

**IN THE MATTER OF THE 6TH QUADRENNIAL COMMISSION
ON JUDICIAL COMPENSATION AND BENEFITS**

**REPLY SUBMISSIONS OF THE PROTHONOTARIES OF THE FEDERAL
COURT TO THE JUDICIAL COMPENSATION AND BENEFITS
COMMISSION**

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PART I. INTRODUCTION

1. These submissions are in reply to the submissions of the Government of Canada and the Judiciary dated March 29, 2021, and will address the following items:

- a) The Government's proposed cap on IAI increases;
- b) The Association and Council's position on incidental allowances; and
- c) The Association and Council's proposal for salary increases in 2022 and 2023.

2. The Government's submissions dated March 29, 2021 are aligned with those of the Prothonotaries on the issue of supernumerary status for Prothonotaries, and do not address the issues of incidental allowances for Prothonotaries or the requested change of title. The Prothonotaries will defer comment on the Government's position on these latter two issues to the hearing.

PART II. SUBMISSIONS

A. *The Government's Proposed Cap on IAI Increases*

1. The Proposed Cap is neither Principled nor Warranted

3. The Government's proposal to limit IAI increases to a maximum of 10% over the period of the Commission's mandate is neither principled nor warranted. It has the potential to cause prejudice to the Judiciary (including Prothonotaries), by effectively reducing salaries in real terms in the latter part of the mandate. This proposal should be rejected.

4. The Government's rationale for the proposed cap is that temporary economic conditions related to Covid-19 have caused a higher-than-usual IAI increase for the year commencing April 1, 2021. The reason for the higher increase is that many employees earning below-average incomes lost their employment during the first phase of the pandemic, thereby raising the average.

5. However, the whole point of the Government's argument is that this is a temporary and self-correcting phenomenon. As Canada emerges from the pandemic, the

employment impact is expected to normalize, and the impact of lower-income employment losses on the IAI is expected to reverse. Gains in the 2021 IAI will be offset by a downward effect on the IAI for subsequent years.

6. Recent economic guidance from Budget 2021 (April 19, 2021) suggests that the proposed cap could have a greater adverse impact than the Government assumed in its initial submissions. Increasingly, economic forecasts project a stronger recovery than was previously assumed. In the Government's Fall Economic Statement, relied upon in their submissions, real GDP growth was projected to be 4.8% in 2021, 3.2% in 2022, and 2.3% in 2023. Budget 2021 revises these projections upwards to 5.8% (2021), 4.0% (2022) and 2.1% (2023) respectively,¹ while the Bank of Canada's growth projections are 6.5% (2021), 3.75% (2022), and 3.25% (2023) respectively.²

7. Higher growth means that the effects of the Covid-19 induced recession will not linger as long. Already, unemployment is markedly lower than the pessimistic projections of the Fall Economic Statement, due to higher than expected growth in the first quarter of 2021. Statistics Canada reports that unemployment has already decreased to 7.5%, compared to the assumption of 8.1% for all of 2021 in the Government Submissions.³ If stronger growth translates into higher inflation, the cap may be reached sooner, and income of Judges and Prothonotaries may decline more in real terms.

8. Parliament has already set a 7% cap in any one year as an upper limit on the IAI. That provides a legislated limit that Parliament considered to be the appropriate point at which an IAI increase should be capped. There is no reason to depart from this statutory standard. The Rémillard Commission noted that there are good reasons to retain the IAI as the benchmark for annual increases, including its longstanding acceptance across multiple commissions, and the link it provides over time to the progress of the Canadian economy.⁴

¹ Budget 2021, Annex 1: Details of Economic and Fiscal Projections, Table A1.1 (Average Private Sector Forecasts), Prothonotaries' Book of Documents ("Proth BOD"), Tab 1.

² Bank of Canada, Monetary Policy Report Press Conference Opening Statement (April 21, 2021), Proth BOD, Tab 2.

³ Submissions of the Government of Canada dated March 29, 2021, para. 20.; Statistics Canada, "Labour Force Survey, March 2021", *The Daily*, April 9, 2021, Proth BOD, Tab 3.

⁴ Rémillard Commission Report dated June 30, 2016, paras. 36-42, JBD Tab 13.

