

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

**2020 JUDICIAL COMPENSATION  
AND BENEFITS COMMISSION**

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**SUBMISSIONS OF THE GOVERNMENT OF CANADA**

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## TABLE OF CONTENTS

I.	OVERVIEW .....	1
II.	COMMISSION MANDATE.....	2
III.	ANALYSIS OF THE ADEQUACY OF JUDICIAL COMPENSATION .....	4
	A. Total Compensation is Adequate .....	4
	1) First Criterion: Prevailing Economic Conditions in Canada are Very Challenging.....	5
	a) Projected IAI increase of 6.7% is at odds with the current economic situation ....	7
	b) A four-year outlook for IAI increases .....	9
	2) Second Criterion: Financial Security of the Judiciary in Ensuring Judicial Independence is Respected .....	14
	3) Third Criterion: No Difficulty Attracting Outstanding Candidates .....	16
	a) Consider the Pools from which Judges Drawn.....	16
	b) Salary Adequate to Attract Outstanding Private Sector Lawyers.....	20
	c) Salary Adequate to Attract Outstanding Candidates from Public Sector .....	38
	4) Fourth Criterion: Other Objective Criteria that the Commission Considers Relevant .....	40
	a) Benchmarking to DM-3 Should not be Applied in a Formulaic Manner .....	40
	b) Comparison to Other Professionals and Compensation for Judiciaries in other Countries .....	48
	5) Conclusion On Adequacy of Judicial Compensation.....	50
IV.	PROPOSED NEW MEDICAL ASSISTANCE FOR JUDGES WHO RESIDE IN REMOTE LOCATIONS .....	51
V.	PROTHONOTARIES' COMPENSATION.....	51
	1) Total Compensation is Adequate .....	51
	2) Proposed Creation of a Supernumerary Office for Prothonotaries .....	53
VI.	OVERALL CONCLUSION .....	54

## I. OVERVIEW

1. The Government of Canada is committed to upholding the constitutional principle of judicial independence as manifested through security of tenure, administrative independence, and financial security.

2. In light of this principle, the current salary and related benefits of federally-appointed judges and Federal Court prothonotaries ensure that Canada's judiciary remains independent and enjoys financial security, and that outstanding candidates continue to be attracted to judicial office.

3. An objective analysis of the statutory criteria set out in subsection 26(1.1) of the *Judges Act*, and in particular the current economic conditions of Canada, supports the conclusion that judicial salaries for this quadrennial cycle ending in 2024 should be increased in accordance with the Industrial Aggregate Index (IAI) to a maximum four-year cumulative increase of 10% from the salary in 2020. This is consistent with the historic annual IAI increase over the past 20 years.

4. In respect of the first legislative criterion, Canada's economic position and the overall state of the Government's finances, there are very significant challenges as a consequence of the COVID-19 pandemic. Paradoxically, however, the current economic conditions have resulted in an anomaly in the IAI that would provide the federally-appointed judiciary with its highest yearly increase in 20 years. These unpredictable economic circumstances may also result in a negative IAI (which could result in a reduction in judicial salaries) in the near future. In order to provide stable and predictable increases in judicial salaries for this quadrennial cycle and to ensure that the federally-appointed judiciary assume their share of the economic burden in these unprecedented times, the Government proposes a cumulative four-year total increase in judicial salaries of 10% commencing on April 1, 2020.

5. As to the second legislative criterion, there can be no suggestion that the 2020 judicial salary of \$338,800 and the prothonotary salary of \$271,000 (projected to be \$361,600 and \$289,200, respectively as of April 1, 2021) have fallen below an acceptable

minimum such that judicial independence has been compromised. Indeed, taking into account the generous judicial annuity, which has a net value of approximately 37.8% of the judicial salary, it significantly increases their average age-weighted total compensation (hereinafter referred to as “total compensation”) in 2020 to approximately \$509,400 for judges, with a projected increase to \$543,800 as of April 1, 2021. The prothonotary age-weighted total compensation for 2020 is \$408,100 with a projected increase to \$435,500 as of April 1, 2021.

6. In reference to the third legislative criterion, there is no evidence of any difficulty in recruiting outstanding candidates to either office. A comparison of judicial and prothonotary salaries with the income levels of lawyers in both the public and private sectors who would be eligible for both offices, demonstrates that the salaries are fully adequate to continue to attract outstanding candidates; there is also no indication that there is a shortage of interested candidates. In addition, the generous judicial annuity and other related benefits act as further incentives and attractions to potential candidates for judicial office.

7. Finally, in reference to the fourth legislative criterion, the judiciary has historically argued that federally-appointed judges’ salaries should keep pace with the mid-point of federal deputy ministers at the DM-3 level plus half of available at-risk (the so-called “Block comparator”). The compensation for the federally-appointed judiciary has kept pace with (and now overtaken) the Block comparator.

## **II. COMMISSION MANDATE**

8. The Commission’s mandate is informed by both constitutional principles and statutory provisions. In *PEI Reference* the Supreme Court of Canada described the constitutional role of judicial compensation commissions as “institutional sieve[s]” that would serve the constitutional function of preventing the “setting or freezing of judicial remuneration from being used as a means to exert political pressure through the economic

manipulation of the judiciary”.<sup>1</sup> More pointedly, as described in the Fifth Commission Report dated June 30, 2016 (Rémillard Commission), the constitutional guarantee of judicial independence is a cornerstone of the integrity of our judicial system with the three elements of judicial independence being security of tenure, administrative independence, and financial security.<sup>2</sup>

9. The legislative mandate for the Commission is found in subsection 26(1.1) of the *Judges Act*, which mandates that the Commission conduct its inquiry with reference to the following prescribed criteria: (1) the prevailing economic conditions in Canada; (2) the role of financial security of the judiciary in ensuring judicial independence; (3) the need to attract outstanding candidates to the judiciary; and (4) any other objective criteria that the Commission considers relevant.<sup>3</sup> The *Judges Act* also requires that the adequacy of Federal Court prothonotaries’ compensation be considered as part of the same Commission process.<sup>4</sup>

10. When amendments to the *Judges Act* were first introduced in 1998 in the House of Commons, statutory criteria were not proposed.<sup>5</sup> However, when the Senate and the Standing Senate Committee on Legal and Constitutional Affairs considered the relevant bill, it was determined that the inclusion of express mandatory criteria was required to “help define and clarify the scope of the mandate” of the Commission’s inquiry.<sup>6</sup>

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<sup>1</sup> *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3, [PEI Reference], para 170, **Joint Book of Documents, Tab 4**

<sup>2</sup> Report of the Fifth Quadrennial Judicial Compensation and Benefits Commission, dated June 30, 2016, [Rémillard Commission Report], p 2, para 7, **Joint Book of Documents, Tab 13**

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

<sup>4</sup> *Ibid*, s. 2.1(1)

<sup>5</sup> *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No 32, 1<sup>st</sup> Sess, 36<sup>th</sup> Parl, September 30, 1998 [Senate Committee September 30, 1998], pp 32:7-32:9, **Government’s Book of Documents, Tab 1**

<sup>6</sup> *House of Commons Debates*, 36<sup>th</sup> Parl, 1<sup>st</sup> Sess, No 151 (6 November 1998) [Hansard November 6, 1998], at 9944 (Eleni Bakopanos), **Government’s Book of Documents, Tab 2**; *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*,

11. The first two criteria were added in direct response to the Supreme Court’s decision in *PEI Reference*.<sup>7</sup> The third criterion, “the need to attract outstanding candidates”, was added based on testimony before the Senate committee<sup>8</sup> which referred to a need to measure “how we compensate our judges against that body of people from which we are drawing to ensure that we are competitive”.<sup>9</sup> The fourth criterion, namely “any other objective criteria that the Commission considers relevant”, was added to allow the Commission to consider other criteria “that are justified, ones that are measured on objective grounds”.<sup>10</sup>

12. Finally, as the Rémillard Commission noted, although the Commission is not bound by findings of previous Commissions, it should take a “common sense approach” to new evidence and arguments and only depart from previous findings where “valid reasons” such as a change in circumstances or additional evidence, support a departure from determinations of previous Commissions.<sup>11</sup>

### III. ANALYSIS OF THE ADEQUACY OF JUDICIAL COMPENSATION

#### A. Total Compensation is Adequate

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

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Issue No 37, 1<sup>st</sup> Sess, 36<sup>th</sup> Parl, October 22, 1998 [Senate Committee October 22, 1998], pp 37:20, **Government’s Book of Documents, Tab 3**

<sup>7</sup> Senate Committee October 22, 1998, *ibid*, pp 37:18-37:21

<sup>8</sup> *Ibid*, at p 37:20

<sup>9</sup> Senate Committee September 30, 1998, *supra*, pp 32:18-32:19, **Government’s Book of Documents, Tab 1**

<sup>10</sup> Senate Committee October 22, 1998, *supra*, p 37:21, **Government’s Book of Documents, Tab 3**

<sup>11</sup> Rémillard Commission Report, p 7, para 26, **Joint Book of Documents, Tab 13**

14. The current salaries (as of April 1, 2020) are \$338,800 for judges and \$271,000 for prothonotaries. The net value of the judicial annuity and disability benefits increases those salary levels by approximately 37.8%.<sup>12</sup> The resulting average age-weighted total compensation (weighted based on the ages of appointees) for a federally-appointed judge in 2020 is approximately \$509,400 and approximately \$408,100 for a prothonotary.<sup>13</sup> With a 6.74% increase projected for 2021 based on IAI, a judge's total compensation rises to \$543,800 and a prothonotary's to \$435,500.<sup>14</sup>

**1) First Criterion: Prevailing Economic Conditions in Canada are Very Challenging**

15. This first statutory criterion mandates the Commission to consider “the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government”.<sup>15</sup> Given the changing economic circumstances that are present during each Commission, findings relating to this criterion are by their nature reflective of the current state of the economy, and previous Commission findings in this area are of little relevance.

16. To state the obvious, the current economic conditions in Canada and the world broadly, are very challenging. The ongoing COVID-19 pandemic has forced the Canadian government, and almost all other governments around the world, to commit to record deficits in order to battle the economic toll placed on the world economy by the pandemic.<sup>16</sup>

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<sup>12</sup> Peter Gorham, Compensation Review of Federally Appointed Judges for the Department of Justice Canada regarding the 2020 Judicial Compensation and Benefits Commission dated March 26, 2021 [Gorham Report], pp 22, 30, paras 100, 134, **Government's Book of Documents, Tab 4**

<sup>13</sup> Gorham Report, *ibid*, pp 7, 35-36, paras 19, 23, 153, 162, **Government's Book of Documents, Tab 4**

<sup>14</sup> Gorham Report, *ibid*, pp 7-8, 36, paras 20, 24, 158, 163 **Government's Book of Documents, Tab 4**. We note that this projection is based on a projected IAI of 6.74%, which is slightly greater than the 6.7% projected by the Office of the Chief Actuary

<sup>15</sup> *Judges Act, supra*, s. 26(1.1)(a), **Joint Book of Documents, Tab 3**

<sup>16</sup> Letter dated December 9, 2020 from the Assistant Deputy Minister of Finance, Department of Finance Canada, p 1, **Joint Book of Documents, Tab 24**

Although there are hopeful signs with the roll out of vaccines, the short and medium term outlook for the Canadian economy remains fragile.

17. Since the Government's budget of March 19, 2019, Canada's economic and fiscal outlook has deteriorated.<sup>17</sup> For 2020, Statistics Canada reported that the Canadian economy contracted by 5.4%, which is the largest economic contraction since they started recording this data in 1961.<sup>18</sup>

18. For the fiscal year that ended March 31, 2020, the Government reported a budgetary deficit of \$34.4 billion.<sup>19</sup> As of March 31, 2020, the federal debt stood at \$721.4 billion – 31.2% of GDP.<sup>20</sup> The projected deficit for the year ending March 31, 2021 is \$381.6 billion<sup>21</sup> and the projection for the deficit for the year ending March 31, 2022 is \$121.2 billion.<sup>22</sup>

19. The Consumer Price Index (CPI), which is widely used to determine cost-of-living adjustments, is projected to increase over the next four years as follows: 1.7% in 2021; 1.9% in 2022; 2.0% in 2023; and 2.1% in 2024.<sup>23</sup>

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<sup>17</sup> Department of Finance Canada, Fall Economic Statement 2020, November 30, 2020, online: <https://www.canada.ca/en/department-finance/news/2020/11/government-of-canada-releases-supporting-canadians-and-fighting-covid-19-fall-economic-statement-2020.html>, **Joint Book of Documents, Tab 25**; See also: Letter dated December 9, 2020 from the Assistant Deputy Minister of Finance, Department of Finance Canada, p 1, **Joint Book of Documents, Tab 24**

<sup>18</sup> Statistics Canada, "Gross domestic product, income and expenditure, fourth quarter 2020", March 2, 2021, online: <https://www150.statcan.gc.ca/n1/en/daily-quotidien/210302/dq210302a-eng.pdf?st=Z-ce4CK1>, **Government's Book of Documents, Tab 8**

<sup>19</sup> Department of Finance Canada, Fall Economic Statement 2020, November 30, 2020, *supra*, Annex 1, Details of Economic and Fiscal Projections, **Joint Book of Documents, Tab 25**

<sup>20</sup> *Ibid.*

<sup>21</sup> Letter from the Assistant Deputy Minister of Finance dated December 9, 2020, Department of Finance Canada, *supra*, p 2, **Joint Book of Documents, Tab 24**

<sup>22</sup> *Ibid.*

<sup>23</sup> Department of Finance Canada, Fall Economic Statement 2020, November 30, 2020, *supra*, Annex 1, Details of Economic and Fiscal Projections, **Joint Book of Documents,**



20. The unemployment rate is also a measure of the status of the country's economy. Unemployment is beginning to improve after a severe decline in March and April of 2020, wherein almost 3 million Canadians lost their jobs. Unemployment rates are expected to remain close to 10% on average in 2020 and to decline to 8.1% in 2021.<sup>24</sup> Prior to the onset of COVID-19, unemployment levels were below 6%.

21. The Government expects to table a new Budget on April 19, 2021, which will provide further information on the current status of the economy. The new Budget may have an impact on this statutory criterion. The Government will, if necessary, make further representations to the Commission on the present state of the economy in its reply submissions.

22. The current economic situation in Canada, and generally in the world, caused primarily by the COVID-19 pandemic and the resulting historic deficits run by the Government, must be a significant factor taken into account when determining the appropriate level of judicial compensation. As recognized by the Supreme Court of Canada, the guarantee of a minimum salary is not a device to shield the judiciary from the effects of deficit reduction:

Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times.<sup>25</sup>

**a) Projected IAI increase of 6.7% is at odds with the current economic situation**

23. The Government recognizes that subsection 25(2) of the *Judges Act* stipulates that the IAI is the basis for annual increases in judicial compensation. That increase is capped at 7% by the legislation. The Rémillard Commission confirmed that the IAI was the

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**Tab 25;** Letter from the Assistant Deputy Minister of Finance dated December 9, 2020, Department of Finance Canada, *ibid*.

<sup>24</sup> Letter from the Assistant Deputy Minister of Finance dated December 9, 2020, Department of Finance Canada, *ibid*.

