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

2020 JUDICIAL COMPENSATION AND BENEFITS COMMISSION

REPLY SUBMISSIONS OF THE GOVERNMENT OF CANADA

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TABLE OF CONTENTS

I. Overview

1. The Block Commission's statement that "the issue is not how to attract the highest earners; the issue is how to attract outstanding candidates" from both private and public sectors, from large and small firms, and from large and small centres,[1] remains the touchstone of judicial appointments. The continued linkage by the judiciary between high earnings in the private sector and merits of candidates for judicial office reflects an outdated and unsupportable view of who is an outstanding judicial candidate. This linkage has been dismissed by successive Commissions.

2. The Government is not suggesting that high earners in large metropolitan centres are not outstanding candidates for judicial office; many are highly qualified and the overwhelming majority of appointments to judicial office are from the private sector. However, high earners are not an exclusive class from which judicial appointments are made. Success as a lawyer, and qualification as an outstanding applicant for judicial office, are measured in more ways than reaching the top earning levels of a large firm in a large metropolitan centre. Even if private sector earnings were the sole barometer of the quality of a candidate for judicial office, the current base judicial salary is greater than the 75th percentile of self-employed private sector lawyers. That amount jumps to almost the 90th percentile when tax-adjusted total compensation (i.e., including annuities and other benefits) is measured.

3. More importantly, the legal profession is becoming more diverse. These changes reflect the broader ongoing changes in society at large. Women and members of minority communities make up increasingly larger segments of all practice areas of the profession. Further, the profession has expanded to include more fields of practice such as non-governmental organizations, non-profit organizations, legal aid centres and organizations that specialize in particular causes or societal issues. Each of these areas of practice attracts high quality counsel.

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

4. Further, the quality of candidates appointed to the judiciary remains very high. As set out in the Government's main submission, for every appointment made to the judiciary there are at least two other applicants who have been recommended or highly recommended for appointment by the independent Judicial Advisory Committees. Therefore, any suggestion that the pool of outstanding applicants to judicial office has been narrowed is simply wrong. The false narrative that high quality lawyers are only found in the corner offices of large firms in major metropolitan centres must be set aside.

5. Successive Commissions have used the Block comparator as the benchmark for adequate compensation for the judiciary. Before this Commission, the judiciary 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 "Block comparator"), the judiciary now advocates for "total average DM-3 compensation". This significant change would only further reduce the usefulness of the DM measure for setting judicial salaries, because "total average DM-3 compensation" is heavily influenced by the performance ratings of a few individuals at the DM-3 level.

6. Finally, in spite of the very optimistic prospects set out in the judiciary's evidence, the facts remain that the Canadian and world economies face very challenging times because of the continued impact of the COVID-19 pandemic. The suggested increase of 19.9% from the base salary in 2020 far outstrips any reasonable expectation of economic performance over this quadrennial cycle. Using the judiciary's proposal as a basis, by 2024 the total tax-adjusted yearly compensation (i.e., salary, annuity and other benefits) for a federally-appointed judge would be $610,600.

II. Judicial Salaries are Fully Adequate

A. A Defensible Comparison

7. It is inaccurate to consider only the base judicial salary when comparing judicial compensation to other comparators in the "adequacy" analysis. It would be equally inaccurate to compare the pre-tax income of one profession with the after-tax income of

another. In the case of the federally-appointed judiciary, the judicial annuity and other benefits have measurable value. The entire compensation package (salary, annuity and other benefits) provided to the judiciary must be incorporated into this comparative analysis.

8. The judiciary's submissions fail to do this because they downplay the significance of the judicial annuity and other benefits. They focus almost exclusively on the base judicial salary. As most recently noted by the Rémillard Commission, the judicial annuity is a significant factor in judicial compensation.[2]

9. Furthermore, when carrying out a comparison, the impact of taxation must also be considered. As explained in greater detail in his supplemental report letter of April 16, 2021, Peter Gorham notes that, when saving for retirement, any self-employed lawyer is only permitted to save a certain amount via tax-sheltered means (e.g., an RRSP). Unlike the judicial annuity where contributions are entirely tax-sheltered, for a self-employed lawyer to amass retirement savings equal to two-thirds of their lawyer's salary, a significant amount of savings will be subject to taxation before it is invested in any type of retirement savings vehicle. Thus, the tax-sheltered nature of the judicial annuity adds further value to judicial compensation and must be accounted for in order to achieve an apples-to-apples comparison.

10. As set out in the Government's main submission, the "average age-weighted total compensation", which includes base salary, the judicial annuity and other benefits, is valued at $543,000 as of April 1, 2021.[3] In his supplemental report letter of April 16, 2021, Peter Gorham provides further detail supporting the analytical process underlying this

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

[3] Government's main submission, para 5. Note the small adjustment from $543,800 to $543,000 based on the finalized increase effective April 1, 2021. See Peter Gorham, 2020 Quadrennial Commission – Supplemental Information, April 16, 2021 [Gorham Supplemental Report], **Government's Supplementary Book of Documents**, **Tab 2**

valuation of total compensation.[4] First, as set out in his March report,[5] Mr. Gorham determined the value of the judicial annuity and other benefits at 37.84% of judicial base salary. He then adjusted that amount to take into account the effect of taxation on the ability of a private sector lawyer to save enough money for proportionally equivalent annuity and benefits.[6]

11. Mr. Gorham explains that the *Income Tax Act* places a limit on how much an individual may put towards retirement savings via a tax-sheltered vehicle. Even if a private sector lawyer could save enough to produce an annual retirement income equal to two-thirds of their salary, only half of the amount saved would be sheltered from taxation (e.g., via an RRSP). Consequently, for a private sector lawyer to create an annuity equal to two-thirds of their salary, saving 37.84% of their annual salary would be insufficient. Instead, to account for taxation, they would need to save 49.51% of their salary each year.