9. Further, the Government does not propose a symmetrical arrangement. The Government proposes that if downward pressure on the IAI in the last years of the Commission's mandate results in a negative change to the IAI, as the effects of the pandemic unwind, there would be no decrease to judicial salaries. However, given the normal range of inflationary increases, as well as economic growth that is normally reflected in the IAI increase, this does not appear likely to occur – especially if inflation picks up.⁵

10. There is no reason to implement the Government's proposed cap. There have been times in past when the Government has benefited from IAI increases that are much lower than had been forecast, and no doubt there will be more of these times in future. Over time, it all evens out. There is no reason to depart from the long-established practice of tying annual salary increases to the IAI.

2. The Government's Comparisons between Judges/Prothonotaries and Lawyers in Private Practice are Flawed

11. The Government relies upon comparisons between Judges/Prothonotaries and lawyers in private practice that are flawed. The calculations used by the Government result in artificially high "total compensation" amounts for Judges and Prothonotaries, and artificially low amounts for lawyers in private practice.

12. The Government relies on the Gorham Report's calculations of "total compensation" for the Judiciary. These calculations provide an actuarial estimate of the value of Judges' benefits such as the judicial annuity, and add the value of benefits to their salaries to determine "total compensation". That amount is then grossed up, effectively, to account for the tax efficiency of the judicial annuity, compared to the assumption that once RRSP contribution room is exhausted, lawyers must save in after-tax dollars.⁶

⁵ Budget 2021 projects increases in the CPI of 2.2% in 2021, 2.0% in 2022, 2.1% in 2023, and 2.1% in 2024 – higher than the projections of 1.7% (2021), 1.9% (2022), and 2.0% (2023) in the Fall Economic Statement: Budget 2021, Annex 1: Details of Economic and Fiscal Projections, Proth BOD, Tab 1.

⁶ Peter Gorham, Compensation Review of Federally Appointed Judges for the Department of Justice Canada dated March 26, 2021 ("Gorham Report"), para. 137, Government's BOD, Tab 4.

13. However, the grossed up calculations ignore the potentially significant impact of professional corporations (“ProfCorps”) on the tax efficiency of lawyers’ savings.⁷ As outlined in the Leblanc/Pickler Report filed by the Association and Council,⁸ the main benefit of ProfCorps is that they allow lawyers to retain earnings within the corporation, where these earnings are taxed at a much lower rate. Retained earnings can be accumulated until retirement, and then paid out to the individual lawyer in a flexible and tax-advantaged manner.

14. In effect, ProfCorps function in a manner similar to a second RRSP for lawyers who have made the maximum contribution to their RRSP, but are still able to save more. ProfCorps are not as tax-efficient as an RRSP, in that income retained by the ProfCorp (i.e. not paid out to the lawyer/employee) is still taxed, albeit at a favourable rate.⁹ However, they have the advantage that there is no limit on the amount of income that can be retained within the ProfCorp. The tax advantages of a ProfCorp increase with the amount of income earned.¹⁰

15. Leblanc and Pickler confirm that in their experience, ProfCorps become advantageous once a lawyer earns \$200,000 to \$300,000 or more, depending on the lawyer’s personal expenses such as mortgage payments, commitments to their dependents, and the like. This confirms that they are most likely to be used by lawyers earning high incomes, especially during the phase of their careers when personal expenses such as mortgage payments and children’s school or university tuition may have decreased.

16. Leblanc and Pickler calculate that a lawyer earning \$500,000 through a ProfCorp could save as much as \$102,000 in taxes, if only \$100,000 of that income is needed to

⁷ S. Leblanc & A. Pickler, Supplementary Report dated April 21, 2021 (“Supplementary Leblanc/Pickler Report”).

⁸ Report of S. Leblanc & A. Pickler dated March 26, 2021 (“Leblanc/Pickler Report”), Ex. B to Joint Submission of Association and Council dated March 29, 2021.

⁹ For example, the maximum rate is 26.5% for active business income earned by a ProfCorp in Ontario: Ernst & Young, Corporate income tax rates for active business income – 2021, Proth BOD, Tab 5.

