JUDICIAL COMPENSATION AND BENEFITS COMMISSION

SUBMISSION

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

on the

GOVERNMENT'S PROPOSED PRE-APPOINTMENT INCOME STUDY

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I. OVERVIEW

1. These submissions to the Judicial Compensation and Benefits Commission (the "**Commission**") are made on behalf of the Canadian Superior Courts Judges Association (the "**Association**") and the Canadian Judicial Council (the "**Council**") in response to the Government of Canada's request that the Commission ask the Canada Revenue Agency ("**CRA**") to undertake a study of the pre-appointment income of judges that the Government has appointed between 2004 and 2014 (the "**PAI study**").

2. In support of this unprecedented request, presented at a most inopportune time, the Government asserts that the proposed study would generate data that "would be relevant to and highly probative of a central question before the Commission; namely, whether the judicial salary is adequate to attract outstanding candidates to the judiciary." The Government also asserts that "[t]he study would be responsive to specific requests for data made by both the 2003 and 2007 Commissions."[1]

3. Neither of these assertions is correct. Indeed, as demonstrated in this submission, the one Commission that was presented with pre-appointment income data came to the *opposite* conclusion. After carefully considering the question of the usefulness and relevance of such data, on the basis of full submissions by the Government and the judiciary, the Block Commission stated:

> 90. We do not believe that a snapshot of appointees' salaries prior to appointment is particularly useful in helping to determine the adequacy of judicial salaries. Such a study does not tell us whether judicial salaries deter outstanding candidates who are in the higher income brackets of private practice from applying for judicial appointment.

4. The Association and the Council have serious concerns about the Government's proposed PAI study. The submission of the Association and the Council is that the Government's proposed PAI study will not provide the Commission with any useful or reliable information, while the collection of that information clearly engages deeply rooted privacy concerns on the part of sitting judges. The fundamental threshold concern

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[1] Submissions of the Government of Canada on the Proposal for a Pre-Appointment Income Study ("**Government's PAI Submission**") at para. 1.

of the Association and the Council, however, relates to the untimely nature of the Government's proposal.

5. The Government is asking the Commission to decide, as a preliminary matter, whether the Commission and the parties should invest the time and resources required to conduct, over the next two to four months, a study into the pre-appointment income of recent appointees to the Bench. With respect, the Commission is not yet in a position to make this decision, which would be certain to delay the Commission's report beyond the statutory deadline of June 30, 2016. None of the parties have yet briefed the Commission on its mandate or the approach that previous Commissions have taken to determining the adequacy of judicial salaries. The parties have not even put forward their respective positions and supporting evidence on the issue of judicial salaries, the very issue on which the Government's proposed PAI study is supposed to assist the Commission.

6. The Commission needs to hear the parties' full submissions in order to properly assess the alleged usefulness and reliability of the information that the Government's proposed PAI study would generate, as well as the separate question of whether it would be appropriate for the Commission itself to supervise the design and execution of a study into the pre-appointment income of sitting judges.

7. For the reasons elaborated below, the Association and the Council submit that the Commission should decline the Government's request at this stage, while reserving the possibility, after the Commission has received the parties' submissions on all of the issues, including the issue of judicial salaries, of seeking additional information that the Commission might consider relevant to its inquiry.

8. The judiciary is confident that once it is fully briefed on the issues, this Commission, much like the Block Commission, will conclude that PAI data concerning sitting judges is irrelevant to the Commission's inquiry. The judiciary also explains below the reasons why, in its submission, the PAI data is potentially self-serving and would not meaningfully fill gaps in the data otherwise available to the Commission.

II. THE GOVERNMENT'S REQUEST IS UNTIMELY

9. The mandate of the Commission is set out in s. 26 of the *Judges Act*, which reads, in part, as follows:

> Commission
>
> 26(1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally.
>
> Factors to be considered
>
> (1.1) In conducting its inquiry, the Commission shall consider
>
> (a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
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> (b) the role of financial security of the judiciary in ensuring judicial independence;
>
> (c) the need to attract outstanding candidates to the judiciary; and
>
> (d) any other objective criteria that the Commission considers relevant.

10. In considering the adequacy of judicial salaries in light of the statutory criteria just cited, past Commissions – both Triennial and Quadrennial – have traditionally relied on two principal comparators: (a) the remuneration of DM-3s, the most senior level of deputy ministers within the federal Government;[2] and (b) the incomes of senior lawyers in the private practice of law in Canada.