12. Were a federally appointed judge to earn a salary of $361,100 in the private sector, they would have to save 49.51% of their annual salary to achieve a two-thirds retirement annuity. Thus, when that percentage is applied to the base salary of $361,100 as of April 1, 2021, the current average age-weighted total compensation for federally-appointed judges is $543,000 and $434,900 for prothonotaries.[7] Ignoring taxation and using only the 37.84% value of the judicial annuity and other benefits, total compensation for federally-appointed judges as of April 1, 2021 is $497,740 and $398,080 for prothonotaries.[8]

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[4] *Ibid*; **See also** Peter Gorham, Compensation Review of Federally Appointed Judges for the Department of Justice Canada regarding the 2020 Judicial Compensation and Benefits Commission dated March 26, 2021 [Gorham Report], paras 122-142, **Government's Book of Documents**, **Tab 4**

[5] Gorham Report, *ibid,* pp 29-31, paras 133-134, 141-142

[6] Gorham Supplemental Report. *supra*, pp 1-2, **Government's Supplementary Book of Documents**, **Tab 2**

[7] *Ibid*; Office of the Commissioner for Federal Judicial Affairs, Salary Adjustment, March 31, 2021 [CFJA 2021 Salary Adjustment], **Government's Supplementary Book of Documents**, **Tab 1**

[8] Gorham Supplemental Report, *ibid*, p 2

B. The Industrial Aggregate Index

13. In its main submission, the Government argued that increases to judicial salaries based on the Industrial Aggregate Index (IAI) should be limited to a cumulative maximum of 10% for this quadrennial cycle, ending in 2024.[9] This would mean that on April 1, 2024, the base judicial salary would be $372,600 and the tax-adjusted total compensation would be $560,200, an increase of $33,800 in base judicial salary and $50,800 in tax-adjusted total compensation over that four-year period.

14. By contrast, the judiciary is suggesting that they should receive the full IAI increase for this four-year period plus additional 2.3% increases for each of 2022 and 2023.[10] This would result in an average annual compounded increase of 4.65% per year until 2024, which would lead to a base judicial salary of $406,300 on April 1, 2024[11] and a tax-adjusted total compensation on April 1, 2024 of $610,600.[12]

15. According to the Rémillard Commission, one of the purposes of indexation is to ensure that increases to judicial compensation keep pace with inflation.[13] Whereas the full IAI increase would provide an average annual compounded increase of 3.5% over the next four years, the Consumer Price Index (CPI) – widely used to determine cost-of-living adjustments – is only projected to increase over the next four years as follows: 2.2% in 2021; 2.0% in 2022; 2.1% in 2023; and 2.1% in 2024.[14] Another projection by the University of Toronto Rotman School of Management projects CPI to be in the range of

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[9] Government's main submission, para 35
[10] Judiciary's main submission, para 155
[11] Gorham Supplemental Report, *supra,* **Government's Supplementary Book of Documents**, **Tab 2**
[12] *Ibid.*
[13] Rémillard Commission Report, *supra*, p 12, para 41, **Joint Book of Documents**, **Tab 13**
[14] Department of Finance Canada, Budget 2021: A Recovery Plan for Jobs Growth and Resilience, April 19, 2021 [Budget 2021], online: https://www.budget.gc.ca/2021/home-accueil-en.html, Annex 1, Details of Economic and Fiscal Projections, **Government's Supplementary Book of Documents**, **Tab 3**; Letter dated December 9, 2020 from the Assistant Deputy Minister of Finance, Department of Finance Canada, p 2, **Joint Book of Documents**, **Tab 24**

2.0-2.3% for each of 2021, 2022 and 2023.[15] The Government's proposed 10% cumulative increase significantly exceeds the projected inflation for this quadrennial cycle.

16. The judiciary's suggestion that it has suffered a loss because actual IAI rates have been lower than the IAI projections used by successive Quadrennial Commissions is misguided.[16] As set out by the Rémillard Commission, the general purpose of using IAI is to ensure that judicial salaries reflect the increase in the average wages in the Canadian economy.[17] However, statutory indexation is implemented on the basis of actual – not projected – IAI. The key point is that the statutory increases in salary align with average wages paid to workers across a broad range of sectors, as reflected in actual IAI. The judiciary would only suffer a "loss" if their annual increases were less than the annual rate of IAI. Furthermore, as noted in the Government's main submission, the level of the IAI increase effective April 1, 2021 is directly attributable to the fact that the wages of millions of lower wage earning Canadians are no longer counted due to the fact that they lost their jobs as a result of the pandemic.

17. Perhaps more importantly, the judiciary's suggestion that it has suffered a "loss" also fails to take into account that by benefiting from IAI-based annual increases, the judiciary has not only achieved parity with the Block comparator but, as of this year, will exceed that long-standing base salary measure. The judiciary's change in course concerning the use of the Block comparator will be discussed in more detail below.

III. Prevailing Economic Conditions in Canada are Very Challenging

18. The judiciary points to a very optimistic economic forecast as part of its supporting rationale for the 19.9% increase in base judicial salary it seeks in this quadrennial cycle. The Government also hopes for a strong and rapid recovery from the current economic

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[15] Rotman School of Management/University of Toronto, "New Forecast for Canada – Much More Optimistic Than Our Recent Outlooks", March 19, 2021, **Government's Supplementary Book of Documents, Tab 6**

[16] Judiciary's main submissions, paras 75-80, 117-118

[17] Rémillard Commission Report, *supra*, p 12, para 41, **Joint Book of Documents**, **Tab 13**

conditions, and there is cause for cautious optimism in the longer term. However, some of the bases for the judiciary's forecast must be put into proper context.

