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

2015 JUDICIAL COMPENSATION AND BENEFITS COMMISSION

REPLY SUBMISSIONS OF THE GOVERNMENT OF CANADA

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I. OVERVIEW

1. These reply submissions address matters raised by the joint submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council (the judiciary's submissions) and the submissions of the Federal Court prothonotaries (the prothonotaries' submissions) that were not already addressed in the Government of Canada's opening submissions. These submissions also address matters raised by other interested parties.

2. The Government reiterates its position that, based on an objective analysis of the statutory criteria set out in s. 26(1.1) of the *Judges Act*, annual indexation of judges' salaries in accordance with the Consumer Price Index (CPI) will maintain the required adequacy of their total compensation and ensure judicial independence is not compromised. Prothonotaries' judicial independence will also be maintained and the adequacy of their total compensation ensured through the link to the salary of Federal Court judges and their entitlement to the judicial annuity.

II. REPLY SUBMISSIONS

A. Government's Commitment to a Collaborative Process

3. Under the heading "Process Issues" the judiciary has identified a number of areas of concern in relation to events leading up to the establishment of this Commission, but does not seek any recommendations from the Commission.

4. The Government fully respects and supports the public interest nature of the Commission's inquiry, tied as it is the constitutional imperative of securing and maintaining judicial independence. Further, the Government agrees that public submissions are an effective way of engaging the public in the process which is fundamentally for its benefit.[1] This includes respecting the right of the judiciary to use the

[1] *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 193, **Joint Book of Documents, Volume 2, Tab 25**

opportunity of public submissions to put their historic concerns before this Commission and on the public record. In the Government's view, however, the Commission's mandate is not well-served by providing a point-by-point rebuttal of the judiciary's characterization of the events surrounding this Commission's establishment. Rather, the Government prefers the approach advocated by the judiciary in paragraph 56 of its opening submissions, namely, to embark on this inquiry in a collaborative and non-adversarial manner.

5. However, if the Commission considers it useful, the Government invites the Commission to review the complete record of correspondence which the judiciary has provided. In so doing, it may determine for itself if the inclusion of this information is helpful for the Commission's effective fulfillment of its mandate to inquire into the adequacy of judicial compensation, and seek any additional information it may require for a complete consideration of these matters.

6. As the judiciary notes, the Commission has asked to be advised of what follow-up has occurred in respect of the Levitt Commission's recommendations in relation to process. The previous Government, in its response dated May 15, 2012, commented on its position in relation to Recommendations 8 and 9 which did not entail further action on the part of the Government.[2]

7. Recommendation 10 of the Levitt Commission provided that:

> Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus should be taken into account by the Commission, and reflected in the submissions of the parties.[3]

8. To suggest that "consensus" – that is, general agreement – exists in the face of the contrary view of one of the principal parties is paradoxical. In this regard, the Government's response stated:

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[2] Government Response to the 2011 Judicial Compensation and Benefits Commission, May 15, 2012 [2012 Government Response], pp 7-8, **Judiciary's Book of Exhibits and Documents, Tab 10**

[3] Report of the Fourth Quadrennial Judicial Compensation and Benefits Commission, dated May 15, 2012 [Levitt Commission Report], p 40, **Joint Book of Documents, Volume 2, Tab 31**

> With respect to Recommendation 10 of the Commission's Report, the Government continues to be of the view that as a matter of law, to meet the constitutional requirements of independence, objectivity and effectiveness, each commission must turn its mind to the evidence and submissions before it and cannot simply adopt unimplemented recommendations of a prior commission without conducting its own independent and objective analysis. Moreover, there is only a "consensus" on an issue if all parties before the Commission have agreed on that issue. The joint goal of both the Government and the judiciary to achieve a less adversarial and more effective process is not advanced by compounding a disagreement on a particular issue with an additional disagreement about whether there was a consensus about that issue in the past. Rather, a less adversarial and more efficient process can be achieved by seeking and building upon genuine consensus, and the Government agrees with the Commission that the parties should explore additional methods for doing so.[4]

9. The particular "consensus" issues raised by the judiciary[5] – the DM-3 comparator and the filters to be applied to the Canada Revenue Agency (CRA) private sector lawyers data – are discussed in paragraphs 27-32 and 56-63 below.

10. Acting on Recommendation 11,[6] the Government and the judiciary undertook discussions to identify means of enhancing the efficiency and effectiveness of the Commission process. Successive Deputy Ministers of Justice met with members of the judiciary several times with a view to advancing these discussions. However, despite the clear statement of the Government in response to Recommendation 10, the judiciary continued to approach the efficiency discussions as an opportunity to revisit key issues on which it knew the Government held a different view. As a result, the discussions were not as productive as hoped. Another challenge emerged since the judiciary sought changes not just on areas in which the Levitt Commission had purported to identify consensus, but to an expanded list that it presented. This list included compensation-related matters that were unrelated to and beyond the scope of discussions devoted to the Commission process.

11. Finally, the Government notes and shares the frustration of the judiciary that, despite the best efforts of the principal parties, the coincidental timing of the statutory start of this Commission's inquiry and the date of the fixed-date election resulted in inevitable

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[4] 2012 Government Response, *supra*, pp 7-8, **Judiciary's Book of Exhibits and Documents, Tab 10**
[5] Judiciary's submissions, para 41
[6] Levitt Commission Report, *supra*, p 42, **Joint Book of Documents, Volume 2, Tab 31**

delay of the start of this Commission. The constitutional principle of responsible government in Canada is implemented in accordance with the Westminster model, based on the individual and collective responsibilities of Ministers to Parliament. In the context of the establishment of the Quadrennial Commission, the practical impact of this constitutional reality manifested itself in the inability of the Government, both during the election period (during which the statutory start date fell) and immediately after the election, to effect the appointments of the Commissioners in advance of October 1, 2015.

12. As it did in 2012 when it included amendments to improve the timeliness of the Commission process in the Bill implementing its response to the Levitt Commission Report, the Government will consider whether legislative amendments are advisable to avoid this temporal challenge in the future. As it also did with the 2012 changes, the Government will ensure that the judiciary has an appropriate opportunity to provide input in this regard.

B. Judicial Salaries are Fully Adequate Considering the Statutory Criteria

13. The Government does not agree that staged, annual increases to salaries, in addition to indexation in accordance with the Industrial Aggregate Index (IAI), are required to satisfy the adequacy test in the *Judges Act*. The current judicial salary level, coupled with the generous judicial annuity, the option of supernumerary status and a number of other benefits, is fully adequate to ensure judicial independence and to continue to attract outstanding lawyers to the bench.

14. It is critical for the Commission to undertake its analysis of the adequacy of judicial compensation within the framework of the four statutory criteria. The judiciary's approach fails to do so and instead places undue and unwarranted emphasis on what they term the "key comparator for the establishment of judicial salaries"[7] – the DM-3 salary level. In that vein, the judiciary's salary proposal focusses exclusively on reducing the gap between the total average compensation for DM-3s and judicial salaries.[8]

[7] Judiciary's submissions, para 4
[8] *Ibid*, paras 4, 58, 102-111

15. The judiciary's stated rationale for their salary proposal is two-fold: (1) to bridge the gap between the judicial salary and the average compensation of DM-3s; and (2) to continue to attract outstanding candidates from private practice. In the Government's view, the evidence does not establish that salary increases are warranted for either of these reasons.

16. As will be explained in further detail below, the Government maintains its position that formulaic benchmarking to the DM-3 group is not justified at any level. In this process, however, the judiciary now seeks to measure judicial salaries against a different and higher benchmark within the DM-3 level. Rather than requesting that judicial salaries be benchmarked against the "midpoint of the DM-3 salary plus one-half performance pay", the judiciary now reverts to advocating for "total average compensation". In doing so, and despite a stated desire to adhere to "consensus", the judiciary is distancing itself from an issue it had characterized as "settled".

17. With respect to the income levels of private sector lawyers, as explained in its opening submissions, the Government does not accept the filters applied by the judiciary. Those filters result in an overly restrictive private sector lawyer comparator. In this process, the judiciary has narrowed the population they focus on even further by increasing the salary exclusion they apply to $80,000 from $60,000. This results in further reducing the target group of all self-employed lawyers in the CRA data set to 21%.[9]

1. Economic Conditions Militate Against Salary Increases Above CPI

18. As described in the Government's opening submissions, Canada is facing challenging economic times. The current uncertain economic outlook, the Government's deficit situation and the tight restraints on expenditures from the public purse militate against the annual salary increases proposed by the judiciary.