11. While there has been some variation in the treatment of these comparators from Commission to Commission, a clear consensus has emerged to the effect that these are the two key comparators.

12. With respect to the DM-3 comparator, the Block Commission noted that "[t]he DM-3 level [...] has been a comparator for nearly every previous commission, and we believe, like

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[2] The DM-4 level is actually the highest, but following the creation of the DM-4 level, the judiciary agreed for the time being not to consider that to be the relevant comparator since the number of people at that level has been low (it is currently three).

the Courtois Commission, that this 'reflects what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges'".[3] The Levitt Commission commented in particular on the evolution of the DM-3 comparator, finding that a consensus had arisen from past Commissions that there should be a rough equivalence between the salaries of federally appointed puisne judges and the midpoint of the remuneration of DM-3s:

> 48. In arriving at its judgment about the weight to be accorded to a discrepancy between judges` salaries and the total cash compensation of the public sector comparator group when formulating its recommendation as to puisne judges` salaries, the Drouin Commission cited with approval a submission made by the Government to the 1993 Triennial Commission to the effect that judicial salaries should be dealt with on the basis "that there should be a rough equivalence to the DM-3 midpoint". The Drouin Commission also observed that the salaries of judges "should not be permitted to lag materially behind the remuneration available to senior individuals within the Government", and that "[t]his concept of rough equivalence expressly recognizes that while the DM-3s and judges do not perform the same work, there is a basis for approximate remuneration parity". The McLennan Commission found no basis in the Judges Act for employing the concept of rough equivalence with a comparator group. The Block Commission framed its recommendation as to salary in terms of a "rough equivalent". After considering the evidence in light of its mandate, the Commission agrees with the conclusion of the Drouin and Block Commissions that the "rough equivalence" standard is a useful tool in arriving at a judgment as to the adequacy of judicial remuneration, because this concept reflects the judgmental (rather than mathematical) and multi-faceted nature of the enquiry.[4]

13. As discussed further below, the Government asked the Block Commission to consider the pre-appointment income of recently appointed judges as a comparator. The Block Commission, after hearing the parties' full submissions, rejected the Government's proposal on the basis of relevance.

14. The Government is again asking the Commission, now differently composed, to assess the relevance and reliability of pre-appointment income, but this time it is asking the Commission to make its decision as a preliminary matter, before the parties have set out

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[3] Block Report at para. 103

[4] Levitt Report at para. 48.

their positions on judicial salaries, put any evidence before the Commission, or made any submissions.

15. The position might be different if the parties agreed that the pre-appointment income of recently appointed judges was a legitimate and useful comparator. However, this is not the case. As set out below, the submission of the Association and the Council is that the Government's proposed PAI study will return irrelevant and unreliable information, is potentially self-serving and therefore inherently suspect. Moreover, the collection of this data would unnecessarily encroach on the privacy rights and legitimate expectations of sitting judges.

16. Proceeding with any PAI study at this point will also delay the quadrennial process and prevent the Commission from completing its mandate by the statutory deadline of June 2016. According to the Government, the PAI study would take between 2-4 months. Further delay would inevitably be caused by the need for the judiciary to have an expert review, analyze and possibly file an expert report on this subject on behalf of the Association and the Council. The Government itself may also wish to do this. The parties would then have to be given an opportunity to make submissions to the Commission on the data generated and the expert evidence filed.

17. It is important to note that the Government had the opportunity to raise this matter at an earlier stage. The Government held a kickoff meeting with the Association and the Council in connection with the present Quadrennial Commission in February 2015. At that meeting, consistent with the Levitt Commission's process recommendations, the parties committed to working collaboratively in the lead-up to the Commission inquiry. Correspondence was exchanged in the following months. The Government did not at that time disclose its intention to ask the Commission to conduct a PAI study.

18. Since summer 2015, the parties have been working with CRA in connection with the collection of data to be presented to this Commission on the income of self-employed lawyers. Again, the Government did not, in that context, disclose its intention in relation to a possible PAI study. In fact, the Government did not raise the prospect of a PAI study until late December 2015, with the end result that if a PAI study is to proceed, the Commission will be unable to issue its report in accordance with the statutory deadline.

19. In such circumstances, the judiciary submits that for procedural reasons alone and with a view to promoting the orderly and timely conduct of the inquiry, the better course for the Commission is to decline the Government's request at this stage. Should the Commission consider that additional information is required for its inquiry after the parties' positions are known, have been briefed, and the Commission has been provided with the parties' evidence in support of their respective positions, it can always seek additional information from the parties.

