach been to the disability benefit when arriving at the value of the Judicial Annuity?

Answer 1a)

As noted in the answer above, it is my understanding that the fifth Judicial Compensation and Benefits Commission did not factor in the disability benefit when determining the value of the Judicial Annuity.

It is also worth noting that, in 2012, Mr. FitzGerald stated that the decision as to whether the disability benefit should be included in the value of the Judicial Annuity is a matter to be agreed between the parties - and that it is not an actuarial decision. Mr. FitzGerald then noted that other benefits such as group insurance were also excluded from the value.

In 2012, Mr. Sauvé, an expert hired by the 2011 Judicial Compensation and Benefits Commission, agreed with Mr. FitzGerald that the valuation of the disability benefit should be made as part of a broader benchmarking exercise including group insurance benefits - and should therefore not be included in the valuation of the Judicial Annuity. In coming to this conclusion, it was noted that long term insurance benefits are typically funded directly by individuals so that they can be paid on a tax-free basis, and thus the employer-paid portion of these benefits, and the resulting compensation value, is nil.

I agree with Messrs. Sauvé and FitzGerald in their approach to the valuation of the disability benefit.

Question 1b)

What was the methodology leading to the figures of 32.74% and 37.84%, respectively, arrived at by Mr. Gorham for the pension value and total value of pension and disability?

Answer 1b)

The Gorham Report at paragraphs 122 through 134 provides a detailed explanation of the methodology, and assumptions, he used to calculate his Weighted Average values of 32.74% for the Pension Net of Judges' Contributions and 37.84% for the Total Value of Pension and Disability Net of Judges' Contributions.

Broadly speaking, the methodology determines the amount of funds, expressed as a percentage of earnings, required as a contribution in each year of service up to retirement to replicate the benefits provided under the Judicial Annuity.

It is noted that the amount of funds, expressed as a percentage of earnings, required to replicate the Judicial Annuity varies greatly depending on the age of appointment of a judge. For this reason, a value is determined at various ages of appointment from age 40 through 69 (although age 68 is the oldest age of appointment in the data from January 1, 1997 to October 23, 2020), and then a weighted average of these amounts is determined using data on historical judicial appointments. It is worth noting that when determining the weighted average, Mr. Gorham has used actual appointment ages for judges appointed between April 1, 2011 to October 23, 2020.

Question 1c)

What figures do you arrive at using the same methodology?

Answer 1c)

Using the same methodology as outlined in the Gorham Report, but a different set of assumptions that I have selected as my "best estimates", and a weighted average using actual appointment ages for judges during the period January 1, 1997 to October 23, 2020, I have calculated a Weighted Average value of 31.7% for the Pension Net of Judges' Contributions and a Weighted Average value of 36.7% for the Total Value of Pension and Disability Net of Judges' Contributions.

For additional details on the assumptions and appointment age data used in my calculations, please refer to Appendix B and C.

I wish to observe that some of the key assumptions Mr. Gorham uses are more conservative than mine, which will push the valuation higher – but I believe the assumptions he selected are still within the range of accepted actuarial practice. Notable differences include a discount rate of 4.50% per annum (versus 5.0% per annum in my calculation), and a salary increase rate of 3.0% per annum (versus 2.5% per annum in my calculation). Also, there are other assumptions in which we have slight differences (e.g. mortality assumption, retirement age assumption, surviving spouse assumption).

In addition, it is worth repeating that Mr. Gorham used a slightly different dataset for the weighted average - namely using actual appointment ages for judges appointed between April 1, 2011 to October 23, 2020. I wish to observe that the average appointment ages were slightly higher during the period April 1, 2011 to October 23, 2020 as compared to the entire period January 1, 1997 to October 23, 2020, resulting in a Weighted Average value that is approximately 1.0% higher.

Furthermore, I wish to note that I was unable replicate Mr. Gorham's calculation of the Judicial Annuity using the assumptions he had selected. At this time, I have not had an opportunity to attempt to reconcile these differences with Mr. Gorham.

Question 1d)

What value of the Judicial Annuity do you arrive at without including the disability benefit?