19. The judiciary's salary proposal ignores Canada's current economic climate. Global economic uncertainty and low commodity prices continue to weigh on the Canadian

[9] Statistics derived from CRA Data, **Joint Book of Documents**, **Tab 1**

economy. As a result, Canada's economic and fiscal outlook has deteriorated since the November 2015 *Update of Economic and Fiscal Projections*.[10]

20. Given the deterioration in the economy, the Department of Finance revised its economic outlook with reference to the three factors relevant to the first criterion in s. 26(1.1) of the *Judges Act* between its letters of December 2015 and February 2016.[11] The fragility of the Canadian economy was further described in the Government of Canada's March 22, 2016 budget, which showed that, since December 2015,

a. the prevailing economic conditions in the Canadian economy generally weakened;

b. CPI and IAI have been revised downwards; and

c. significantly larger budgetary deficits are projected for 2016-17 and 2017-18 – $29.4 billion and $29 billion, respectively.[12]

2. Financial Security Does Not Preclude Parliamentary Accountability

21. The Government agrees that judges occupy a unique position in Canadian society and that the setting of their compensation necessarily follows a unique process. Nonetheless, Parliament is still accountable for decisions made in relation to public expenditures, which include judicial salaries.

22. The jurisprudence does not support the contention that expenditures on judicial salaries are automatically paramount to all other Government spending obligations. If that were the case, no role would be left for the Government and Parliament in responding to the Commission's recommendations. Yet the Supreme Court expressly recognized such a

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[10] Department of Finance Canada, Backgrounder – Canadian Economic Outlook, February 22, 2016, online: http://www.fin.gc.ca/n16/data/16-025_1-eng.asp, **Government's Book of Documents, Volume 1, Tab 12**

[11] Letter dated December 11, 2015 from the Assistant Deputy Minister of Finance, Department of Finance Canada, **Joint Book of Documents, Volume 1, Tab 8;** Letter dated February 24, 2016 from the Assistant Deputy Minister of Finance, Department of Finance Canada, **Joint Book of Documents, Volume 1, Tab 9**

[12] Government of Canada, Budget 2016, "Annex 1 – Details of Economic and Fiscal Projections", **Government's Supplementary Book of Documents, Tab 1**

role, noting that the allocation of scarce public resources is fundamentally a policy decision.[13]

23. Finally, the principles of parliamentary accountability necessarily include a role for political actors, such as Ministers and parliamentarians. It is important not to conflate Parliamentary accountability with political expediency. Ensuring that the setting of judicial salaries is "depoliticized" does not mean that any involvement of Parliament or the parliamentary cycle is inappropriate. Indeed, the Constitution requires it.[14]

3. The Need to Attract Outstanding Lawyers to the Bench

24. The Government repeats and relies on its opening submissions with respect to its position that this third criterion is concerned with the salary levels of the pools from which judges are drawn – private sector and public sector lawyers (including provincial court judges and law professors).[15]

25. The DM-3 salary is not relevant to the third criterion – the need to attract outstanding candidates. The DM-3 group is not a pool from which judges are drawn nor can it be reasonably argued that the judiciary and the DM-3 group are vying for the same candidates such that, for retention and recruitment purposes, judicial salaries should have some relativity to DM-3 salary levels.

26. At paragraphs 81-83 of their opening submissions, the judiciary sets out some of the negative aspects of judicial office. The Government agrees that these are important considerations and recognizes that only judges and former judges have knowledge of these concerns. As such, it repeats the request set out in paragraphs 177-179 of its opening submissions that the Commission undertake, for future use, a quality of life study to examine both the positive and negative attributes of judicial office.

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[13] *PEI Reference*, *supra*, para 176, **Joint Book of Documents, Volume 2, Tab 25**
[14] *Constitution Act, 1867*, 30 & 31 Vict, c 3, s 100, **Joint Book of Documents, Volume 1, Tab 22**
[15] See also Canadian Bar Association's submissions, p 6

(a) Misplaced Narrow Focus on Private Sector Lawyers

27. The judiciary's focus on a very small target group as the appropriate private sector comparator results in a significantly higher net private sector lawyer average salary for comparability purposes. Accepting the judiciary's filters and narrowing the private sector lawyer comparator group perpetuates the fallacy that higher income earners are the most outstanding and worthy candidates for appointment to the bench.

28. The Government does not agree that there has been any consensus about the relevance and applicability of filters.[16] Neither of the last two Commissions endorsed the use of filters as advocated by the judiciary. Instead, both Commissions simply noted that the principal parties disagreed on methodology and the use of filters and then described each party's proposed private sector comparator.[17]

29. Neither Commission made a determination as to which private sector comparator was more appropriate – the Government's or the judiciary's. After noting the "lengthy legal arguments from both parties as to why the methodology used by the other party is flawed", the Block Commission simply stated that there are private sector lawyers whose incomes "greatly exceed those of judges".[18] The Levitt Commission concluded that judicial compensation was "on a par with the total compensation of the private sector comparator group" advocated by the judiciary and "well above" that of the private sector comparator advocated by the Government.[19]

30. In fact, only the Levitt Commission and the present Commission have had the benefit of the parties' collaboration on the CRA private sector data set. Prior to that, the parties each presented different data sets and there were concerns about reliability, as

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[16] Judiciary's submissions, paras 41, 118
[17] Report of the Third Quadrennial Judicial Compensation and Benefits Commission, dated May 30, 2008 [Block Commission Report], paras 112-115, **Joint Book of Documents, Volume 2, Tab 30**; Levitt Commission Report, *supra*, paras 35-43, 47(a), **Joint Book of Documents, Volume 2, Tab 31**
[18] Block Commission Report, *supra*, para 115, **Joint Book of Documents, Volume 2, Tab 30**
[19] Levitt Commission Report, *supra*, para 47(a), **Joint Book of Documents, Volume 2, Tab 31**

expressed by the Block Commission.[20] Based on the Block Commission's recommendation,[21] the principal parties collaborated with the CRA on a joint data set.

31. As the Canadian Bar Association recognizes, the data relied upon by the Commission should reflect "the wide cross-section of the legal community"[22] from which judges are appointed. The assumption that the highest earners are the most qualified for judicial office is without foundation. To restrict the data set in the manner proposed by the judiciary does not reflect the reality of the Canadian judiciary, which is comprised of individuals with a rich diversity of skill, talent and experience.

32. The CRA data set only provides information about income levels of self-employed lawyers. As a result, the Commission has no evidence about the income levels of other private sector lawyers eligible for appointment, such as non-equity law firm partners, law firm associates or those lawyers who operate as professional corporations. Thus, to further narrow this data set as the judiciary does fails to provide an accurate picture. In addition, there is no basis to assume that only high-income earners operate as a professional corporation or use family trusts.[23]

(b) $80,000 Salary Exclusion Further Skews the Results

33. In the present process, the judiciary advocate for an $80,000 salary exclusion without any supporting justification for doing so – simply asserting that they are advised it would be appropriate to adjust it to account for inflation.[24]

34. As stated in its opening submissions, the Government submits that salary exclusions are inappropriate. As noted by the Government's expert, Haripaul Pannu, the use of a salary exclusion is not common practice in compensation benchmarking. Rather,

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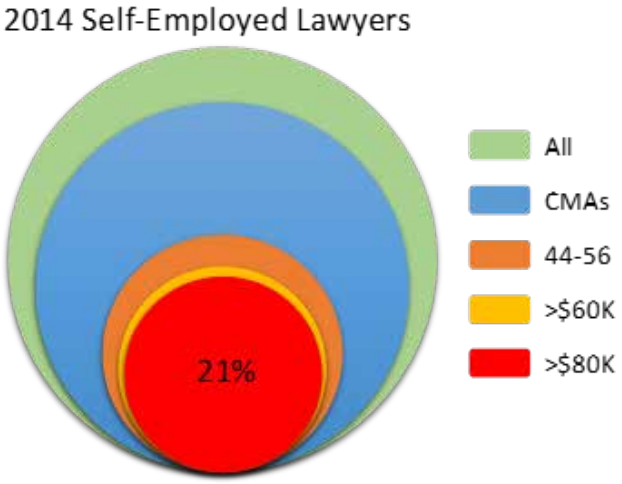
[20] Block Commission Report, *supra*, para 112, **Joint Book of Documents, Volume 2, Tab 30**
[21] *Ibid*, para 202
[22] Canadian Bar Association's submissions, p 7
[23] Judiciary's submissions, para 122
[24] *Ibid*, para 120

it is an "unusual approach that distorts the salary information".[25] A more standard approach, according to Mr. Pannu, is "to use a fair percentile benchmark without salary exclusion".[26]