<sup>25</sup> *PEI Reference, supra*, para 196, **Joint Book of Documents, Tab 4**

appropriate economic indicator to use for this purpose<sup>26</sup> and the Government does not suggest discontinuing or replacing IAI for the purposes of annual increase to judicial compensation. At the current projected increase of 6.74%, judicial salaries will increase by a total of \$22,800 on April 1, 2021, to a level of \$361,600 exclusive of other benefits such as retirement annuities that are part of the complete judicial compensation package as discussed below.<sup>27</sup>

24. However, Parliament's limit of a 7% increase must be looked at in the context of the current economic conditions in Canada and the world, none of which could have been foreseen at the time the current legislation was passed. As noted in the 2016 report of the Rémillard Commission, the annual statutory increase was linked to the IAI to ensure that the annual earnings of judges keep pace with the annual earnings of the average Canadian.<sup>28</sup> The balance or symmetry between increases to judicial salaries and those of average Canadians has been skewed by the current economic conditions. Therefore, rather than reflect an increase in wages across the economy and allow judicial salaries to keep pace with such increases, the current year's IAI increase is an anomaly.

25. The Industrial Aggregate is an overall 12-month average of the *Average Weekly Earnings* (AWE) for most Canadian employees.<sup>29</sup> The IAI is the rate of change of the Industrial Aggregate. In 2020, there occurred an overall drop in employed workers. Job losses at the lower-wage end of the scale (for example in accommodation services, food services, the arts, entertainment and recreation) significantly outnumbered job losses for employees who earned above the median AWE. With the loss of more lower-wage jobs and the resulting removal of those lower-wage jobs from the AWEs used to calculate the Industrial Aggregate, the average of the wages that remain in the wage market has

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<sup>26</sup> Rémillard Commission Report, pp 11-12, paras 36-42, **Joint Book of Documents, Tab 13**

<sup>27</sup> Gorham Report, *supra*, p 23, para 106, **Government's Book of Documents, Tab 4**; Letter from the Office of the Chief Actuary, Office of the Superintendent of Financial Institutions Canada, February 26, 2021, **Joint Book of Documents, Tab 23**. Gorham report projects 6.74% and OSFI projects 6.7%.

<sup>28</sup> Rémillard Commission Report, p 11, para 39, **Joint Book of Documents, Tab 13**

<sup>29</sup> Gorham Report, *supra*, p 16, para 70, **Government's Book of Documents, Tab 4**

necessarily gone up and the IAI has risen to unprecedented levels.<sup>30</sup> As a result, the legislative increase of judicial salaries will be the largest in the history of Quadrennial Commissions.

26. When the Rémillard Commission commented that the IAI ensured that judicial salaries kept pace with the annual earnings of the average Canadian, it could not have foreseen the economic reality the country now faces and how this would affect judicial compensation. Millions of average Canadians have lost their jobs because of COVID-19 and this has resulted in an abnormally inflated IAI that is directly benefiting the judiciary.

27. Further, as the economy recovers and lower wage earners re-enter the market *en masse*, the possibility of a negative IAI may arise. The calculation of judicial salaries based on a negative annual IAI has never occurred. In light of this possibility, the Government proposes that the *Judges Act* be amended to provide that, in the event of a negative IAI, judicial salaries would not be decreased, but would simply be frozen at existing levels. This change, combined with the 10% cumulative increase over this quadrennial cycle, will properly insulate the judiciary from any economic fluctuations.

#### **b) A four-year outlook for IAI increases**

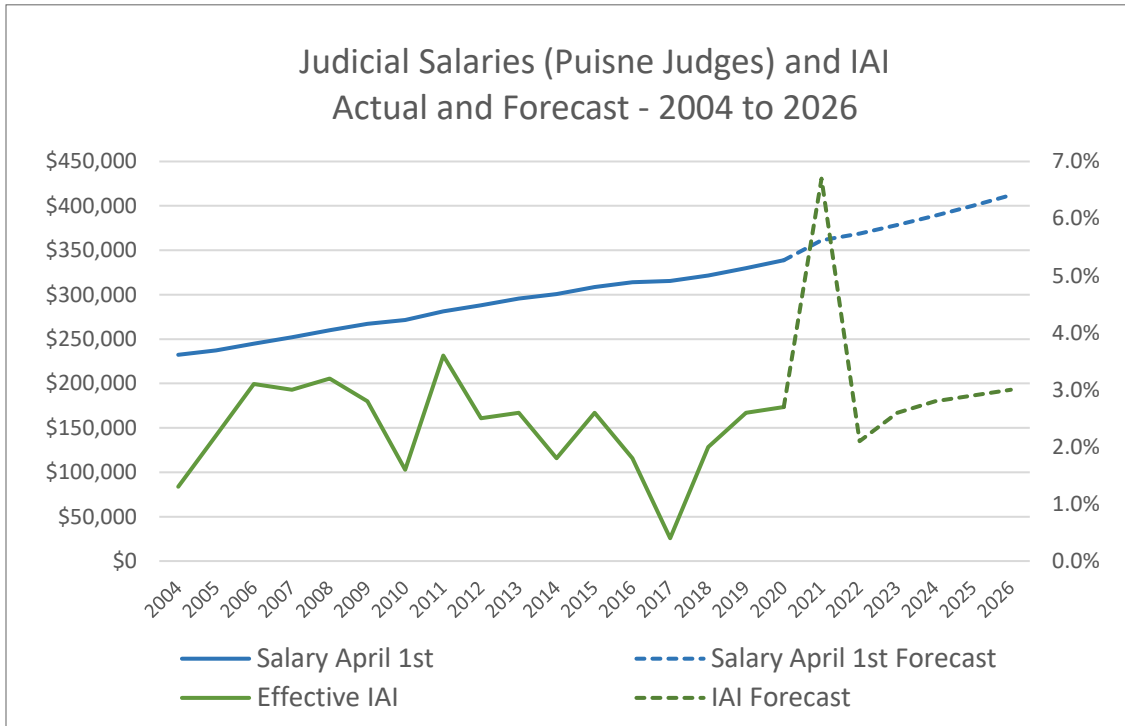
28. The 2021 anomaly of an IAI increase of nearly 7% is an issue that should be looked at in the context of the complete term of this Quadrennial Commission cycle rather than in isolation as a single year. Indeed, given the current economic fluctuations, it is possible that the IAI will drop significantly for the fiscal year of April 2021-March 2022.<sup>31</sup> Regardless of this possibility, the Government is not advocating for a reduction of judicial compensation should IAI fall into negative numbers. However, that possibility demonstrates that this particular disruptive and very unusual economic situation suggests that IAI indexation requires careful consideration as it relates to the quadrennial period ending in 2024.

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<sup>30</sup> *Ibid*, pp 16-17, paras 72-78

<sup>31</sup> Gorham Report, *supra*, p 20, paras 88-99, **Government's Book of Documents, Tab 4**

29. The stability of the IAI increases in the past provides helpful context. Over the previous 16 years, the IAI as applied to judicial salaries has maintained an average annual increase of 2.4%.<sup>32</sup> The chart below depicts this relative stability in the IAI and the reflected steady increase in the judicial salaries.



30. As set out in the chart below, the average IAI cumulative four-year increase has been 9.9%, with a maximum four-year increase of 11.9% and a minimum four-year increase of 7.9%.

<sup>32</sup>Statistics derived from Yearly Judicial Salaries, 2000-2020, provided by the Commissioner for Federal Judicial Affairs, **Government’s Book of Documents, Tab 6**; Letter from the Office of the Chief Actuary, Office of the Superintendent of Financial Institutions Canada, February 26, 2021, *supra*, **Joint Book of Documents, Tab 23**

<i>Selected Summary Statistics</i> <sup>33</sup>	<i>Puisne Judge</i>	<i>DM-03</i>	<i>Public Service</i>
<i>Four Year Average Maximum Yearly Increase</i>	2.9%	2.4%	2.2%
<i>Four Year Average Minimum Yearly Increase</i>	1.9%	0.3%	1.4%
<i>Four Year Average Cumulative Increase</i>	9.9%	5.9%	7.2%
<i>Four Year Cumulative Maximum</i>	11.9%	10%	9.0%
<i>Four Year Cumulative Minimum</i>	7.9%	1.3%	5.9%

31. In addition, the 16-year average yearly increase has been 2.4%, with a yearly high of 3.6% and a yearly low of 0.4%. This demonstrates a steady and consistent increase of judicial salaries in line with IAI that is well within the proposed cumulative four-year increase of 10% for this quadrennial cycle.

<i>Selected Summary Statistics</i> <sup>33</sup>	<i>Puisne Judge</i>	<i>DM-03</i>	<i>Public Service</i>
<i>16 Year Average Yearly Increase</i>	2.4%	1.4%	1.8%
<i>16 Year Maximum Yearly Increase</i>	3.6%	3.0%	2.6%
<i>16 Year Minimum Yearly Increase</i>	0.4%	0.0%	1.3%
<i>16 Year Cumulative Increase</i>	45.8%	27.5%	32.1%

32. More specifically, given the extremely uncertain fluctuations in the IAI in the current economic context, the Government proposes the following:

- a. judicial compensation should continue to be adjusted on the basis of IAI, to a maximum of 10% of the April 1, 2020 judicial salary over the four-year

<sup>33</sup> Statistics derived from Yearly Judicial Salaries, 2000-2020, provided by the Commissioner for Federal Judicial Affairs, *ibid*; Statistics derived from Privy Council Office, “DM Average Salary Mid-Point and Counts”, January 2020, **Joint Book of Documents, Tab 32**; Statistics derived from Treasury Board of Canada: Negotiated Wage Settlements, 2014-2022, Negotiated Pay Increase, Restructure & CPI Movement as of Mar 17, 2014, and Negotiated Pay Increase, Restructure & CPI Movement as of February 28, 2007, **Joint Book of Documents, Tabs 35-37**. The 16-year period of salary increases span from year 2004 to year 2020. The four-year average yearly increase is based on the average year over year increase within each of the selected four-year periods of 2005-2008, 2009-2012, 2013-2016, 2017-2020. The four-year average cumulative increase is based on the average increase over the whole (four years) selected four-year periods of 2005-2008, 2009-2012, 2013-2016, 2017-2020. Note that wage increases listed for DM-03 are based on the increases to the ceiling of the DM-03 range.

quadrennial period. This aligns with the historic range of the 2-3% annual increase based on IAI.<sup>34</sup> If the 10% maximum is reached before the end of the quadrennial period, salaries would be frozen until the beginning of the next quadrennial period; and

- b. should the IAI be a negative number, judicial salaries should remain constant and should not be reduced.

33. This proposal would take into account the abnormal highs and lows expected in the IAI over the current quadrennial period and would provide overall stability and predictability in judicial compensation between now and 2024. The chart below sets out in detail the increase for the various judicial offices based on this proposal.

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<sup>34</sup> Letter from the Office of the Chief Actuary, Office of the Superintendent of Financial Institutions Canada, February 26, 2021, *supra*, **Joint Book of Documents, Tab 23**

Projected Salaries under the <i>Judges Act</i> with Proposed 10% Cumulative Increase Limit						
Salary as of Date	SCC CJ	SCC Puisne	CJ and ACJ	Puisne	Prothonotary <sup>35</sup>	Increase Based on Projected IAI <sup>36</sup>
April 1, 2020	\$435,600	\$403,300	\$371,400	\$338,800	\$271,000	6.7%
April 1, 2021	\$464,700	\$430,300	\$396,200	\$361,400 <sup>37</sup>	\$289,100	2.1%
April 1, 2022	\$474,400	\$439,300	\$404,500	\$368,900	\$295,100	1.03% <sup>38</sup>
April 1, 2023	\$479,100	\$443,700	\$408,500	\$372,600	\$298,000	0.0% <sup>39</sup>
April 1, 2024	\$479,100	\$443,700	\$408,500	\$372,600	\$298,000	2.9%
April 1, 2025	\$492,900	\$456,500	\$420,300	\$383,400	\$306,700	3.0%

34. This proposal is also consistent with the Supreme Court of Canada's statement that the judiciary must shoulder their share of the burden in difficult economic times.<sup>40</sup> The proposal protects the judiciary against potential negative IAI, provides stability and certainty in the area of judicial compensation, and demonstrates to Canadian society at large that the increases are reflective of, and take into consideration, the current economic conditions in Canada.

35. The current Government proposal related to a cumulative 10% maximum is limited to the quadrennial period currently under review. The existing statutory indexation would resume on the expiry of that period. The next Quadrennial Commission commencing in

<sup>35</sup> Prothonotary salaries are equal to 80% of the salary of a *puisne* Federal Court judge (as adjusted by IAI), *Judges Act, supra*, s. 10.1, *supra*, **Joint Book of Documents, Tab 3**

<sup>36</sup> Projected IAI for the row year (i.e. 6.7% is the projected value of IAI for 2020 which will be used to calculate salary increases effective April 1, 2021) - Letter from the Office of the Chief Actuary, Office of the Superintendent of Financial Institutions Canada, February 26, 2021, *supra*, **Joint Book of Documents, Tab 23**

<sup>37</sup> This is based on a 6.7% IAI projection for April 1, 2021.

<sup>38</sup> The 10% maximum cumulative increase over the four-year period was reached. Projections by the Office of the Chief Actuary list the IAI for 2023 as 2.6% - Letter from the Office of the Chief Actuary, Office of the Superintendent of Financial Institutions Canada, February 26, 2021, *supra*, **Joint Book of Documents, Tab 23**

<sup>39</sup> The 10% maximum cumulative increase over the four-year period was reached. Projections by the Office of the Chief Actuary list the IAI for 2024 as 2.8% - Letter from the Office of the Chief Actuary, Office of the Superintendent of Financial Institutions Canada, February 26, 2021, *ibid*.

<sup>40</sup> *PEI Reference, supra*, para 196, **Joint Book of Documents, Tab 4**

2024 would undertake its inquiry, as usual, based on the statutory criteria and circumstances at that time. The Government’s proposal is consistent with the purpose of the Commission, as articulated in *PEI Judges*, to allow periodic review of judicial salaries to ensure their continued adequacy and appropriateness in light of relevant social conditions.

## **2) Second Criterion: Financial Security of the Judiciary in Ensuring Judicial Independence is Respected**

36. When assessing the “adequacy” of judicial compensation, s. 26(1.1)(b) of the *Judges Act* requires the Commission to consider whether judicial remuneration ensures the financial security of the judiciary. Financial security is an essential condition of judicial independence, its purpose being ultimately to protect the judiciary from economic manipulation by the legislature or the executive.<sup>41</sup>

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

I have no doubt that the Constitution protects judicial salaries from falling below an acceptable minimum level. The reason it does is for financial security to protect the judiciary from political interference through economic manipulation, and to thereby ensure public confidence in the administration of justice. If salaries are too low, there is always the danger, however speculative, that members of the judiciary could be tempted to adjudicate cases in a particular way in order to secure a higher salary from the executive or the legislature or to receive benefits from one of the litigants...<sup>42</sup>

38. The current judicial salary as of April 1, 2020, of \$338,800 is well above the minimum level at which a need to protect the judiciary from political interference through economic manipulation would be relevant. Automatic indexing in accordance with the IAI offers further protection against the erosion of judicial salaries.

