Judicial Compensation and Benefits Commission

Commission d'examen de la rémunération des juges

REPORT AND RECOMMENDATIONS

SUBMITTED TO
the Minister of Justice of Canada

June 30, 2016

Judicial Compensation and Benefits Commission

Commission d'examen de la rémunération des juges

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June 30, 2016

The Honourable Jody Wilson-Raybould
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, Ontario
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Dear Minister:

Pursuant to Subsection 26(2) of the *Judges Act,* I am pleased to submit the report of the fifth Judicial Compensation and Benefits Commission.

Yours truly,

Gil Rémillard
Chair

Encl.

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CHAPTER 1 – INTRODUCTION

THE COMMISSION'S HISTORY

1. This is the Report of the fifth Quadrennial Judicial Compensation and Benefits Commission ("Quadrennial Commission" or "Commission") established under section 26 of the *Judges Act*[1] to inquire into the adequacy of salaries and benefits payable to federally-appointed judges.

2. This Commission was established by Order in Council and its appointment announced on December 18, 2015, by the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada.[2] The Commissioners are Chairperson Gil Rémillard, Margaret Bloodworth, and Peter Griffin. The term of this Commission runs for four years, ending September 30, 2019.

3. This Report is delivered to the Minister of Justice within the nine-month period specified in section 26(2) of the *Judges Act*. [3]

4. In accordance with section 26(7) of the *Judges Act*, the Minister of Justice must respond to the Commission's report within four months after receiving it and thereafter, where applicable, initiate any legislation to implement the response. [4]

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[1] RSC 1985, c J-1.
[2] Department of Justice, "Judicial Compensation and Benefits Commission Appointments" (18 December 2015), Appendix A to this Report.
[3] *Supra* note 1
[4] *Ibid*

THE COMMISSION'S MANDATE

5. Section 100 of the *Constitution Act, 1867* authorizes Parliament to set compensation for the judiciary.[5]

6. Section 101 authorizes Parliament to establish the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court of Canada, and the Tax Court of Canada and to fix the remuneration of the judges of these Courts.[6] The Quadrennial Commission process was initiated by amendments to the *Judges Act* in 1998 after the Supreme Court of Canada's decision in *Re Remuneration of Judges of the Provincial Court of Prince Edward Island.*[7]

7. That case and the subsequent jurisprudence emphasize that the constitutional guarantee of judicial independence is a cornerstone of the integrity of our judicial system.[8] These cases affirm the three elements of judicial independence as: security of tenure, administrative independence, and financial security.[9] They establish the requirements of a process to address the compensation of the judiciary while preserving its independence.[10]

8. In examining judicial compensation, section 26(1.1) of the *Judges Act* requires Quadrennial Commissions to consider the following factors:

(a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;

(b) the role of financial security of the judiciary in ensuring judicial independence;

(c) the need to attract outstanding candidates to the judiciary; and

(d) any other objective criteria that the Commission considers relevant.[11]

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[5] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.
[6] *Ibid.*
[7] *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*].
[8] *Ibid* at 190, citing *R v Lippé*, [1991] 2 SCR 114 at 139.
[9] *PEI Reference*, *supra* note 7 at 80-81; and see *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 SCC 44 at para 7, [2005] 2 SCR 286 [*Bodner*].
[10] *PEI Reference*, *supra* note 7 at 88-89, 94, 102-112; *Bodner*, *ibid*, at paras 13-21.
[11] *Supra* note 1.

9. The Quadrennial Commission process has resulted in four previous reports:

(a) the Drouin Commission Report (2000)[12;]

(b) the McLennan Commission Report (2004)[13];

(c) the Block Commission Report (2008)[14]; and,

(d) the Levitt Commission Report (2012)[15.]

10. The compensation-setting process of the Quadrennial Commissions applies to all judges appointed pursuant to section 96 of the *Constitution Act, 1867*.[16] These are the judges of: the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court of Canada, the Tax Court of Canada, the courts of appeal of each province and territory, and the superior courts of each province and territory.

11. Prothonotaries are judicial officers of the Federal Court of Canada. Their office attracts a constitutional guarantee of judicial independence. Prothonotaries' compensation was added to the Quadrennial Commission's scope of review in 2014 by amendments to the *Judges Act* that extended the definition of "Judiciary" to include these officers.[17]

12. Prior to this amendment, Special Advisor George Adams conducted the first independent review process of prothonotaries' salaries and benefits, leading to a report dated May 30, 2008 that set out comprehensive recommendations.[18]

13. This report was followed by the July 31, 2013 report of Special Advisor Douglas Cunningham**,** who made similar recommendations.[19] These recommendations led to various

[12] Joint Book of Documents, Tab 28.
[13] *Ibid*, Tab 29.
[14] *Ibid*, Tab 30
[15] *Ibid*, Tab 31.
[16] *Supra* note 5.
[17] *Supra* note 1, s 26.4.
[18] Report of the Honourable George W Adams QC, Joint Book of Documents, Tab 32 at 54-66 ["Adams Report"].
[19] Report and Recommendations of the Honourable J Douglas Cunningham QC, Joint Book of Documents, Tab 33 at 29-34 ["Cunningham Report"].

compensation improvements for prothonotaries and to the amendment to the *Judges Act* bringing prothonotaries into the Quadrennial Commission process.

THE COMMISSION'S PROCEEDINGS

14. We dealt with several preliminary matters:

(a) We held procedural conference calls with representatives of the Government, the Association and Council[20], and the Prothonotaries on December 23, 2015 and January 11, 2016.

(b) We issued and posted a Procedural Notice on January 21, 2016, followed by a News Release, issued on January 25, 2016.[21]

(c) We heard a conference call motion on February 8, 2016 to consider two preliminary issues:

(i) The Government's request that the Commission undertake a study on the pre-appointment income of sitting judges appointed between the years 2004 and 2014 ("Pre-Appointment Income Study"); and

(ii) The Prothonotaries' request that the Commission immediately recommend full funding for their representational costs in the Commission process.

(d) We issued our Ruling with Reasons denying both requests on February 18, 2016.[22]

(e) On February 9, 2016, the Government requested that we strike certain paragraphs and Exhibit B of the Association and Council's main submission. The paragraphs and Exhibit surrounded the Government's proposed nominee to the Commission

[20] Throughout this Report, we refer to the "Association and Council" when referring to submissions made by representatives of that party, and not to "the Judiciary". This is consistent with the practice of the Levitt Commission. We use the term "the judiciary" to refer to that branch of government in a general sense. Note also that, when capitalized, the term "Prothonotaries" refers to the party before this Commission; we use the lower case to refer to this group of officers in the more general sense, although we appreciate that given the group's numbers, the party and the more general group may be considered one in the same. Lower case terms such as "judge" and "superior court" denote a position, non-specific institution, or general usage, whereas upper case usage, such as the "Chief Justice of the Federal Court", refers to a specific person or institution. The term "Government" refers to counsel for that party.

[21] "Notice" (undated), Appendix B to this Report; **"**Quadrennial Judicial Compensation and Benefits Commission Begins Inquiry" (25 January 2016), Appendix C to this Report.