35. Applying an $80,000 salary exclusion skews the results to a higher degree. The 65th percentile with an $80,000 salary exclusion is actually the 78th percentile, while the 75th percentile with the same salary exclusion is actually the 84th percentile.[27] Excluding all self-employed lawyers with incomes of less than $80,000 reduces the CRA data set by 38% – 8 % more than the $60,000 salary exclusion.[28]

36. For the 2014 taxation year, applying an $80,000 salary exclusion, in addition to the other filters advocated by the judiciary, further reduces the target group of all self-employed lawyers in the CRA data set to only 21%.[29]



37. The judiciary's rationale for an income exclusion is that lawyers who earn below a certain threshold are not suitable candidates for the judiciary. They assume that a low income reflects a lack of success or time commitment.[30] This fails to recognize that a

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[25] Haripaul Pannu, Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in Preparation for the 2015 Judicial Compensation and Benefits Commission dated February 25, 2016 [Pannu Report], p 7, **Government's Book of Documents, Volume 1, Tab 10**
[26] *Ibid*, p 8
[27] *Ibid*
[28] *Ibid*
[29] Statistics derived from CRA Data, *supra*, **Joint Book of Documents, Volume 1, Tab 1**
[30] Judiciary's submissions, para 119

lawyer's income may be low, or indeed even negative, in a given year when accumulated expenses are greater than gross income.[31] As recognized by the Drouin Commission, "there may be many explanations, in addition to part-time employment" for lower incomes.[32] A lawyer's income may be low based on a variety of other factors either within the lawyer's control – such as choices related to files, clients, or billing rates – or outside of it, such as sickness or extended leaves of absences for childcare or caring for aging parents.

38. There is simply no justification for using a higher salary exclusion. Even if the $60,000 exclusion was accepted as meaningful, from 2003 until 2014, applying CPI only raises it to $73,000.[33] It is unclear on what basis the judiciary has inflated the original salary exclusion from $60,000 to $80,000. To the extent that there is any objective measure of inflationary pressures on private sector incomes, CPI is the most appropriate index.[34]

(c) Current Judicial Annuity Valuation is Required

39. The judiciary relies on a February 2012 valuation of the judicial annuity undertaken by the Levitt Commission's expert.[35] The Government submits that this is not a reasonable approach and the Government's expert's recent valuation is to be preferred for three main reasons.

40. First, valuation results done four years ago cannot be automatically applied. Shifts in a variety of economic and demographic assumptions can produce significant changes.[36] The 2012 valuation does not reflect the current judicial demographic profile and updated

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[31] Pannu Report, *supra*, p 4, footnote 3, **Government's Book of Documents, Volume 1, Tab 10**
[32] Report of the First Quadrennial Judicial Compensation and Benefits Commission, dated May 31, 2000 [Drouin Commission Report], p 39, **Joint Book of Documents, Volume 2, Tab 28**
[33] According to Statistics Canada, the CPI for 2003 is 102.8 and the CPI for 2014 is 125.2, out of which the $73,000 can be calculated: Statistics Canada, "Consumer Price Index, historical summary (1996 to 2015)", online: http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/econ46a-eng.htm, **Government's Supplementary Book of Documents, Tab 2**
[34] CPI is preferred over IAI because self-employed lawyers, by definition, are not wage earners. It follows, therefore, that they are not identified among the groups of wage-earners measured by IAI, see: Statistics Canada, "Earnings, average weekly, by industry, monthly (Canada)", online: http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/labor93a-eng.htm, **Government's Book of Documents, Volume 2, Tab 41**
[35] Judiciary's submissions, para 123
[36] Letter from Haripaul Pannu, March 21, 2016, pp 1-2, **Government's Supplementary Book of Documents, Tab 3**

economic and demographic assumptions. These changes result in a net increase of 1.2% to in the Government's valuation of the judicial annuity.[37]

41. More particularly, the following economic assumptions have changed between the last Commission process and this process:[38]

a. the discount rate assumption was lowered to 5.5% per annum from 5.75% per annum to reflect the current long term view of investment returns;
b. the mortality assumption was adjusted to reflect the most current mortality assumptions for Canadians;
c. the disability rate assumption was updated to reflect a revised assumption used in the actuarial valuation report for the pension plan for federally appointed judges as at March 31, 2013; and
d. the demographics of judicial appointments for 2012 to 2015.

42. Second, while the Commission's expert valued the retirement portion of the annuity at 24.7% in his February 2012 report, he also noted that estimating the value of the judicial annuity as a percentage of salary is highly dependent on interest rate assumptions used. Looking at three different scenarios, he demonstrated that the valuation could range between 24.7% and 44.4%. He opined that all three scenarios could "be viewed as constituting a range of acceptable assumptions" and that "the Commission could adopt an intermediate scenario as a best estimate".[39]

43. Third, this approach fails to account for and value the disability benefit, which is an integral part of the total judicial annuity.[40] The judicial annuity comprises both a retirement benefit and a disability benefit. In order to compare the incomes of self-employed lawyers and judges, the value of the total judicial annuity should be considered.

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[37] The 2012 valuation was 35.3% and the current valuation is 36.5%.
[38] Letter from Haripaul Pannu, March 21, 2016, p 2, **Government's Supplementary Book of Documents, Tab 3**
[39] Letter dated February 14, 2012 from André Sauvé, **Government's Supplementary Book of Documents, Tab 4**
[40] Letter from Haripaul Pannu, March 21, 2016, pp 1-2, **Government's Supplementary Book of Documents, Tab 3**

Indeed, the Levitt Commission's expert revised his approach in May 2012 and valued the disability benefit as part of the judicial annuity.[41]

44. Self-employed lawyers would not only have to save for their own retirement, but also have to pay for their own disability benefits. On that basis, it is reasonable and appropriate to value both components. The Government's expert's present valuation is 36.5%, of which 32% is the retirement benefit and 4.5% is the disability benefit.[42]

45. Furthermore, as recognized by the Levitt Commission, while the actuarial valuation of the judicial annuity is important in order to assign a value to its impact on judicial compensation, its relative worth extends beyond what its valuation suggests:[43]

> Moreover, the fact that the judicial annuity is a federal government obligation fully protected from inflation and based on a final earnings calculation makes it qualitatively more attractive to a private sector lawyer (particularly one who is self-employed) than the actuarially estimated value suggests.[44]

46. The 2012 judicial annuity valuation relied on by the judiciary under-values total judicial compensation, which exacerbates the discrepancy between the judicial salary and the private sector lawyer comparator advocated by the judiciary. As an example, table 7 of the judiciary's opening submissions estimates the 2014 judicial salary, including the annuity, as $375,098, whereas, using the Government's 2016 valuation of the annuity, the 2014 judicial salary is valued as $410,592.[45] This discrepancy is significant.

4. DM-3 Comparator not Objectively Justified

47. The Government repeats and relies upon its opening submissions that formulaic benchmarking to the DM-3 level is not warranted in the circumstances even under the fourth criterion – other objective criteria the Commission deems relevant. To the extent that the salary level of DM-3s is relevant, it is only as part of a general survey of public

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[41] *Ibid*, p 2
[42] Pannu Report, *supra*, p 13, **Government's Book of Documents, Volume 1, Tab 10**
[43] Canadian Bar Association's submissions, p 7
[44] Levitt Commission Report, *supra*, para 41, **Joint Book of Documents, Volume 2, Tab 31**
[45] Pannu Report, *supra*, p 13, **Government's Book of Documents, Volume 1, Tab 10**

sector compensation trends as set out in paragraphs 139-150 of the Government's opening submissions.

48. An exclusive focus on the remuneration of DM-3s undermines the purpose of the Commission process – to determine the adequacy of judicial compensation with regard to the four statutory criteria. The danger with salary comparability was highlighted by the 1974 Triennial Commission:

> There is a tendency for groups in the community in discussing wages or salary requirements to make invidious comparisons between their incomes and of those of other groups. This unfortunately results in a "jacking" process in which merits may be lost sight of.[46]

(a) Comparative Analysis Required to Substantiate Benchmarking

49. It is wholly inappropriate to specifically tie judicial salaries to the DM-3 level given the very different nature of the positions in question. The basis for the judiciary's continued reliance on the DM-3 group as their "key comparator" is that DM-3s and judges share similar "skills, experience and levels of responsibilities".[47] The Government agrees that these factors are relevant to a comparative exercise, but notes than such an exercise has not been undertaken to date. Past commissions instead have simply relied on the DM-3 group as a comparator based on the personal attributes of character and ability presumably shared by judges and deputy ministers.