39. Further, as set out by the Rémillard Commission, the gap in the “Block comparator” (i.e., the difference between judicial salary and the mid-point of the DM-3 salary plus half

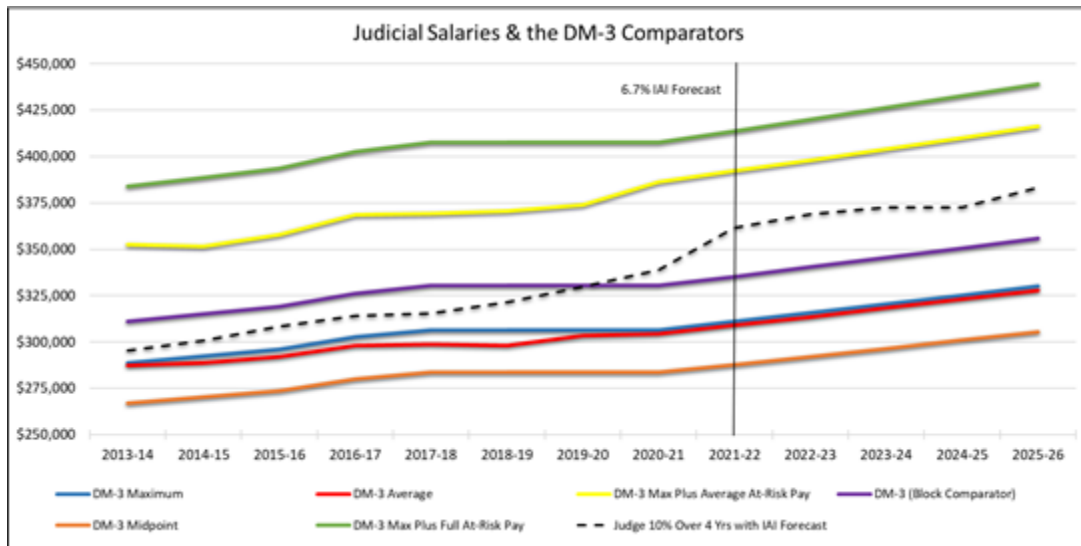
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<sup>41</sup> Rémillard Commission Report, *supra*, para 131, **Joint Book of Documents, Tab 13**

<sup>42</sup> *Ibid*, para 193



of the available DM-3 at-risk pay), has been closed by annual increases to judicial salaries in accordance with the IAI. In the words of that Commission, the indexing has served its purpose.<sup>43</sup> In fact, as demonstrated in this graph, continued use of the IAI would see the judicial salaries far exceed the DM-3 Block comparator in the next quadrennial cycle based on current projections.<sup>44</sup>



40. In addition, as outlined in more detail below, the present judicial salary (even without the additional benefits such as a retirement annuity included) places the judiciary at or very near the top of salaries for the legal profession and high-earning professionals in the economy as a whole. Canadian judicial salaries are also within the same range as judicial salaries of other comparable Western democracies. The purpose here is not to provide a direct or linear comparison, but rather to provide general context to assess the adequacy of Canadian superior court judicial salaries.

<sup>43</sup> *Ibid*, p 16, para 55

<sup>44</sup> Chart based on statistics derived from Appointment Demographics provided by the Commissioner for Federal Judicial Affairs, with Summary, judicial appointments April 1, 2015 to October 23, 2020 [CFJA data], **Joint Book of Documents, Tab 19** and Statistics derived from Privy Council Office, "DM Average Salary Mid-Point and Counts", *supra*, **Joint Book of Documents, Tab 32**. Projected DM salaries assume an increase of 1.5% per year to base rate.

### 3) Third Criterion: No Difficulty Attracting Outstanding Candidates

#### a) Consider the Pools from which Judges Drawn

41. As noted by the Rémillard Commission, all parties agree that Canada has an outstanding judiciary. That report also pointed out that while it is necessary to set judicial salaries at a level that will not deter outstanding candidates from applying to the judiciary, financial factors are not the only, or even the major, factor in attracting outstanding candidates. Other factors, such as the desire to serve the public, security of tenure and availability of supernumerary status and the quality of life associated with judicial office, are all important incentives for accepting appointment to the judiciary.<sup>45</sup>

42. The statistics collected by the Commissioner for Federal Judicial Affairs show that there is no shortage of interested and highly qualified candidates for judicial positions. For example, as of October 23, 2020, Judicial Advisory Committees across Canada had 925 fully-assessed applications. Of these, 140 appointments were made, 183 other individuals were “recommended” but not appointed, and 105 other candidates were “highly recommended” but not appointed.<sup>46</sup> Put another way, for every individual appointed to the bench, there were approximately two other candidates who are fully qualified, recommended and awaiting possible appointment.

43. Further, as set out by the Block Commission, “the issue is not how to attract the highest earners; the issue is how to attract outstanding candidates” from both private and public sectors, from large and small firms, and from large and small centres.<sup>47</sup> Or as the

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<sup>45</sup> Rémillard Commission Report, *supra*, p 23, paras 80-83, **Joint Book of Documents, Tab 13**; see also Report of the Fourth Quadrennial Judicial Compensation and Benefits Commission, dated May 15, 2012 [Levitt Commission Report], p 15, para 42, **Joint Book of Documents, Tab 12**

<sup>46</sup> Applications for Appointment, Statistics, provided by the Commissioner for Federal Judicial Affairs, March 30, 2017 to October 23, 2020, **Joint Book of Documents, Tab 20**

<sup>47</sup> Report of the Third Quadrennial Judicial Compensation and Benefits Commission, dated May 30, 2008 [Block Commission Report], p 37, para 116, **Joint Book of Documents, Tab 11**

Drouin Commission noted, “no segment of the legal profession has a monopoly on outstanding candidates”.<sup>48</sup>

44. Based on the evidence heard by the Standing Senate Committee on Legal and Constitutional Affairs, the third criterion, “the need to attract outstanding candidates to the judiciary”, was prescribed when the *Judges Act* was amended in 1998.<sup>49</sup> This criterion was intended to address recruitment—what was necessary in order to “attract” senior members of the Bar to judicial office.

However, taking the point about the criteria, we do always have to be measuring how we compensate our judges against that body of people from which we are drawing to ensure that we are competitive.<sup>50</sup>

45. The first Quadrennial Commission, the Drouin Commission, understood that subsection 26(1.1) of the *Judges Act* expressly mandates consideration of this relationship:

The criterion identified in subsection 26(1.1)(c), for example, is directed expressly to the issue of recruitment of suitable candidates for the Bench. Traditionally, most judges in Canada are appointed from the ranks of private legal practitioners. Accordingly, those factors constituting incentives or disincentives to the seeking of judicial office by private legal practitioners are relevant to recruitment of judicial candidates.<sup>51</sup>

46. The analysis below shows that the majority of judicial appointments continue to be from the private sector and that there is no evidence that there is any difficulty in attracting high quality candidates from the private sector.

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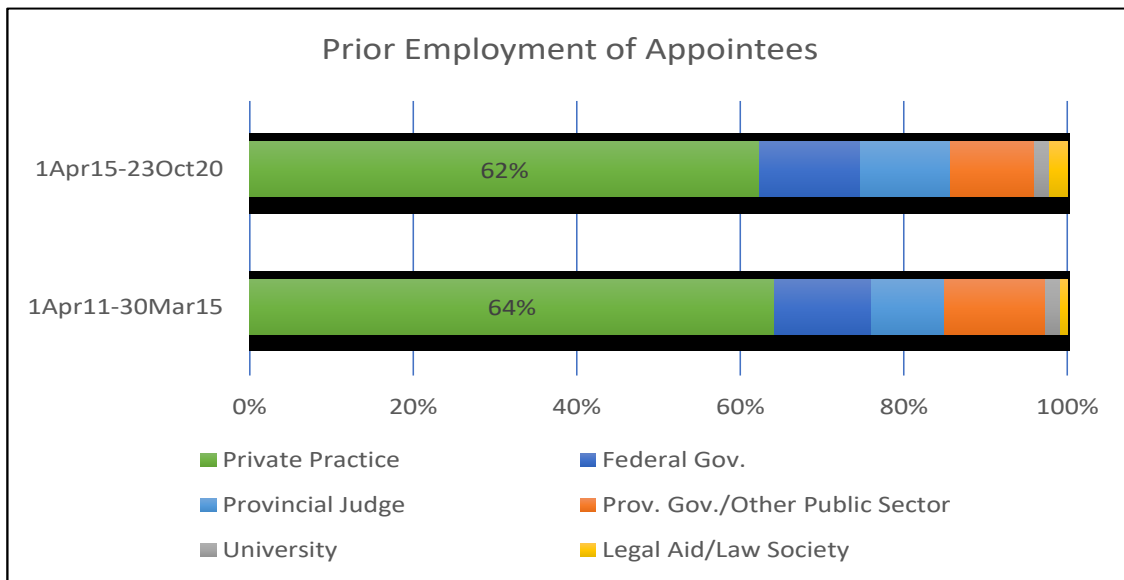
<sup>48</sup> Report of the First Quadrennial Judicial Compensation and Benefits Commission, dated May 31, 2000 [Drouin Commission Report], p 36, **Joint Book of Documents, Tab 9**

<sup>49</sup> Hansard November 6, 1998, *supra*, p 1025, **Government’s Book of Documents, Tab 2**; Senate Committee October 22, 1998, *supra*, p 37:20, **Government’s Book of Documents, Tab 3**

<sup>50</sup> Senate Committee September 30, 1998, *supra*, pp 32:18-32:19, **Government’s Book of Documents, Tab 1**

<sup>51</sup> Drouin Commission Report, *supra*, p 23, **Joint Book of Documents, Tab 9**. See also: Drouin Commission Report, *ibid*, p 35-36; Report of the Second Quadrennial Judicial Compensation and Benefits Commission, dated May 31, 2004 [McLennan Commission Report], pp 31 & 41, **Joint Book of Documents, Tab 10**

47. Between 2015 and 2020, of the 372 lawyers appointed to the judiciary, 62% were from private practice and 38% from other sectors—federal and provincial government lawyers, legal aid lawyers, academics and the provincial court judiciary. This is consistent with the percentages from the last Quadrennial Commission process, where 64% of appointees were from the private sector and 36% of appointees were from other sectors. Indeed, the small drop in private sector appointees appears to be as a result of more provincial court judges being appointed to the federal bench.<sup>52</sup>



Prior Employment	Time Period	
	1Apr11-30Mar15	1Apr15-23Oct20
Federal Gov.	12%	12%
Prov. Gov./Other Public Sector	12%	10%
University	2%	2%
Legal Aid/Law Society	1%	2%
Provincial Judge	9%	11%
Private Practice	64%	62%
<b>Total</b>	<b>100%</b>	<b>100%</b>

<sup>52</sup> Statistics derived from CFJA Data, *supra*, **Joint Book of Documents, Tabs 19**

48. As noted in the Rémillard Commission, there is no need to seek an exact point in the comparators at which judicial salaries should be set.<sup>53</sup> It is therefore useful to consider the income levels of the lawyers who are eligible for appointment to the bench from private practice, as well as outside the private sector.

49. In looking at the use of comparators in past Commissions, the Rémillard Commission observed that “there are no entirely accurate comparators” to the judiciary as no job is similar to that of a judge. Nonetheless, as in past Commissions, the Rémillard Commission looked primarily at public sector and private sector incomes (self-employed lawyers’ income) when analyzing the adequacy of judicial salaries.<sup>54</sup>

50. Reference to the compensation levels of federal deputy ministers (in particular at the DM-3 level) has been a point of disagreement between the Government and the judiciary in the past.<sup>55</sup> After reviewing the position of the Government and the judiciary on the issue, the Rémillard Commission was of the view that the DM-3 compensation was still relevant for its long-term use, consistency and objectivity, but it was not to be applied in a formulaic manner. Specifically, that Commission noted that the DM group was not a significant source of recruitment for the judiciary and the average compensation of a very small group such as the DM-3 group would not be a useful reference point.<sup>56</sup>

51. DM-3 compensation, as noted by the Drouin Commission, is properly considered under the fourth criterion under s. 26(1.1)(d) – “any other objective criteria that the Commission considers relevant”.<sup>57</sup> Unlike the public and private sector comparators, DM-3 compensation is not itself a comparator in the same sense. As is fully explored below, although the Government does not take issue with the fact that DM-3 compensation is one factor among many to be considered by the Commission when examining the public sector comparator as a whole, DM-3 compensation is not the determinative factor. Rather, the better approach is to consider public sector compensation trends, as well as other

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<sup>53</sup> Rémillard Commission Report, *supra*, p 23, para 82, **Joint Book of Documents, Tab 13**

<sup>54</sup> *Ibid*, p 13, para 44

<sup>55</sup> *Ibid*, p 13, para 46

<sup>56</sup> *Ibid*, p 15, para 52

<sup>57</sup> Drouin Commission Report, *supra*, pp 9, 23, **Joint Book of Documents, Tab 9**

compensation levels for senior professionals in the economy as a whole, when looking for public sector comparators.

### **b) Salary Adequate to Attract Outstanding Private Sector Lawyers**

52. To the extent that private sector employment income is a useful measure, it demonstrates that the judicial salary compares very favourably to the income levels of self-employed lawyers in private practice. In 2019, the judicial salary of \$329,900 was higher than the net incomes of 80% of self-employed lawyers aged 35-69, without even taking into consideration the judicial annuity.<sup>58</sup> This 80% level has remained consistent between 2015 and 2019.<sup>59</sup>

53. In reflecting similar findings of past Commissions, the Rémillard Commission recognized the judicial annuity as a significant component of judicial compensation that must be considered in any comparison with private sector salaries.<sup>60</sup> To assist with the comparative process, the Government engaged Peter Gorham, an actuary with expertise in executive compensation, with a focus on pensions and employee benefits, to provide a report (“Gorham Report”) on various aspects of judicial compensation. The Gorham Report has assessed the age-weighted net value of the annuity and disability benefits at 37.8% of the judicial salary.<sup>61</sup> When this value is included as part of judicial compensation and is age-weighted based on the age of appointees, it increases the 2019 judicial total compensation to \$496,000, which exceeded the net income of at least 88% of all self-employed lawyers in 2019.<sup>62</sup>

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<sup>58</sup> Statistics derived from Self-Employed Lawyers’ data provided by the Canada Revenue Agency, [CRA Data], **Joint Book of Documents, Tab 16**

<sup>59</sup> *Ibid*

<sup>60</sup> Rémillard Commission Report, *supra*, p 20, para 71, **Joint Book of Documents, Tab 13**. See also

Levitt Commission Report, *supra*, p 15, para 42, **Joint Book of Documents, Tab 12**; Drouin Commission Report, *supra*, p 42, **Joint Book of Documents, Tab 9**; McLennan Commission Report, *supra*, p 5, **Joint Book of Documents, Tab 10**

<sup>61</sup> Gorham Report, *supra*, p 30, para 134, **Government’s Book of Documents, Tab 4**

<sup>62</sup> Statistics derived from the CRA Data, *supra*, **Joint Book of Documents, Tab 16**

54. This demonstrates that the judicial salary and overall compensation remain more than sufficient to attract and recruit high quality candidates from the private sector for judicial office. As noted above in para 47 and the charts that follow, the percentage of judicial appointments from the private sector has remained consistent over the most recent quadrennial cycle. Although several factors play into the recruitment of candidates for judicial office, the present salary and overall compensation continue to be an inducement for private sector candidates to consider seeking judicial appointment.