[22] "Ruling Respecting Preliminary Issues: Pre-Appointment Income Study and Representational Costs of Prothonotaries" (18 February 2016), Appendix D to this Report.

and the Association and Council's objection to that appointment. We received written submissions on the motion and issued our Ruling with Reasons denying the request on March 22, 2016.[23]

(f) We convened a conference call with the parties on March 29, 2016 to receive oral submissions on the Government's request to adjourn public hearings scheduled for April 5 and 6, 2016, due to unexpected circumstances affecting its counsel.

(g) On March 31, 2016, we issued a Notice adjourning the hearings until April 28 and 29, 2016.[24]

15. Public hearings, with transcription and simultaneous interpretation, were held in Ottawa on April 28 and 29, 2016. We received oral and written submissions, although some parties preferred to rely solely on their written submissions. A list of hearing participants is set out in Appendix G to this Report and a list of documents received is set out in Appendix H.

16. This Commission benefitted from the filing of expert evidence by both the Government and the Association and Council on the key issues of comparators, judicial annuity value, and indices.

17. In light of the nature of the expert evidence received, we did not consider it necessary to engage our own compensation expert to conclude the deliberations.

THE COMMISSION'S APPROACH

18. We actively solicited input from any interested party by widely distributing our initial Notice as a news release, and through email and Twitter. Our website was updated regularly with all submissions received.

[23] "Ruling Respecting Preliminary Issue: Objection to Paragraphs 46-49 and Exhibit B of the Judiciary's Principal Submissions" (22 March 2016), Appendix E to this Report .
[24] "Notice" (31 March 2016), Appendix F to this Report.

19. We benefitted, over two days of hearings, from the thorough and well-prepared written submissions and comprehensive oral submissions from counsel and participants knowledgeable and experienced in the Quadrennial Commission process.

20. In addition to written and oral submissions, we had the benefit of studying the reports of the five previous Triennial Commissions and four previous Quadrennial Commissions and the reports of the two Special Advisors on prothonotaries' salaries and benefits.[25]

21. The differing positions on the contested issues were thoroughly canvassed.

22. We have carefully considered the role that prior Quadrennial Commissions' determinations and recommendations play in our deliberations.

23. In the *Bodner* decision, the Supreme Court of Canada identified the starting point for a judicial compensation commission as the date of the previous commission's report.[26] Each commission must make its own assessment in its own context. However, this does not mean that each new compensation commission operates in a void, disregarding the work and recommendations of its predecessors.

24. A new Quadrennial Commission may very well decide that, in the circumstances, its predecessors conducted a thorough review of judicial compensation and, in the absence of demonstrated change, that only minor adjustments are necessary. If, on the other hand, it considers that previous reports failed to set compensation and benefits at the appropriate level due to particular circumstances, the new Commission may legitimately go beyond the findings of its predecessor and, after a careful review, make its own recommendations.

25. The Government, the Association and Council, and the Appellate Court Judges approached this direction by the Supreme Court of Canada somewhat differently.

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[25] See Book of Exhibits and Documents of the Canadian Superior Courts Judges Association and the Canadian Judicial Council, Tabs 24 to 28 and the Joint Book of Documents, Tabs 28 to 33.
[26] *Supra* note 9 at para 14.

(a) The Government: To suggest that consensus exists in the face of the contrary view of one of the principal parties is paradoxical. Each Commission must turn its mind to the evidence in the submissions before it. It cannot simply adopt unimplemented recommendations of a prior Commission without conducting its own independent and objective analysis.[27]

(b) The Association and Council: The idea that each Quadrennial Commission should build on the work of previous Commissions is so unassailable, rooted as it is in common sense, that it should no longer be debated. The parties should not re-litigate issues that have been the subject of consensus before past Commissions.[28]

(c) The Appellate Court Judges: The Government cannot simply repeat what it said before previous Commissions. It must produce compelling evidence to cause this Commission to depart from the unimplemented recommendations of its predecessors.[29]

26. We approached matters decided by previous Commissions and Special Advisors in light of the evidence and arguments made before us. We adopted a common sense approach: careful consideration has been given to the reasoning of previous Commissions as well as to the evidence brought before us. Valid reasons were required – such as a change in current circumstances or additional new evidence – to depart from the conclusions of a previous Commission.

27. In adopting this approach, we are confident that we have fulfilled the direction of the Supreme Court of Canada in *Bodner*:

[27] Reply Submission of the Government of Canada at para 8 ["Government Reply Submission"].
[28] Main Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council at para 41 ["Association and Council Submission"].
[29] See e.g. Submission on behalf of the Canadian Appellate Judges at para 16 ["Appellate Judges' Submission"].

> The commission must objectively consider the submissions of all parties and any relevant factors identified in the enabling statute and regulations. Its recommendations must result from a fair and objective hearing. Its report must explain and justify its position.[30]

ACKNOWLEDGMENTS

28. We are pleased to have been able to participate in this important constitutional process. This Commission's processes could not have been completed without the participation of all of those who made written and oral submissions, to whom we owe our thanks. A full and fair consideration of the issues at hand would not have been possible without the light shone on them by these submissions. The Commissioners would also like to thank Louise Meagher, our talented and efficient Executive Director, her assistant Jacqueline Thibodeau, Marie-Ève Lamy who worked closely with the president of the Commission and Melanie Mallet, who assisted with editing this Report.

THE REPORT'S STRUCTURE

29. This Report will address the issues before the Commission in the following order:

[30] *Supra* note 9 at para 17.

CHAPTER 2 – JUDGES' SALARIES

30. Pursuant to section 100 of the *Constitution Act, 1867*, Parliament establishes and provides for salaries and benefits for all superior court judges.[31] Sections 25 and 26 of the *Judges Act* set out the process for regular review and revision of judicial compensation.[32] This process is carried out within the context of constitutional protection of judicial independence, explained by the Supreme Court of Canada in the *PEI Reference*.[33]

31. Pursuant to section 25(2)(b) of the *Judges Act*, judges' salaries are adjusted annually by the percentage change in the Industrial Aggregate Index (IAI), or by 7%, whichever is lower. In addition to statutory indexation, the Commission inquires every four years into "the adequacy of the salaries and other amounts" payable under the *Judges Act* and the "adequacy of judges' benefits generally".[34]

32. In considering the adequacy of judicial salaries, we had the benefit of submissions from the Government, the Association and Council, and the Canadian Bar Association (CBA). We also had the benefit of expert evidence regarding the value of the judicial annuity, an important component of judicial compensation, as well as expert evidence on the use of comparators and indexation. A group of 64 appellate court judges, the Ontario Superior Court judges Association, Justice Gordon Campbell and the Superior Court Chief Justices Trial Forum presented submissions regarding a salary differential between the puisne judges of the trial and appellate courts.