50. Indeed, the Government's opening submissions advocated that these factors – skills, responsibilities and experience – are among those compensable factors that must be taken into account in order to substantiate continued benchmarking. In that respect, the Government proposes that, should this Commission decide that the DM-3 level is of particular relevance to the determination of the adequacy of judicial compensation, the

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[46] Report of the Special Advisory Committee on Judicial Compensation and Related Benefits, September 13, 1974 [Hall Commission Report], para 1.6, pp 4-5, **Government's Book of Documents, Volume 2, Tab 30**

[47] Judiciary's submissions, paras 4, 109

Commission should undertake the relevant compensation exercise during its tenure for the benefit of the 2019 Commission.[48]

51. At this juncture, there is insufficient objective information for the Commission to conclude that DM-3s and judges do, in fact, share similar skills, experience and levels of responsibilities such that formulaic benchmarking as advocated by the judiciary is justified.

52. In terms of experience, DM-3s must spend many years coming up through the ranks in the public service, often in a range of departments. They also have to survive the crucible of DM-1 service, where many are weeded out. As the data shows, there are significantly more individuals at the DM-1 and 2 levels than at the DM-3 level. As of April 1, 2015, there were 32 DM-1s, 33 DM-2s and only 8 DM-3s.[49] Further, as explained in the Government's opening submissions, appointment to the DM-3 level is based on the individual, as opposed to the position.

53. In terms of responsibilities, DM-3s have large budgets to administer and often thousands of staff. As a result, there are the associated personnel issues to address and respond to. They have to take direction from Ministers, support Cabinet and engage with the Privy Council Office and other central agencies. They lead the implementation of government policy and are heavily involved in developing those policies. In furthering the Government's agenda, they have to negotiate with non-governmental organizations, industry, unions, provinces, territories, international bodies, various boards and commissions, as well as other departments that may have competing objectives.

54. While judges and DM-3s may have some of the same skills, these would be generic and shared by professionals in many other areas.

55. In light of the foregoing, the Government maintains that reliance on the DM-3 group as a "key comparator" for determining judicial salaries is misguided. Distinct from

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[48] In order to determine whether salary relativity is warranted, it is common practice in compensation benchmarking to undertake job evaluations of the positions in issue. See: Advisory Committee on Senior Level Retention and Compensation, First Report, January 1998, pp 7-15, **Judiciary's Book of Documents, Tab 12**

[49] Privy Council Office, Income Information Regarding Deputy Ministers, as of April 1, 2015, **Joint Book of Documents, Volume 1, Tab 12**

past Commission processes, there is ample reliable information about the pools from which judges are drawn upon which the Commission may objectively determine the current adequacy of judicial compensation. In addition, undertaking a pre-appointment income study would supplement this analysis.

(b) No Clear Consensus

56. The Government disagrees that there has been a "clear consensus" that judicial salaries should be tied to that of DM-3s.

57. Past commissions have grappled with the use of the DM-3 comparator. In 1995, the Scott Commission concluded that a "strong case" could be made that the comparison was "both imprecise and inappropriate".[50] The first Quadrennial Commission, the Drouin Commission, concluded that, while the DM-3 salary level was relevant, it "should not be determinative of our recommendations concerning judicial salaries".[51] The second Quadrennial Commission process, the McLennan Commission, refused to focus solely on the DM-3 group, instead preferring to look at a "broader range of the most senior public servants".[52]

58. The Levitt Commission acknowledged that it was not an "ideal" comparator. The Commission nonetheless decided to rely on it based on "the seniority of the group and the functions its members discharge".[53] The Levitt Commission, however, did not undertake a review of the similarity of functions and, like the judiciary, simply assumed they are comparable.

59. Furthermore, the Levitt Commission determined it was the "best choice as a public sector comparator".[54] This erroneously presumes that a "public sector comparator" is required. As set out in the Government's opening submissions, the Commission is not

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[50] Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits, September 30, 1996 [Scott Commission Report], p 14, **Government's Book of Documents, Volume 2, Tab 29**
[51] Drouin Commission Report, *supra*, p 31, **Joint Book of Documents, Volume 2, Tab 28**
[52] Report of the Second Quadrennial Judicial Compensation and Benefits Commission, dated May 31, 2004 [McLennan Commission Report], pp 28, 30, **Joint Book of Documents, Volume 2, Tab 29**
[53] Levitt Commission Report, *supra*, para 27, **Joint Book of Documents, Volume 2, Tab 31**
[54] *Ibid*

mandated to consider such a comparator. Any comparator must be objectively justified under s. 26(1.1)(d) of the *Judges Act*.

(c) Judiciary Seeks to Change Benchmark

60. While maintaining its insistence that consensus exists on the DM-3 comparator (despite the Government's longstanding objections), the judiciary is now distancing itself from the benchmark considered by the past two Commissions. During this process, the judiciary has modified the formulaic benchmark they propose. Rather than the "midpoint salary plus one-half performance pay", they now advocate for total average DM-3 compensation as the appropriate comparator.

61. While the Government does not agree that there has been a "consensus" and disagrees with formulaic benchmarking to the DM-3s, prior Commissions have considered the "midpoint" of DM-3 salaries rather than the "average" when considering DM-3 salaries.[55] Further, those Commissions who have considered performance pay have consistently looked at one-half of maximum performance pay, as opposed to the average.[56]

62. The Levitt Commission went so far as to say that there had been a consensus with respect to the appropriate comparator – namely "the mid-point of the DM-3 salary range, plus one-half of maximum performance pay". The Levitt Commission regarded that determination as "a settled matter of principle".[57]

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[55] Report and Recommendations of the 1989 Commission on Judges' Salaries and Benefits, March 5, 1989 [Courtois Commission Report], p 10, **Government's Book of Documents, Volume 2, Tab 34**; Report and Recommendations of the 1992 Commission on Judges' Salaries and Benefits, March 31, 1993 [Crawford Commission Report], p 11, **Government's Book of Documents, Volume 2, Tab 33**; Scott Commission Report, *supra*, p 13, **Government's Book of Documents, Volume 2, Tab 29**; Drouin Commission Report, *supra*, p 29, **Joint Book of Documents, Volume 2, Tab 28**; Block Commission Report, *supra*, paras 106, 118-120, **Joint Book of Documents, Volume 2, Tab 30**; Levitt Commission Report, *supra*, para 28, **Joint Book of Documents, Volume 2, Tab 31**

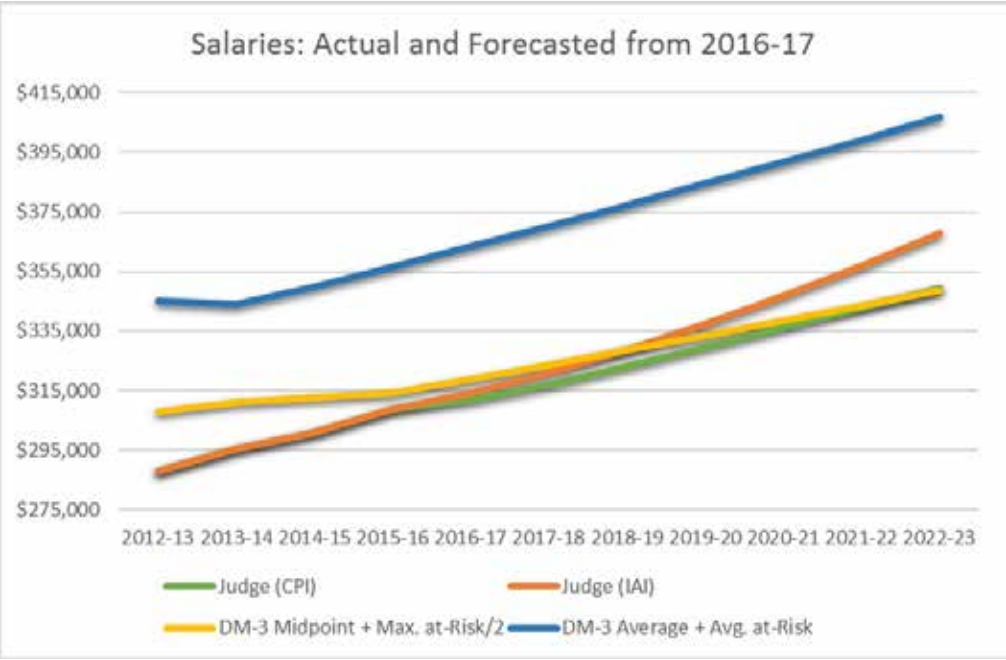
[56] Block Commission Report, *supra*, para 111, **Joint Book of Documents, Volume 2, Tab 30**; Levitt Commission Report, *supra*, para 29, **Joint Book of Documents, Volume 2, Tab 31**

[57] Fourth Judicial Compensation and Benefits Commission, Notice dated December 8, 2011, **Government's Supplementary Book of Documents, Tab** 5

63. The judiciary criticises the Government for seeking to "re-litigate" matters considered settled.[58] This is precisely what the judiciary seeks to do here if indeed there is consensus, at least among the judiciary and past Commissions, about the DM-3 benchmark.