Answer 1d)

When valuing the Judicial Annuity without including a disability assumption, I calculate the Weighted Average Benefit Value, or Weighted Average Total Value of Pension Net of Judges' Contributions, to be 34.1%. More specifically, using the methodology, assumptions, and data noted below, **I have calculated the value of the Judicial Annuity to be 34.1% as expressed as a level percentage of a judge's annual income during their appointment to the bench.**

In my opinion, the methods and assumptions used to determine the value of the Judicial Annuity provides an appropriate measure of the value of the benefits which are financed by the Government of Canada in providing the Judicial Annuity. Also, in my opinion, the data on which the calculation is based are sufficient and reliable for the purposes of this calculation.

It should be understood that there are various methods and assumptions that could be used to value the benefits received by the judges from the Judicial Annuity, and that any calculation will be sensitive to the underlying methodology and assumptions. Furthermore, any calculation of the value of the Judicial Annuity may differ greatly from a judge's perceived value of the benefit.

Commentary

My calculation of the value of the Judicial Annuity that is financed by the Government of Canada, expressed as a level percentage of the judge's annual income during their appointment to the bench, is performed using the assumptions outlined in Appendix B, my understanding of the provisions of the Judicial Annuity outlined in Appendix A, and the methodology described below.

It is my understanding that the value of the Judicial Annuity may be considered when the Commission makes recommendations on judges' compensation.

The methodology used in this report expresses the value of the benefits provided by the Government of Canada under the Judicial Annuity as a level percentage of a judge's annual income during their appointment to the bench, regardless of whether they have elected to give up regular judicial duties and hold office only as a supernumerary judge under sections 28 and 29 of the *Judges Act*.

Methodology

While no actual membership data is used in my calculations, I note that the methodology described below considers the actual appointment ages for judges during the period January 1, 1997 to October 23, 2020 (see Appendix C for a summary of this data). Moreover, the methodology described below does not require actual salary data. Specifically, for the purposes of calculating the "Benefit Values" at the various appointment ages, the actuarial present value of benefits, contributions, and salaries are all determined in reference to the salary at the date of appointment.

I have performed my calculations using a method which expresses the value of the benefits provided by the Government of Canada under the Judicial Annuity as a level percentage of a judge's annual income during their appointment to the bench. Such a method represents the expected cost of providing the benefits under the Judicial Annuity during the judge's appointment to the bench.

Specifically, and consistent with the approach used in by the 2012 FitzGerald Report and the 2016 Newell Report, I have calculated a "Benefit Value" for each appointment age from 40 through 67.[1] The "Benefit Value" for each appointment age has been determined by calculating the total actuarial present value of the benefits provided under the Judicial Annuity, then reducing this value by the total actuarial present value of benefits which are funded by the judge's contributions, and then dividing the resulting value by the actuarial present value of the judge's salary during their appointment to the bench. For greater clarity, the actuarial present value calculations noted above are calculated as at the judge's date of appointment. The "Benefit Value" for appointment ages 40 through 67 expressed as a formula is as follows:

$$\text{Benefit Value}_{\text{Age x}} = \{\text{PVFBen}_{\text{Age x}} - \text{PVFCont}_{\text{Age x}}\} \,/\, \text{PVFSal}_{\text{Age x}}\text{; where}$$

$\text{PVFBen}_{\text{Age x}}$ is the Actuarial Present Value, calculated at the appointment date, of the benefits provided under the Judicial Annuity for a judge appointed at age x;

$\text{PVFCont}_{\text{Age x}}$ is the Actuarial Present Value, calculated at the appointment date, of the judge's contributions for a judge appointed at age x; and

$\text{PVFSal}_{\text{Age x}}$ is the Actuarial Present Value, calculated at the appointment date, of the judge's salary for a judge appointed at age x.

It should be understood that "Benefit Values" above vary significantly by appointment age. As a result, I have calculated a "Weighted Average Benefit Value" to determine a single value applicable to all judges.

In determining the "Weighted Average Benefit Value", I have used the following formula:

$$\begin{aligned}\text{Weighted Average Benefit Value} = {} & \{4.8\% \times \text{Average Benefit Value}_{\text{Age 40 to 43}}\} + \\ & \{19.4\% \times \text{Average Benefit Value}_{\text{Age 44 to 47}}\} + \\ & \{23.3\% \times \text{Average Benefit Value}_{\text{Age 48 to 51}}\} + \\ & \{24.6\% \times \text{Average Benefit Value}_{\text{Age 52 to 55}}\} + \\ & \{17.4\% \times \text{Average Benefit Value}_{\text{Age 56 to 59}}\} + \\ & \{8.0\% \times \text{Average Benefit Value}_{\text{Age 60 to 63}}\} + \\ & \{2.5\% \times \text{Average Benefit Value}_{\text{Age 64 to 67}}\};\end{aligned}$$

where

$\text{Average Benefit Value}_{\text{Age y to z}}$ is the arithmetic average of the "$\text{Benefit Value}_{\text{Age x}}$" from ages y to age z.