19. First, at paragraphs 45-47 of their submissions, the judiciary refers to the budgetary deficits incurred as a result of the pandemic. The Government's 2021 Budget confirmed a deficit of $354.2 billion in 2020-21. However, the projected budgetary deficits that the judiciary references appear not to take into account future budgetary deficits of $154.7 billion in 2021-22 and over $50 billion in each of 2022-23 and 2023-24.[18] As set out by the Chief Economist of BMO Economics, the ongoing debt and deficit challenges will continue into the immediate future.[19]

20. Second, the judiciary points to an expected increase in Gross Domestic Product (GDP) of 12.4% between calendar years 2021 and 2024.[20] Based on the views of 13 private sector economists, the Government projects GDP to grow by 13.8% during the same period.[21] In either case, projected growth must be understood in its context: as a result of the pandemic, the Canadian economy contracted by 5.4% in 2020 alone.[22] Accordingly, a significant portion of the projected increase in GDP must be characterized as recovery rather than growth. When the current economic conditions are properly accounted for, the overall projected growth of Canada's GDP between 2020 and 2024 is approximately 8.4% which, although not directly comparable, is less than the Government's proposed maximum cumulative increase of 10% based on IAI over the coming four years.

21. It is within the current context of high deficits, a contracted economy, and an ongoing pandemic with millions of Canadians unemployed that we ask the Commission to carefully scrutinize the judiciary's request for salary increases of 19.9% over the coming

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[18] Budget 2021, *supra*, Annex 1, Details of Economic and Fiscal Projections, **Government's Supplementary Book of Documents**, **Tab 3**

[19] Douglas Porter, Chief Economist, BMO, "Confronting Canada's Debt Deluge", March 19, 2021, **Government's Supplementary Book of Documents, Tab 7**

[20] Judiciary's main submissions, para 48

[21] Budget 2021, *supra*, Annex 1, Details of Economic and Fiscal Projections, **Government's Supplementary Book of Documents**, **Tab 3**

[22] Government's main submissions, para 17; Budget 2021, *ibid*, Annex 1, Details of Economic and Fiscal Projections

four years. Equally, it is within this context that the Government asks the Commission to consider a recommendation to limit IAI increases to a cumulative maximum of 10% from the 2020 base salary for this quadrennial period.

IV. Factors to Determine Judicial Compensation

A. Expenditure of Public Money

22. As set out in the Government's main submission, when assessing the "adequacy" of judicial compensation, s. 26(1.1)(b) of the *Judges Act* requires the Commission to consider whether judicial remuneration ensures the financial security of the judiciary. Financial security is an essential condition of judicial independence, its purpose being ultimately to protect the judiciary from economic manipulation by the legislature or the executive.[23]

23. The Government agrees that judges occupy a unique position in Canadian society and that the setting of their compensation necessarily follows a unique process.[24] Nonetheless, Parliament is still accountable for decisions made in relation to public expenditures, which include judicial salaries.

24. 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 remain for the Government and Parliament in responding to the Commission's recommendations. Yet the Supreme Court has expressly recognized such a role, noting that the allocation of scarce public resources is fundamentally a policy decision.[25]

25. In addition, the principles of parliamentary accountability necessarily include a role for political actors, such as Ministers and other parliamentarians. It is important not to

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[23] Government's main submissions, para 36; Rémillard Commission Report, *supra,* para 131, **Joint Book of Documents**, **Tab 13**
[24] Judiciary's main submission, paras 17-22
[25] *PEI Reference*, *supra*, para 176, **Joint Book of Documents, Volume 2, Tab 25**

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 such involvement.[26]

26. The current judicial base salary as of $361,100 as of April 1, 2021, and tax-adjusted total compensation of $543,000, are well above the minimum level at which a need to protect the judiciary from political interference through economic manipulation may arise. Automatic indexing in accordance with the IAI, to a cumulative maximum of 10% over the coming four years, would offer further protection against the erosion of judicial salaries and further safeguard the independence of the judiciary.

B. DM-3 and the Block Comparator

i) Commissions have Consistently Rejected Total Average Compensation

27. The judiciary has consistently sought to measure its compensation against that of federal deputy ministers paid at the DM-3 level. Before previous Commissions, the judiciary sought to achieve the Block comparator of mid-point of the DM-3 salary range plus one-half available performance pay. Now that this has been achieved, the judiciary seeks a higher reference point of total average DM-3 compensation.[27] In keeping with the approach used by previous Commissions (most recently the Rémillard Commission[28]), this Commission should decline to follow the judiciary's approach.

28. Prior to the Rémillard Commission, successive Commissions only reviewed the "midpoint" of DM-3 salaries rather than the "average" when considering DM-3 salaries.[29]

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[26] *Constitution Act, 1867*, 30 & 31 Vict, c 3, s 100, **Joint Book of Documents, Volume 1, Tab 22**

[27] Judiciary's main submissions, para 113

[28] Rémillard Commission Report, *supra,* pp. 14-16, paras 45-56, **Joint Book of Documents**, **Tab 13**

[29] Report and Recommendations of the 1989 Commission on Judges' Salaries and Benefits, March 5, 1989 [Courtois Commission Report], p 10, **Judiciary's Book of Exhibits and Documents [BED], Tab 22**; Report and Recommendations of the 1992

Those Commissions that considered performance pay consistently looked at one-half of maximum performance pay, as opposed to the average.[30]

29. Even though the Government did not agree with the use of the Block Comparator, the Levitt Commission went so far as to say that there had been a "consensus" regarding the use of that comparator –"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".[31]

30. 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".[32] 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 and their performance, not on positions.