(d) New Benchmark is Significantly Higher

64. As the chart below demonstrates, the benchmark now proposed by the judiciary is significantly higher than the "DM-3 midpoint plus one-half performance pay" reference point previously relied on by the judiciary.



65. Looking at the matter objectively, it could reasonably be suggested that the change in position is based on the fact that the new benchmark would allow for a higher salary comparator for the future. In that vein, the salary proposal is results-oriented rather than principled. The fact is, "total average DM-3 compensation" has exceeded the DM-3 salary "mid-point plus one-half of maximum performance pay" for the last four Quadrennial Commission processes.[59]

[58] Judiciary's submissions, para 41
[59] Judiciary's submissions, Table 1, p 30

66. Further, any historical gap between the judicial salary and the DM-3 midpoint plus one-half performance pay has been closed. The current judicial salary is now only 2% less than that benchmark. In fact, the gap is the lowest it has been since 2000. The reason for this is that annual increases to judicial salaries in accordance with IAI have outpaced increases to DM-3 remuneration every year since the economic downturn in 2008.[60]

67. As illustrated by the chart following paragraph 64 above, projecting into the future based on statutory indexation alone, the judicial salary will soon outpace the DM-3 midpoint plus one-half performance pay. Using IAI as the statutory indexation factor, judicial salaries will exceed DM-3 salaries in 2019-20. Using CPI, they will exceed DM-3 salaries in 2022-23. This may occur sooner, however, if deputy ministers continue to receive 0.5% increases as they did in 2014-15 and 2015-16. The projections above are based on 1.5% increases to DM-3 salaries annually.

68. Seeking to move the marker to a higher and more lucrative reference point without a principled basis is not an approach that meets the adequacy test set out in the *Judges Act*.

(e) Total Average Compensation not Appropriate Measure

69. The Government's position, as expressed in its opening submissions, is that the judicial salary has no objective link to that of DM-3s. Formulaic benchmarking to total average compensation is even more problematic. Fundamentally, the critical issue with the judiciary's new approach is that it ties judicial salaries even more tightly to the performance of a handful of DM-3s in recent years than did the DM-3 midpoint plus one-half performance pay.

70. There is no principled basis for linking the judicial salary to the performance of individual DM-3s. Using the average DM-3 salary and average performance pay as the benchmark does precisely that. When a DM's base salary is set near the top of the available range it is because *that individual* has accumulated years of experience defined by a proven

[60] In 2014-15 and 2015-16, DMs received increases of 0.5%. See: Treasury Board of Canada, Government Response to the March 2015 Advisory Committee Report, July 31, 2015, **Government's Supplementary Book of Documents, Tab 6**

record of exceptional performance. In addition, the average performance pay can also rise significantly when a single DM receives a rating near the maximum.

71. The most recent Report on the Advisory Committee on Senior Level Retention and Compensation underscores the fact that DM compensation is highly individual and thus neither transferable nor relevant to the setting of judicial salaries. Performance pay is directly reflective of the "particular role and organizational context" in which each DM operates. Individuals are assessed in accordance with "each individual's unique context".[61]

72. Furthermore, militating against comparing DM and judicial salaries is the increasing role performance pay has played in DM compensation since its inception in 1998. More particularly, in 1998 maximum performance pay was 10%[62] increasing to 20% by 2005.[63] In 2014, maximum performance pay is set at 33%.[64] The growing proportion of performance pay underscores the increasing importance of individual performance. This is antithetical in the judicial context, where compensation has no link to performance precisely because of judicial independence.

73. In any event, average DM-3 compensation is not an appropriate measure because it is not constant. Rather, it varies according to the seniority and performance of a handful of DMs. As table 1 of the judiciary's opening submissions demonstrates, total average compensation has declined twice in the past four years – in 2012 and again in 2013.

74. The Block Commission specifically addressed this issue and concluded that the mid-point of the DM-3 salary range was "an objective, consistent measure of year over year changes in DM compensation policy".[65] The mid-point was more objective based on the fluctuations year by year given the small size of the DM-3 group and that salary levels are based on individuals not positions.

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[61] Treasury Board of Canada, March 2015 Report of the Advisory Committee on Senior Level Retention and Compensation, March 24, 2015, **Government's Supplementary Book of Documents, Tab 7**
[62] Drouin Commission Report, *supra*, p 25, **Joint Book of Documents, Volume 2, Tab 28**
[63] Block Commission Report, *supra*, para 108, **Joint Book of Documents, Volume 2, Tab 30**
[64] Privy Council Office, "Remuneration for DM-1s to DM-3s – Fiscal 2011-2014", p 3, **Joint Book of Documents, Volume 1, Tab 11**
[65] Block Commission Report, *supra*, para 106, **Joint Book of Documents, Volume 2, Tab 30**

75. A similar view was expressed by the Block Commission with respect to the use of one-half performance pay as a reference point for comparability rather than the average as it "does not vary over time like average performance pay does".[66] The Levitt Commission adopted the Block Commission's choice of the mid-point of the DM-3 salary range and one-half performance pay.[67]

76. Based on the inherent difficulties with using average compensation of a small group such as DM-3s, this Commission should decline to adopt the judiciary's proposed benchmark against which to measure judicial salaries.

5. Conclusion

77. The judiciary's salary proposal would yield a net increase of 16.9% by 2019-20. The judiciary advocates that such an increase is justified since there have been no salary increases aside from statutory indexation since 2004. In doing so, they focus on the "loss" they have suffered as a result of the Government's decision not to implement salary recommendations of prior Commissions.[68]

78. In response, the Government makes three observations. First, the Government notes that judicial salaries have increased by 32.8% since 2004.[69] It is difficult to see how this can be equated with a financial loss.

79. Second, the last Commission determined that the judicial salary did not "require adjustment in order to maintain the adequacy of judicial compensation and benefits in light of the statutory criteria".[70]

80. Third, characterizing the projected salary as a financial loss[71] implies that there is an entitlement to the implementation of the Commission's salary recommendations. This

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[66] *Ibid*, para 111
[67] Levitt Commission Report, *supra*, para 28, **Joint Book of Documents, Volume 2, Tab 31**
[68] Judiciary's submissions, para 124
[69] This increase is based on statutory indexation; however, whether the increase is based on statutory indexation or a substantive increase is irrelevant as long as the resulting salary is adequate to maintain judicial independence.
[70] Levitt Commission Report, *supra*, para 52, **Joint Book of Documents, Volume 2, Tab 31**
[71] Judiciary's Submissions, para 124

is not how the constitutional process established by the Supreme Court in *PEI Judges* and *Bodner*[72] operates: the Government's responses are also part of the constitutional process.

C. Prothonotaries' Compensation is Fully Adequate Considering the Statutory Criteria

81. In 2014, the Federal Court prothonotaries received a 10% increase in their salaries retroactive to 2012, and were given entitlement to the generous judicial annuity upon retirement.[73] Given the recency of these significant increases to their total compensation, the Government does not agree that prothonotaries should now receive a further 9.2%-13.2% increase in salary.[74] The Government submits that there is no basis for concluding that a quantitative leap of over 31% in salary since 2012-13 is necessary to ensure the adequacy of prothonotaries' salaries.[75]

82. The Government underscores that in view of the difficult economic circumstances facing the country, as outlined previously, the increase requested by the prothonotaries cannot be justified. There is no doubt that the work of prothonotaries is important to the proper functioning of the Federal Court. However, the proposed salary increase of more than 31% between 2012 and 2016 (excluding annuity) without any evidence of a corresponding change in circumstance, role or responsibility, is unsupportable. The Government does, however, propose that the prothonotaries receive a $3,000 non-taxable incidental allowance for the payment of expenses related to their duties.