III. THE GOVERNMENT'S PROPOSED PAI STUDY WILL NOT PROVIDE THE COMMISSION WITH USEFUL INFORMATION TO DISCHARGE ITS MANDATE

20. When making recommendations on judicial salaries, the Commission is required to consider the criteria set out in s. 26(1.1) of the *Judges Act*, cited above. The PAI study will not assist the Commission in its application of the statutory criteria and is irrelevant to the Commission's inquiry. Moreover, the data generated by the PAI study is potentially self-serving and would not provide a complete picture of the pre-appointment income of judges.

A. The pre-appointment income of judges is irrelevant to the inquiry of the Commission

21. The Government states that its proposed PAI study is responsive to the recommendations of the McLennan and Block Commissions that the Government and judiciary work together to provide pre-appointment income data to the Commission.[5] This is incorrect. The Government's proposed PAI study presents the same difficulties that led the Block Commission to reject the usefulness of such data.

22. The Quadrennial Commission is required under s. 26(1.1)(c) of the *Judges Act* to determine whether judicial salaries are sufficient "to attract outstanding candidates to the judiciary". While the McLennan Commission and the Block Commission both speculated that pre-appointment income data could be a part of that determination, neither Commission endorsed the collection or use of any such data as *prima facie* relevant. To the contrary, the Block Commission concluded that the pre-appointment data in isolation was not relevant.

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[5] Government's PAI Submission at para. 14-16.

23. The McLennan Commission was "troubled by the difficulties in obtaining appropriate current information on the income levels of self-employed lawyers in private practice".[6] At that time, 2003-2004, the CRA data was nowhere near the level of quality as it is now, given the refinement of the methodology since that time. It is in that context that the McLennan Commission recommended that the Government and judiciary work together to develop a reliable set of statistical evidence concerning the income of self-employed lawyers, noting that the statistical evidence could "be expanded to get some appreciation as to the income levels of those lawyers who are appointed to the judiciary."[7] The McLennan Commission speculated that "[s]tatistical evidence could be gathered over time from those who were appointed to the bench in a way that would preserve their anonymity and privacy", although it admitted that "[t]here may be other ways."[8]

24. It is important to note that, when making these comments, the McLennan Commission did not have any pre-appointment income data before it or even any specific proposal for the collection of pre-appointment income data. Also, the Commission had not received any submissions from the parties on the potential relevance of any such pre-appointment income data. In any case, the McLennan Commission did not see pre-appointment income data as useful in and of itself, but rather as just one component of a potential larger study into the motives of lawyers for accepting judicial appointments.[9]

25. During its preparations for the Block Commission, the Department of Justice asked CRA to collect data on the pre-appointment income of judges appointed between 1995 and 2007. The Government subsequently provided this data to an outside consultant and included the resulting PAI study in its Reply Submissions. The Government did this without any prior notice or consultation with the Association or the Council.

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[6] McLennan Report at 91.

[7] McLennan Report at 92.

[8] *Ibid.*

[9] *Ibid.* In this regard, the Government raises a series of rhetorical questions at para. 7 of its PAI Submission: "How would their life as a judge compare to life as a lawyer? Will they enjoy the lifestyle and work? How will their lifestyle change? How will it affect their future and their dependents [*sic*]?" The PAI study would not shed light on these questions or on some of the arguably more relevant questions that bear on the decision to accept a judicial appointment, such as: How important a factor is the potential appointee's desire to contribute to public service?

26. The Government's PAI study before the Block Commission purported to provide information on the percentage of self-employed lawyers who received an increase in income upon their appointment to the Bench compared with those who received a decrease in income. The Government relied on this report to support its position that "current judicial salaries are not a disincentive to attracting significant numbers of judges who enjoyed high pre-appointment incomes".[10]

27. The Association and the Council strongly objected to the inclusion of the PAI study in the Government's Reply Submissions. The Association and the Council were concerned with the manner in which the Government proceeded to obtain the pre-appointment income data, and the appropriateness of gathering such data, as well as the reliability and relevance of the data.