[1] It is noted that approximately 99% of judges are appointed between these ages.

The weighting rates applicable to the "Average Benefit Values" in the formula above are representative of the ages of appointment for federal judges for the period January 1, 1997 to October 23, 2020.

My calculations have been prepared using a calculation date of January 1, 2020. Nevertheless, given the nature of the calculation above, the calculation date does not have a material impact on the results of my calculation.

This methodology is consistent with the methodology I used to calculate the value of the Judicial Annuity for the 2015 Judicial Compensation and Benefits Commission (as discussed in Section 3.5 below), and the methodology used by Mr. Brian FitzGerald to calculate the value of the Judicial Annuity for the 2011 Judicial Compensation and Benefits Commission.

In my opinion, this methodology is appropriate for the purposes of expressing the value of the benefits provided by the Government of Canada under the Judicial Annuity as a level percentage of a judge's annual income during their appointment to the bench.

Assumptions

For reference, the key economic assumptions are an interest rate of 5.00% per annum, a salary increase rate of 2.50% per annum, and an inflation rate of 2.00% per annum. Appendix B provides a complete list of the assumptions used in the calculation.

For clarity, the assumptions selected for this calculation are my "best estimate" assumptions. In setting the "best estimate" assumptions, I selected assumptions that, in my opinion, are the most appropriate long-term assumption for each separate assumption, based on current conditions and available data.

In developing my "best estimate" assumptions, the interest rate assumption was developed in a manner consistent with that which would be used to measure the costs of a pension plan in a going-concern funding valuation[1] – that is, the interest rate assumption is established in reference to the expected investment return on a balanced portfolio of assets held in a pension plan. Such an approach to establish the "best estimate" interest rate assumption is, in my opinion, appropriate for the purposes of this calculation, as I consider it to reasonably reflect the judges' perceived value of the benefit provided by the Judicial Annuity.

In developing my "best estimate" assumptions for the other economic assumptions (e.g. inflation and salary increase rates), I have used assumptions that I feel are the most appropriate for the long-term, based on the current conditions and available data.

[1] But without including a margin for adverse deviations as is usually required for funding valuations for registered pension plan, as such a margin would lead to a conservative bias.

However, in developing my "best estimate" assumptions for the demographic assumptions (e.g. retirement age, mortality rates, and marital status), I have largely adopted the same demographic assumptions used by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions in their 2019 OSFI Report. In my opinion, such an approach of establishing "best estimate" demographic assumptions is reasonable since, and as noted in the 2019 OSFI Report, these assumptions are determined using the historical experience of the Judicial Annuity and are updated by the Office of the Chief Actuary to reflect past experience to the extent that they have deemed credible.[1]

For clarity, "best estimate" assumptions produce only one set of calculation results. It should be understood that "best estimate" assumptions, by their very nature, are open to judgement. Furthermore, accepted actuarial practice in Canada does not prescribe a specific set of "best estimate" assumptions; and there is no upper or lower bound on the range for each assumption codified. As a result, it should be understood that another set of assumptions – which would lead to a different calculation result – could also be considered appropriate and within accepted actuarial practice in Canada.

As noted above, the "best estimate" assumptions I have used in this calculation reflect current conditions, and the availability of new data such as the 2019 OSFI Report.

In my opinion, the use of "best estimate" assumptions outlined in Appendix B are appropriate for the purposes of expressing the value of the benefits provided by the Government of Canada under the Judicial Annuity as a level percentage of a judge's annual income during their appointment to the bench.