31. The Block Commission expressed a similar view with respect to the use of one-half performance pay as a reference point for comparability rather than the average, as one-half

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Commission on Judges' Salaries and Benefits, March 31, 1993 [Crawford Commission Report], p 11, **BED, Tab 23**; Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits, September 30, 1996 [Scott Commission Report], p 13, **BED, Tab 24**; Report of the First Quadrennial Judicial Compensation and Benefits Commission, dated May 31, 2000 [Drouin Commission Report], p 29, **Joint Book of Documents, Volume 1, Tab 9**; Block Commission Report, *supra*, paras 106, 118-120, **Joint Book of Documents, Volume 1, Tab 11**; Report of the Fourth Quadrennial Judicial Compensation and Benefits Commission, dated May 15, 2012 [Levitt Commission Report], para 28, **Joint Book of Documents, Volume 1, Tab 12**; Rémillard Commission Report, pp. 13-15, paras 43-52, **Joint Book of Documents**, **Volume 1, Tab 13**

[30] Block Commission Report, *supra*, para 111, **Joint Book of Documents, Volume 1, Tab 11**; Levitt Commission Report, *supra*, para 29, **Joint Book of Documents, Volume 1, Tab 12** Rémillard Commission Report, pp.14-16, paras 45-56, **Joint Book of Documents**, **Volume 1, Tab 13**

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

[32] Block Commission Report, *supra,* para 106, **Joint Book of Documents, Volume 1, Tab 11**

performance pay "does not vary over time like average performance pay does".[33] The Levitt Commission adopted the Block Commission's choice of the mid-point of the DM-3 salary range and one-half performance pay.[34]

32. The Rémillard Commission's difficulty was the very small number of individuals in that group (eight DM-3s at the time of that Commission and eight as of March 2020). It concluded that such a small group would not provide a consistent view of year over year compensation of the DM-3 group because the considerable variation in compensation depended on the exact composition of the DM-3 group at any given time.[35] According to the Rémillard Commission:

> Any merit in comparing total average compensation would come from a comparison with a much larger group that could provide objectivity and consistency, without being inordinately influenced by the individual member of the group and any given time.[36]

33. The Rémillard Commission's comments are still apt today. The primary difficulty with the judiciary's approach is that total average DM-3 compensation is significantly influenced by the personal performance of a few individuals. The variability is outlined in the table found at page 36 of the judiciary's submission. In his expert report, Mr. Gorham explains how a small number of individuals can excessively and disproportionately affect the average compensation of the DM-3 level. The individual weighting on average compensation is set out in the Gorham report at page 56.[37]

34. In any event, the Government reiterates the conclusions of the Rémillard Commission: while the DM-3 group remains a useful reference point, any comparison to it should not be applied in a formulaic manner.[38] The calculations found at paragraphs 146

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[33] *Ibid*, para 111
[34] Levitt Commission Report, *supra*, para 28, **Joint Book of Documents, Volume 1, Tab 12**
[35] Rémillard Commission Report, *supra,* p 14, para 50, **Joint Book of Documents, Volume 1, Tab 13**
[36] *Ibid*, p 15, para 51
[37] Gorham Report, *supra*, p 56, **Government's Book of Documents, Tab 4**
[38] Rémillard Commission Report, *supra,* p 15, para 52, **Joint Book of Documents**, **Volume 1, Tab 13**

and following of the judiciary's main submission cannot be described as anything other than formulaic benchmarking.

ii) Average DM-3 Compensation tied Directly to Individual Performance of DMs

35. It is worth re-iterating that, as observed by the Rémillard Commission, the gap between base judicial salaries and the Block comparator (i.e., the difference between base judicial salary and the mid-point of the DM-3 salary plus half of the available DM-3 at-risk pay), has been closed by annual increases to judicial salaries in accordance with the IAI. As stated by that Commission, indexing has served its purpose.[39] Moreover, as demonstrated in the Government's main submission, the continued use of annual increases based on IAI will see base judicial salaries continue to surpass the Block comparator over the coming years.[40]

36. The Government has long maintained that the judicial salary has no objective link to that of DM-3s. Average DM-3 compensation is a particularly inappropriate measure because it is not constant. It varies according to the seniority and performance of a handful of DMs. Consequently, there is no principled basis for linking the judicial salary to the performance of individual DM-3s. When a DM's base salary is set near the top of the available range, it is because that particular individual has accumulated years of experience defined by a proven record of exceptional performance. In addition, average performance pay can also rise significantly when a single DM receives a rating near the maximum.

37. The most recent Report on the Advisory Committee on Senior Level Retention and Compensation underscores the fact that DM compensation is highly individualized 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

[39] *Ibid,* p 16, para 55
[40] Government's main submissions, para 39

operates. Individual DMs are assessed in accordance with "each individual's unique context".[41]

38. 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%[42] increasing to 20% by 2005.[43] Since 2014, maximum performance pay has been set at 33% for DM-3s.[44] 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.

39. Finally, one additional argument of the judiciary must be addressed. The judiciary points to the fact that DM salaries in the recent past have remained unchanged and have therefore supposedly "subverted the very purpose of the (Block) comparator".[45] With respect, this is unhelpful speculation that provides the Commission with no assistance in making its recommendations. The setting of DM salaries is in no way linked to their use as a "comparator" for judicial compensation.

iii) Proposed New Benchmark Results in Significantly Higher Compensation

40. 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.