¹⁰ To be precise, normally the greater the amount of earnings a lawyer practising through a ProfCorp can retain in the corporation, the greater the tax benefit. A lawyer practising through a ProfCorp can increase the corporation’s retained earnings by increasing the amount the ProfCorp earns, or by decreasing the amount that the ProfCorp pays out in expenses, including his or her salary.

meet the lawyer's personal expenses and the rest is kept in the ProfCorp as retained earnings, based on the applicable Quebec corporate tax rate of 26.5%. (On their analysis, tax savings would be \$80,000 if the lawyer needed \$200,000 to meet personal expenses.)¹¹

17. The higher the income, the greater the benefits of incorporation may be. A lawyer earning \$1,000,000 through a ProfCorp, assuming the same expenses, would save proportionally more tax than a lawyer earning \$500,000. Roughly speaking, for each \$100,000 in incremental income, a lawyer practicing through a ProfCorp may save approximately \$25,000 in taxes by retaining that income in the ProfCorp rather than paying it out as salary, once the top marginal tax rate is reached on his or her salary.¹²

18. Nowhere in Gorham's report, nor in his supplementary report dated April 16, 2021, does he account for this highly advantageous vehicle that is available to lawyers in private practice to save in a more tax-efficient manner. ProfCorps are now widely used by lawyers, and their use is increasing rapidly.¹³

19. The Government's flawed analysis is then compounded by the fact that they proceed to underestimate the incomes of lawyers in private practice, by failing to account for ProfCorps. Given that ProfCorps are typically not useful for lawyers with incomes under \$200,000, that the tax advantages of ProfCorps increase as lawyers' incomes increase, and that they are most advantageous for those lawyers who have both higher incomes and lower personal expenses (for example, at a stage in their careers when their mortgage has been paid off and their children have graduated from university), it is fair to assume that use of ProfCorps is heavily skewed towards the highest-earning lawyers. Indeed, for a partner at a Bay Street firm earning \$1 million per year or more, it is difficult to articulate a reason why they would not practice through a ProfCorp.

¹¹ Leblanc/Pickler Report, p.4.

¹² The top marginal rate for personal income in Ontario is 53.53%, payable on taxable income over \$220,000: Ernst & Young, Ontario Combined federal and provincial personal income tax rates – 2021, Proth BOD, Tab 4. Corporate tax is a maximum of 26.5% on active business income. The difference is \$27,000 per \$100,000 in income. ProfCorps do involve some additional expenses.

¹³ Usage of Professional Corporations by Lawyers, JBD Tab 40, p.389.

20. The combined effect of these flaws is that very little reliance can be put in the Government's statements about the comparison between judicial "total compensation", and the incomes of lawyers in private practice. That in turn means that their percentile comparisons are unreliable.

3. Conclusion on the Government's Proposed CAP on IAI Increases

21. IAI-linked increases have been a part of the architecture of establishing judicial salaries since 1981, and should not be lightly tampered with.¹⁴ The Government has not made out a case to alter this long-standing practice. The Commission should reject the Government's proposal to cap IAI-linked increases.

B. Incidental Allowances

22. The Association and Council have set out, at paras. 160-178 of their submissions, the case for an increase in the Judges' incidental allowance from \$5,000 per annum to \$7,500 per annum. The incidental allowance is not a component of compensation, but rather a mechanism to reimburse reasonable expenses that have actually been incurred,¹⁵ on provision of receipts.

23. The factors cited by the Association and Council to justify an increase apply with equal force to the Prothonotaries. Each of the listed categories of expense applies in the same manner and to the same extent to Prothonotaries as to Judges.

24. In particular, Prothonotaries have made the same transition to remote hearings, settlement conferences, and case management conferences as Judges have. There is reason to believe that even after the pandemic subsides, more of the work of the courts will be performed remotely than was the case in pre-pandemic times.

25. The Federal Court hears cases from all regions of Canada. The Court is relatively small, currently consisting of 33 full-time Judges and 7 Prothonotaries.¹⁶ The Court has a large and varied caseload, spanning a broad range of areas of federal jurisdiction,

¹⁴ Rémillard Commission Report dated June 30, 2016, paras. 37-38, JBD Tab 13.

¹⁵ *Judges Act*, s.27, JBD Tab 3.