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[72] *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, [2005] 2 SCR 286, [*Bodner*], **Government's Supplementary Book of Documents, Tab 8**

[73] *Judges Act*, *supra*, ss 2.1 10.1, 42, **Joint Book of Documents, Volume 2, Tab 24**

[74] 9.2-13.2% is based on the prothonotaries' submission that they receive 83-86% of a Federal Court judge's salary.

[75] This figure represents the net increase from 2012-13 to 2016-17 if the prothonotaries' salaries were raised to 83-83% of Federal Court judges. This figure includes the increase given to prothonotaries in 2014, which was retroactive to 2012. It also includes increases based on statutory indexation. Were the prothonotaries' salaries increased to 83-86% as they request, that would result in a net increase of 31.2-35.9% between 2012-13 and 2016-17.

1. Fully Adequate to Attract Outstanding Candidates

83. There is no evidence that the current prothonotary salary of $234,500, along with the enhanced annuity and other benefits now available, is inadequate. Rather, when considering the pools of lawyers from which prothonotaries are typically drawn – government lawyers and private sector lawyers – the total compensation level is fully adequate.

84. Three of the five sitting prothonotaries, who were the most recent appointments, were appointed from the private sector. Even leaving aside the value of the generous judicial annuity (to which prothonotaries are now entitled), the 2014 prothonotary salary was greater than the 65th percentile of self-employed lawyers' incomes for that year. In fact, a prothonotary's 2014 salary was approximately equal to the 70th percentile of a self-employed lawyer's income that year.[76]

85. Two of the five sitting prothonotaries were appointed from the public sector. The 2014 salary of $228,600 was higher than the highest paid federal and provincial government lawyers that same year.[77]

86. The recently-increased retirement annuity surpasses the retirement benefits available to any government lawyer.[78] Furthermore, as outlined in detail at paragraphs 83-88 of the Government's opening submissions, the judicial annuity available to

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[76] Pannu Report, *supra*, p 4, chart entitled "Percentile analysis of net professional income", **Government's Book of Documents, Volume 1, Tab 10**

[77] See paras 62-63 of the Government's opening submissions.

[78] Judges' and Prothonotaries' Compensation: April 1, 2015, **Joint Book of Documents, Volume 2, Tab 34**. For Federal Government lawyers, in order to receive the equivalent of a 2/3 annuity, a lawyer would have to work approximately 32.5 years: Treasury Board of Canada Secretariat, "Agreement between the Treasury Board and the Association of Justice Counsel", March 12, 2013, **Government's Book of Documents, Volume 1, Tab 16**; *Public Service Superannuation Act*, RSC 1985, c P-36, s 11, **Government's Supplementary Book of Documents, Tab 9**. See also, for eg: for British Columbia Government lawyers, Pension Corporation (B.C.) "Public Service Pension Plan: A Guide for Plan Members", online: http://www.pensionsbc.ca/portal/page/portal/pencorpcontent/pspppage/publications/memberguides/pspp_guide.pdf, pp 8-9, 13-14, **Government's Supplementary Book of Documents, Tab 10**; and for Ontario Government Lawyers, Ontario Pension Board, "Public Service Pension Plan: A Guide For Members", online: http://www.opb.ca/portal/ShowBinary?nodePath=/OPBPublicRepository/OPB/Publications/Shared/Booklets/en/Planning%20Today%20For%20Tomorrow, pp 5-6, **Government's Supplementary Book of Documents, Tab 11**

prothonotaries cannot be ignored. It far exceeds any self-funded retirement benefit that most private sector lawyers could reasonably save for. The increased annuity would, therefore, be viewed by those considering applying for an appointment as a significant incentive.

87. In addition, when the value of the judicial annuity is factored in, a prothonotary's salary increases by approximately 36.5%.[79] In terms of the 2014 prothonotary salary it increases it to $312,039, which is approximately equal to the 80th percentile of a self-employed lawyer's income that year.[80]

88. As for the prothonotaries' reference to provincial Masters, no Master has ever been appointed as a prothonotary nor has any prothonotary been named a Master. Consideration of Masters' salaries is therefore inappropriate under the adequacy criterion. Masters are not a pool from which prothonotaries are drawn and this criterion is concerned with the relationship between prothonotary salaries and those salaries of the members of the bar from whose ranks prothonotaries are drawn. In that respect, Masters' and provincial court judges' salaries are not relevant to whether the prothonotary salary is adequate to attract or recruit outstanding candidates under s. 26(1.1)(c) of the *Judges Act*.

2. Other Objective Criteria

(a) Federal Court Judges Most Appropriate Comparator

89. The best comparator for Federal Court prothonotaries is Federal Court judges. As a guiding principle, compensation should be set in a manner that is internally relative and equitable within a given organization.[81] Both prothonotaries and Federal Court judges work in the same jurisdiction, are members of the same court and are drawn from the same pools of candidates.

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[79] This assumes that the age profile of prothonotaries at appointment is the same as that of judges. If prothonotaries are generally younger than judges at appointment, the average value of their annuity benefit would be lower than 36.5% and *vice versa*.
[80] Pannu Report, *supra*, p 5, **Government's Book of Documents, Volume 1, Tab 10**
[81] Treasury Board of Canada, "First Report of the Advisory Committee on Senior Level Retention and Compensation," January 1998, p 7, **Judiciary's Book of Documents, Tab 12**

90. Reference to other jurisdictions renders any comparison less precise as salaries in other jurisdictions are set by reference to factors that have no application in the Federal Court context.[82] As previous Special Advisors have found, measuring the relative roles and responsibilities as between the prothonotary and the Federal Court judge is the most appropriate way of setting total compensation for prothonotaries.[83]

91. In light of what the Cunningham Report called the "principled reason for linking their salaries to that of Federal Court judges",[84] the only question is the percentage of a Federal Court judge's salary that is appropriate.

92. Following the prothonotaries' significant salary increase in 2014, they now receive 76% of a Federal Court judge's salary. During this Commission process, the prothonotaries have failed to provide any evidence of a change in circumstance, role or responsibility that would warrant increasing their salaries a further 9.2 to 13.2% as they propose. Absent any evidence that might justify such a significant increase only two years after a 10% salary increase, the Government submits that nothing more than the continued link to judicial salaries, which benefit from statutory indexation, is required during this Commission process.

(b) Military Judges

93. Ensuring internal relativity also dictates that both the Commission and the Government consider the implications of increasing the prothonotaries' salaries above military judges' salaries. As the Government explained in its response to the Cunningham Report, military judges are tasked with the weighty responsibility of determining criminal matters that affect individual liberty and public safety.[85] The Government implemented an alternative level of 76% of a Federal Court judge's salary rather than the 80%

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[82] *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, 2003 NBCA 54, para 163, **Government's Supplementary Book of Documents, Tab 12**

[83] Special Advisor of Federal Court Prothonotaries' Compensation Report [Cunningham Report], July 31, 2013, p 22, **Joint Book of Documents, Volume 2, Tab 33**. ("In fact, the best comparator may very well be the judges of the Federal Court."); Special Advisor of Federal Court Prothonotaries' Compensation Report [Adams Report], May 30, 2008, p 43, 56, **Joint Book of Documents, Volume 2, Tab 34**

[84] Cunningham Report, *ibid*, p 23

[85] Response of the Minister of Justice to the Special Advisor on Prothonotaries' Compensation dated February 27, 2014, p 2, **Joint Book of Documents, Volume 2, Tab 33a**

recommended by Special Advisor Cunningham because accepting that recommendation would have resulted in the prothonotaries receiving a higher salary than military judges. To pay prothonotaries more than federally appointed military judges would be neither fair nor reasonable.

(c) Masters and Provincial Judges not Appropriate Comparators

94. The Government does not agree that the gross salaries of Masters or provincial court judges are a proper comparator for prothonotaries.

95. In fact, the comparison proposed by the prothonotaries is inaccurate because it fails to look at total compensation. Rather, it is based exclusively on the gross salaries of Masters and provincial court judges. Previous Commissions have repeatedly emphasized the importance of examining total compensation, including the judicial annuity.[86] Indeed, the first Special Advisor characterized judicial annuities as "the most distinctive feature of judicial compensation".[87]

96. The prothonotaries' annuity is valued at approximately 36.5% of the prothonotary salary.[88] In 2015, the prothonotaries' total compensation, including the annuity, was approximately $320,093.

97. The prothonotaries have not provided this Commission with any information or valuation of the pension available to Masters and provincial court judges to enable proper comparison of total compensation.