28. The Block Commission expressed its regret that the collection of the pre-appointment income data was "a source of acrimony between the parties",[11] but declined to comment on the procedural issues or the reliability of the data. Instead, the Block Commission simply rejected the usefulness of the Government's PAI study because it did not have any relevance to the inquiry the Commission was required to perform under the *Judges Act*, beyond the obvious point that the data "only served to confirm that some appointees earn less prior to appointment and some earn more."[12]

29. Contrary to the Government's key assertion that the PAI study would generate data that "would be relevant to and highly probative of a central question before the Commission",[13] the Block Commission, having had the benefit of full submissions from the parties, and the necessary time fully to consider the issue, including the study itself, rejected it as not particularly useful in helping to determine the adequacy of judicial salaries. The full relevant passage is the following:

> 90. **We do not believe that a snapshot of appointees' salaries prior to appointment is particularly useful in helping to determine the adequacy of judicial salaries. Such a study does not tell us whether judicial salaries deter outstanding**

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[10] Reply Submissions of the Government of Canada to the Block Commission at para. 21.

[11] Block Report at para. 89.

[12] *Ibid.*

[13] Government's PAI Submission at para. 1.

> **candidates who are in the higher income brackets of private practice from applying for judicial appointment.** A study that revealed this information would be more helpful in determining the adequacy of judicial salaries. Ideally, this information would be obtained through a targeted survey of individuals who were at the higher end of the earnings scale and who could be objectively identified as outstanding potential candidates for judicial appointment. We acknowledge however the difficulties inherent in the design and implementation of any such survey. Such information might also be indirectly obtained through an analysis of whether the number of high-earning appointees to the Bench is increasing or decreasing over time.[14]

30. The Government's proposed PAI study will not assist the Commission in determining whether "judicial salaries deter outstanding candidates who are in the higher income brackets of practice from applying for judicial appointment."

31. All the PAI study will confirm is the obvious point that the judicial salary was sufficient to attract those lawyers who were appointed, or at least was not enough of a disincentive to detract them. The study will not say anything about those who have not applied, yet would be outstanding candidates.

32. As with the Government's PAI study before the Block Commission, all the Government's proposed PAI study will do is "confirm that some appointees earn less prior to appointment and some earn more".[15]

B. The proposed PAI study is potentially self-serving and, as such, inherently suspect

33. Along with providing information which is neither relevant nor probative to the central issue before the Commission, the Government's proposed PAI study raises the prospect of a self-serving comparator being used to perpetuate in the future an arguably inadequate level of judicial compensation.

34. The backdrop to the proposed PAI study is the reality that the Government, through its ability to select judicial appointees, ultimately has control of the input into the proposed study. It will be recalled, in this regard, that in 2006, the Government changed the terms

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[14] Block Report at para. 90 [emphasis added].

[15] Block Report at para. 89.

of reference of the federal Judicial Advisory Committees by abolishing the requirement to differentiate between qualified candidates who are "highly recommended" for judicial appointment, from those who are simply "recommended".[16]

35. If the Commission were to adopt the pre-appointment income of recently appointed judges as a comparator, the Government could use it in the future for the self-serving purpose of perpetuating the appearance that judicial salaries are adequate. That is, the Government could, simply by appointing lesser-earning lawyers, modify to its advantage the "average RATIO of pre-appointment net income [...] to the net income of a puisne judge in the year following appointment".[17]

36. The fallacy in the path proposed by the Government is the fact that once established as a comparator (which it cannot legitimately be), the PAI data could then be referred to by the Government as a conclusive indication that the judicial salary is adequate because a number of appointees increased their income upon appointment, while others accepted an appointment even if it resulted in a reduction in their compensation—an argument for all seasons.

37. Related to this inherent defect is the possibility that the recent trend towards appointing an increasing number of lawyers from the public sector, who generally earn less than lawyers in private practice, will continue, despite the fact that a strong majority of the Canadian judiciary has traditionally been composed of appointees from private practice.[18] The Block Commission took note of the unfortunate situation in the United States where a majority of judicial appointments used to be filled from the private sector, but the position had since shifted and the percentages gradually inverted.[19]

38. As can be seen, in addition to being irrelevant to the inquiry of the Commission for the reasons given by the Block Commission, the PAI data is potentially self-serving and, for

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[16] See Guidelines for Advisory Committee Members, December 2006: http://www.fja-cmf.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html#Assessments.

[17] Government's PAI Submission, Tab 10 "Pre-Appointment Income Study Methodology" at 1.

[18] Government's PAI Submission at para. 30: "the number of judges appointed from the public sector increased significantly from 29% to 36% since the last Quadrennial Commission process"; Block Report at para. 73: "between April 1, 2004 and March 31, 2007, 78% of new Canadian judges came from private practice".

[19] Block Report at para. 72.

this additional reason, does not warrant the attention or justify expending the resources of the Commission and the parties.