33. The Government submitted that the current remuneration of superior court judges is entirely adequate to ensure that Canada continues to enjoy an independent judiciary and that

[31] *Supra* note 5.
[32] *Supra* note 1.
[33] *Supra* note 7.
[34] *Supra* note 1.

outstanding candidates continue to be attracted to judicial office.[35] Canada's economic position and the overall state of the Government's finances militate against increasing judicial salaries any more than the cost of living.[36] Moreover, the appropriate measure for indexing salaries is the Consumer Price Index (CPI), not the currently mandated IAI.[37] Finally, the Government argued that continued comparison to the "Deputy Minister-3" (DM-3) group has no logical or legal basis.[38]

34. The Association and Council submitted that superior court judges' salaries should be increased by 2% on April 1, 2016 and April 1, 2017, and by 1.5% on April 1, 2018 and April 1, 2019, in addition to the statutory indexing based on the IAI.[39] They submitted that the DM-3 group is an appropriate comparator, used since at least 1987, with half of "at-risk" pay added to the comparator by the Block Commission Report in 2008.[40] The Association and Council advocated a change in the comparator, moving from the "Block Comparator" – the midpoint of the DM-3 salary range, plus half of "at-risk" pay – to total average compensation of the DM-3 group.[41] They further submitted that economic conditions do not prevent us from recommending an increase in judicial salaries that would otherwise be warranted.[42] Private sector lawyers' income remains an appropriate comparator, as lawyers in the private sector are an important source of candidates for the bench.[43]

35. The CBA took no position on the amount of judicial compensation. Rather, it submitted that judicial compensation should be at a level that ensures "that judges do not experience significant economic disparity between pre-appointment and post-appointment compensation levels".[44] Compensation must be set "at a level that attracts the best and most capable candidates… and those who consider as part of their reward the satisfaction of serving society on

[35] Main Submission of the Government of Canada at paras 2, 5, 20, 37-95 ["Government Submission"].
[36] *Ibid* at paras 3, 22-33.
[37] *Ibid* at paras 7, 152-160.
[38] *Ibid* at paras 6, 98-151.
[39] Association and Council Submission, *supra* note 28 at paras 111, 125.
[40] *Ibid* at paras 84-105.
[41] *Ibid* at paras 97-105; see especially paras 103, 105.
[42] *Ibid* at paras 60-71.
[43] *Ibid* at paras 115-123.
[44] Submission of the Canadian Bar Association at 7.

the bench".[45] The CBA urged us to consider forms of compensation other than salaries, such as the judicial annuity.[46]

SECTION 25(2) OF THE *JUDGES ACT*: INDEXATION

36. The Government argued that the appropriate measure for annual indexation of judicial salaries should be the CPI and not the IAI, as the *Judges Act* currently requires.[47] It asserted that the CPI is a "more modern and relevant" measure and that it is more appropriate to maintain purchasing power, the intent of indexation.[48]

37. Indexation in accordance with the IAI has been a part of establishing judicial salaries since 1981 and was intended to address an ongoing confrontation between the judiciary and the government on the issue of judges' salaries.[49] (A maximum for the adjustment is set in the statute as 7%, but as the IAI has been lower than this, the lower figure has been used rather than the maximum 7%).

38. We agree with the Levitt Commission that the IAI adjustment was intended to be a key element in the legislative architecture governing judges' salaries and should not be lightly tampered with.[50]

39. As Professor Hyatt, the expert retained by the Association and Council, said, "Changes in the IAI reflect changes in weekly wages, including both the cost of living and the real wage (the standard of living)".[51] The IAI ensures that the "annual earnings of judges" keep pace with the "annual earnings of the average Canadian".[52]

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[45] *Ibid.*
[46] *Ibid.*
[47] Government Submission, *supra* note 35 at paras 7, 152-160.
[48] *Ibid* at para 152.
[49] Levitt Commission Report, *supra* note 15 at para 44.
[50] *Ibid* at para 46.
[51] Report of Professor Douglas E Hyatt, page 1 of Appendix D in Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council ["Association and Council Reply Submission"].
[52] *Ibid*.

40. We find that the CPI is not more relevant than the IAI for the purpose of indexing judges' salaries. The Commission accepts the evidence of Professor Hyatt and finds that it is entirely appropriate to adjust judges' salaries on the basis of the average salary increase of the public that judges serve. Such an adjustment helps to ensure a consistent relationship between judges' salaries and the salaries of other Canadians. Indeed, if the relationship with the salaries of the various comparators does not materially change, then IAI adjustment by itself can ensure that judges' salaries remain adequate.

41. It is important to note that adjustment in accordance with the IAI does more than simply protect judges' salaries against erosion through inflation. It adjusts these salaries in accordance with average wage increases of Canadians working in a wide variety of occupations and professions and thus contains elements beyond a cost of living increase.

42. A further factor supporting continued use of the IAI is the fact that the CPI is used to adjust judges' annuities: once retired, judges' incomes are no longer adjusted in accordance with the average wage increases of working Canadians. A choice was made to adjust salaries in accordance with the measure that reflects changes in the average income of Canadians, not in accordance with the index that measures only changes in the cost of living, as is done for retirement annuities.

RECOMMENDATION 1

The Commission recommends that:

> **Judges' salaries should continue to be adjusted annually on the basis of increases in the Industrial Aggregate Index, in accordance with the current *Judges Act*.**

COMPARATORS

43. In addition to annual indexation in accordance with the average change in Canadians' incomes, Commissions examine judges' salaries every four years to determine whether any additional adjustment in the salary levels is required.[53]

44. In examining the adequacy of judges' salaries, an important consideration is the appropriate comparators to use. There are no entirely accurate comparators, as no job is similar to a judge's. However, previous Commissions have considered two comparators – one from the public sector (the DM-3 comparator) and one from the private sector (self-employed lawyers' income) – in analyzing the adequacy of judges' salaries.[54] We had the benefit of considerable evidence and analysis from both parties on both comparators.

(a) The Public Sector Comparator: the DM-3 Comparator

45. Previous Triennial and Quadrennial Commissions, dating back to 1975, have considered the salaries of deputy ministers in determining the adequacy of judicial salaries. In particular, previous Commissions have considered the salary range of highly-ranked deputy ministers – the DM-3 group – as a reference point. The comparator considered was the mid-point of that salary range, to which the Block Commission added half of at-risk pay after this became a significant component of deputy ministers' compensation. This model is referred to as the "Block Comparator".[55]

46. The Government argued that focusing on the DM-3 comparator is not warranted, as it is not "objective, relevant and justified". A better approach would be to consider trends in public sector compensation generally.[56]

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[53] *Supra* note 1, s 26(1).
[54] See e.g. Levitt Commission Report, *supra* note 15.
[55] Block Commission Report, *supra* note 14 at para 111.
[56] Government Submission, *supra* note 35 at para 98.

47. We agree that the position of a highly-ranked deputy minister is very different in a number of ways than the position of a judge, and that the DM-3 comparator should not be used in a "formulaic benchmarking" fashion.[57] We do not read previous Commission reports as having done that. Rather, the DM-3 comparator has been used as a reference point against which to test whether judges' salaries have been advancing appropriately in relation to other public sector salaries.