Calculation Results

Using the methodology outlined above, the provisions of the Judicial Annuity outlined in Appendix A, the assumptions described above and listed in Appendices B, and the judicial appointment age data from January 1, 1997 to October 23, 2020 listed in Appendix C, **I have calculated the "Weighted Average Benefit Value" to be 34.1% of a judge's annual income during their appointment to the bench.**

The methodology and assumptions used to perform this calculation are appropriate for the purposes of expressing the value of the benefits provided by the Government of Canada under the Judicial Annuity program as a level percentage of a judge's annual income during their appointment to the bench. Likewise, the data on which the calculation is based are sufficient and reliable for the purposes of this calculation. The methodology, assumptions, and data used to perform this calculation may not be suitable for any other purpose.[2]

[1] Of particular interest, the retirement age assumption does not assume that all judges will retire at the Normal Pensionable Retirement Age. Rather, probabilities are applied to judges retiring at various ages between 55 and 75, thus giving weight to judges who may retire early and receive a reduced pension, as well as weight to judges who may retire beyond their Normal Pensionable Retirement age without getting any enhancement to their pension.

[2] Including for the purpose of prefunding the benefits under the Judicial Annuity, as this would require a set of funding, investment, and risk management policies specific to the circumstances.

Sample Calculations

Below I have provided additional details of the calculations noted above at sample ages. Specifically, I provided the details of the "Benefit Value$_{Age\ 40}$" and "Benefit Value$_{Age\ 65}$" calculations.

The results of the calculations for "Benefit Value$_{Age\ 40}$" are as follows:[1]

Benefit Value$_{Age\ 40}$ = {PVFBen$_{Age\ 40}$ – PVFCont$_{Age\ 40}$} / PVFSal$_{Age\ 40}$

Benefit Value$_{Age\ 40}$ = {$1,873,000 – $387,600} /$6,906,500

Benefit Value$_{Age\ 40}$ = 21.5%

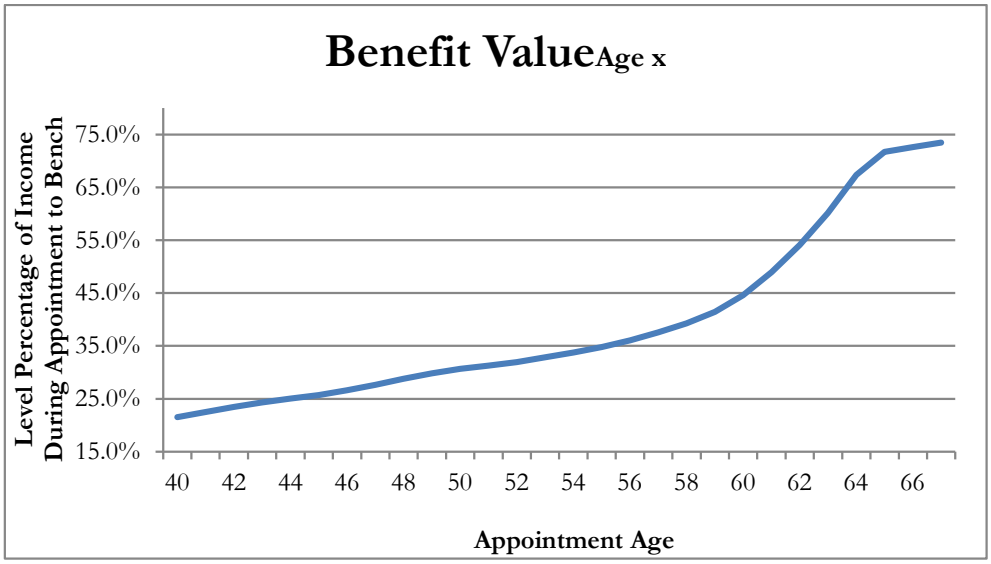
The results of the calculations for "Benefit Value$_{Age\ 65}$" are as follows:[1]

Benefit Value$_{Age\ 65}$ = {PVFBen$_{Age\ 65}$ – PVFCont$_{Age\ 65}$} / PVFSal$_{Age\ 65}$

Benefit Value $_{Age\ 65}$ = {$2,236,300 – $198,800} /$2,840,600

Benefit Value $_{Age\ 65}$ = 71.7%

The chart below illustrates the "Benefit Value$_{Age\ x}$" from appointment ages 40 through 67.



[1] A salary rate of $338,800 was used as the basis to calculate the actuarial present value of benefits, contributions, and salaries in these examples. While a different salary rate would alter the actuarial present value components in the formula, it would not change the net result of the "Benefit Value$_{Age\ x}$" calculation.