¹⁶ The Court is currently awaiting the appointment by the Minister of an 8th and 9th Prothonotary following a recent recruitment effort. The Court also has several other vacancies.

including national security law, intellectual property law, maritime law, aboriginal law, and administrative law including immigration law.¹⁷ The Court normally sits for in-person hearings in all provinces and territories. During the pandemic, in-person hearings have been suspended in some provinces; most recently in Ontario and Quebec. Under the Court's current practice direction, all cases from these provinces are required to proceed remotely unless there are exceptional circumstances.¹⁸

26. This has required both Judges and Prothonotaries to adapt to conduct hearings and conferences from home, and in some cases to invest in computers and printers, second devices to be able to view documents and counsel/witnesses at the same time, broadband capacity, and other home office expenses. Counsel and parties who appear before the Court have now made the transition to remote hearings, and it is reasonable to expect that post-pandemic, there will be continued demand for remote hearings in many circumstances where proceeding remotely will reduce costs and promote access to justice. Prothonotaries will likely be affected at least as much by these trends as Judges. Prior to the pandemic, Prothonotaries routinely travelled extensively from their home bases in Ottawa, Montreal, Toronto and Vancouver to ensure coverage of the whole country.

27. If anything, it can be anticipated that Prothonotaries will find themselves doing more remote hearings than Judges in the post-pandemic world. The Canadian Bar Association's *Task Force Report on Justice Issues Arising from COVID-19* recommends as follows:

Remote (video, online, telephone) proceedings should be available for settlement conferences, examinations for discovery, various hearings, motions, trials and appeals. Remote proceedings should continue especially for procedural, uncontested, shorter and less complex matters.¹⁹

28. This description covers a substantial portion of the work of Prothonotaries.

¹⁷ Letter from the Chief Justice, Federal Court Website, <https://www.fct-cf.gc.ca/en/pages/about-the-court/message-from-the-chief-justice#cont>, Proth BOD, Tab 6.

¹⁸ Practice Direction (Covid-19) Update No. 7 (January 18, 2021), <https://www.fct-cf.gc.ca/Content/assets/pdf/base/Covid19-Practice-Direction-7th-Update-January%202021-Final.pdf>, Proth BOD, Tab 7.

¹⁹ Canadian Bar Association, *No Turning Back: CBA Task Force Report on Justice Issues Arising from COVID-19*, Feb. 2021, p.11, Association and Council's BED, Tab 29.

29. Prothonotaries are also subject to the same requirement to complete 10 days of continuing education per year as Judges, and may well need to use the incidental allowance to cover related expenses to the extent that they are not otherwise covered. Prothonotaries must be up-to-date in the same areas of federal jurisdiction as the Federal Court Judges, and they have the same need for legal publications.

30. Since the Prothonotaries have the same needs to incur incidental expenses as Judges, their incidental expenses should be set at the same level.

C. *The Association and Council's Proposed Salary Increase*

31. The Prothonotaries support the Association and Council's proposal for a salary increase of 2.3% on each of April 1, 2022 and April 1, 2023, in addition to the increases linked to the IAI. This proposed salary increase is modest and justifiable in light of the data presented by the Association and Council.

32. Even without considering the impact of professional corporations, the CRA data from the top 10 CMAs, with an \$80,000 cut-off, indicates that self-employed lawyers earned \$550,000 at the 75th percentile for the 44-56 age group at which most Judges (and Prothonotaries) are appointed. This is far above the salary or "total compensation" of Judges (when fairly calculated), and even further above the salary or total compensation of Prothonotaries.

33. Data from the top 10 CMAs has particular relevance for Prothonotaries. As outlined in the Prothonotaries' main submissions, Prothonotaries are assigned to the largest CMAs in Canada – Toronto, Montreal, Ottawa, and Vancouver – where living costs are highest. These also include the CMAs where average incomes of self-employed lawyers are highest. The experience required of candidates for vacant Prothonotary positions is such that the most qualified, and highly ranked, candidates generally practice in Toronto, Ottawa, Montreal and Vancouver (although one recent candidate is based in Edmonton). These are the cities in Canada where the disparity between incomes earned by the most qualified potential candidates and the income earned by Prothonotaries is the greatest.