55. That said, the Government agrees with the observation of the Rémillard Commission that determining the income data with which to make the appropriate salary comparison is challenging.<sup>63</sup> As noted by that Commission, specific concerns arise in relation the use of the Canada Revenue Agency data (“CRA data”) because the data does not capture lawyers who structure their practices as professional corporations. Other concerns were the decrease in the number of self-employed lawyers in the data base, the disagreement between the parties as to which “filters” regarding age, the appropriate income percentile and geographic location to be used and whether low income lawyers should be removed from the data set.<sup>64</sup>

**i. Context of the Analysis of the CRA Data**

56. Similar to the last Commission process, the principal parties collaborated and worked with the CRA for the purpose of jointly submitting the CRA data. The data provide income information for self-employed lawyers who declared professional income when filing their income taxes for the 2015-2019 taxation years.<sup>65</sup>

57. While the principal parties have jointly requested and received this data, in the past, views differed on how to interpret the data, in particular on the use of filters in analyzing the data. Filters related to age, region, and minimum income threshold have a significant impact on the resulting average income level. In addition, the appropriate and relevant

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<sup>63</sup> Rémillard Commission Report, *supra*, p 16, para 57, **Joint Book of Documents, Tab 13**

<sup>64</sup> *Ibid*, p 17, para 58

<sup>65</sup> Statistics derived from the CRA Data, *supra*, **Joint Book of Documents, Tab 16**

comparative percentile is an important consideration which the parties have not agreed on before past Commissions.

58. The Gorham Report analyzes the CRA data, identifies significant trends in the income of self-employed lawyers, compares the judicial salary with the income of self-employed lawyers, and provides a valuation of the judicial annuity.<sup>66</sup>

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

**ii. Concerns Regarding the Utility of the CRA Data**

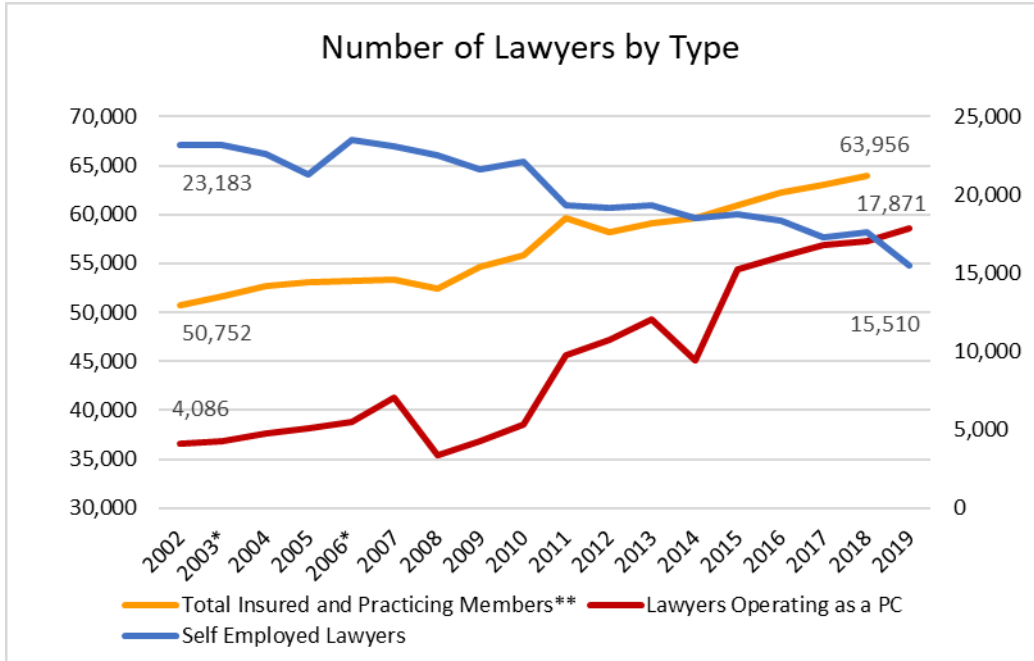
60. As noted above, an increasing number of lawyers in Canada have restructured their legal practices such that they operate as an incorporated entity.<sup>67</sup>

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<sup>66</sup> Gorham Report, *supra*, p 4, para 5, **Government’s Book of Documents, Tab 4**

<sup>67</sup> Chart based on data provided by the Federation of Law Societies of Canada, **Joint Book of Documents, Tabs 38 & 40**. \*Data for these years were not included due to missing QC data; \*\* Total insured and practicing members of the various Canadian law societies (excluding the Chambre des Notaires du Québec).





61. When the CRA gathers information on self-employed lawyers, it cannot capture and disclose data regarding the increasing number of lawyers that operate as professional corporations.<sup>68</sup> As a consequence, the number of self-employed lawyers captured by the CRA data continues to decline even while the number of lawyers in Canada rises. In fact, as set out in the above graph, 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.<sup>69</sup> If this trend continues, the CRA data may become less and less reflective of practicing lawyers' incomes.

### iii. Filters Used When Interpreting the CRA Data

62. Any discussion of the CRA data must be placed in its proper context. Comparing the income of self-employed lawyers to the base judicial salary is the actuarial equivalent of comparing apples and oranges. To be accurate and reliable, compensation professionals

<sup>68</sup> The parties sought to capture instances where lawyers received income through a professional corporation; however, limitations in the data available to the CRA prevented this analysis from being performed by CRA.

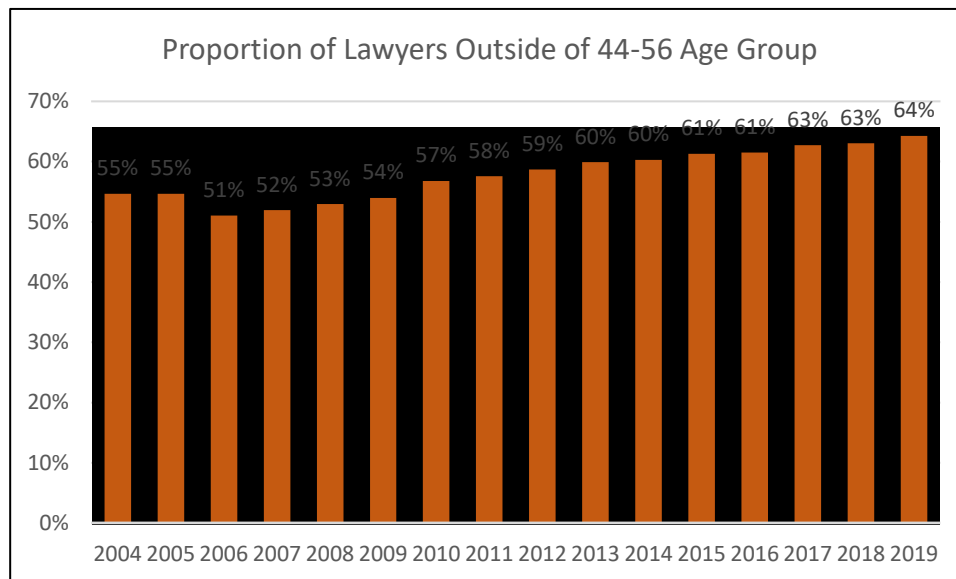
<sup>69</sup> Note that this does not capture the possibility that a lawyer may structure their operations as both a self-employed lawyer and a professional corporation.

require that such comparisons should examine the total compensation of each group.<sup>70</sup> Therefore, engaging in a comparative review of the judicial salaries without taking into account the judicial annuity is fundamentally flawed and leads to results that cannot be properly supported.

#### a) Age of Appointment to the Judiciary

63. The Rémillard Commission determined that focusing on the age group from which the majority of judges are appointed (ages 44-56) was a useful starting point for comparative purposes. However, as that Commission pointed out, a significant portion of appointments fall on either side of this age grouping such that the incomes of self-employed lawyers outside this age band should also be considered.<sup>71</sup>

64. It is worth noting that the effect of excluding the data for individuals who are not in the 44-56 age band is increasing with each successive year. If lawyers outside the 44-56 age band are excluded from the CRA data (and no other restrictions are applied), the proportion excluded has grown steadily from 51% in 2006 to 64% in the 2019 data.



<sup>70</sup> Gorham Report, *supra*, p 6, paras 13-15, **Government's Book of Documents, Tab 4**

<sup>71</sup> Rémillard Commission Report, *supra*, p 18, para 61, **Joint Book of Documents, Tab 13**

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

66. Accordingly, the Gorham Report age-weighted private sector incomes based on the relative number of judges appointed at each age between 2011 and 2020.<sup>72</sup> This approach provides a single point of income comparison for a private sector lawyer who is hypothetically considering accepting a judicial appointment.

67. For 2019, age-weighting in this manner raises the 75<sup>th</sup> percentile of self-employed lawyer income from \$270,000 to \$340,000, which is in the same range as the 2019 base judicial salary of \$329,900 (excluding annuity).<sup>73</sup>

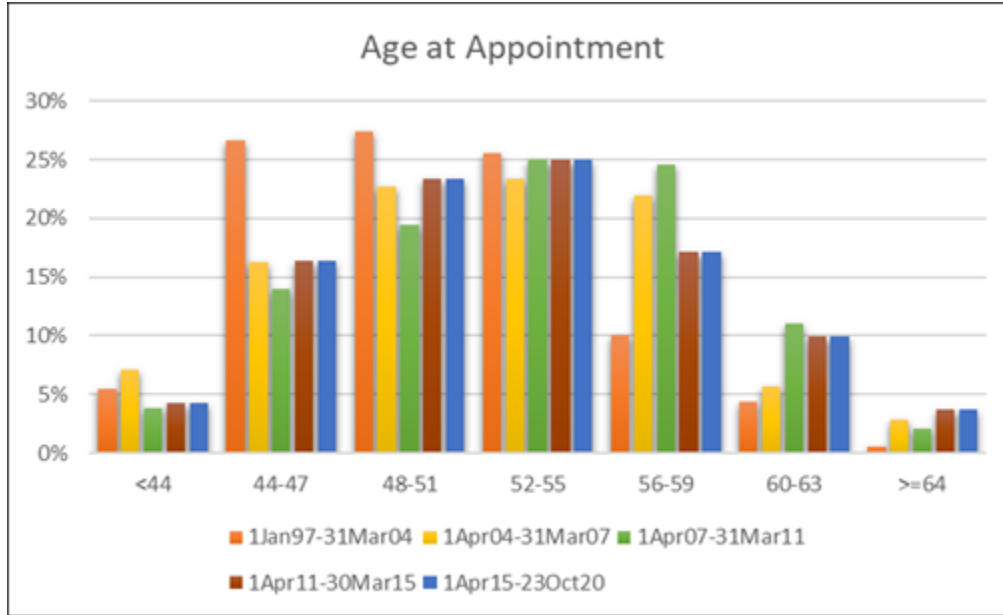
68. A further reason to prefer age-weighting based on the relative number of judges outside the 44-56 age band over simply excluding all ages other than the 44-56 age band is that ages of appointment have changed. As the charts below illustrate, there has been a slight trend towards older appointees:<sup>74</sup>

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<sup>72</sup> Gorham Report, *supra*, pp 43-44, paras 197-201, **Government's Book of Documents, Tab 4**

<sup>73</sup> *Ibid*, pp 7, 44, paras 18, 200

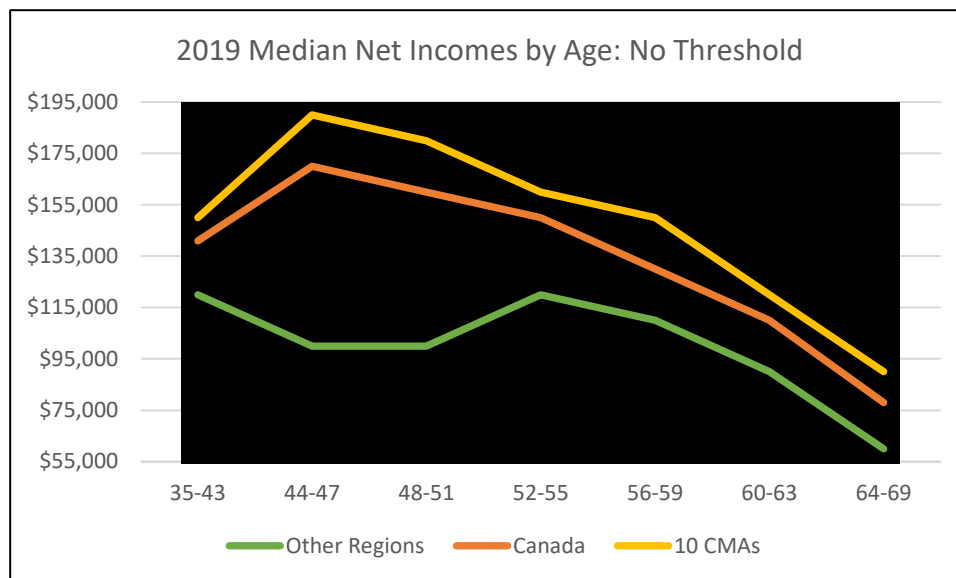
<sup>74</sup> Statistics derived from CFJA Data, *supra*, **Joint Book of Documents, Tab 19**



Appointed	Median Age at Appointment
1Jan97-31Mar04	50
1Apr04-31Mar07	52
1Apr07-31Mar11	53
1Apr11-30Mar15	52
1Apr15-23Oct20	53

69. Finally, another reason to age-weight rather than wholly exclude age bands is that private sector lawyers' incomes decline after the median age of judicial appointment. More particularly, the data show that self-employed lawyers' incomes stagnate and/or decrease significantly after age 56. As illustrated below, this trend is particularly evident in Canada's major cities and at higher income brackets.<sup>75</sup> On that basis, focussing on the average income of self-employed lawyers between the ages of 44-56 is not an accurate portrayal of the incomes they would actually be giving up in future years in accepting a judicial appointment.

<sup>75</sup> Statistics derived from CRA Data, *supra*, **Joint Book of Documents, Tab 16**



70. Consequently, the incomes of all private sector lawyers who are eligible for appointment should be considered, with appropriate age-weighting. To focus solely on the 44-56 age band excludes the incomes of 57% of self-employed lawyers between 2004 and 2019.<sup>76</sup> In 2019 alone, focusing on that same age band would exclude 64% of self-employed lawyers from consideration.<sup>77</sup>

#### **b) Exclusion of Salary Ranges of Lower Income Self-Employed Lawyers**

71. There is no objective basis for applying any salary exclusions to the data. As the Rémillard Commission found, in the past Commission processes, the judiciary applied a \$60,000 income exclusion based on the rationale that income below that threshold reflects a lack of success or time commitment incommensurate with a judicial appointment.<sup>78</sup> That Commission commented that, even assuming there was a basis for excluding lower incomes from the data to be examined, they would need additional evidence to exclude lawyers with incomes below \$80,000 in income from the data set.<sup>79</sup>

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> Rémillard Commission Report, *supra*, p 18, para 62, **Joint Book of Documents, Tab 13**; Gorham Report, *supra*, p 40, para 183, **Government's Book of Documents, Tab 4**

<sup>79</sup> Rémillard Commission Report, *ibid*, p 19, para 65

72. The Government has been, and continues to be, of the position that the exclusion of any income percentiles from the data set is not an accepted practice in compensation benchmarking. The reason for this position is clear: the result of such exclusions is that percentile information is distorted by the compression of data that excludes salaries below a certain amount, which in turn further skews the salary distribution.<sup>80</sup> As set out in the Gorham report:

Excluding lower salaries is a very unusual method that results in distorted results. I am unable to determine a valid and appropriate reason for such an exclusion.