Comparison to Other Calculations

For clarity, this calculation of the value of the Judicial Annuity of 34.1% is distinct from my calculation of 36.7% in the question 1c above, which includes an assumption for disability. The figure of 34.1% does not include a disability assumption whereas the 36.7% figure includes a disability assumption and values a Disability Benefit inclusive in the Judicial Annuity. Similarly, my value of 34.1% is distinct from Mr. Gorham's value arrived at through his calculation of the Total Value of Pension and Disability Net of Judges' Contributions of 37.84%, which also includes an assumption for disability, and thus values a Disability Benefit inclusive in the Judicial Annuity.

For greater clarity, my calculated value of the Judicial Annuity of 34.1% should not be compared directly to values of the pension portion of the Judicial Annuity when that pension portion is calculated as part of a larger calculation of the Judicial Annuity value that includes a disability assumption. It is a case of apples and oranges. Specifically, my calculated value of the Judicial Annuity of 34.1% (apples) should not be compared directly to my calculation of 31.7% (oranges) for the value of the Pension Net of Judges' Contributions, or to Mr. Gorham's calculation of 32.74% (oranges) for the value of the Pension Net of Judges' Contributions. This is because the value of the Judicial Annuity of 34.1% (apples) does not include a disability assumption and it determines a value for the entirety of the Judicial Annuity (assuming all members would qualify for a retirement pension). In contrast, the calculation of the value of the pension portion of the Pension Net of Judges' Contribution with a disability assumption (oranges) only reflects a portion of the benefits provided by the Judicial Annuity.

Question 1e)

Please comment on the figure of 49.51% arrived at by Mr. Gorham by taking into account the 11.67% additional cost to a self-employed lawyer to replicate the judicial annuity.

Answer 1e)

It is true that lawyers in private practice would be limited in their use of 'tax-efficient' means to replicate the Judicial Annuity if they were to rely upon RRSP contributions and additional contributions to a taxable investment plan (due to the RRSP contribution limits, the taxable status of the investment plan, and the value Judicial Annuity). Nevertheless, it may be possible for lawyers in private practice to avoid these limits using other retirement savings vehicles.

As is noted in the April 21, 2021 Ernst & Young Letter, the 11.67% additional cost to a self-employed lawyer to replicate the judicial annuity would be overstated due to the fact that the tax deferral available through incorporation of a professional corporation, or the use of an Individual Pension Plan, was not taken into consideration by Mr. Gorham.

Furthermore, while the 'tax-efficient' nature of the Judicial Annuity may represent an advantage, it does not represent an additional expected cost for the Government in providing the benefit. For this reason, it may not be prudent to factor in the 'tax-efficiency' of the Judicial Annuity when considering judicial compensation.

Question 1f)

What has the Commission's approach been to the issue of adjusting for CPP contributions in the valuation of the Judicial Annuity?

Answer 1f)

It is my understanding that the Commission has not previously considered the half of the Canada Pension Plan contributions that is paid by the Government as an adjustment to increase the Base Judicial Total Compensation. For greater clarity, this has not been considered part of the value of the Judicial Annuity in the past.

Professional Standards & Actuarial Opinion

Section 4000 of the Standards of Practice of the Canadian Institute of Actuaries applies to actuarial evidence work. Relevant sections of this Standards include Section 4100 – Scope, Section 4200 – General, 4300 – Actuarial Evidence Calculations, Other than Capitalized Value of Pension Plan Benefits for a Marriage Breakdown and Criminal Rate of Interest, and Section 4700 – Reporting. This letter has been prepared in accordance with these Standards.

Section 1530 of the Canadian Institute of Actuaries' Standards of Practice provides guidance with respect to the review of another actuary's work. This letter has been prepared in accordance with these Standards.

In my opinion, the methods and assumptions used to determine the value of the Judicial Annuity provides an appropriate measure of the value of the benefits which are financed by the Government of Canada in providing the Judicial Annuity. Also, in my opinion, the data on which the calculation is based are sufficient and reliable for the purposes of this calculation.

This letter has been prepared, and my opinions given, in accordance with accepted actuarial practice in Canada.