48. Indeed, the Levitt Commission agreed with previous Commissions in calling the DM-3 comparator a "rough equivalence".[58] The Levitt Commission found that, while a 7.3% gap "tests the limits of rough equivalence", judicial salaries did not require adjustment in view of this comparator to remain adequate and respect the criteria in the *Judges Act*.[59]

49. The Association and Council raised a further issue in relation to the DM-3 comparator. They argued that the comparator should be changed from the midpoint of the DM-3 salary range, plus half of at-risk pay, to the total average compensation of DM-3s.[60]

50. The difficulty with that proposal is that DM-3s constitute a very small group – currently eight – the compensation of which is subject to considerable variation depending on the exact composition of the group at any given point in time. Previous Commissions have used the DM-3 reference point as "an objective, consistent measure of year over year changes in DM-3 compensation policy".[61] Moving to the total average compensation of a very small group would not meet those criteria. We agree with the Block Commission, which rejected moving to average pay and performance pay because it would not "provide a consistent reflection of year over year changes in compensation".[62]

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[57] See *ibid* at para 123.
[58] *Supra* note 15 at para 48.
[59] *Ibid* at para 52.
[60] Association and Council Submission, *supra* note 28 at paras 103, 105.
[61] Levitt Commission Report, *supra* note 15 at para 28, citing Block Commission Report, *supra* note 14 at para 106.
[62] Block Commission Report, *ibid*.

51. 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 members of the group at any given time.

52. In summary, we agree that a highly-ranked deputy minister's job is not similar to a judge's job and that the DM-3 group is not a significant source of recruitment for judges. However, we believe the DM-3 comparator remains worthwhile for its long-term use, consistency, and objectivity. It is not to be used – and has not been used in the past – formulaically, but as a useful reference point. The total average compensation of a very small group, the composition of which changes regularly, however, would not be a useful reference point.

53. Both the Government and the Association and Council provided charts indicating the comparison of judges' salaries and the Block Comparator (the midpoint of the DM-3 salary range, plus half of at-risk pay) over time, including projections to the year 2020.[63] The only area of disagreement between the parties in the projected figures in these charts was the projected growth of the Block Comparator. The Government based its projection on an annual growth rate of 1.5 %, based on average growth between 2006 and 2015, while the Association and Council used 1.9%, based on average growth between 2000 and 2014.[64] The results below reflect the rate of 1.9% growth used by the Association and Council.

Date	**Judicial Salary**	**Block Comparator**
Apr 1, 2011	$281,100	$303,250
Apr 1, 2012	$288,100	$307,910
Apr 1, 2013	$295,500	$311,055
Apr 1, 2014	$300,800	$312,628

[63] Letter from the Government to the Commission dated May 2, 2016; letter from the Association and Council to the Commission dated May 6, 2016
[64] *Ibid*

Date	Judicial Salary	Block Comparator
Apr 1, 2015	$308,600	$314,259
Apr 1, 2016	$314,100	$320,230
Apr 1, 2017	$321,000	$326,314
Apr 1,2018	$328,700	$332,514
Apr 1, 2019	$337,200	$338,832
Apr 1, 2020	$346,600	$345,270

54. The Government's numbers would show a slightly lower Block Comparator for the projected years of 2017 to 2020 and would thus show the projected judicial salary exceeding the projected Block Comparator in 2019 rather than 2020, as indicated on the above chart.

55. Both sets of projections demonstrate that the 7.3%, or $22,149, gap between the Block Comparator and judges' salaries that existed at the time of the Levitt Commission has reduced significantly to about 2%, or $5,659, in 2015. And the gap is projected to close completely during this Commission's term.

56. These figures suggest that indexation in accordance with the IAI is serving its intended function.

(b) The Private Sector Comparator: Self-Employed Lawyers

57. Self-employed lawyers' income is an important comparator since the majority of judicial candidates are lawyers in private practice. However, determining the income data with which to make the appropriate salary comparison is challenging. The Canada Revenue Agency (CRA) compiled a database from the 2010 to 2014 tax returns of individuals identified as self-employed lawyers. This database generates statistics, based on certain parameters.

58. However, the information derived from this database poses certain problems:

(a) The database does not capture self-employed lawyers who structure their practices as professional corporations.

(b) The number of self-employed lawyers in the CRA database has decreased between 2010 and 2014.

(c) The parties disagreed on the appropriate way to analyze the available data, or which "filters" to apply to the CRA data. They disagreed on the appropriate age group to consider in the analysis and on whether the salaries of certain lower income lawyers should be excluded from consideration. Finally, they disagreed on the appropriate percentile to use as a comparator.

(d) The parties did not agree as to whether or how to account for private practice lawyers' salaries in the largest urban areas of the country (CMAs).

We discuss these issues and their effects on calculating compensation in the following subsections.

(i) Age Group of Private Sector Lawyers

59. The Association and Council: only the salaries of the 44-56 year age group should be considered since the average age of a judicial appointee is 52 years.[65] Moreover, this is the age group used by previous Commissions.[66]

60. The Government: all age groups' salaries should be considered since judicial appointments are made from all age groups. Excluding those under 44 years and over 56 years means the data does not reflect a wide cross-section of the legal community. Age-weighting reflects the percentage of judges appointed from each age group. Since average salaries for self-

[65] Association and Council Submission, *supra* note 28 at para 117.
[66] *Ibid* at para 118.

employed lawyers are generally lower under age 44 and decline after age 56, excluding these age groups raises the average salary portrayed in the data. [67]

61. We agree that focusing on the age group from which the majority of judges is appointed is a useful starting point. However, using any of the comparators in considering the appropriate judicial salary is not a mathematical exercise. We must apply sound judgment in determining the adequacy of judges' salaries. In doing so, we have considered the fact that 33% of the appointments over the past 17 years have come from those either younger or older than the 44-56 year age group.[68]

(ii) Exclusion of Salary Ranges of Private Sector Lawyers

62. The Association and Council started by excluding all salaries below $60,000, as they had before previous Commissions. Their rationale was that those who earn below a certain threshold are not suitable candidates for the judiciary: low income reflects a lack of success or time commitment incommensurate with the demands of a judicial appointment.[69] The Association and Council then argued that salaries below $80,000 should be excluded, to "account for inflation since the year 2000, the year in the data when the level of $60,000 was first applied".[70]

63. The Government argued against a salary exclusion from the data. The Government's expert, Mr. Haripaul Pannu, stated that "[i]t is not a normal practice to use salary exclusion for compensation benchmark purposes. The percentile information is distorted by the compression of data that excludes salaries below a certain dollar amount and further skews the salary distribution".[71] In other words, choosing the appropriate percentile will necessarily result in examining only relevant salaries. Even if the $60,000 exclusion is accepted as meaningful, there

[67] Government Submission, *supra* note 35 at paras 66-72.
[68] *Ibid* at para 72.
[69] Association and Council Submission, *supra* note 28 at paras 117-119.
[70] *Ibid* at para 120.
[71] 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", Tab 10 of the Government's Book of Documents at 8 ["Pannu Report"].

is no basis for raising it to $80,000. Inflation as measured by the CPI would only bring the number to $73,000.[72]

64. The Association and Council's expert, Ms. Sandra Haydon, stated that Mr. Pannu's weighted model distorts the data; the better approach is to consider where the vast majority of appointees are drawn from. In her view, compelling arguments justify excluding lower levels of income, and comparison with seasoned legal practitioners is appropriate.[73]

65. Even assuming a basis for excluding lower incomes from the data to be examined, we are not convinced that a case has been made to increase the salary level based on this type of exclusion. The cost of living has not gone up as much as the increase proposed, and the average income of private sector lawyers has decreased over some of the years in question. Further convincing evidence would be required to persuade us to exclude even more from the comparator group.