C. The PAI study would generate incomplete data

39. The Government states that its proposed PAI study would fill in some of the gaps and inherent limitations in the data presented to past Commissions, in that it would include categories of individuals who may be eligible for appointment yet who are not currently included in the CRA private-practice data.

40. The Government's proposed PAI study would not remedy any alleged problems with the data presently available to the Commission, and, to the contrary, would introduce new challenges.

- The Government criticizes the CRA private-practice data because it only includes 21% of the total number of lawyers practising in any given year. However, the CRA private-practice income data is not, and never was, designed to be a comprehensive analysis of the incomes of all lawyers in Canada. Instead, the parties have agreed to limit the collection of the data (through the application of filters such as percentiles and minimum income) in order to produce a data set that approximates the likely pool of judicial candidates. For example, if the Government intended to include all lawyers in the CRA private-practice data set, it would not have agreed to instruct CRA to collect the income of lawyers between the ages of 35 and 69. In this regard, the 92,163 figure which the Government cites as the number of practising lawyers in 2013 would include a significant number of lawyers who do not even meet the bare eligibility rules under the *Judges Act*, because they have been practising for less than ten years.

- The Government's proposed PAI study would not address the stated concern with the CRA private-practice income data that it does not capture the growing number of lawyers who operate as professional corporations (or set up a family trust). Indeed, the Government's proposed PAI study would suffer from the same weakness. While CRA would be able to obtain the filings of any judge who also earned income through a professional corporation (or family trust) prior to appointment, the reported income in the judge's tax return would likely be incomplete since a professional corporation is normally used either to defer the payment of dividends, or to pay dividends (or distribute income in the case of family trusts) to the taxpayer's spouse and/or children, in order to reduce the tax liability of the lawyer through income splitting. Accordingly, the filings of recently appointed judges who had operated through professional corporations would likely consistently under-report the appointee's actual pre-appointment income.

- Finally, the Government states that its proposed PAI study would be useful because it would include the pre-appointment income of judges who were appointed from the public sector. However, information on the salary bands of public-sector lawyers is readily available without the need to undertake a PAI

study. The Government itself has submitted this information in the past, including information about pension and other benefits. It should be noted that the latter information, namely the value of the pension and benefit entitlements of public sector appointees, would not be reflected in the PAI study, another shortcoming. Moreover, the inclusion of the pre-appointment income of judges who were appointed from the public sector would certainly not assist the Commission in determining whether, as the Block Commission put it, "judicial salaries deter outstanding candidates who are in the higher income brackets of private practice from applying for judicial appointment".

41. The Association and the Council recognize that there are limitations inherent in the CRA private-practice income data. That being said, the parties have come a long way from the McLennan Commission days, when neither party could agree on the usefulness or reliability of the data. The Government's proposed PAI study would only serve to open a new debate between the parties on the usefulness or reliability of the data placed before the Commission. It is respectfully submitted that the Government's concerns with the CRA private-practice data set are better addressed by working collaboratively with the judiciary in order to refine the existing data set, rather than by asking the Commission to undertake an invasive study into the pre-appointment income of sitting judges.

IV. PRIVACY CONCERNS

42. Against the backdrop of the demonstrated lack of relevance of the data, the Association and the Council submit that it is inappropriate for the Government to seek to collect and rely upon pre-appointment income data of judges obtained from CRA without their consent in the context of the Commission process. The data would relate to a small identifiable group of judges, the vast majority of whom would be sitting judges. It would be derived from individual tax returns, filed with an expectation of privacy, and which reflect the personal financial affairs of the individuals in question.

43. In this regard, the proposed PAI study would be markedly different from the CRA data on self-employed lawyers. Unlike the latter, which is selected based on industry codes for legal practice and draws from a pool of tens of thousands of lawyers, the PAI study would be based on individuals identified by name, who are only a couple of hundred in number.

44. In addition to its lack of relevance and the potentially self-serving nature of the data that would be generated by the PAI study, the Government's proposed study clearly engages

the privacy rights and legitimate expectations of sitting judges. This is a further reason to decline the Government's request.

V. ORDER SOUGHT

45. The Association and the Council respectfully request that this Commission decline at this stage the Government's preliminary request that CRA be mandated to conduct a study on the pre-appointment income of judges appointed between 2004-2014, all the while recognizing that such an order would not foreclose the possibility for the Commission to make a subsequent request for additional information from the parties, at the appropriate time in the course of its inquiry, should the Commission consider it useful.

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

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