Dean Newell
Fellow, Canadian Institute of Actuaries

April 29, 2021
Date

cc: Azim Hussain, NOVAlex
Jean-Simon Schoenholz, Norton Rose Fulbright Canada LLP

Summary of Plan Provisions Judicial Annuity	
Membership	Compulsory for all judges appointed to federal or provincial courts by the Government of Canada.
Contributions – Judges	Judges appointed after February 16, 1975: 1% of salary to the Supplementary Retirement Benefits Account, and if not eligible for a full annuity, 6% of salary to the Consolidated Revenue Fund.
Contributions – Government	The government deemed contributions are the excess of the plan benefits paid from the Consolidated Revenue Fund over the contributions by judges thereto. The Government also contributes 1% of the salary which is credited to the Supplementary Retirement Benefits Account for judges appointed after February 16, 1975.
Eligibility to Normal Pensionable Retirement	Judicial office held until age 75; or age plus years of service of at least 80 (minimum 15 years of service); or in respect only of a judge of the Supreme Court of Canada, that service may be 10 years.
Normal Pensionable Retirement	2/3 of the judge's annual salary at the time of ceasing to hold office. The annuity is reduced on a pro-rata basis if the judicial office was held for less than 10 years.
Eligibility to Early Retirement	Age 55 with 10 years of Service.
Early Pensionable Retirement	Normal Pensionable Retirement benefit above, adjusted by the following ratio: a) The numerator is the number of years during which the judge has continued in judicial office, and b) The denominator is the total number of years during which the judge would have been required to be in judicial office in order to be eligible for an unreduced annuity. Such annuity is also reduced by 5% for every year that the annuity commences in advance of age 60.
Normal Form	Married judges: Joint life and 50% survivor annuity. Single judges: Lifetime annuity.
Cost of Living Adjustments	Annuities fully indexed to Consumer Price Index each year.
Termination prior to retirement	Refund of contributions with interest.
Disability benefits	Immediate unreduced annuity payable to the judge.
Pre-retirement Death Benefits	A lump-sum benefit equal to 1/6 of salary, plus ➢ If no surviving spouse exists, a refund of contributions; ➢ If a surviving spouse exists, 1/3 of the salary at death is payable as a lifetime annuity; and ➢ If dependent children exist, an annuity equal to 1/5 of the surviving spouse's annuity is payable (and is adjusted if there are more than 4 children, or the child is orphaned).

Interpretation of Plan Provisions

With respect to the summary of the plan provisions outlined in the 2019 OSFI Report, I note that it is not fully clear what early retirement annuity is provided to judges who retire without qualifying for an unreduced annuity. Specifically, this report indicates that the early retirement annuity is reduced by the fraction of which:

a. The numerator is the number of years during which the judge has continued in judicial office, and
b. The denominator is the number of years during which the judge would have been *required to continue* in judicial office in order to be eligible for an unreduced annuity *(emphasis added)*.

It is my interpretation that this fraction should be determined as follows:

a. The numerator is the number of years during which the judge has continued in judicial office, and
b. The denominator is the total number of years during which the judge would have been required to be in judicial office in order to be eligible for an unreduced annuity.

I wish to note that this understanding does not have a material impact on the calculation results, as the retirement age assumption used for the calculations do not place significant weights to ages where an early retirement reduction is applicable.

APPENDIX B - Assumptions

Valuation Assumptions			
	Newell Best Estimate Approach – without Disability Assumption	**Newell Best Estimate Approach – with Disability Assumption**	**Gorham Assumptions**
Interest Rate	5.00% per annum	5.00% per annum	4.50% per annum
Salary Increase	2.50% per annum	2.50% per annum	3.00% per annum
Consumer Price Index Increase Rate	2.00% per annum	2.00% per annum	2.00% per annum
Post-retirement Indexing	100% of Consumer Price Index	100% of Consumer Price Index	100% of Consumer Price Index
Termination of Employment or Death Prior to Retirement	Nil	Nil	3% in first year, 2% in second year, and 1% per annum for years 3 to 9, nil after 10 years[1]
Incidence of Disability Prior to Retirement	Nil	Rates specified in the actuarial report on the Pension Plan for Federally Appointed Judges as at 31 March 2019 prepared by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions (Unisex 60% male, 40% female)	Rates specified in the actuarial report on the Pension Plan for Federally Appointed Judges as at 31 March 2019 prepared by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions (Gender 59% male, 41% female)
Retirement Age	Retirement rates specified in the actuarial report on the Pension Plan for Federally Appointed Judges as at 31 March 2019 prepared by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions	Retirement rates specified in the actuarial report on the Pension Plan for Federally Appointed Judges as at 31 March 2019 prepared by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions	Retirement rates specified in the actuarial report on the Pension Plan for Federally Appointed Judges as at 31 March 2019 prepared by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions, but based on one additional year of service

[1] It is noted that these rates are 10x the rates used by the Office of the Chief Actuary of the Office of Superintendent of Financial Institutions in the 31 March 2019 report.