(iii) **Percentile of Private Lawyers' Salaries**

66. The government's expert, Mr. Pannu, stated that "it is reasonable to assume that judges' salaries should not be based on the median but rather the 65th percentile".[74] Ms. Haydon explained that "the 75th percentile tends to be the bottom target where the goal is the attraction of exceptional or outstanding individuals". It is not uncommon to focus on higher percentiles up to the 90th.[75]

67. The statutory criteria require us to consider the need to attract outstanding candidates to the judiciary.[76] Accordingly, we find that it is more reasonable to look to the 75th percentile. This is also consistent with the position of previous Commissions.

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[72] Government Reply Submission, s*upra* note 27 at para 38.
[73] Sandra Haydon & Associates, "Commentary on the Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in Preparation for the 2015 Judicial Compensation Benefits Commission (Pannu Report)" Appendix B to Association and Council Reply Submission, *supra* note 51 at12 ["Haydon Report"].
[74] Pannu Report, *supra* note 71 at 5.
[75] Haydon Report, *supra* note 73 at 7.
[76] *Judges Act*, *supra* note 1, s 26 (1.1).

(iv) **Salaries in the Top Ten Census Metropolitan Areas (CMAs)**

68. In oral arguments, the Association and Council stressed that this factor is not to be used as a filter in analyzing the CRA data on private sector lawyers' income. Rather, private sector lawyers' higher rate of income in the ten largest CMAs is a factor for broader consideration since a majority of appointments to the bench come from these areas.

69. Not surprisingly, the average salaries of private sector lawyers in the top ten CMAs are higher than in other parts of the country and are particularly high in Toronto, Hamilton and London, Calgary, and Edmonton. However, private sector lawyers' salaries in other areas of the country are lower than the national average. Federally-appointed judges' salaries do not vary by region: judges holding the same position are paid the same base salary, regardless of where they sit and regardless of where they practiced before appointment to the bench. If lawyers' salaries in the top ten CMAs became so high that attracting qualified applicants to sit in those cities became an issue, consideration of regional allowances might be appropriate. However, no one has raised this possibility, and accordingly, we do not think it necessary to pursue.

70. Accordingly, we have given very limited weight to the difference between private sector lawyers' salaries in the top ten CMAs and those in the rest of the country and have looked primarily to average national salary figures.

VALUE OF THE JUDICIAL ANNUITY

71. We must consider more than income when comparing judges' salaries with private sector lawyers' pay. The judicial annuity is a considerable benefit to judges and is a significant part of their compensation package. Deputy ministers also have pensions of considerable value, so we do not need to consider the value of the judicial annuity when examining the public sector comparator.

72. Both parties retained experts to assess the value of the judicial annuity. Their assessments are remarkably close. Mr. Pannu, the Government expert, concluded that the value

of the annuity is 32.0%, plus 4.5% for the disability benefit, of a judge's annual income.[77] Mr. Newell, the Association and Council's expert, came to a value of 30.6%.[78]

Year	Average Private Sector Income - 75th percentile	Judicial Salary	Judicial salary + value of annuity at 30.6%	Judicial salary + value of annuity at 32%
2010	$403,953	$271,400	$354,448	$358,248
2011	$392,188	$281,100	$367,117	$371,052
2012	$395,660	$288,100	$376,259	$380,292
2013	$390,983	$295,500	$385,923	$390,060
2014	$404,025	$300,800	$392,845	$397,056

73. The above chart is based on the net professional income of self-employed lawyers between the ages of 44 and 56 years, at the 75th percentile. [79] The values in the two right-hand columns were calculated using the annuity values calculated by the parties' experts. To allow for comparison on the same basis the value of the disability benefit has not been included,. We agree with the Levitt Commission regarding the superiority of the judicial annuity to alternatives available to private sector lawyers. This must be taken into account in arriving at a comparison between private sector lawyers and the judiciary. However we did not have any evidence placed before us on the value of various other benefits, including disability, in the private sector.

74. The gap between the average private sector lawyer's income and judges' salary, including the value of the judicial annuity, appears to be closing, regardless of the value used for the annuity. This is true even without considering that over the past 17 years one-third of judicial appointments come from age groups either younger or older than those reflected in this chart; those groups have lower average salaries than those noted above. In 2014, the gap widened slightly, but one year does not constitute a trend. These figures can be revisited by future Commissions if necessary.

[77] Pannu Report, *supra* note 71 at 13.
[78] Dean Newell, "Report on the Value of the Judicial Annuity", Appendix C of the Association and Council Reply Submission, supra note 51 at 14 ["Newell Report"].
[79] Association and Council Reply Submission, *supra* note 51, table 5- revised

ANALYSIS OF SECTION 26(1.1) OF THE *JUDGES ACT*

75. In inquiring into the adequacy of judicial salaries, we are required to consider the four factors set out in section 26(1.1) of the *Judges Act*.[80]

(a) Prevailing Economic Conditions, the Cost of Living, and the Overall Financial Position of the Federal Government

76. The Association and Council: Canada's fiscal position is characterized by low debt levels and sound underlying economic and fiscal fundamentals. Moreover, the Government is planning to introduce fiscal stimuli to promote economic growth. Nothing under this first criterion prevents this Commission from recommending an increase that would otherwise be justified.[81]

77. The Government: Canada is facing challenging economic times. Canada's weak economic and fiscal condition, the less optimistic outlook for growth, the very low rate of inflation, and the low rate of wage growth for other individuals paid from the federal public treasury suggest that no increase beyond indexation is justified at this time.[82]

78. The parties did not fundamentally disagree on the facts underlying current economic conditions. The issue is the impact these facts should have on this Commission's recommendation. We found nothing to suggest that we should vary our conclusions based on prevailing economic conditions. We agree that the outlook presents challenges and uncertainties, but overall, we do not find any compelling reason that would require us to alter the results of our assessment of the other factors in view of economic factors.

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[80] *Supra* note 1.
[81] Association and Council Submission, *supra* note 28 at paras 60-71.
[82] Government Submission, *supra* note 35 at paras 22-33.

(b) The Role of Financial Security of the Judiciary in Ensuring Judicial Independence

79. In the *PEI Reference*, the Supreme Court of Canada recognized financial security as a fundamental component of judicial independence.[83] No party suggested that the current level of compensation jeopardizes judicial independence.