[...]

In my opinion, excluding any compensation amounts distorts the results and creates a perception of possible manipulation.<sup>81</sup>

73. The impact of using a salary exclusion is significant. When a \$60,000 income exclusion is applied to 2019 self-employed lawyer incomes, the 65<sup>th</sup> percentile of the resulting income distribution actually corresponds to the 75<sup>th</sup> percentile in the complete distribution. In the same way, the 75<sup>th</sup> percentile of an income distribution that excludes those under \$60,000 would correspond to about the 82<sup>nd</sup> percentile in the complete distribution.<sup>82</sup> The result of this would be a higher income for each percentile for self-employed lawyers which, when used as a comparative factor, would unduly and inaccurately suggest support for higher judicial compensation.

74. 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.<sup>83</sup> In 2010, it amounted to excluding 28% of those lawyers.<sup>84</sup>

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<sup>80</sup> *Ibid*, p 18, para 63; Gorham Report, *supra*, pp 39-40, paras 179-180, **Government's Book of Documents, Tab 4**

<sup>81</sup> Gorham Report, *ibid*, pp 39, 42, paras 179, 193

<sup>82</sup> Statistics derived from the CRA Data for 2019, **Joint Book of Documents, Tab 16**

<sup>83</sup> *Ibid*.

<sup>84</sup> *Ibid*.

### c) Pre-Appointment Income is not a Determining Factor

75. The Rémillard Commission found that in order to attract outstanding candidates to the judiciary, it was appropriate to look at the 75<sup>th</sup> percentile of private sector self-employed lawyer income. It also found this was consistent with the approach of past Commissions.<sup>85</sup>

76. In 2015, the 65<sup>th</sup> percentile of self-employed lawyer's income was \$188,585 and in 2019 it was \$203,300.<sup>86</sup> The base salary of federally-appointed judges (without considering the judicial annuity) was consistently at least 62% higher during that period: in 2015 it was \$300,600 and by 2019 it was up to \$329,900.<sup>87</sup>

77. Even if the Commission is inclined to consider the 75<sup>th</sup> percentile as the appropriate comparator group, the judicial salary is still significantly higher. In 2019, the 75<sup>th</sup> percentile of self-employed lawyer's income was \$270,000, \$59,900 less than the base judicial salary (without considering the judicial annuity) of \$329,900.<sup>88</sup> In 2019, the base judicial total compensation, including the judicial annuity, was \$496,000, which places it at the 88<sup>th</sup> percentile of self-employed lawyers.<sup>89</sup>

78. A comparison of the judicial salary and the 65<sup>th</sup> and 75<sup>th</sup> percentile of self-employed lawyers' incomes between 2002 and 2019 shows that while base judicial salaries have continued to increase at a steady rate, self-employed lawyers' incomes have fluctuated, often decreasing over the course of several years (e.g., 2010-14).<sup>90</sup> Thus, the current judicial salary now far outpaces that of the 65<sup>th</sup> and 75<sup>th</sup> percentiles of private sector lawyers.

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<sup>85</sup> Rémillard Commission Report, *supra*, p 19, paras 66-7, **Joint Book of Documents, Tab 13**

<sup>86</sup> Statistics derived from the CRA Data, **Joint Book of Documents, Tab 16**

<sup>87</sup> CFJA Data, *supra*, **Joint Book of Documents, Tab 19**

<sup>88</sup> CRA Data, **Joint Book of Documents, Tab 16**; CFJA Data, *ibid.*

<sup>89</sup> Gorham Report, *supra*, pp7, 86, paras 18, 283, **Government's Book of Documents, Tab 4**

<sup>90</sup> Statistics taken from historic CRA Data used before the 2015 Judicial Compensation and Benefits Commission

79. Furthermore, as set out in the chart and graph below, the CRA data capture annual point-in-time snapshots of self-employed lawyers' incomes. However, given how self-employed lawyers' fees – unlike salaries – fluctuate year over year, focusing on a specific percentile risks creating an artificial measure that is not a true reflection of any particular group of lawyer who would comprise potential outstanding candidates.<sup>91</sup>

### Net Self-Employed Lawyer Incomes<sup>92</sup>

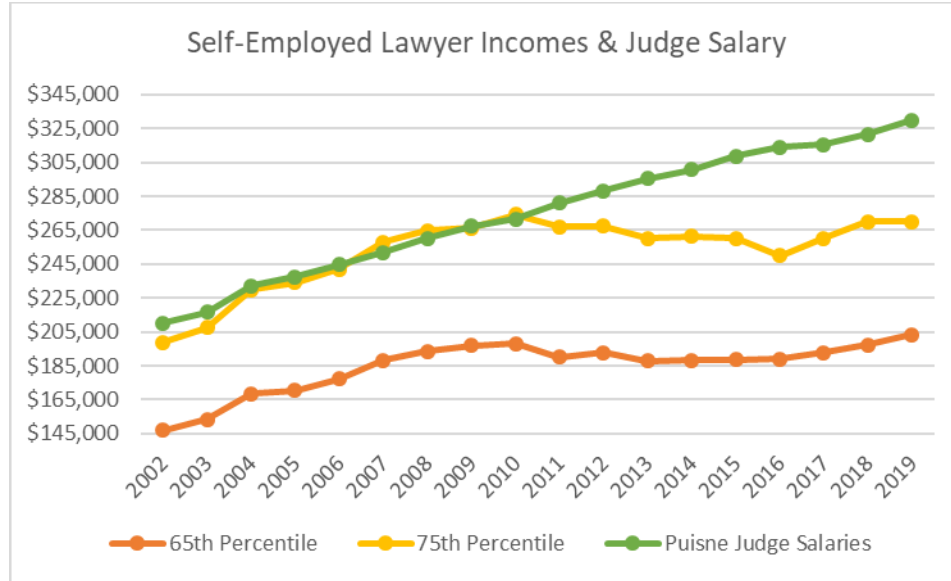
	2002	2003	2004	2005	2006	2007	2008	2009	2010
65th Percentile	\$147,077	\$153,491	\$168,523	\$170,261	\$177,137	\$188,204	\$193,401	\$196,790	\$198,030
75th Percentile	\$198,950	\$207,429	\$229,797	\$233,932	\$242,006	\$257,762	\$264,550	\$266,210	\$274,058
Puisne Judge Base Salaries	\$210,200	\$216,600	\$232,300	\$237,400	\$244,700	\$252,000	\$260,000	\$267,200	\$271,400

	2011	2012	2013	2014	2015	2016	2017	2018	2019
65th Percentile	\$189,995	\$192,658	\$187,833	\$188,138	\$188,585	\$188,800	\$192,850	\$197,345	\$203,300
75th Percentile	\$266,843	\$267,223	\$260,088	\$261,363	\$260,000	\$250,000	\$260,000	\$270,000	\$270,000
Puisne Judge Base Salaries	\$281,100	\$288,100	\$295,500	\$300,800	\$308,600	\$314,100	\$315,300	\$321,600	\$329,900

<sup>91</sup> Gorham Report, *supra*, p 38, paras 171, 173, **Government's Book of Documents, Tab 4**

<sup>92</sup> All P65 and P75 values are estimated based on CRA Data except P75 from 2015-19, which are actual P75 rounded values provided by CRA. P65 and P75 from 2002 to 2014 derived from historic CRA Data used before the 2015 Judicial Compensation and Benefits Commission; other values take from CRA Data, *supra*, **Joint Book of Documents, Tab 16**; Judicial salary statistics derived from Yearly Judicial Salaries, 2000-2020, provided by the Commissioner for Federal Judicial Affairs, *supra*, **Government's Book of Documents, Tab 6**





#### **d) Income Analysis to the Top 10 CMAs Unhelpful**

80. The Rémillard Commission concluded that very little weight should be given to private sector lawyers' salaries in the top 10 Census Metropolitan Areas (CMAs) as opposed to salaries of private sector lawyers in the rest of the country. That Commission instead looked primarily at national average salaries and stated that the top 10 CMA salaries should only be seen as part of a broad review.<sup>93</sup>

81. The approach of the Rémillard Commission echoes that of the Drouin Commission, which properly concluded that it is not “responsible to suggest that the salary level of the Judiciary should be set so as to match the income of the highest earning lawyers in the largest urban centres in Canada”.<sup>94</sup>

82. For use in the broad analysis to be conducted by this Commission, the Government offers the following information. In 2019, the judicial salary of \$329,900 (not including judicial annuity) placed it approximately in the 80<sup>th</sup> percentile of CRA data nationally.<sup>95</sup>

<sup>93</sup> Rémillard Commission Report, *supra*, p 20, paras 68, 70, **Joint Book of Documents, Tab 13**

<sup>94</sup> Drouin Commission Report, *supra*, p 46, **Joint Book of Documents, Tab 9**

<sup>95</sup> Gorham Report, *supra*, p 84, para 274 **Government's Book of Documents, Tab 4**

Further, the 2019 judicial salary was higher than the 75<sup>th</sup> percentile in the top CMAs, except Toronto, where it was at the 72<sup>nd</sup> percentile.<sup>96</sup>

83. Restricting the analysis to the CMAs ignores a significant portion of lawyers' incomes and does not accurately reflect the populations from which judges were actually drawn. Between January 1997 and March 31, 2019, 38% of judicial appointees from the private sector bar were from outside the CMAs.<sup>97</sup>

84. In addition, the incomes of self-employed lawyers are considerably lower outside the CMAs. Thus focussing exclusively on lawyers' incomes in the CMAs rather than considering the income levels from across Canada significantly increases resulting incomes. Using the 2019 CRA data as an illustration:

- a. At the 65<sup>th</sup> percentile, the "all of Canada" income is \$203,300 whereas in the top 10 CMAs, that income is \$229,425 – a difference of \$26,125 or 11%;<sup>98</sup> and
- b. At the 75<sup>th</sup> percentile, the all of Canada income is \$270,000 whereas in the top 10 CMAs, that income is \$310,000 – a difference of \$40,000 or 13%.<sup>99</sup>

**e) The Filters used Can Skew the Results**

85. Before previous Commissions, the judiciary has advocated for the application of filters related to age, location, and low-income exclusions which result in a significant reduction in the size of the data set of self-employed lawyers. Historically, their position has been that the Commission should only consider the incomes of those self-employed

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<sup>96</sup> Statistics derived from the CRA Data, **Joint Book of Documents, Tab 16**

<sup>97</sup> Statistic derived from the CFJA Data, *supra*, **Joint Book of Documents, Tab 19**; Table 5, Census Metropolitan Area of Private Practice, derived from CFJA data, **Joint Book of Documents, Tab 21e**

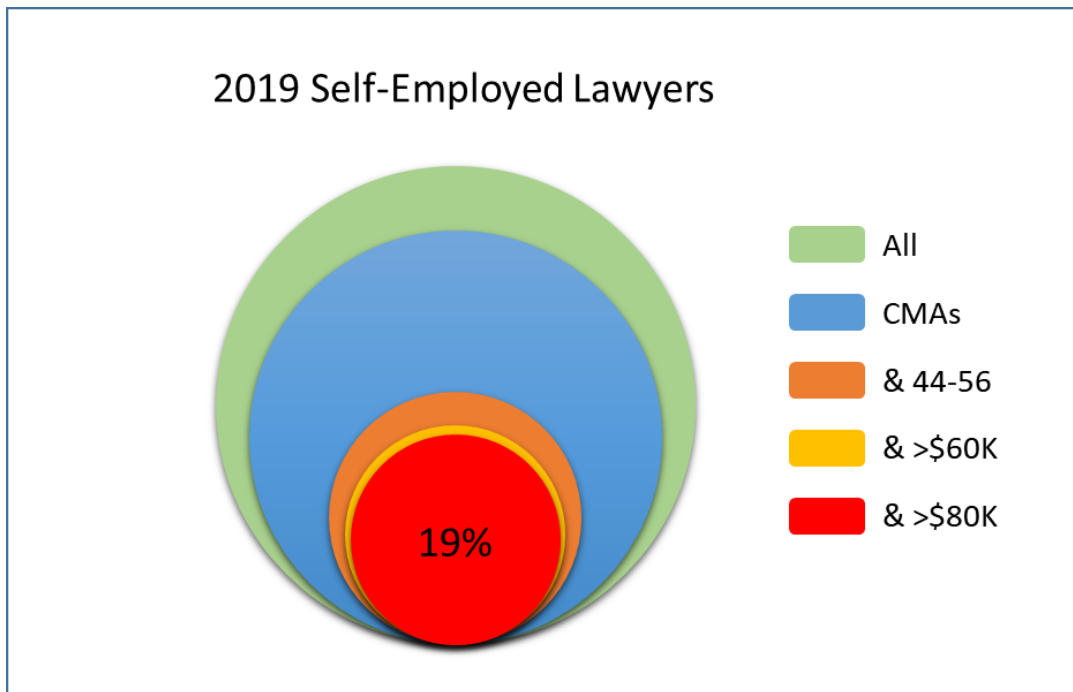
<sup>98</sup> Statistics derived from the CRA Data, **Joint Book of Documents, Tab 16**

<sup>99</sup> *Ibid.*

lawyers who (1) are between age 44-56; (2) practice in Canada's top 10 CMAs<sup>100</sup>; and (3) earn greater than \$60,000 or \$80,000.

86. It would be statistically and logically inaccurate to base the Commission's analysis and recommendations on the net income of so few self-employed lawyers. All of these factors have been reviewed above and the Government's position on each has been set out. However, the chart below demonstrates how restrictive the comparative salary pool of self-employed lawyers would be if the factors historically proposed by the judiciary were applied.

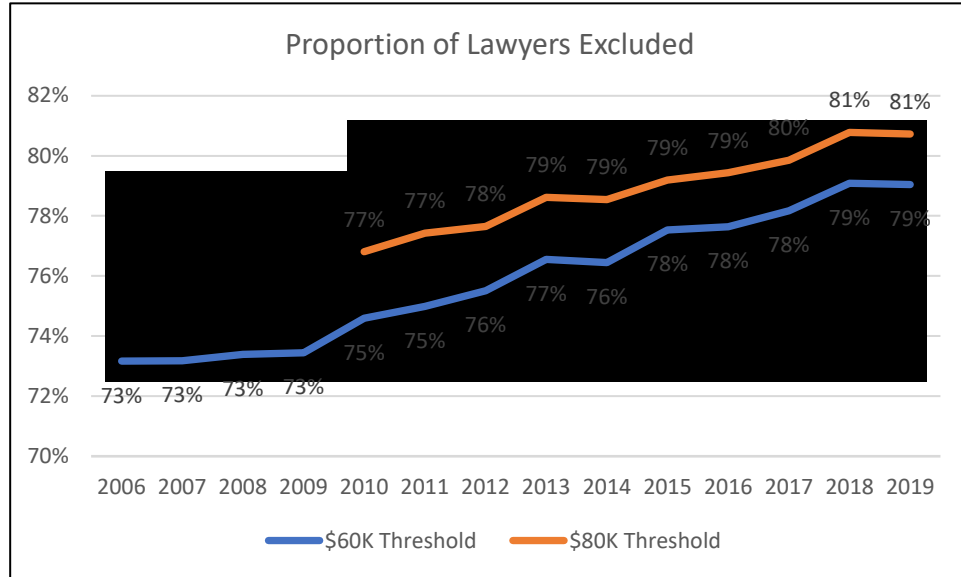
87. For the 2019 taxation year, applying these filters reduces the target group of all self-employed lawyers in the CRA data set to only 19% or 2,990 out of the original 15,510:<sup>101</sup>



<sup>100</sup> A Census Metropolitan Area is an area consisting of one or more neighbouring municipalities situated around a core. A CMA must have a total population of at least 100,000 of which 50,000 or more live in the core. See: Statistics Canada, "Standard Geographical Classification (SGC) 2016 – Volume I, The Classification", (excerpts) online: <https://www.statcan.gc.ca/eng/subjects/standard/sgc/2016/introduction#a5.1>, **Government's Book of Documents, Tab 9**

<sup>101</sup> Statistics derived from CRA Data, *supra*, **Joint Book of Documents, Tab 16**

88. It is also worth noting that the extent to which these proposed exclusions or filters skew the data is increasing with time. In 2006, if we apply a \$60,000 exclusion and limit the data to self-employed lawyers aged 44 to 56 from the top 10 CMAs, we would exclude 73% of self-employed lawyers from consideration. Doing the same exercise in 2019 would exclude 79%. With each successive quadrennial period, these exclusions further distort the data and risk rendering the resulting analysis dubious.