98. The Government's expert was unable to complete a valuation of Masters' pensions due to his inability to access Masters' and provincial court judges' demographic

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[86] See Levitt Commissioner Report, *supra*, para 42, p 15, **Joint Book of Documents, Volume 2, Tab 31**; McLennan Commission Report, *supra*, pp 5, 15, 57, **Joint Book of Documents, Volume 2, Tab 29**; Drouin Commission Report, *supra*, p 42, **Joint Book of Documents, Volume 2, Tab 28**
[87] Adams Report, *supra*, pp 27-29, **Joint Book of Documents, Volume 2, Tab 34**
[88] *Supra*, footnote 77; Pannu Report, *supra*, p 13, **Government's Book of Documents, Volume 1, Tab 10**

information.[89] The comparison he completed, however, shows that a prothonotary's annuity surpasses that of Masters and provincial court judges in the vast majority of cases.[90]

99. Furthermore, Masters and provincial court judges are a weak comparator for prothonotaries because the pools of lawyers from which they are drawn are significantly different. The prothonotaries correctly point out that appointees must be capable of working in "specialized areas such as pharmaceutical regulation, intellectual property, Aboriginal law, maritime law, and judicial review."[91] An appointee must also have a "thorough knowledge of the [*Federal Courts*] Rules of practice". Given these areas of specialization, it follows that the most relevant pool of lawyers is composed of those who practice in areas of law that fall within the Federal Court's jurisdiction.

100. By contrast, Masters and provincial courts judges work in different jurisdictions, in different areas of specialization and may have limited or no knowledge of how the Federal Court operates.

3. Supernumerary Status – A Policy Decision

101. The Government agrees that supernumerary status is a considerable financial benefit to judges. A supernumerary judge remains a member of the court and receives a full salary but will typically carry a reduced workload of approximately 50% of a full-time judge. The attractiveness of this option is demonstrated by the high take-up rate by the judiciary, outlined at paragraph 92 of the Government's opening submissions.

102. However, when the supernumerary model was adopted by the Government in 1971, it was not driven by the need to enhance judges' remuneration. Rather, it was motivated by concerns relating to the administration of the courts. It was considered a cost-effective means of retaining experienced judges on the court, who could contribute to the court's

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[89] Letter from Haripaul Pannu, March 21, 2016, p 4, **Government's Supplementary Book of Documents, Tab 3**
[90] *Ibid*
[91] Prothonotaries' submissions, para 2

workload, and provide additional flexibility to the chief justice to manage the docket.[92] From an administrative perspective, a judge's election to assume supernumerary office automatically creates a vacant position into which a new full-time judge can be appointed. In this way, the full-time complement of the court is maintained and the court benefits from the workload carried by the supernumerary judge.

103. The decision to create a supernumerary office falls within the constitutional authority of governments to legislate in respect of the constitution, maintenance and organization of the courts. Indeed, the prothonotaries appear to agree that the decision to establish the office of a supernumerary judge is fundamentally a matter of policy.[93] While judicial independence must be respected, determining the composition and size of the Federal Court is fundamentally a policy decision for the Government, in close collaboration with judicial administrators, and, where appropriate, the Chief Justice.

104. With respect to the s. 96 superior courts, the provinces have constitutional jurisdiction over their organization, maintenance and constitution.[94] The availability of supernumerary status is therefore contingent on provincial legislation permitting such a status. Following the creation of the supernumerary model in 1971, it was up to each province to consider whether or not supernumerary offices were necessary to meet the needs of their particular jurisdictions. Ultimately, all jurisdictions have opted for this and have enacted the necessary legislation.

105. However, not all provinces have adopted the federal supernumerary model for their provincial courts. Instead, many jurisdictions employ retired judges paid on a *per diem* basis for work assigned by the chief justice. In contrast to most *per diem* regimes, the supernumerary election is at the option of the judge – it does not require the agreement of the government or the chief justice, nor is it based on the needs of the court.

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[92] *Proceedings of the House of Commons Standing Committee on Justice and Legal Affairs*, Issue No 29, 3rd Sess, 28th Parl, June 22, 1971, 29:9-29:20, **Government's Supplementary Book of Documents, Tab 13**

[93] Prothonotaries' submissions, para 112

[94] *Constitution Act, 1867*, 30 & 31 Vict, c 3, s 92(14), **Government's Supplementary Book of Documents, Tab 14**

106. As court dockets grow, some jurisdictions have queried whether the high administrative costs associated with a supernumerary election, such as facilities and support costs, are the most cost-effective means of meeting growing demands. Ultimately, such decisions entail the commitment of public resources for which governments are accountable. Accordingly, these are policy matters for the government to determine.

107. In his submissions to this Commission, Chief Justice Crampton relies in part on workload concerns to support of the creation of supernumerary office for prothonotaries. The Government respectfully submits that determining the appropriate level of public resources that should be accorded to the Court to deal with workload pressures is a matter for discussion between the Government and the Chief Justice. To this end, the Government and the Federal Court have developed a collaborative approach for assessing the need for additional judicial resources, founded on objective measures of need. Any flexible post-retirement arrangement for Federal Court prothonotaries should be addressed through a similar approach.

108. The Government also notes the Chief Justice's reference to the Supreme Court of Canada decision in *Mackin v. New Brunswick* and agrees that the ability to elect supernumerary status entails significant financial benefit for the prothonotaries. However, *Mackin* dealt with an attempt by a provincial government to modify the existing office of supernumerary judge.[95] The Court found that because the office constituted a significant financial benefit to the incumbent judges, a province could only make modifications to the regime once the matter had been considered by a compensation commission.[96]

109. The Government respectfully submits that *Mackin* does not stand for the proposition that a judicial officer is entitled to elect supernumerary status or that this option is a necessary element to ensuring the financial security of prothonotaries. Such an interpretation would amount to the creation of a positive obligation on governments to structure the courts in a particular way so as to achieve maximum financial benefit for

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[95] *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, para 4, **Joint Book of Documents, Volume 2, Tab 27**
[96] *Ibid*, para 69

judicial officers. Instead, court structuring must take into account the broad range of policy considerations outlined above.

110. Furthermore, there is no evidence before this Commission that attracting individuals to the position of prothonotary is a challenge. Similarly, there is no evidence that the lack of supernumerary status for prothonotaries plays any role in influencing a candidate's decision to apply. Supernumerary status, which entails significant policy implications related to court structuring and administration, is not required to achieve adequate compensation or ensure judicial independence.

4. Incidental Allowance

111. The Government agrees that prothonotaries should be entitled to receive a non-taxable allowance to be used for the payment of expenses related to their duties. The Government proposes that the prothonotaries receive a non-taxable allowance of $3,000. This is in keeping with the recommendations received in the past from both Special Advisors.[97] The Government submits that this amount is sufficient to ensure that their overall compensation is adequate.

5. Representational Costs

112. Pursuant to s. 26.3 of the *Judges Act*, the prothonotaries are entitled to two-thirds of their representational costs. Full funding of representational costs has consistently been rejected by past Governments in order to encourage parsimony with regard to the use of public resources.[98] Giving prothonotaries unchecked discretion in deciding what legal costs should be incurred is not in the public interest. It is therefore the Government's view that the partial indemnification provided is sufficient to assist in defraying legal costs related to the review process. In addition, the Commission has heard thorough submissions on this

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[97] Adams Report, *supra*, p 65, **Joint Book of Documents, Volume 2, Tab 32**; Cunningham Report, *supra*, p 33, **Joint Book of Documents, Volume 2, Tab 33**

[98] Response of the Government of Canada to the 1999 Judicial Compensation and Benefits Commission, December 13, 2000, p 6, **Government's Supplementary Book of Documents, Tab 15**; Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission, November 20, 2004, pp 9-10, **Government's Book of Exhibits and Documents**, **Volume 2, Tab 46**; Response of the Government of Canada to the Report of the 2007 Judicial Compensation and Benefits Commission, February 11, 2009, **Government's Supplementary Book of Documents, Tab 16**

precise question and is actively considering this matter. If the Commission considers it necessary to make a recommendation, the Government will fully consider it in the context of the Commission's report.

6. Conclusion

113. The salary increase proposed by the prothonotaries would give the prothonotaries a 31% increase between 2012 and 2016 (excluding annuity). The Government submits that there is no objective evidence of a corresponding change in circumstance, role or responsibility to support such an increase.

114. Prothonotaries' judicial independence will be maintained and the adequacy of their total compensation ensured through the link to the salary of Federal Court judges and their entitlement to the generous judicial annuity. The Government also proposes that the prothonotaries receive a $3,000 non-taxable incidental allowance for the payment of expenses related to their duties.