34. When professional corporations are also factored in, the discrepancy in income is highly likely to be much greater. As noted above, professional corporations carry significant tax advantages for practicing lawyers, and those advantages increase with the amount of income earned by lawyers. Over the past several years, lawyers have “voted with their feet” by the thousands to establish these vehicles, which now account for more than 25% of all practicing lawyers.²⁰

35. It is a fair inference that the approximately 25% of practicing lawyers who now practice through ProfCorps are strongly correlated with the top ranks of income earners in private practice. The CRA data do not permit us to quantify the incomes of these lawyers directly, but given that lawyer incomes generally cover a wide range, it is reasonable to assume that many thousands of lawyers with incomes in the high six figures or more are excluded from the CRA data.

36. That being the case, and in the absence of any explanation from the Government as to why high-income lawyers in private practice would not take advantage of professional corporations, the Commission should adopt the working assumption that the CRA data significantly understate the real incomes of lawyers in private practice. This is particularly so for lawyers who have the experience required to be an attractive candidate for appointment to the position of Prothonotary. The demonstrated gap between judicial salaries and the incomes of top quartile lawyers in private practice appears to be widening, and is likely to be much greater than the CRA tables indicate. The salaries of Prothonotaries, whose salaries are set at 80% of Federal Court Judges, are even further below the incomes of many practicing lawyers who appear before them.

37. Lawyers in private practice have always been the largest pool from which Judges are appointed. If judicial salaries do not keep pace with increases in the incomes of lawyers in private practice, recruitment of excellent jurists from the private bar is bound to be affected in the long run. As the Beck Commission on Remuneration for Provincial Court Judges in Ontario noted, if remuneration of practicing lawyers is not given adequate weight, “growth in the existing disparity between the levels of remuneration will, over time,

²⁰ Usage of Professional Corporations by Lawyers, JBD Tab 40, p.389.

adversely affect the current enviable record of the Government in attracting quality candidates.”²¹

38. Further, current projections of the economic recovery from the pandemic are that economic growth will be strong in the years for which the Judiciary seeks increases. It is reasonable to expect that incomes of lawyers in private practice will surge during these years.²² If this Commission does not make recommendations to close the gap, there is a substantial risk that it will widen further by the time the next Commission begins its mandate.

39. The current economic circumstances are not like past recessions, in which the economy has contracted sharply and it has taken many years to undo the economic damage. This is not a situation, like that alluded to in the *PEI Reference*, where Judges must do their part to shoulder the economic burden by accepting across-the-board wage restraints,²³ as the country slowly climbs out of recession. There is no evidence of any across-the-board wage restraint programs implemented by the Federal Government. Further, Government support programs and the pandemic-related restrictions on consumer spending have led to high rates of saving by Canadians, which in turn are projected to lead to a quick and robust recovery.²⁴

40. For these reasons, the Commission should recommend the salary increases proposed by the Association and Council.

²¹ Report of the 4th Provincial Judges Remuneration Commission, (Beck Commission, Ontario, 1998), Proth BOD, Tab 8.

²² The Bank of Canada projects economic growth of 6.5% in 2021, 3.75% in 2022, and 3.25% in 2023: Bank of Canada, Monetary Policy Report Press Conference Opening Statement (April 21, 2021), Proth BOD, Tab 2. These growth figures comfortably exceed the amount of the increases sought by the Association and Council for 2022 and 2023.

²³ *PEI Judges Reference*, [1997] 3 SCR 3, JBD Tab 4, para. 196.


²⁴ The Bank of Canada modelling assumes that 15% of the additional savings that Canadians have accumulated over the last year will be spent as vaccines become widespread and lockdowns are removed. See M. Rendell, “Bank of Canada unfazed by short-term inflation increase”, *Globe and Mail*, April 28, 2021, Proth. BOD, Tab 9.

PART III. DESIGNATION OF REPRESENTATIVE

41. The Prothonotaries respectfully request that the Commission designate Andrew Lokan, of Paliare Roland Rosenberg Rothstein LLP, as the representative of the Prothonotaries for the Commission process, pursuant to s.26.4 of the *Judges Act*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

April 30, 2021



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