#### iv. The Value of the Judicial Annuity Raises Total Compensation Significantly

89. If eligible for a full annuity, a judge who retired in 2019 would have received an annual annuity of \$219,933 for the remainder of their life.<sup>102</sup> The annuity would increase annually in accordance with CPI. When they pass away, their surviving spouse will receive one-half of that amount for the remainder of the survivor's life.<sup>103</sup> This survivor's benefit is also indexed to CPI.

90. There is little question that for those in private practice, the judicial annuity is a significant incentive to apply for a judicial appointment and must be factored in when

<sup>102</sup> *Judges Act, supra*, s. 42(1), **Joint Book of Documents, Tab 3**

<sup>103</sup> *Ibid*, s. 44(2)

comparing judicial and private sector lawyer compensation. The Rémillard Commission concluded that “the judicial annuity is a considerable benefit to judges and is a considerable part of their compensation packages”.<sup>104</sup> Further, as recognized by the Levitt Commission:

the superiority of the judicial annuity to the capital accumulation alternatives available to private sector lawyers to provide retirement income must be taken into consideration in order to arrive at a comparison of judicial and private sector lawyer compensation.<sup>105</sup>

91. The judicial annuity comprises not only a retirement benefit, but a generous permanent disability benefit as well. In terms of retirement, after 15 years on the bench,<sup>106</sup> a judge is entitled to an annuity for life equal to two-thirds their salary at the time of retirement.<sup>107</sup> Based on the 2019 judicial salary, for a *puisne* judge retiring in 2019 the annual retirement benefit is approximately \$219,933. A judge who becomes permanently disabled is entitled to the full annuity for life, with no minimum service requirement.<sup>108</sup>

92. The net total annuity (including disability and CPP) is valued at 37.8% of the judicial salary as an age-weighted average, with the net retirement benefit being 32.74% and the net disability benefit 5.1%.<sup>109</sup> Taking into account the value of the judicial annuity and disability benefit, the 2019 judicial salary increases from \$329,900 to \$496,000.<sup>110</sup> In comparison, that level of total compensation exceeded the net income of at least 88% of self-employed lawyers nationally in 2019, who would still need to save for retirement and pay for disability insurance out of that income.<sup>111</sup>

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<sup>104</sup> Rémillard Commission Report, *supra*, p 20, paras 71, **Joint Book of Documents, Tab 13**

<sup>105</sup> Levitt Commission Report, *supra*, p 15, para 42, **Joint Book of Documents, Tab 12**. See also: McLennan Commission Report, *supra*, pp 5, 15, 57, **Joint Book of Documents, Tab 10**; Drouin Commission Report, *supra*, p 42, **Joint Book of Documents, Tab 9**

<sup>106</sup> For an individual to be eligible, their age plus their years of service must equal 80: see *Judges Act, supra*, s. 42(1)(a), **Joint Book of Documents, Tab 3**

<sup>107</sup> *Judges Act, ibid*, s. 42(1); Gorham Report, *supra*, p 24, para 112 (a), **Government’s Book of Documents, Tab 4**

<sup>108</sup> *Judges Act, ibid*, s. 42(1)(c); Gorham Report, *ibid*, p 24, para 112 (b)

<sup>109</sup> Gorham Report, *ibid*, pp 29-30, paras 133-134

<sup>110</sup> *Ibid*, p 7, 35, paras 18, 152

<sup>111</sup> *Ibid*, pp 7, 35, paras 16, 156; CRA Data, *supra*, **Joint Book of Documents, Tab 16**

93. An alternative way to value the retirement benefit would be to determine the cost to a self-employed lawyer to fund a similar benefit. Based on this analysis, a self-employed lawyer would have to contribute 49.51% of their annual income to fund a retirement benefit equal to roughly 2/3rds of their income.<sup>112</sup>

94. Reducing a private sector lawyer's annual net income by 49.51%, the amount needed to fund a pension that is proportionally equivalent to that of a judge, the 2019 75<sup>th</sup> percentile private sector income is reduced to approximately \$136,323, which is approximately 59% less than a 2019 base judicial salary.<sup>113</sup>

#### v. Supernumerary Status – An Important Incentive

95. Consideration of the third legislative criterion – the need to attract outstanding candidates – must also factor in the option to elect supernumerary status.<sup>114</sup> Its value to prospective judicial candidates is significant. Indeed, the Supreme Court recognized that it is an “undeniable economic benefit” that is taken into account “by candidates for the office of judge in planning their economic and financial affairs”.<sup>115</sup>

96. The mandatory retirement age for a judge is 75. Based on data from the Office of the Commissioner for Federal Judicial Affairs (CFJA), 43% of judges retired at 75 (excluding death and disability) and the average age of retirement since 1997 has been 71.7.<sup>116</sup> However, judges can elect to become supernumerary if (1) they are eligible to retire with a full annuity; or (2) have served 10 years and attained the age of 70.<sup>117</sup> A

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<sup>112</sup> Gorham Report, *ibid*, p 32, para 142

<sup>113</sup> CRA Data, *supra*, **Joint Book of Documents, Tab 16**

<sup>114</sup> McLennan Commission Report, *supra*, p 5, **Joint Book of Documents, Tab 10**

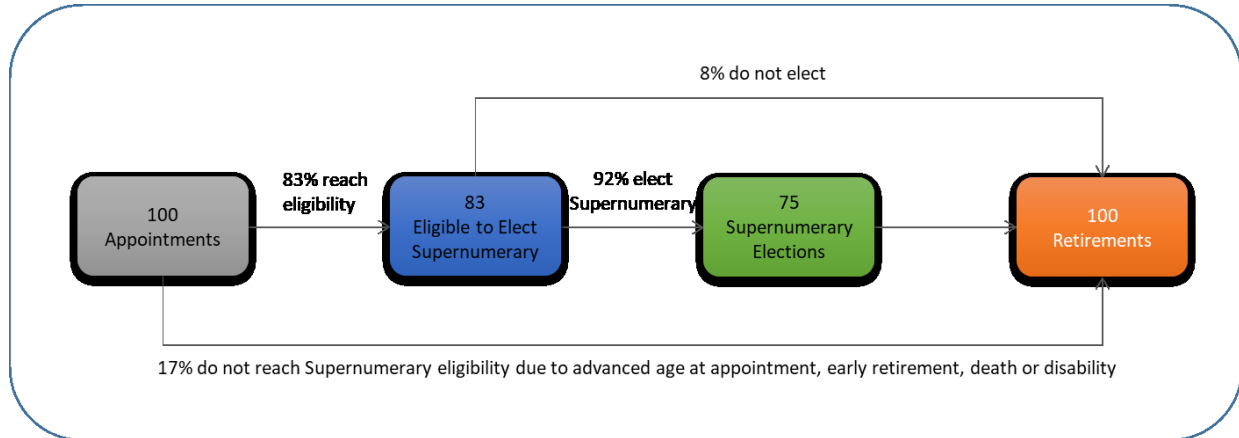
<sup>115</sup> *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, [2002] 1 SCR 405, para 67, **Joint Book of Documents, Tab 5**

<sup>116</sup> Anonymized Data Re: Appointment, Supernumerary Status and Retirement, 1933 to 2020, based on data provided by the Commissioner for Federal Judicial Affairs, **Government's Book of Documents, Tab 7**

<sup>117</sup> *Judges Act, supra*, s. 28, **Joint Book of Documents, Tab 3**

supernumerary judge remains a member of the court and receives a full judicial salary, but is generally understood to carry a 50% workload.<sup>118</sup>

97. The relative attractiveness of this benefit is supported by the fact that approximately 92% of judges eligible to elect supernumerary status do so.<sup>119</sup>



98. The prospect of maintaining a high salary to age 75 is a significant inducement for attracting outstanding candidates from the private sector to the bench. Even if a private sector lawyer is not required to retire well before age 75 by his or her firm, on average, as illustrated above by the chart following paragraph 69, private sector income levels start to decrease in a lawyer's early to mid-50s.<sup>120</sup> By contrast, a judge's salary increases year by year, and if a judge elects supernumerary status, a full salary can be maintained with a significantly reduced workload for up to 10 years before retirement (depending on age of appointment and when the supernumerary election is made).

<sup>118</sup> Gorham Report, *supra*, p 13, para 56, **Government's Book of Documents, Tab 4**

<sup>119</sup> Anonymized Data Re: Appointment, Supernumerary Status and Retirement, 1933 to 2020, based on data provided by the Commissioner for Federal Judicial Affairs, *supra*, **Government's Book of Documents, Tab 7**. Supernumerary Election Trends per 100 Appointments, for period between April 1, 2015 and October 15, 2020

<sup>120</sup> Statistics derived from CRA Data, *supra*, **Joint Book of Documents, Tab 16**

**vi. Other Benefits Afforded to the Judiciary**

99. Another aspect to consider in comparing the compensation of self-employed lawyers and the judiciary is the generous benefits package provided to the judiciary. Most self-employed lawyers would have to provide their own individual extended health and dental benefits and purchase life insurance.<sup>121</sup> The judges' premiums, on the other hand, are paid for by the Government.<sup>122</sup>

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

- a. basic life insurance, supplementary life insurance, post-retirement insurance and dependents' life insurance;<sup>123</sup>
- b. accidental death and dismemberment insurance;<sup>124</sup>
- c. health care plan;<sup>125</sup> and
- d. dental care plan.<sup>126</sup>

**c) Salary Adequate to Attract Outstanding Candidates from Public Sector**

101. The Canadian judiciary must continue to be drawn from a broad background, in addition to private sector lawyers. As the Block Commission recognized, "it is important that there be a mix of appointees from private and public practice".<sup>127</sup>

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<sup>121</sup> Gorham Report, *supra*, pp 11-12, para 42, **Government's Book of Documents, Tab 4**

<sup>122</sup> *Ibid*, pp 11, 25, paras 42, 115

<sup>123</sup> *Judges Act, supra*, s. 41.2(1), **Joint Book of Documents, Tab 3**

<sup>124</sup> *Ibid*

<sup>125</sup> *Ibid*, s. 41.3(1)

<sup>126</sup> *Ibid*

<sup>127</sup> Block Commission Report, *supra*, p 37, para 116, **Joint Book of Documents, Tab 11**



102. In the last four years, 38% of judges were appointed from sources other than private practice. This included federal and provincial government lawyers, legal aid lawyers, law professors, and judges from other courts.

103. The current judicial salary of \$338,800 (\$361,600 projected as of April 1, 2021) exceeds the salary levels of all those positions. Within the federal government, the highest paid rank in the Law Practitioner Group is LP5/Senior General Counsel, with rates of pay ranging from \$181,624 to a maximum of \$222,210, with maximum at-risk pay of 10%.<sup>128</sup>

104. The judicial salary is also significantly higher than the most senior law positions in provincial governments. The maximum rate of pay of the top-ranking Ontario provincial government lawyer (Crown Counsel 4) is \$231,920.<sup>129</sup> In British Columbia, the highest-paid lawyers (Level 4) earn a salary is a maximum of \$233,779.<sup>130</sup>

105. The current judicial salary is in same the range as the highest-paid law professors in Canada. According to the 2019 list published pursuant to the Ontario *Public Sector Salary Disclosure Act*, the highest professor salaries at the University of Toronto were \$339,195 and \$336,516, respectively.<sup>131</sup> In fact, the 2019-20 judicial salary was significantly higher than all Canadian law school Deans, except for the Deans of the University of Toronto, the University of British Columbia and the University of Alberta, who earned slightly more.<sup>132</sup>

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<sup>128</sup> Expert report of Mark Szekely, Columbia Pacific Consulting Ltd., [Szekely Report], March 23, 2021, para 17, **Government Book of Documents, Tab 5**

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> Government of Ontario, Treasury Board Secretariat, “Public Sector Salary Disclosure for 2019: Universities”, online: <https://www.ontario.ca/page/public-sector-salary-disclosure>, **Government’s Book of Documents, Tab 12**

<sup>132</sup> Szekely Report, *supra*, pp 5,7, paras 15-16, **Government Book of Documents, Tab 5**: University of Toronto Law Dean earned \$364,911; the University of British Columbia Law Dean earned \$348,365; and the University of Alberta Law Dean earned \$345,161

**4) Fourth Criterion: Other Objective Criteria that the Commission Considers Relevant**

**a) Benchmarking to DM-3 Should not be Applied in a Formulaic Manner**

106. The Rémillard Commission commented on the long-standing discussion concerning the appropriateness and adequacy of comparing the salaries of federal deputy ministers at the DM-3 level (DM-3s) with that of the judiciary. That report held that the “Block comparator” of the mid-point of a DM-3 salary plus half of the available at-risk pay was a relevant comparator for judicial salaries but that it was not to be applied in a formulaic manner.<sup>133</sup>

107. The Rémillard Commission also dismissed the contention that the “Block comparator” should be abandoned in favour of a comparator equal to the total average compensation for DM-3s. It was pointed out that the DM-3 group is very small (only 11 in 2019-20)<sup>134</sup> and moving to a comparator with such a small group would not meet the criteria of an objective comparison. As that Commission concluded, moving to the total average compensation would not provide a consistent reflection of the year over year changes in compensation for DM-3s.<sup>135</sup>

108. That conclusion was supported by the McLennan Commission, which recognized the inherent dangers of simply linking the judicial salary to another group:

We were, and are, of the view that it would be counter-productive to fix judicial salaries as having a pre-determined relationship to other salaries, whether those of senior civil servants or senior legal practitioners. Those considerations represent dynamics at work in our society and they change constantly. We believe the proper approach was to consider these and other factors in light of the most current

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<sup>133</sup> Rémillard Commission Report, *supra*, p 13-14, para 45-47, **Joint Book of Documents, Tab 13**

<sup>134</sup> Statistics derived from data provided by the Privy Council Office, “DM Average Salary Mid-Point and Counts”, *supra*, **Joint Book of Documents, Tab 32**

<sup>135</sup> Rémillard Commission Report, *supra*, p 14, para 49-50, **Joint Book of Documents, Tab 13**

information. Were it otherwise, there would be no need to address this subject every four years, as contemplated by the *Judges Act*.<sup>136</sup>

Ultimately, the Commission determined that there was no “mandate in the statute or in logic to maintain” rough equivalence with any comparator.<sup>137</sup>

109. As mentioned, the Block Commission was the first to focus on identifying a “single consistent benchmark” within the public sector against which the judicial salary could be compared.<sup>138</sup> That Commission’s salary recommendation was entirely founded on “what compensation increase is required, then, to bring the salary of *puisne* judges to rough equivalence with the DM-3 salary range mid-point plus one-half of maximum performance pay?”<sup>139</sup>

110. The Levitt Commission also focussed exclusively on the DM-3 group, finding that while it was not “ideal”, it was the “best choice”.<sup>140</sup> It rationalized the benchmark on the basis that judicial candidates needed “certainty” about future remuneration.<sup>141</sup>

#### **i. Formulaic Linkage Inconsistent with Commission Mandate**

111. The Rémillard Commission’s finding against a formulaic adoption of the DM-3 comparator is supported by the fact that had Parliament intended that Commissions simply measure the adequacy of judicial salaries against a single, formulaic benchmark, it would have specifically provided for that in the *Judges Act*. Instead, Parliament prescribed certain criteria to guide Commissions in their inquiry.