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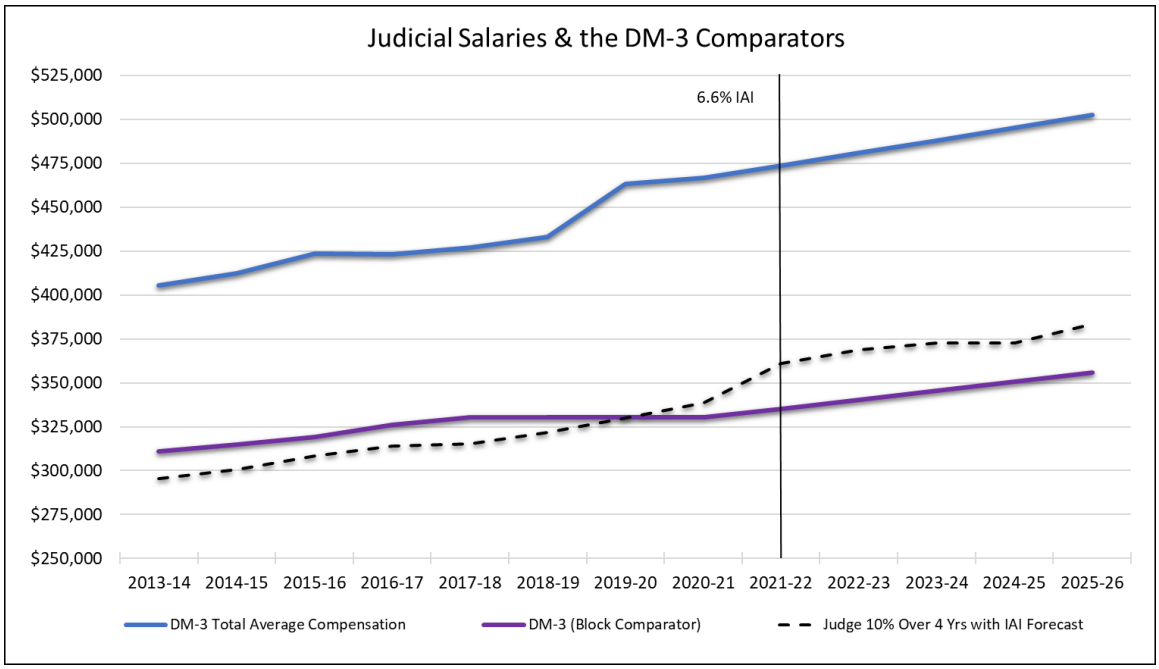
[41] Treasury Board of Canada, March 2015 Report of the Advisory Committee on Senior Level Retention and Compensation, March 24, 2015, **Government's Supplementary Book of Documents, Tab 4**; Privy Council Office, "Performance Management Program Guidelines for Deputy Ministers, Associate Deputy Ministers and Individuals Paid in the GX Salary Range", updated October 2020, online: https://www.canada.ca/en/privy-council/programs/appointments/governor-council-appointments/performance-management/senior-public-servants.html, **Government's Book of Documents, Tab 10**

[42] Drouin Commission Report, *supra*, p 25, **Joint Book of Documents, Volume 1, Tab 9**

[43] Block Commission Report, *supra,* para 108, **Joint Book of Documents, Volume 1, Tab 11**

[44] Privy Council Office, "Deputy Minister Performance Management Program Award Percentages for 2018-19", **Joint Book of Documents, Volume 2, Tab 30**

[45] Judiciary's main submissions, para 106



41. 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.[46]

42. Further, as set out in the Government's main submission at paragraph 39, any historical gap between the judicial salary and the DM-3 midpoint plus one-half performance pay has been closed. This is because annual increases to judicial salaries in accordance with IAI have outpaced increases to DM-3 remuneration every year since the economic downturn in 2008.[47]

43. Seeking to move the marker to a higher and more lucrative reference point without a principled basis is not a measure of adequacy as set out in the *Judges Act*.

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[46] Judiciary's main submissions, Table 1, p 30
[47] Privy Council Office, "DM Average Salary Mid-Point and Counts", January 2020,
Joint Book of Documents, Volume 2, Tab 32

C. The Judiciary's Comparison to Private Sector Does not Justify Proposed Increase in Compensation

i) The Need to Look Beyond the Highest Earners

44. As set out in the Government's main submission, the proper way to measure compensation is to look at the entire compensation package provided to the judiciary, which means including base salary, annuity and other benefits such as allowances and health insurance.[48] The complete tax-adjusted compensation package in 2021 amounts to approximately $543,000, which would place judicial total compensation in the 89th percentile of self-employed lawyers.[49]

45. Even accepting the limitations of the CRA data recognized by all participants,[50] it is difficult to accept that a total compensation package of $543,000 is insufficient to attract outstanding candidates to the judiciary and to provide the necessary financial security to ensure judicial independence.

46. The total compensation package is also well within a reasonable range of the judiciary's target comparator of a partner at a large firm in a large metropolitan centre. As developed in the Government's main submission and discussed below, the Government does not accept that the highest end of the compensation range for private sector lawyers should be a proper comparator; however, even using the highest earners in the profession, the judicial compensation package is more than adequate to achieve the statutory and constitutional requirements.

47. One additional comment must be made concerning the comparison to partners in large law firms. The judiciary's submissions refer to recent media reports that female

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[48] Government's main submissions, paras 14, 53-54, 89-100

[49] Gorham Supplemental Report, *supra*, p 2, **Government's Supplementary Book of Documents, Tab 2**. Note that the reference to the 89th percentile is based on Peter Gorham's projection regarding the 2021 equivalent of the CRA data based on past trends within that data: see Gorham Report, *supra*, p 86, para 285, **Government's Book of Documents, Tab 4**

[50] Government's main submissions, paras, 60-61; Judiciary's main submissions, paras 123, 137-145

partners in private practice in a large metropolitan centre make approximately 25% less than male partners. The Government does not understand how this example of the continued unequal treatment of women by some private practice law firms can somehow be used as a reason for increasing judicial salaries.[51]

48. Also concerning is the judiciary's suggestion that the majority of judges must be from the private sector so they have a "distance from the State."[52] The Government fully agrees that all judicial appointees must be independent of all parties that appear before them. Casting doubt on the independence of some members of the judiciary based on their former legal practice is speculation with absolutely no factual basis. It is completely untethered from any reasonable argument concerning adequate judicial compensation.

ii) Use of Filters Leads to Unsupportable Comparisons

49. The judiciary also spends a significant amount of time setting out why certain filters should apply to the CRA data used by the parties as a basis for suggesting that this Commission focus the private sector comparison on a tiny fraction of the actual population of practicing lawyers in the country.[53] The Government discusses the inappropriateness of these filters at length in its main submission,[54] as does the Gorham Report at paragraphs 13-15.[55] The Rémillard Commission also commented extensively on this practice and gave it little weight.[56]