Mortality – Post-Retirement	CPM2014 (Combined) Generational Mortality Table with improvement scale CPM-B (unisex 60% male, 40% female), and with size adjustment factors of 0.74 for male judges and 0.92 for female judges (and no size adjustment factors for surviving spouses)	CPM2014 (Combined) Generational Mortality Table with improvement scale CPM-B (unisex 60% male, 40% female), and with size adjustment factors of 0.74 for male judges and 0.92 for female judges (and no size adjustment factors for surviving spouses)	CPM2014 Public Generational Mortality Table with improvement scale CPM-B, and with size adjustment factors of 0.74 for males and 0.92 for females[1] (Gender 59% male, 41% female)
Disability Mortality	N/A	CPM2014 (Combined) Generational Mortality Table with improvement scale CPM-B (unisex 60% male, 40% female), and with size adjustment factors of 0.74 for male judges and 0.92 for female judges (and no size adjustment factors for surviving spouses)	CPM2014 Public Generational Mortality Table with improvement scale CPM-B, and with size adjustment factors of 0.74 for males and 0.92 for females (Gender 59% male, 41% female)
Marital Status at Retirement	Judges assumed to be 85% married at retirement; male spouses assumed to be 3 years older than female spouse	Judges assumed to be 85% married at retirement; male spouses assumed to be 3 years older than female spouse	The probability of having a surviving spouse at deat as well as the number of surviving children and their assumed age is consistent with rates specified in the actuarial report on the Pension Plan for Federally Appointed Judges as at 31 March 2019 prepared by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions

[1] This is not exactly the same as the rates used by the Office of the Chief Actuary of the Office of Superintendent of Financial Institutions in the 31 March 2019 report. Differences include using the 'Public' mortality table instead of the 'Combined' mortality table, and it appears that the size adjustment factors may also be used for the surviving beneficiaries, and not just the judges.

APPENDIX C – Appointment Age Data

Judicial Appointment Ages from January 1, 1997 to October 23, 2020	
Appointment Age	**Number**
40 and under	8
41	13
42	12
43	32
44	45
45	69
46	69
47	78
48	73
49	74
50	75
51	90
52	79
53	88
54	86
55	77
56	72
57	64
58	54
59	43
60	38
61	35
62	15
63	19
64	12
65	13
66	3
67	6
68	1
Total	1,343

APPENDIX D - Documents

In performing my calculations, I have relied upon the following documents and information provided by Norton Rose Fulbright Canada LLP:

- Table 1 – Appointees Age at Date of Appointment, April 1, 2011 to March 30, 2015
- Quad Comm Appointments (without elevation) Between April 1, 2015 and October 23, 2020
- Letter titled "Judges' Salary Increases" dated February 26, 2021, from Mr. François Lemire, F.C.I.A., F.S.A. of the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions to Ms. Anna Dekker of the Judicial Affairs Section of the Department of Justice (the "February 26, 2021 OSFI Letter")
- Letter titled "Cost to Replicate the Judicial Annuity" dated April 21, 2021, from Ernst & Young LLP, signed by Stéphane Leblanc and Andre Pickler (the "April 21, 2021 Ernst & Young Letter").
- P. Gorham, "Compensation Review of Federally Appointed Judges: Department of Justice regarding the 2020 Judicial Compensation and Benefits Commission" dated March 26, 2021 (the "Gorham Report").
- P. Gorham, "2020 Quadrennial Commission – Supplemental Information" dated April 16, 2021.