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<sup>136</sup> McLennan Commission Report, *supra*, p 8, **Joint Book of Documents, Tab 10**. See also: Drouin Commission Report, *supra*, p 22, **Joint Book of Documents, Tab 9**; Senate Committee September 30, 1998, *supra*, pp 32:16- 32:17, **Government’s Book of Documents, Tab 1**

<sup>137</sup> McLennan Commission Report, *ibid*, p 49

<sup>138</sup> Block Commission Report, *supra*, p 32, para 103, **Joint Book of Documents, Tab 11**

<sup>139</sup> *Ibid*, p 38, para 120

<sup>140</sup> Levitt Commission Report, *supra*, p 9, para 27, **Joint Book of Documents, Tab 12**

<sup>141</sup> *Ibid*, p 11, para 30

112. Parliament included a “catch-all” or residual provision which contemplates the consideration of other objective and relevant criteria, in addition to the three enumerated ones:

If we are to allow the commission the capacity to do its work, then it must be able to consider other criteria, but in an objective manner. In other words, it must consider criteria that are justified, ones that are measured on objective grounds, that is why the word “objective” is so important.<sup>142</sup>

**ii. Comparability Issues Remain and Should be Considered**

113. As the 2015 Rémillard Commission also pointed out, benchmarks must be objective, relevant and justified.<sup>143</sup> To ensure that the linkage to the DM-3 group is appropriate and not formulaic, the following comparability issues must still be kept in mind: (a) the small size of the DM-3 group, (b) differences in tenure between the respective positions, (c) differences in considerations concerning DM-3 compensation and (d) the need to look at general trends.

**a) Small Sample Size**

114. In 2019-20 there were only 11 DM-3s compared to 1198 judges. The McLennan Commission did not restrict its inquiry to DM-3s based, in part, on this factor – “a very small sample upon which to base the remuneration of more than 1,100 federally appointed judges”.<sup>144</sup>

115. In fact, the size of the DM-3 group fluctuates. In the past 6 years, there have been anywhere from 8 to 14 individuals at the DM-3 level at any given time.<sup>145</sup> This fluctuation

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<sup>142</sup> Senate Committee October 22, 1998, *supra*, p 37:21, **Government’s Book of Documents, Tab 3**

<sup>143</sup> Rémillard Commission Report, *supra*, p 14, para 49-50, **Joint Book of Documents, Tab 13**

<sup>144</sup> McLennan Commission Report, *supra*, p 28, **Joint Book of Documents, Tab 10**

<sup>145</sup> At the time of the last Quadrennial Commission process in 2015, there were 8 DM-3s, Privy Council Office, “DM Average Salary Mid-Point and Counts”, *supra*, **Joint Book of Documents, Tab 32**. In 2011, there were 13 DM-3s, Levitt Commission Report, *supra*, footnote 26, p 9, **Joint Book of Documents, Tab 12**. In 2003 there were 9 DM-3s,

is due to the fact that the deputy minister level is not tied to the position, but rather the individual. That is, one individual in a position could be appointed at the DM-3 level and the next day a new appointee could be appointed at a different level (e.g., DM-2).

### b) No Security of Tenure

116. The fact that deputy ministers do not have the security of tenure accorded to judges is also a relevant consideration.<sup>146</sup> Deputy ministers serve at the pleasure of the Governor in Council and, as such, are demonstrably at risk of losing their position. On the other hand, pursuant to s. 99 of the *Constitution Act, 1867*, judges cease to hold office only if they attain the age of 75 or are removed from office by the Governor General on address of the Senate and the House of Commons.

117. Among the 49 individuals who served as a DM-3 and whose tenure as a DM-3 or DM-4 ended between 2000 and 2019, the median tenure at the rank of DM-3 or DM-4 was 4.5 years. Since 2000, the longest tenure was 12.4 years, and among current senior deputies the maximum tenure to date at the DM-3 or DM-4 level is 11.9 years.<sup>147</sup>

118. In contrast, the 904 judges who retired between 2000 and September 2020 had spent a median of 21.4 years as a judge, with the maximum tenure of 37.5 years.<sup>148</sup> Indeed, only 8.1% of these judges retired with less than 12.4 years of service, which was the maximum tenure at the DM-3 and DM-4 level.<sup>149</sup>

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McLennan Commission Report, *supra*, p 24, **Joint Book of Documents, Tab 10**. In 1999 there were 10 DM-3s and in 2000 13 DM-3s, Drouin Commission Report, *supra*, p 23, **Joint Book of Documents, Tab 9**; according to Data derived from the Privy Council Office, in the years 2014-15 through 2019-2020 there have been 11, 8, 9, 10, 14, 11 DM-3s in each respective year, **Joint Book of Documents, Tab 32**

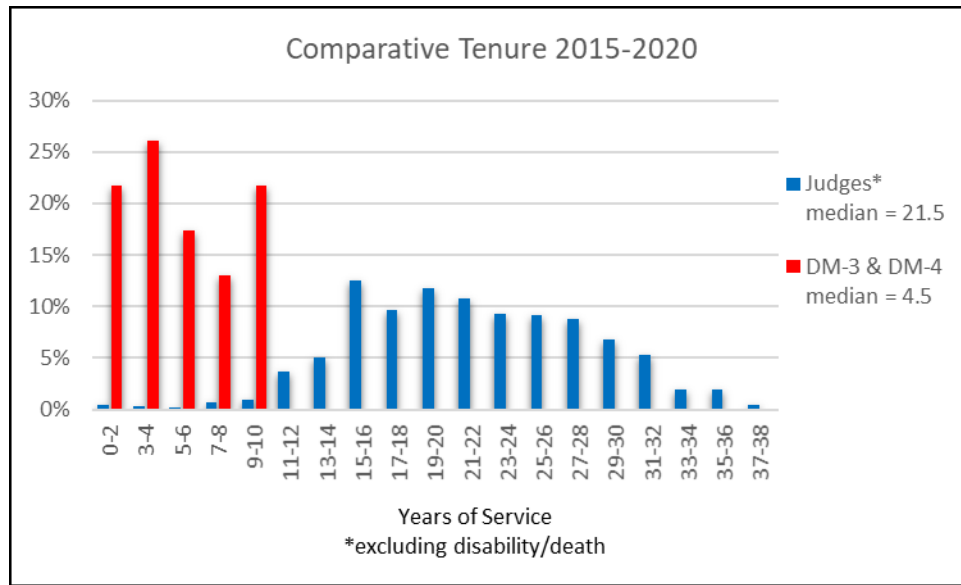
<sup>146</sup> McLennan Commission Report, *supra*, p 28, **Joint Book of Documents, Tab 10**

<sup>147</sup> Statistics derived from data provided by the Privy Council Office, “DM Tenure”, **Joint Book of Documents, Tab 31**

<sup>148</sup> Anonymized Data Re: Appointment, Supernumerary Status and Retirement, 1933 to 2020, based on data provided by the Commissioner for Federal Judicial Affairs, *supra*, **Government’s Book of Documents, Tab 7**. Note that data excludes those who died in office or took a disability annuity.

<sup>149</sup> *Ibid.*

119. The chart below illustrates the significant differences in tenure between the DM-3 and DM-4 groups combined and the judiciary, from 2015-2020.



### c) Significant Differences in Compensation Measures

120. There are two additional significant differences in compensation measures that argue against formulaic benchmarking with the DM-3 group. First, an individual who occupies a DM position is paid at a certain level based on a combination of the individual's skills and experience and the duties to be performed. The DM salary plan is more akin to an appointment to level, rather than to a position. Because DM compensation is so highly individualized, a newly appointed deputy minister could be paid less or more than the individual who occupied the position immediately before, depending on his/her seniority and skills, and the complexity of the Government's agenda. This system of determining compensation individually and based on personal achievements is not appropriate in the context of judicial compensation.

121. Second, since 1998, deputy ministers have been eligible to receive "performance pay" measured against agreed targets and the achievement of business plans. Performance pay has two elements: a potential variable amount (at-risk pay) which is re-assessed each

year and a potential bonus for performance that surpasses expectations.<sup>150</sup> At-risk pay is measured against individual commitments which are composed of policy and program results in support of the Government's agenda, management results, leadership results and corporate results in support of a priority identified by the Clerk of the Privy Council.<sup>151</sup>

122. The at-risk pay is determined according to the performance assessment of the individuals in those positions in a given year. From year to year, the same person's cash compensation will fluctuate. Given the highly individual nature of these "bonuses", they are not transferrable to the broader judicial compensation context, in which performance assessments would be inappropriate.

**d) The Deputy Minister Salaries have stayed Constant since 2017**

123. From 2017 to 2020, the salary ranges of deputy ministers have not increased.

124. Assuming the addition of at-risk pay (midpoint salary and one-half of maximum performance pay) is used, not only does the judicial salary compare very favourably to the DM level, it surpasses all levels but the DM-4 which is the very highest in the DM range. As of April 1, 2020, it is higher than that of DM-1s, DM-2s and DM-3s and is \$40,493 lower than the current DM-4 level. The DM-4 comparison is truly striking given that this level is "reserved for exceptional circumstances and positions of particularly large scope".<sup>152</sup> At present, there are only three individuals appointed to the DM-4 level, including the Clerk of the Privy Council, who is the head of the public service.<sup>153</sup>

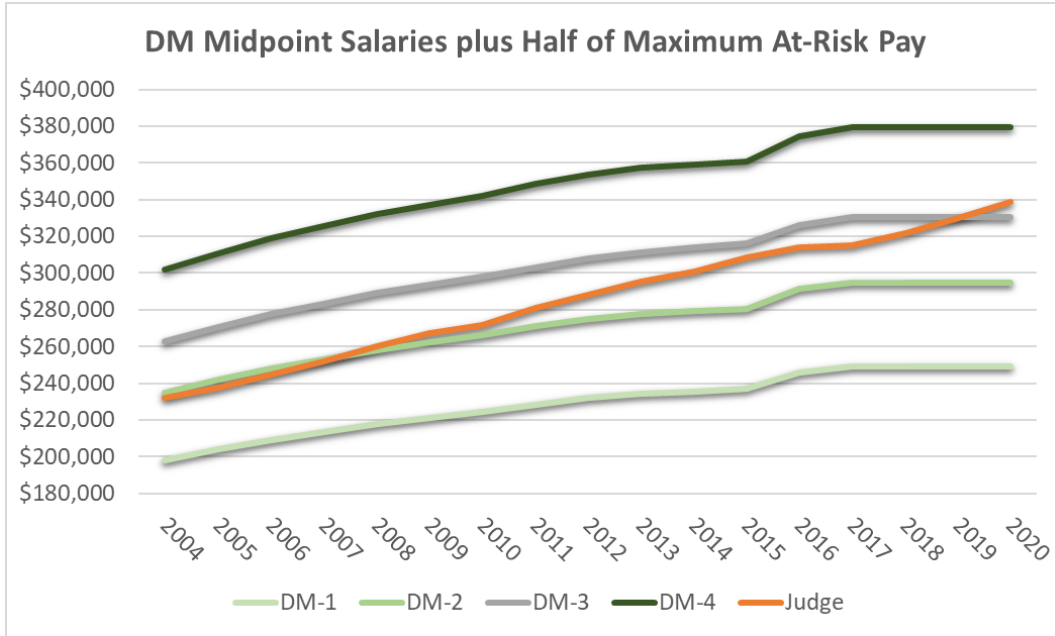
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<sup>150</sup> Privy Council Office, "Performance Management Program Guidelines for Deputy Ministers, Associate Deputy Ministers and Individuals Paid in the GX Salary Range", updated October 2020, online: <https://www.canada.ca/en/privy-council/programs/appointments/governor-council-appointments/performance-management/senior-public-servants.html>, **Government's Book of Documents, Tab 10**

<sup>151</sup> *Ibid.*

<sup>152</sup> Block Commission Report, *supra*, p 33, para 105, **Joint Book of Documents, Tab 11**

<sup>153</sup> Privy Council Office, "DM Average Salary Mid-Point and Counts", *supra*, **Joint Book of Documents, Tab 32**



#### e) Consideration of Salary Levels of Other Senior Public Servants

125. The Government continues to be of the view that useful context for setting judicial compensation can be gathered by looking more broadly at compensation for senior civil servants other than the DM-3 group. This is not to suggest that these other comparisons should be viewed as determinative of judicial salary, rather they provide context to demonstrate that other high-ranking public positions of significant responsibility are generally in line with the salary provided to the judiciary. This approach was commented on favourably by the McLennan Commission<sup>154</sup> and the Drouin Commission.<sup>155</sup>

126. For example, economic increases in the federal public sector since the last Quadrennial Commission were as follows: 2016 - 1.25%; 2017 - 1.25%; 2018 - 2.58%; 2019 - 2.14%; and 2020 - 1.38%.<sup>156</sup> There have been no new agreements finalized since then.

<sup>154</sup> McLennan Commission, pp 28-31 **Joint Book of Documents, Tab 10**

<sup>155</sup> Drouin Commission Report, *supra*, p 32, **Joint Book of Documents, Tab 9**

<sup>156</sup> Treasury Board of Canada, “Negotiated Wage Settlements, 2014-2022”, **Joint Book of Documents, Tab 35**



127. Other high-ranking Government officials also bear consideration. Governor in Council appointees in the GC and GCQ<sup>157</sup> groups are smaller in number than the DM group. At present, there are 5 GC-9 positions<sup>158</sup> and only 2 GC-10s.<sup>159</sup> For example, the Chief Public Health Officer of Canada is a GC-9 and the President of the National Research Council is a GC-10. There are 5 GCQ-9s at present<sup>160</sup> and 1 GCQ-10.<sup>161</sup> For example, the Chair of the CRTC and the Commissioner of Competition are GCQ-9s and the Commissioner of the RCMP is a GCQ-10.