(c) The Need to Attract Outstanding Candidates to the Judiciary

80. All parties agreed that Canada has an outstanding judiciary. To continue to attract outstanding candidates, judges' salaries must be set at a level that will not deter them from applying to the bench.

81. Comparators help us to assess this factor, but this is not a mathematical exercise. Financial factors are not and should not be the only factor –or even the major factor – attracting outstanding judicial candidates. The desire to serve the public is an important incentive for accepting an appointment to the judiciary.

82. We agree with past Commissions that have decided not to seek an exact point in the comparators at which judges' salaries should be set.[84] We have sought to ensure that overall compensation levels do not deter outstanding candidates from applying.

83. In addition to compensation, including the value of the judicial annuity, other factors, such as the desire to serve the public, security of tenure, and the availability of supernumerary status attract candidates to the bench.

84. All of the evidence leads us to conclude that judicial compensation is sufficient to continue to attract outstanding candidates. The IAI is currently achieving the objective it was

[83] *Supra* note 5 at paras 80-81.
[84] See e.g. Levitt Commission Report, *supra* note 15 at para 48.

intended to: ensuring that judges' salaries keep pace with increases in the salaries of Canadians, whom judges serve.

(d) Any other Objective Criteria that the Commission Considers Relevant

85. We did not find any objective criteria other than those already addressed that we considered relevant to our deliberations.

RECOMMENDATION 2

The Commission recommends that:

Effective April 1, 2016, the salary of federally-appointed puisne judges should be set, inclusive of statutory indexation, at $314,100.

APPELLATE JUDGES' SALARY DIFFERENTIAL

86. As the Levitt Commission noted, submissions have been made to all Quadrennial Commissions regarding a salary differential between the puisne judges of the trial and appellate courts.[85]

87. Prior Quadrennial Commissions have addressed this question. The Drouin Commission commented favourably on submissions supporting of a salary differential, but declined to act on the basis that the matter required further review and evaluation, which it offered to undertake.[86]

88. The McLennan Commission declined to act on the submissions for jurisdictional reasons, indicating that were it re-designing the system, "it is entirely probable we would design a system where appellate court members received higher compensation than trial court members".[87] That Commission was not prepared to find that such a differential could be justified based on the

[85] Levitt Commission Report, *supra* note 15 at para 62.
[86] Drouin Commission Report, *supra* note 12 at page 52.
[87] McLennan Commission Report, *supra* note 13 at page 55.

Judges Act criteria and left it for the Government to consider whether this salary differential would be appropriate.[88]

89. After a detailed review on the evolution of appellate courts and their distinct functions, the Block Commission recommended instituting a 3% salary differential.[89]

90. The Levitt Commission recommended that "puisne judges sitting on provincial and federal appellate courts should be given a salary differential of 3% above puisne judges sitting on provincial and federal trial courts".[90]

91. Before us, the Government's response to the renewed request for an appellate salary differential was that nothing had changed since the first Quadrennial Commission: hierarchy within the court system did not justify the differential increase in light of section 26 (1.1) criteria.[91]

92. This Commission received submissions on this issue from other parties.

93. The Ontario Superior Court Judges Association stressed the different but equal role of a superior court judge and the lack of evidence indicating that the current arrangement is harmful to the courts' function or to the availability of suitable candidates for appellate courts. It maintained that a salary differential could cause division between trial and appellate court judges.[92]

94. Justice Gordon Campbell of the Supreme Court of Prince Edward Island submitted that no differential was justified, based both on the historic rejection of such a differential by the Government and the lack of current justification for a change.[93]

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[88] *Ibid.*
[89] Block Commission Report, *supra* note 14 at para 171 and page 56.
[90] Levitt Commission Report, *supra* note 15 at para 65.
[91] Government Reply Submission, *supra* note 27 at para 115.
[92] Submission from the Ontario Superior Court Judges Association.
[93] Submission from Justice Gordon L Campbell on [the] Proposal for Appellate Salary Differential.

95. Chief Justice Joyal of the Court of Queen's Bench of Manitoba, on behalf of the Superior Courts Chief Justices Trial Forum, did not take a position on the differential. He requested that, should we recommend a differential, commensurate adjustments and recommendations to maintain existing differentials between superior court chief justices and appellate court puisne judges should be made.[94]

96. After the hearings, the Commission requested information from counsel for the Canadian Appellate Judges as to how many of 165 appellate judges across the country approved the submission for a salary differential, and where those judges sat. The breakdown of supporting appellate judges by province is as follows:

Court of Appeal	Number of Judicial positions including Supernumeraries	Number of Approving Judges
Federal Court of Appeal	16	
Alberta	18	12
British Columbia	23	
Manitoba	12	10
New Brunswick	7	6
Newfoundland and Labrador	7	
Nova Scotia	11	
Ontario	30	
Prince Edward Island	3	
Quebec	30	29
Saskatchewan	8	7
Total	**165**	**64**

Sources: Office of the Commissioner for Federal Judicial Affairs' website; email from Joseph R. Nuss dated May 19, 2016.

97. We observe that those appellate judges approving the salary differential represent only five provinces and territories. The Federal Court of Appeal and the appellate courts of two of the most populous provinces, British Columbia and Ontario, have not supported the differential.

98. The number of appellate court judges approving the differential seems to vary over time.

[94] Submission from the Superior Courts Chief Justices Trial Forum.

99. Before the Drouin Commission, the appellate judges of six appellate courts (Alberta, Saskatchewan, Manitoba, Ontario, Quebec, and New Brunswick) supported the request for a differential. One puisne judge of an appellate court opposed the request, as did the Government. The Association and Council remained neutral.[95]

100. Before the McLennan Commission, 74 of 142 appellate judges supported the submission. None of the judges of two provincial appellate courts supported the differential, and one judge expressly opposed it. The Government opposed the proposal. The Association and Council maintained their neutrality.[96]

101. Before the Block Commission, 99 of 141 appellate court judges supported the submission. Eighteen opposing submissions were received, some on behalf of particular courts and others on an individual basis. The Government continued to oppose the submission and the Association and Council maintained a neutral position.[97]

102. The Levitt Commission did not refer to the level of support by appellate judges.

103. This Commission's jurisdiction to recommend an appellate judge salary differential is not contested.

104. The reasons supporting the conclusions of both the Block and Levitt Commissions were repeated in submissions before this Commission. In short, these submissions reflect the different, hierarchical role of appellate judges in correcting legal errors and clarifying and stating the law within the province. These submissions also reflect the practical finality of all but a small minority of those decisions, given the number of cases considered annually by the Supreme Court of Canada and the leave to appeal restrictions that largely remove appeals as of right to the Supreme Court of Canada.[98]

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[95] Cited in the Block Commission Report, *supra* note 14 at para 127.
[96] *Ibid* at para 129.
[97] *Ibid* at paras 131-132.
[98] Appellate Judges Submission, *supra* note 29, Schedule A at 8-9.

105. We are mindful of the important, and different, role played by superior court judges in Canada, who are the front line of civil, criminal, and family litigation. The majority of this litigation is finally determined at this level. Evaluating in any qualitative way the relative values of the roles played by trial and appellate judges is too subjective an analysis, in our view, to warrant a salary differential recommendation.