In addition, I have relied upon the following information, which is publicly available:

- The actuarial report on the Pension Plan for Federally Appointed Judges as at 31 March 2019 prepared by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions (the "2019 OSFI Report").
- The actuarial report on the Pension Plan for Federally Appointed Judges as at 31 March 2016 prepared by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions (the "2016 OSFI Report").
- The actuarial report on the Pension Plan for Federally Appointed Judges as at 31 March 2013 prepared by the Office of the Chief Actuary of the Office of the Superintendent of Financial Institutions (the "2013 OSFI Report").
- H. Pannu, "Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in Preparation for the 2015 Judicial Compensation and Benefits Commission" dated February 25, 2016.
- Letter titled "Valuation of the Judicial Annuity" dated March February 14, 2012, from Mr. André Sauvé, F.S.A., F.C.I.A. to the 2011 Judicial Compensation and Benefits Commission.
- Letter titled "Earnings Equivalent to the Judicial Annuity" dated February 23, 2012, from Mr. André Sauvé, F.S.A., F.C.I.A. to the 2011 Judicial Compensation and Benefits Commission.

- H. Pannu, "Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in Preparation for the 2011 Judicial Compensation and Benefits Commission" dated December 13, 2011.

I have also relied upon the following information, which was part our working papers from the work we performed in 2012:

- Letter titled "Valuation of Judicial Annuity" dated January 27, 2012, from Mr. Brian FitzGerald, F.I.A., F.C.I.A. (the "2012 FitzGerald Report")
- Letter titled "Valuation of Judicial Annuity" dated February 19, 2012, from Mr. Brian FitzGerald, F.I.A., F.C.I.A.
- Letter titled "Judicial Annuity" dated March 5, 2012, from Mr. Brian FitzGerald, F.I.A., F.C.I.A.

Dean Newell

Dean Newell is a Vice President of Actuarial Solutions Inc. and manages ASI's actuarial practice. A Fellow of the Canadian Institute of Actuaries and the Society of Actuaries, Dean graduated from the University of Waterloo with an Honours Bachelor of Mathematics in 2002. Upon graduation, he joined the international accounting firm PricewaterhouseCoopers in its retirement practice in Toronto. Dean joined Actuarial Solutions Inc. in 2007.

Dean has a breadth of experience in performing valuations for pension and post-retirement benefit plans for funding, accounting, and plan wind-up purposes. In addition, he has experience consulting with plan sponsors on a range of matters affecting pension and post-retirement benefit plans including plan design, plan conversion, benefit improvement costing, legislative compliance, plan documentation, plan administration, and risk management.

Dean has accumulated significant expertise in the various global accounting standards affecting pension and post-retirement benefit plans (i.e. CPA Canada Handbook, US GAAP, IFRS). He has extensive experience in preparing the financial statement accounting disclosures (i.e. balance sheet, income statement, and note disclosures) for the pension and post-retirement benefit plans sponsored by his clients. In addition, Dean has substantial experience in assisting auditors perform their review of the pension and post-retirement benefit plan financial statement accounting disclosures of their clients.

Dean also has experience in assisting clients with mergers and acquisitions. Specifically, he has experience in preparing financial due-diligence analyses on target companies' benefit plans. Upon completion of the transaction, Dean has experience in working with the acquiring firm in implementing the new benefit strategy.

Education

- Graduated from the University of Waterloo in 2002 with a Bachelor of Mathematics
- Fellow of the Society of Actuaries (2005) – member in good standing
- Fellow of the Canadian Institute of Actuaries (2005) – member in good standing

Employment

- 2002-2007 – PricewaterhouseCoopers LLP, in roles of increasing responsibility and ultimately becoming Manager, Human Resource Services
- 2007-present – Actuarial Solutions Inc., in roles of increasing responsibility and ultimately becoming Vice President

Professional Activities

Canadian Institute of Actuaries (CIA)

- *Vice-Chair, Actuarial Guidance Council – 2019 to present (Member 2016 to 2019)*
- *Member, CIA Committee on Pension Plan Financial Reporting – 2010 to 2014*
- *Member, ASB Designated Group Review of Practice-Specific Standards of Practice for Pension Plans – 2011 to 2012*
- *Member, CIA Annual and General Meeting Organization Committee – 2007 to 2010*

Society of Actuaries (SOA)

- *Education Committees – Course 5 Grader – 2005*

Financial Services Regulatory Authority of Ontario (FSRA)

- *Member, Technical Advisory Committee for Asset Transfers – 2019 to 2020*