128. The judicial salary of \$338,800 as of April 1, 2020 is significantly higher than the GC-9 salary midpoint with one-half maximum performance pay of \$288,912 and is virtually equal to that of the GC-10 salary midpoint with one-half maximum performance pay of \$339,460.<sup>162</sup> It is also higher than the GCQ-9 salary midpoint and only slightly lower than the GCQ-10 salary midpoint (neither of which involves performance pay) of \$303,500 and \$357,900 respectively.<sup>163</sup>

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<sup>157</sup> GCQ defined, Privy Council Office, online:

<https://www.canada.ca/en/privycouncil/programs/appointments/governor-council-appointments/compensation-terms-conditions-employment/terms-conditions.html>,

**Government's Book of Documents, Tab 11**

<sup>158</sup> (1) Chief Public Health Officer, Public Health Agency of Canada; (2) President, Natural Sciences and Engineering Research Council; (3) President, Social Sciences and Humanities Research Council; (4) President and Chief Executive Officer, Parks Canada Agency; (5) President, Impact Assessment Agency of Canada: see: Privy Council Office, "GC and GCQ Income Information", **Joint Book of Documents, Tab 33**

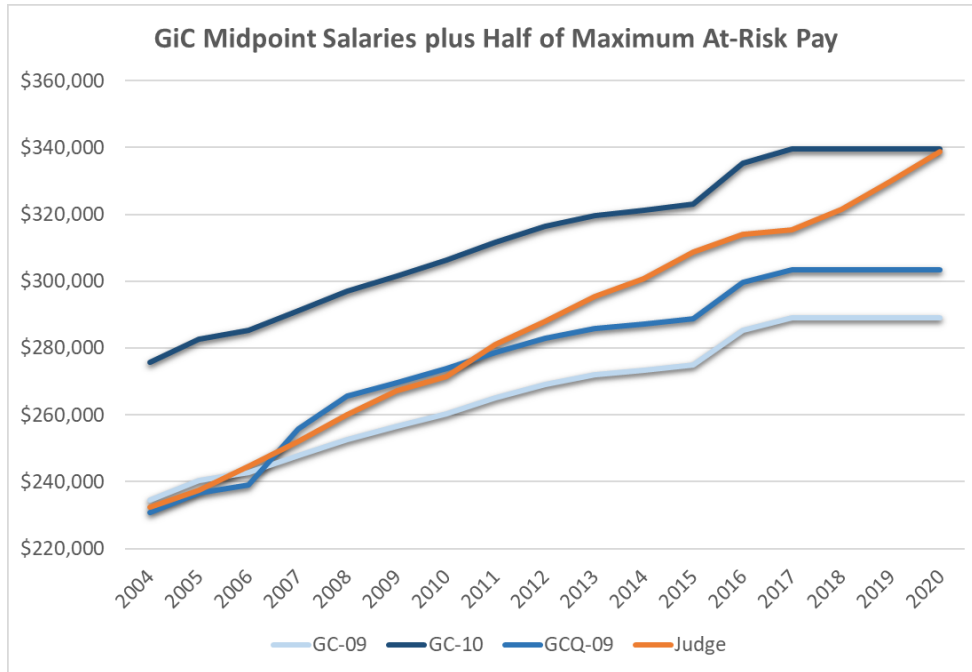
<sup>159</sup> The Presidents of the Canadian Institutes of Health Research and the National Research Council of Canada, *ibid.*

<sup>160</sup> (1) Chairperson and Member, Canadian Radio-television and Telecommunications Commission; (2) Chair, Canada Transportation Agency; (3) Commissioner of Competition; (4) Superintendent, Office of the Superintendent of Financial Institutions; (5) Chief Statistician, Statistics Canada, *ibid.*

<sup>161</sup> Commissioner, RCMP, *ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*



## **b) Comparison to Other Professionals and Compensation for Judiciaries in other Countries**

129. In addition to comparison to the DM group and other senior federal government officials, the Government is of the view that it is useful to look at the broader context of other professions, in particular those that are similarly paid out of the public purse and are integral to the functioning of society. It is also felt that other judiciaries in Western democracies that are roughly comparable to the Canadian judiciary can offer useful contextual information that may assist in determining the adequacy of judicial salaries.

### **i. Other Professionals**

130. The Government agrees with the observation of the Rémillard Commission that there is no profession or position similar to that of a judge.<sup>164</sup> The position of a judge in our society is unique. However, there are several categories of professionals in society, such as medical doctors, professional engineers and corporate managers, for example, who

<sup>164</sup> Rémillard Commission Report, *supra*, p 13, para 44, **Joint Book of Documents, Tab 13**

represent positions of responsibility and authority, which are demanding in terms of time and effort and intellectual requirements, and that are respected and admired in society generally. A review of these other senior professions in society demonstrates that the judiciary is at or very near the top of salaries in the broader economy.

131. For example, medical doctors in Canada are paid out of public funds.<sup>165</sup> A review of their salary range demonstrates that medical salaries are, with the exception of a few specialists, below the judicial salary. In 2018, there were approximately 35,919 family doctors practicing in Canada. Their average earnings for that year were approximately \$204,568. In that same year, there were approximately 2027 general surgery specialists in Canada, whose average earnings were approximately \$347,860.<sup>166</sup> For comparison, the judicial salary on April 1, 2018 was \$321,600 (not including the annuity).

## ii. Other Judiciaries

132. There is no direct comparison between the Canadian judiciary and the judiciaries in other countries. The jurisdiction, history, responsibilities and role in the legal landscape are unique for each country.<sup>167</sup> In addition, factors such as the costs of living and exchange rates must be accounted for. However, such economic discrepancies can be generally accounted for by using purchasing power parity (PPP) exchange rates that account not only for differences in currency but also for cost of living differences in the various countries.<sup>168</sup>

133. Notwithstanding these differences, broad similarities can be found when comparing the Canadian judiciary to the judiciaries of the United States, the United Kingdom, New Zealand and Australia. The comparisons made have, to the extent possible, attempted to reflect roughly the same level of court as the superior courts in Canada. The comparisons were only made for salary without reference to additional benefits or annuities offered in each jurisdiction. This comparative exercise shows that the judicial salaries of Canadian superior court judges is higher than those for similarly placed judges in the

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<sup>165</sup> Szekely Report, p 8, para 19, **Government Book of Documents, Tab 5**

<sup>166</sup> *Ibid*, p 9 at Table 3

<sup>167</sup> *Ibid*, p 10, para 26

<sup>168</sup> *Ibid*, pp 10-12, paras 30-33, 36, 40, 43

United States and, in some instances, the United Kingdom and Australia, but lower than those found in New Zealand.

134. Using the 2020 salary of \$338,800 for the federally-appointed judiciary as a benchmark and applying the PPP exchange rate, the following comparisons are made:

- i. **Australia:** Federal Circuit Court Judges \$323,772 (CAN); Family and Federal Court Judges \$383,644 (CAN)<sup>169</sup>
- ii. **New Zealand:** High Court \$386,824 (CAN); Court of Appeal \$405,217(CAN)<sup>170</sup>
- iii. **United Kingdom:** Group 3 Judge \$366,982 (CAN); Group 4 Judge \$322,292 (CAN)<sup>171</sup>
- iv. **United States:** Federal District Court \$259,266 (CAN); Federal Circuit Courts of Appeal \$274,961 (CAN)<sup>172</sup>

135. Even allowing for the differences mentioned above, this demonstrates that Canadian judicial salaries are well within the range of judicial salaries from other Western democratic countries with strong and independent judiciaries.

## 5) Conclusion On Adequacy of Judicial Compensation

136. Consideration of the prescribed statutory criteria demonstrates that the current level of judicial compensation is entirely adequate to maintain judicial independence. The salaries of judges need only be increased annually based on IAI until the next quadrennial cycle. However, given the overall state of the Canadian and world economy related to the COVID-19 pandemic, such increases that are based on the annual IAI rate should not rise

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<sup>169</sup> *Ibid*, p. 10, para 33

<sup>170</sup> *Ibid*, p. 11, para 36

<sup>171</sup> Group 3 judges include Inner House Judges of the Court of Session (Scotland), Lords/Lady Justices of Appeal; Group 4 includes *puisne* Judges of the High Court – see Szekely Report, *ibid*, p. 11, para 38

<sup>172</sup> *Ibid*, p. 12, para 43

above 10% cumulatively for the period of 2021-2024. A cumulative increase of 10% over the April 1, 2020 judicial salary is fully in line with the historic rate of IAI increase of approximately 2.5% per year, a rate of increase that has been recognized as sufficient to ensure judicial independence over time.

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

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

138. The proposed new medical assistance would cover reasonable medical travel expenses incurred when a judge who receives a northern allowance under the *Act* is required to travel for non-elective medical or dental treatment. Such assistance is not currently available to judges in receipt of a northern allowance under the *Act*. However, the Commissioner for Federal Judicial Affairs has identified this as an occasional need, and the Government agrees that it would be appropriate to extend such an allowance to judges who are living in the areas already recognized in the *Act*.

#### **V. PROTHONOTARIES' COMPENSATION**

##### **1) Total Compensation is Adequate**

139. The prothonotaries' current compensation arrangements are fully adequate. Their current salary is \$271,000 (projected to be \$289,200 as of April 1, 2021) – 80% of a Federal Court judge's salary.<sup>173</sup> Furthermore, they are now entitled to an annuity calculated in the

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<sup>173</sup> *Judges Act, supra*, s. 10.1, **Joint Book of Documents, Tab 3**

same manner as the judicial annuity – that is two-thirds of their salary at the time of retirement. The judicial annuity and disability benefit, which is valued at 37.8%, increases their 2020 age-weighted average total compensation to approximately \$408,100.<sup>174</sup>

140. If eligible, a prothonotary who retired in 2019 will receive an annual annuity of \$175,933 for the remainder of their life.<sup>175</sup> The annuity would increase annually in accordance with CPI. When they pass away, their surviving spouse will receive one-half of that amount for the remainder of the survivor's life.<sup>176</sup> This survivor's benefit is also indexed to CPI.

141. It must be recalled that the Special Advisor on Federal Court Prothonotaries undertook a comprehensive review of prothonotaries' compensation in 2013.<sup>177</sup> The Government considered the Special Advisor's Report and issued a response in 2014.<sup>178</sup> Parliament then amended the *Judges Act*, significantly increasing the prothonotaries' compensation. Their salary was increased by 10% from \$198,700 to \$218,900 retroactive to April 1, 2012 and the prothonotaries became entitled to an annuity under the *Judges Act* effective January 1, 2015.<sup>179</sup>

142. In 2016, following the recommendations of the Rémillard Commission, the prothonotaries received another increase, this time to the current level of 80% of the judicial salary.<sup>180</sup> In addition to their compensation and annuity, prothonotaries are entitled to the same extensive benefits plan accorded to the judiciary. Such benefits include:

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<sup>174</sup> Gorham Report, *supra*, pp 7, 36, 87, paras 23, 162, 289, **Government's Book of Documents, Tab 4**

<sup>175</sup> *Judges Act, supra*, s. 42(1), **Joint Book of Documents, Tab 3**

<sup>176</sup> *Ibid*, s. 44(2)

<sup>177</sup> Report by the Special Advisor on Federal Court Prothonotaries' Compensation, July 31, 2013 [Cunningham Report], **Joint Book of Documents, Tab 15**

<sup>178</sup> Response of the Minister of Justice to the Report of the Special Advisor on Federal Court Prothonotaries' Compensation, February 27, 2014, **Joint Book of Documents, Tab 15(a)**

<sup>179</sup> *Judges Act, supra*, ss 2.1, 10.1, 42, **Joint Book of Documents, 3**

<sup>180</sup> Response of the Government of Canada to the Report of the 2015 Judicial Compensation and Benefits Commission, November 30, 2016, **Joint Book of Documents, Tab 13(a)**

- a. basic life insurance, supplementary life insurance, post-retirement insurance and dependents' life insurance;
- b. accidental death and dismemberment insurance;
- c. health care plan; and
- d. dental care plan.<sup>181</sup>

143. Based on the significant changes to their salary in 2014 and 2016, the Government submits that the current level of compensation is sufficient to ensure the judicial independence of prothonotaries. The judicial salary to which the prothonotaries' salary is linked will continue to be adjusted based on IAI indexation (as described in the submissions above).

## 2) Proposed Creation of a Supernumerary Office for Prothonotaries

144. In its final report, the Rémillard Commission made the following recommendation:

The Government of Canada and the Chief Justice of the Federal Court of Canada should consider the possibility of allowing prothonotaries to elect supernumerary status under the *Judges Act* or of creating a senior prothonotary program for those eligible for retirement.<sup>182</sup>

145. In its public response, the Government committed to “engaging with the Chief Justice of the Federal Court on the issue of possible pre-retirement arrangements, and continuing to communicate with him on workload issues that affect that Court.”<sup>183</sup> In keeping with that commitment, officials from the Department of Justice have engaged with the Chief Justice of the Federal Court, as well as representatives of the prothonotaries themselves, and arrived at a mutually agreed-upon proposal for supernumerary status that

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<sup>181</sup> *Judges Act, supra*, s 41.2(1), **Joint Book of Documents, Tab 3**

<sup>182</sup> Rémillard Commission Report, *supra*, p 40, **Joint Book of Documents, Tab 13**

<sup>183</sup> Response of the Government of Canada to the Report of the 2015 Judicial Compensation and Benefits Commission, November 30, 2016, **Joint Book of Documents, Tab 13(a)**

is similar to the election available to judges, modified slightly in recognition of the role prothonotaries play in the work of the Federal Court:

- Eligibility when eligible for a full *Judges Act* pension (i.e., after at least 15 years in office and age + years in office equal to 80; or upon completing at least 10 years in judicial office and attaining the age of 70).
- Election (whether and when) at prothonotary's option.
- Duration of supernumerary status for a maximum of 5 years.
- Workload defined in legislation as 50 percent of that of a non-supernumerary prothonotary.

146. The Government thus proposes the creation of a supernumerary office for prothonotaries. The Government recognizes that, in addition to being a significant benefit in and of itself, supernumerary judicial offices also provide benefits to courts as a whole. Courts retain experienced judges who can be called upon to deal with the most difficult cases, while also providing continuity to a court, mentoring to new judges, and additional assignment flexibility to chief justices who are managing full and complicated dockets. There are also benefits in terms of judicial resources: supernumerary judges continue to contribute to courts' workload, and new judges can be appointed into the vacancies created by supernumerary elections. Benefits that attach to supernumerary judicial status can be anticipated in relation to supernumerary prothonotaries.

147. The Government notes that, as acknowledged by the Rémillard Commission, the creation of this office is within the authority of the Government, but further recognizes that it presents a significant benefit to prothonotaries and thus could be seen to contribute to the ability to attract outstanding candidates to the office of prothonotary.

## **VI. OVERALL CONCLUSION**

148. Given the current salary levels and the significant value of the judicial annuity, the Government's position is that no changes to either judicial or prothonotary compensation are justified during the next four years. Annual indexation in accordance with the IAI will provide the required protection against erosion of judicial salaries due to the effect of



inflation. Applying the forecasted IAI amounts to a cumulative 10% net increase over four years, by 2024 the base judicial salary is projected to increase to \$372,600 and the prothonotaries' salaries to \$298,000.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

Dated at Ottawa, Ontario, this 29th day of March, 2021

A handwritten signature in black ink, appearing to read 'CR', is written over a horizontal line.

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