D. Government's Reply to Interested Parties' Submissions

1. Appellate Court Judge Differential not Justified

115. The Government submits that nothing has changed since the first Quadrennial Commission that warrants an increase in appellate judges' salaries above the amount paid to trial court judges. Hierarchy within the court system does not justify such an increase.

116. All four of the Quadrennial Commissions have considered the issue of a salary differential for trial and appellate judges. The Drouin Commission considered that there were merits to the arguments made both for and against a differential. However, it concluded that further review and information would be needed to make a recommendation.[99] The McLennan Commission refused to recommend a salary differential, finding that the creation of such a differential could be harmful.[100] The

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[99] Drouin Commission Report, *supra*, p 52, **Joint Book of Documents, Volume 2, Tab 28**
[100] McLennan Commission Report, *supra*, pp 54, **Joint Book of Documents, Volume 2, Tab 29**

McLennan Commission also concluded that a differential would not "have any impact whatsoever" on the role of financial security of the judiciary in ensuring judicial independence, or the need to attract outstanding candidates to the judiciary.[101]

117. The Block Commission and the Levitt Commission did not accept the argument that a salary differential between trial and appellate judges was necessary to ensure the financial security of appellate judges or to attract outstanding candidates.[102] These two Commissions also rejected the notion that differences in the workload of trial and appellate judges were a basis for a different salary.[103]

118. The sole basis for recommending a salary differential would be the fourth criterion: other objective criteria that the Commission considers relevant. In that regard the Levitt Commission recommended a 3% differential on the basis of "a difference in the impact on the administration of justice of the work of the appellate court judges as compared to that of the work of judges of the trial courts".[104]

119. The Government maintains its longstanding position that appellate judges should not be paid more than trial court judges. The roles of trial and appellate judges are different in nature, but not in importance. Judges of courts of appeal make final decisions on questions of law, subject to appeal to the Supreme Court of Canada. Trial judges have the primary role in determining questions of fact, and while their determinations of law are subject to appeal, in the vast majority of cases they are not appealed. Trial judges have a much greater role in interacting directly with litigants, including non-represented litigants, and have the difficult task of assessing the credibility of witnesses.

120. While appellate decisions are consistently applied by lower courts, the doctrine of *stare decisis* does not make the salaries of appellate court judges inadequate. The hierarchy of judicial decisions and courts does not impact the responsibilities of individual judges;

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[101] *Ibid*, p 55
[102] Block Commission Report, *supra*, para 147, **Joint Book of Documents, Volume 2, Tab 30**; Levitt Commission Report, *supra*, paras 62-68, **Joint Book of Documents, Volume 2, Tab 31**
[103] Block Commission Report, *ibid*, para 148, **Joint Book of Documents, Volume 2, Tab 30**; Levitt Commission Report, *ibid*, paras 62-68, **Joint Book of Documents, Volume 2, Tab 31**
[104] Levitt Commission Report, *ibid*, para 67, **Joint Book of Documents, Volume 2, Tab 31**

whether trial or appellate, all judges are equivalent in terms of their obligation to fairly, impartially and independently decide each case.[105]

121. The Government is of the view that the work of judges of the trial courts is, and should be perceived by the public to be, of equal importance to that of appellate court judges. Hierarchy and status alone bear no relation to the "adequacy of judicial compensation and benefits," as established by section 26 of the *Judges Act*.

122. Moreover, there are numerous reasons not to implement a salary differential for appellate judges, including: 1) the lack of consensus among the approximately 1,100 trial court judges and appellate judges; 2) the real risk of negatively affecting the goodwill and collegiality among trial and appellate judges; 3) the fact that trial courts or trial judges at times perform appellate functions; 4) the fact that trial judges at times sit on courts of appeal; and 5) the fact that trial judges bear sole responsibility for their decisions, whereas appellate court judges sit in panels, and thus share workload and responsibility.

123. The Government submits that an appellate differential would not advance the proper administration of justice or the broader public interest.

2. Removal Allowance for Labrador Judge

124. The Government agrees with the submissions of Mr. Justice Robert P. Stack on the issue of the availability of certain removal allowances under the *Judges Act*. The Government therefore proposes that an amendment be made to extend the entitlement to a removal allowance as described in s. 40(1)(c) and (d) to the judge sitting in Labrador.

3. Compensation of the Chief Justice of the Court Martial Appeal Court of Canada

125. The Government agrees with the submissions of Chief Justice Richard Bell of the Court Martial Appeal Court of Canada (CMAC). It is appropriate that a Chief Justice who is a member of the Canadian Judicial Council and is entitled to a representational allowance

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[105] See Scott Commission Report, *supra*, p 30, **Government's Book of Documents, Volume 2, Tab 29** ("the burden of judicial office ... requires an equivalent discipline and dedication on the part of the judges at both court levels.")

under s. 27(6)(f) of the *Judges Act* receive the same annual salary as other superior court chief justices. The Government therefore proposes that the necessary legislative amendments be made to provide for a salary equal to that of other superior court chief justices. The Government further proposes that, should a Chief Justice of the CMAC step down from that office, he or she be entitled to an annuity, on retirement, based on the chief justice salary.

4. Submissions of Mr. Justice Leonard S. Mandamin

126. The Government acknowledges the thoughtful submissions of Mr. Justice Mandamin of the Federal Court. Justice Mandamin proposes that individuals who sit as members of provincial and territorial courts and are subsequently appointed as superior court judges be able to transfer the years of service accumulated under their provincial or territorial pension plan to the judicial annuity under the *Judges Act*. He explains that the inability to transfer pension credits represents a significant barrier that affects Indigenous provincial and territorial court judges disproportionately.

127. The Government fully agrees that the recruitment of Indigenous judges, as well as judges drawn from other minority populations, is essential to ensuring that the federal judiciary reflects the diverse face of Canada.

128. However, while it may be feasible to design a federal judicial annuity scheme that would allow for portability of provincial judicial pension benefits, such a change would require major reform of the current *Judges Act* scheme. The federal judicial annuity scheme differs fundamentally in its structure and funding from any other pension plan in Canada, including other provincial and territorial judicial pension plans. The structure and unfunded nature of the federal judicial annuity scheme under the *Judges Act* is unique,[106] as fully explained in the Report on the Pension Plan for Federally Appointed Judges prepared by the Office of the Superintendent of Financial Institutions (OSFI). [107]

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[106] See *Judges Act*, *supra*, ss 42-48, **Joint Book of Documents, Volume 1, Tab 24**

[107] Office of the Superintendent of Financial Institutions Canada and Office of the Chief Actuary, "Actuarial Report on the Pension Plan for the Federally Appointed Judges as at March 31, 2013", online:

129. Rather than being financed on a funded basis, which requires that "contributions are made well in advance of the benefit payments they are intended to cover" and through which a pension fund is established to earn investment returns,[108] judicial annuities are paid through a direct statutory draw on the Consolidated Revenue Fund (CRF). This insulates them from any market fluctuations to which traditional pension funds are vulnerable, and ensures the greatest possible degree of certainty in the payment of annuities under the *Judges Act*.

130. Currently, the federal scheme establishes a minimum number of years before entitlement to an annuity is achieved.[109] Traditional pension plans, including those applicable to judges of the inferior provincial and territorial courts, generally allow members to vest after fewer years with reduced benefits.

131. It is also critical to note that any proposal to create portability of pensions between jurisdictions would require changes not only to the federal judicial annuity scheme, but would also require coordinated amendments to provincial and territorial judicial pension legislation, which differ across jurisdictions, to ensure consistency.

132. The Government clearly agrees that the judicial annuity is an integral part of compensation and that the Commission's consideration is essential before any changes could be made to it. The Government will therefore consider, in the context of the Commission's report, any recommendations it may make on the question of the federal judicial annuity and any changes to its structure that it may consider necessary to maintain the financial security of federally appointed judges. The Government suggests, however, that the need to ensure a more diverse federal judiciary, and one that specifically encourages Indigenous candidates to apply for appointment, is better addressed through other policy means.

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http://www.osfi-bsif.gc.ca/Eng/Docs/faj-jnf14.pdf, **Government's Supplementary Book of Documents, Tab 17**

[108] *Ibid*, p 7

[109] This number was lowered from 15 to 10 years, allowing for an early retirement option with reduced benefits, in response to a recommendation contained in the Drouin Report.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, Ontario, this 24th day of March, 2016

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