106. We are, however, mindful of what seems to be a diminishing level of support for a salary differential amongst appellate judges in the country. We also note the lack of unanimity amongst appellate judges across the country. The Ontario Superior Court Judges Association, speaking on behalf of roughly 320 judges in Ontario, opposes the differential. There is no expressed support from that province's Court of Appeal. We have considered Chief Justice Joyal's observation that implementing such a recommendation would require re-engineering various existing salary differentials between the chief justices of superior courts and puisne appellate judges.

107. We have the utmost respect for the conclusions reached by the Block and Levitt Commissions, but this Commission does not believe, in light of our own analysis, according to the section 26(1.1) criteria, that such a salary differential is warranted in this quadrennial period.

108. Nothing in this decision is to be taken as demonstrating anything other than the utmost respect for and acknowledgment of the important role played by puisne judges of the appeal courts.

109. Accordingly, we decline to recommend an appellate salary differential.

RECOMMENDATION 3

The Commission recommends that:

No salary differential should be paid to puisne appellate judges.

RECOMMENDATION 4

The Commission recommends that:

Salary differentials should continue to be paid to the Chief Justice of Canada, the Judges of the Supreme Court of Canada, and the chief justices and associate chief justices of the trial and appellate courts.

Effective April 1, 2016, judges' salaries should be set, inclusive of statutory indexation, at the following levels:

Supreme Court of Canada:

Chief Justice	**$403,800**
Puisne Judges	**$373,900**

Federal Court of Appeal and Provincial and Territorial Courts of Appeal:

Chief Justices	**$344,400**
Associate Chief Justices	**$344,400**
Puisne Judges	**$314,100**

Federal Court, Tax Court, and Trial Courts

Chief Justices	**$344,400**
Senior Associate Chief Justices and Associate Chief Justices	**$344,400**
Senior Judges	**$344,400**
Puisne Judges	**$314,100**

CHAPTER 3 – PROTHONOTARIES' SALARIES AND OTHER BENEFITS

PREVIOUS SPECIAL ADVISORS' REPORTS

110. Prothonotaries' compensation was added to the work of this Quadrennial Commission by section 26.4 of the *Judges Act*, following amendments to that Act in 2014.[99]

111. Prior to these amendments, two Special Advisors issued reports on prothonotaries' compensation: the Honourable George Adams, on May 30, 2008 and the Honourable J. Douglas Cunningham, on July 31, 2013.[100]

112. Mr. Adams recommended that:

(a) prothonotaries' salaries be increased to 80% of that of Federal Court judges'. This figure represented the average of the compensation of traditional masters of superior courts and provincial court judges at the time.

(b) the Minister of Justice and the Chief Justice of the Federal Court consider establishing the opportunity for prothonotaries to elect supernumerary status upon retirement.

(c) prothonotaries receive an annual non-taxable allowance of $3,000 to assist in the payment of costs associated with carrying out their duties.

(d) all of the Prothonotaries' representation costs should be paid by the Government.[101]

113. The Government, in the economic conditions of the day, declined to implement those recommendations. However, it did make a $50,000 *ex gratia* payment to support the Prothonotaries' participation in the Adams process.[102]

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[99] *Supra* note 1, and see para 11. Amendments to s 26.4 introduced by s 321 of the *Economic Action Plan 2014 Act, No 2*, SC 2014, c 39.
[100] *Supra* notes 18 and 19.
[101] Adams Report, *supra* note 18 at 54-65.
[102] Response of the Minister of Justice to the Special Advisor on Prothonotaries' Compensation, Joint Book of Documents, Tab 32(A).

114. Mr. Cunningham made similar recommendations; however, he proposed a maximum of $80,000 be paid for the Prothonotaries' reasonable representational costs.[103] The Government responded that the $50,000 *ex gratia* payment it had already made for reimbursement of legal fees was generous and sufficient.[104]

115. Following the issuance of the Cunningham Report, the *Judges Act* and the *Federal Courts Act* were amended. Section 10.1 of the *Judges Act* now establishes the Prothonotaries' salaries at 76% of Federal Court puisne judges'. Other amendments to the Act brought the Prothonotaries under the same annuity and administrative processes that apply to federally-appointed judges.[105] However, certain benefits were not extended, such as the incidental allowance and the option to elect supernumerary status.[106]

PROTHONOTARIES' ROLES AND RESPONSIBILITIES

116. Prothonotaries are appointed under section 12 of the *Federal Courts Act*. They are judicial officers who hold office during good behaviour until age 75.[107]

117. Prothonotaries' roles are similar to Federal Court judges'. Prothonotaries:

(a) have immunity from liability[108];
(b) exercise full trial jurisdiction up to $50,000;
(c) hear and decide motions on wide-ranging matters, including final determinations on motions to strike or to dismiss proceedings;
(d) decide *Charter* issues and other general questions of law;
(e) adjudicate on complex commercial matters; and

[103] Cunningham Report, *supra* note 19.
[104] Response of the Minister of Justice to the Special Advisor on Prothonotaries' Compensation, Joint Book of Documents, Tab 33(A) at page 2
[105] See *Judges Act*, *supra* note 1 at s 2.1(1).
[106] Main submission of the Federal Court Prothonotaries at paras 49, 50 ["Prothonotaries' Submission"].
[107] RSC 1985, c F-7, s 12(7).
[108] *Ibid*, s 12(6).

(f) preside over references, pre-trial conferences, dispute resolution conferences, and case management proceedings, including in respect of the more recent class actions jurisdiction granted to the Federal Court, all as designated by the Chief Justice of the Federal Court.[109]

118. Currently, there are five prothonotaries, who, based in Toronto, Montreal, and Vancouver, serve the Court throughout the country.

PROTHONOTARIES' SALARIES

(a) The Prothonotaries' Position

119. The Prothonotaries proposed:

(a) salaries be set in the range of 83% - 86% of Federal Court judges', retroactive to April 1, 2016;[110]

(b) that the Minister of Justice and the Chief Justice of the Federal Court consider establishing the opportunity for prothonotaries, once eligible to retire, to elect some form of supernumerary status;[111]

(c) an allowance of $5,000 per year for costs associated with carrying out their duties;[112] and

(d) reimbursement for all reasonable representational costs with respect to this Quadrennial Commission.[113]

[109] On paragraphs (a)-(f), refer to the *Federal Court Rules*, SOR/98-106, s 50, and Prothonotaries' Submission, *supra* note 106 at paras 31-45.
[110] Prothonotaries' Submission, *ibid*, at 30.
[111] *Ibid* at 32.
[112] *Ibid* at 35.
[113] *Ibid* at 37.