50. The fundamental problem with the use of filters is that the ultimate result is a comparator that is only representative of the highest earners in the largest metropolitan centres in the country. Not only is such a comparison not representative of the actual communities from which judicial appointments are made, but it also supports the false

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[51] Judiciary's main submissions, paras 142-143
[52] *Ibid*, para 151
[53] *Ibid*, paras 127-136
[54] Government's main submissions, paras 62ff.
[55] Gorham Report, *supra*, p 6, **Government's Book of Documents, Tab 4**
[56] Rémillard Commission Report, pp 16-20, paras 57-70, **Joint Book of Documents, Volume 1, Tab 13**

narrative that monetary success determines who is an outstanding candidate for judicial office. This narrative has not been accepted by past Commissions and should not be accepted now.

51. The stated rationale for eliminating low earning lawyers from the comparative process is that low income reflects a lack of success or lack of commitment to the profession that effectively disqualifies a candidate from holding judicial office.[57] The judiciary now also suggests that because articling students in some large firms in large metropolitan centres make in excess of $100,000, this is yet another basis for eliminating low-income earners from consideration of judicial office.[58]

52. This argument perpetuates the unjustified link between monetary success and professional ability as the overriding factor in determining suitability for judicial office. If it was ever relevant, this approach is now outdated. The practice of law is more diverse today than at any other period of time. Partnership in a large firm in a large metropolitan centre is not the career goal of every outstanding candidate for judicial office.

iii) No Shortage of Well-Qualified Applicants

53. Contrary to the suggestion of the judiciary, there is no evidence of a reduction in high-quality candidates for the bench, including candidates from private practice.[59] In fact, as illustrated by the chart below, an analysis by the Government shows that the number of private law firm partners (as opposed to non-partners) who have been appointed to the bench has generally increased over the years.[60]

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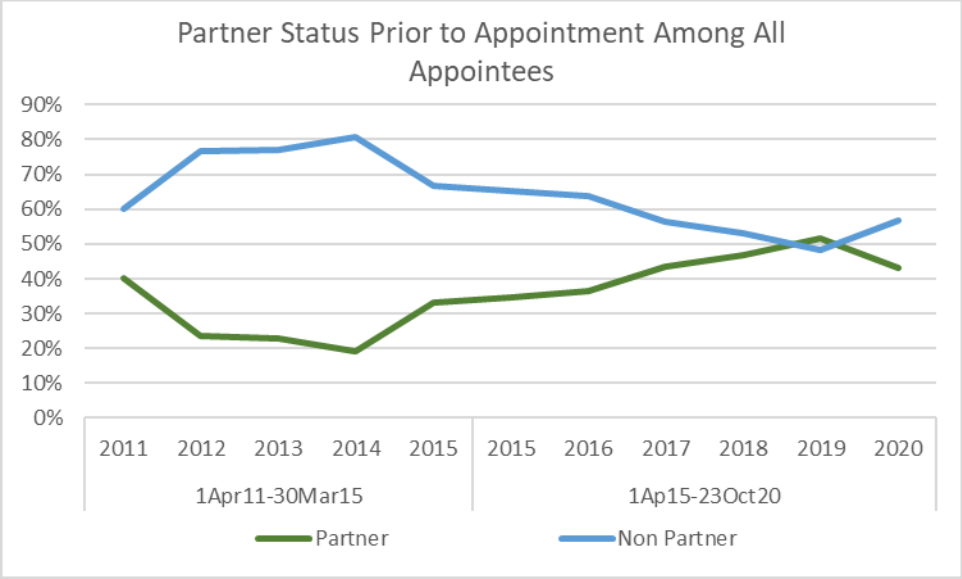
[57] Judiciary's main submissions, para 127
[58] *Ibid*, para 129
[59] *Ibid*, para 43
[60] Statistics in graph collected from appointment announcements listed by the Department of Justice for 2011-2020, online: https://www.justice.gc.ca/eng/news-nouv/ja-nj.aspx



54. The continued focus on the very top earners of the profession as the only ones who are qualified to be judges leads to further unsupported assumptions by the judiciary. For example, at paragraph 66 of its submission, the judiciary refers to a drop in "highly qualified lawyers in private practice" as candidates for the judiciary. The only reason for this drop is said to be relatively low judicial salaries.[61]

55. Some observations are required concerning this conclusion. First, the judiciary is mixing judicial appointment apples with judicial application oranges. As noted in the Government's main submission, the appointment rate from the private sector has been steady for the last decade. The only notable change in the recent past regarding the proportion of appointees coming from the private sector was due to a slight increase in the number of appointments from the provincial courts.[62] In addition, anecdotal observations regarding why some members of the profession may choose not to submit an application is not evidence upon which this Commission should base its recommendations.

56. Second, without reference to any evidence, the judiciary ties the increase in the number of applicants whose applications were rejected (i.e., Judicial Advisory Committees

[61] Judiciary's submissions paras 66-67
[62] Governments main submissions, para 47; Appointment Demographics provided by the Commissioner for Federal Judicial Affairs, with Summary, judicial appointments April 1, 2015 to October 23, 2020 [CFJA data], **Joint Book of Documents, Volume 2, Tab 19**

were "unable to recommend" an applicant) directly to a lack of high-income earners applying for judicial position. Put another way, they try to link an unsubstantiated increase in applications from lower-income earning lawyers (as opposed to higher-income earning lawyers) to an increase in the number of applicants in the "unable to recommend" category.

57. This assertion should be dismissed. The judiciary does not point to any evidence that shows a breakdown of applicants based on sector or income. Furthermore, the Government is unaware of any evidence or study that explains why certain candidates are not recommended for appointment by the independent Judicial Advisory Committees. There is absolutely no evidence that an "unable to recommend" status is in any way based on a candidate's income as a lawyer. In fact, it is just as likely that the same proportion of high-income earners who apply for judicial appointment are not recommended as candidates from other income brackets. Indeed there could be any number of reasons why a candidate (whether a high or low-income earner) may be unacceptable for judicial office.

58. Dedication to the profession can come in many forms, as can the experience needed to be an outstanding candidate for judicial appointment. The legal profession is also changing as a reflection of the changes in society as a whole. The Government is committed to ensuring that the judiciary reflects the society in which it operates. Indeed, some members of the profession are deliberately choosing non-traditional career paths. Such choices are not indicative of a lack of ability, drive or dedication to the profession and should be regarded as a positive sign rather than as a blemish on an application for appointment to the bench.

59. Moreover, many of cases before our courts today deal with criminal and family matters. Often, lawyers who practice in these areas are sole practitioners or members of small firms who may not earn income at the highest levels of the profession. It would be improper to overlook, and worse to exclude completely, an entire class of lawyers who deal with cases that most often come before our courts.

60. A base salary of $361,100 and tax-adjusted total compensation package of $543,000 is, by any measure, more than adequate to attract outstanding candidates from all segments of the profession and ensure their independence as judges.

V. Incidental Allowance

61. According to the judiciary's submission, approximately half of all judges do not use the full amount of the $5,000 currently allotted for incidental allowances.[63] This suggests that there is no pressing need to increase the amount of this allowance as it continues to be responsive to the expenses incurred by members of the judiciary. This is further demonstrated in the public reporting of aggregate amounts on the website of the Commissioner for Federal Judicial Affairs.[64]

62. The primary argument in favour of increasing this allowance appears related to an increase in costs associated with technology as a result of the present COVID-19 restrictions.[65] This would suggest that additional spending in excess of the $5,000 amount is a temporary or cause-specific phenomenon and not a systematic deficiency in the amount provided.

VI. Representation Allowance

63. The judiciary's argument for increasing the representation allowance is based almost exclusively on the rate of inflation since the last increase to this allowance in 2004.[66] Aside from general statements concerning which duties are covered by this allowance, there is no evidence of an increase in these duties. Nor is there any evidence that associated costs have increased. The passage of time alone is insufficient to support increases to the current amounts, especially given the multiple other reimbursements for expenses available under the *Judges Act*.

64. Furthermore, public reports by the Commissioner for Federal Judicial Affairs for the periods for which reports are available indicate that approximately half of eligible

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[63] Judiciary's main submissions, para 173
[64] Office of the Commissioner for Federal Judicial Affairs, "The Incidental Allowance", online: https://www.fja.gc.ca/JudgesExpenses-DepensesJuges/incidentals-faux_frais/index-eng.html
[65] Judiciary's main submissions, para 171
[66] *Ibid*, para 180

judges are not even needing to access the allowance, and the total amounts claimed do not approach the potential maximums.[67]

VII. Post-Retirement Life Insurance

65. The Canadian Judicial Council proposal that post-retirement life insurance for former chief justices should be aligned with the policy that annuities are calculated on the basis of the higher chief justice salary, even if the former chief justice has "stepped down" to the office of a *puisne* judge prior to retirement,[68] mixes the concepts of annuities and life insurance.

66. The annuity serves a different purpose from life insurance. The link to financial security is much stronger in respect of the annuity, which also directly benefits former chief justices' survivors. The suggestion that there is a disincentive for chief justices to take supernumerary status based on this issue is difficult to accept given the other benefits that accompany the supernumerary status. Therefore, no changes to the post-retirement life insurance for former chief justices are necessary to ensure ongoing adequacy of their compensation and benefits or to secure their independence.

VIII. Appellate Court Judge Differential

67. 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.

68. All five 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

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[67] Judiciary's main submissions, para 173; Office of the Commissioner for Federal Judicial Affairs, "The Incidental Allowance", online: https://www.fja.gc.ca/JudgesExpenses-DepensesJuges/incidentals-faux_frais/index-eng.html

[68] Judiciary's main submissions, *ibid,* para 187

concluded that further review and information would be needed to make a recommendation.[69] The McLennan Commission refused to recommend a salary differential, finding that the creation of such a differential could be harmful.[70] The 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.[71]

69. Although they recommended a salary differential for appellate judges, 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.[72] These two Commissions also rejected the notion that differences in the workload of trial and appellate judges were a basis for a different salary.[73]

70. Most recently, the Rémillard Commission reviewed this issue in detail and declined to make a recommendation for different salaries for appellate judges. That Commission cited, among other factors, the decline in support for a differential in salary among appellate level judges.[74] It would appear that the level of support for this recommendation continues to decline. The letter from the Honourable Justice Jacques Chamberland dated March 10, 2021 shows very limited support for this proposal.[75] Of the 177 appellate judges currently

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[69] Drouin Commission Report, *supra*, p 52, **Joint Book of Documents, Volume 1, Tab 9, p 52**
[70] McLennan Commission Report, *supra,* p 54, **Joint Book of Documents, Volume 1, Tab 10, p 54**
[71] *Ibid,* p 55
[72] Block Commission Report, *supra*, paras 147, 183; **Joint Book of Documents, Volume 1, Tab 11**; Levitt Commission Report, *supra*, paras 62-68, **Joint Book of Documents, Volume 1, Tab 12**
[73] Block Commission Report, *ibid*, para 148, **Joint Book of Documents, Volume 1, Tab 11**; Levitt Commission Report, *ibid*, paras 62-68, **Joint Book of Documents, Volume 1, Tab 12**
[74] Rémillard Commission Report, pp.24-28 paras 86-109, **Joint Book of Documents**, **Volume 1, Tab 13**
[75] Letter from the Honourable Jacques Chamberland, Québec Court of Appeal, March 10, 2021

sitting in Canada, it appears that this request for an appellate differential only has the support of 32 appellate judges.[76]

71. 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 unrepresented litigants, and among their many other duties during a trial, have the difficult task of assessing the credibility of witnesses.

72. 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; whether trial or appellate, all judges are equivalent in terms of their obligation to decide each case fairly, impartially and independently.[77]

73. 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 s. 26 of the *Judges Act*.

74. Moreover, there are numerous reasons not to implement a salary differential for appellate judges, including: 1) the lack of consensus among the approximately 1,200 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

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[76] Signatories to the Letter from the Honourable Jacques Chamberland, Québec Court of Appeal, March 10, 2021. The total number of appellate judges listed here (177) includes supernumerary judges but does not include the judges of the Supreme Court of Canada.
[77] See Scott Commission Report, *supra,* p 30, **BED, Tab 24** ("the burden of judicial office ... requires an equivalent discipline and dedication on the part of the judges at both court levels.")

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. The fact that other jurisdictions do have different salaries for different levels of court does not, in and of itself, support the proposition that this would be appropriate within the unique context of the Canadian judicial system.

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

IX. Representational Costs during a Process under subsection 26(4)

76. Pursuant to s. 26.3(2) of the *Judges Act*, judges are entitled to two-thirds of their representational costs. The consistent position of the Government has been that full funding is not necessary to facilitate meaningful participation in the process, and that it would discourage parsimony with regard to the use of public resources.[78] It is not in the public interest to give the judiciary unchecked discretion in deciding what legal costs should be incurred. It is therefore the Government's view that the two-thirds indemnification provided is sufficient to assist in defraying legal costs related to a process initiated under s. 26(4) of the *Judges Act*.

77. Using the example of the only process ever initiated under s. 26(4) of the *Judges Act*, the amounts paid by the judiciary for legal costs on a per-judge basis are minimal.[79]

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[78] Response of the Government of Canada to the 1999 Judicial Compensation and Benefits Commission, December 13, 2000, pp 9-10, **Joint Book of Documents, Volume 1, Tab 9;** Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission, November 30, 2004, pp 9-10, **Joint Book of Documents, Volume 1, Tab 10;**; Response of the Government of Canada to the Report of the 2007 Judicial Compensation and Benefits Commission, February 11, 2009, **Joint Book of Documents, Volume 1, Tab 11**

[79] Following the 2019 process, the total legal bill submitted by counsel for the judiciary was $76,235.52. Under the current rules, the judiciary is responsible for one-third of that bill: $25,411.84. Distributed among the 1198 judges sitting in 2019-20, this amounts to a $21.22 contribution for each judge. By contrast, the Government is responsible to pay $50,823.68.

Furthermore, the very fact that it has been invoked only once since the Commission was first established demonstrates that recourse to s. 26(4) processes will be extremely rare.

X. Prothonotaries

78. As set out in the Government's main submission, it is committed to "engaging with the Chief Justice of the Federal Court on the issue of possible pre-retirement arrangements, and continuing to communicate with him on workload issues that affect that Court."[80] The Government has also committed to the creation of a supernumerary office for prothonotaries.[81]

79. The Government also agrees that it would be appropriate to increase the $3,000 incidental allowance to which prothonotaries are currently entitled under s. 27(1.1) of the *Judges Act* to $5,000. The Government acknowledges that the expenses for which prothonotaries use this allowance are in line with expenses incurred by judges, and that the amount available should also be equal.

80. As for the change in the name of the office of Prothonotary to Associate Judge, the Government notes that it has communicated its support for this change to prothonotaries themselves, including the intention to enact the necessary legislative amendments in future. However, given that court structures, including titles of offices, are policy issues that fall within the mandate of governments, rather than compensation issues included within s. 26.1 of the *Judges Act*, the matter of the name of the office of Prothonotary is outside the jurisdiction of this Commission. The Government will continue to communicate with the Chief Justice of the Federal Court, as well as the prothonotaries, as appropriate and necessary to implement this policy decision.

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[80] Government's main submissions, para 145
[81] Government's main submissions, para 146

XI. Commission lacks Jurisdiction to deal with Issues Raised by the Chief Justice of the CMACC

81. The Government takes notice of the issue of judicial independence raised by Chief Justice of the Court Martial Appeal Court of Canada ("CMACC"). However, the present Commission is not the proper forum for raising that issue given that the statutory mandate of this Commission is limited to issues of compensation for federally-appointed judges and prothonotaries.

82. Specifically, s. 26 (1) of the *Judges Act* sets out that, "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." The question of independence raised by Chief Justice of the CMACC does not fit within the mandate as set out by s. 26.1 of the *Judges Act* because it is not an issue tied to the adequacy of the salary and other benefits paid to federally-appointed judges and prothonotaries.

83. It is accepted that the issue of judicial independence does arise in determining if a salary and other benefits are sufficient to maintain judicial independence. However, the independence issue raised by the Chief Justice of the CMACC is a structural issue tied to the specific and limited statutory jurisdiction of the Court Martial Appeal Court of Canada. That independence issue is not tied to salary and benefits and is therefore outside the jurisdiction of this Commission.

84. In addition, how the courts are structured falls well outside of the Commission's mandate. The fact that the compensation of the Chief Justice of the CMACC, as well as the ability to step down to the office of a *puisne* judge (*Judges Act*, s. 31.1), are established in the *Judges Act* is an insufficient basis for suggesting that the entire structure of the CMACC falls within this Commission's mandate.

85. Consequently, the issue raised by the Chief Justice of the CMACC is beyond the jurisdiction of this Commission. As a result, the Government suggests that the Commission respectfully decline to hear submissions from the representative of the Chief Justice of the CMACC or make any recommendations on the issue raised by the Chief Justice.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, Ontario, this 30th day of April, 2021

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