(b) The Government's Position

120. The Government argued that, given recent significant increases to prothonotaries' total compensation, including entitlement to the generous judicial annuity upon retirement, current compensation is fully adequate, considering the statutory criteria.[114]

APPROPRIATE COMPARATORS

121. Both Mr. Adams and Mr. Cunningham had recommended that prothonotaries' salaries be set at 80% of Federal Court judges' salaries.[115]

122. They arrived at this common figure by slightly different routes. Mr. Adams averaged all known salaries for provincial and territorial court judges and masters across Canada at 79% of Federal Court judges' salaries at the time and identified the average salary for traditional masters in three jurisdictions (Alberta, British Columbia, and Manitoba). Using this calculation, he recommended that prothonotaries' salaries should be 79.4% of Federal Court judges.[116]

123. Mr. Cunningham concluded that Federal Court judges were the most appropriate comparator, given significant overlap between the work of prothonotaries and those judges. He found this to be a principled reason for linking these salaries.[117]

(a) Superior Court Masters

124. The Prothonotaries presented the average salary of provincial masters in British Columbia, Alberta, and Manitoba, as well as Ontario's grandfathered traditional master, as $265,968 in 2015, or 86.2% of Federal Court judges' salaries.[118]

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[114] Government Reply Submission, *supra* note 27 at para 81.
[115] Adams Report, *supra* note 18 at 57; Cunningham Report, *supra* note 19 at 23.
[116] Adams Report, *ibid* at 56-57.
[117] Cunningham Report, *supra* note 19 at 21-23,
[118] Prothonotaries' Submission, *supra* note 106 at paras 88-97.

125. Using the average of these salaries as a comparator is difficult because only three provinces have more than one traditional master and Ontario only has one. As Mr. Adams commented, "[t]hese are not robust comparators, to put it mildly".[119]

(b) Provincial Court Judges

126. According to the Prothonotaries' submissions, the average salary of all provincial and territorial court judges in 2015 was $258,783, or 83.9% of Federal Court judges' salaries.[120]

127. The Prothonotaries relied on the salary recommendation of the 2013 Judges Compensation Commission of British Columbia for Provincial Court Judges and Masters, which increased the average salary of masters to 86.6%, and provincial court judges to 84%, of Federal Court judges' salaries.[121]

128. It is difficult to compare the work of provincial court judges, which is primarily in the criminal and family law areas, with the rather unique role of prothonotaries in the Federal Court structure.

(c) Military Judges

129. The salaries of military judges were not seriously argued before us. The Prothonotaries rejected the comparator.[122] The Government suggested that it would be inappropriate for prothonotaries to be compensated at a level above military judges.[123]

130. We have insufficient information upon which to draw any reliable comparisons between the two positions.

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[119] Adams Report, *supra* note 18 at 56.
[120] Prothonotaries' Submission, *supra* note 106 at para 90.
[121] *Ibid* at para 91.
[122] *Ibid* at para 107.
[123] Government Reply Submissions, *supra* note 27 at para 93.

ANALYSIS ON PROTHONOTARIES' SALARIES

131. As with the superior court judges, the provisions of section 26(1.1) of the *Judges Act* must be considered in to our inquiry on prothonotaries' salaries.[124]

(a) Prevailing Economic Conditions in Canada

132. As addressed earlier in this Report, we do not view the prevailing economic conditions in Canada as militating against a salary increase, if other conditions are met.

(b) Role of Financial Security

133. The current combination of salary and annuity, and the structure around it, is sufficient to ensure financial security of prothonotaries in respect of judicial independence.

(c) The Need to Attract Outstanding Candidates

134. Chief Justice Crampton of the Federal Court provided very helpful submissions, both in writing and in our hearings, outlining some of the challenges the Court faces in attracting suitable candidates to fill the role of prothonotary.[125]

135. Currently, five of six prothonotary positions are filled, and the Federal Court is facing the retirement of two prothonotaries within the next two years.[126]

136. In our hearings, the Chief Justice shared with us some insights into the recruitment process for a sixth prothonotary.

137. Given the unique work of prothonotaries, and the likelihood that they will be recruited from practices that reflect the Court's jurisdiction, the obvious sources of such candidates are the

[124] *Supra* note 1.
[125] Submission of Chief Justice Paul Crampton.
[126] *Ibid* at 1-2.

larger urban centres where prothonotaries routinely sit: Vancouver, Toronto, Ottawa, and Montreal.

138. The Commission views this as an important consideration in addressing prothonotaries' compensation.

(d) Other Objective Criteria

139. Prothonotaries receive the benefit of a judicial annuity which, as with the annuity provided to superior court judges, the parties valued slightly differently.

140. For these purposes, we do not have to resolve the conflicting evidence as to the value of a judicial annuity.

141. Comparing the prothonotaries' annuities to traditional masters' and provincial court judges' retirement benefits emphasizes that prothonotaries' annuities more closely resemble Federal Court judges' annuities.

(e) Conclusion with Respect to Prothonotaries' Salaries

142. The Commission views the prior recommendations of Mr. Adams and Mr. Cunningham of setting prothonotaries' salaries at 80% of Federal Court judges' salaries as the appropriate conclusion. Federal Court judges represent the best relative comparator to the position and work of prothonotaries.

143. Mr. Cunningham recognized how the work of the prothonotaries was integral to the administration of justice in the Federal Court.[127] Mr. Cunningham concluded that fixing prothonotaries' salaries at 80% of Federal Court judges' would be in an acceptable range of provincial and territorial masters' salaries in relation to Federal Court judges', while also taking

[127] Cunningham Report, *supra* note 19 at 22-23.

into account the incomes of private sector lawyers.[128] This consideration, while not binding, provides us further comfort with respect to the appropriateness of the 80% figure. Moreover, the unique role of prothonotaries limits the potential applicants to a restricted pool of more urban-centred practitioners with Federal Court experience. The need to attract outstanding candidates to this role militates in favour of increasing prothonotaries' salaries to 80% of that of Federal Court judges.

RECOMMENDATION 5

The Commission recommends that:

> **The salaries of Federal Court prothonotaries should be increased, retroactive to April 1, 2016, to 80% of Federal Court judges' salaries, or $251,300.**

SUPERNUMERARY STATUS

(a) The Parties' Submissions

144. Federal Court judges, like all section 96 judges, are entitled to elect supernumerary status under the *Judges Act*, subject to certain restrictions.[129]

145. The Prothonotaries, supported by Chief Justice Crampton, requested that they also be entitled to elect supernumerary status, which would both enhance their financial security and benefit the Court.[130]

146. Even with the Chief Justice's support for a supernumerary option, the Prothonotaries' rather attenuated recommendation was for the Minister of Justice and Chief Justice of the Federal Court to consider the opportunity of granting supernumerary status or to create a senior prothonotary position for members of this group who are eligible for retirement.[131]

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[128] *Ibid.*
[129] *Supra* note 1, s 28(1).
[130] Prothonotaries' Submission, *supra* note 106 at paras 108-114.
[131] *Ibid* at (page) 30.

147. The Government argued that the creation of the supernumerary model was a policy decision by the Government of the day, motivated by a desire to find a cost-effective means to retain experienced judges on the Court, to contribute to the Court's workload, and to afford the Chief Justice additional flexibility in managing the Court's docket.[132] Any decision to implement a similar program for prothonotaries is likewise a policy decision.[133] The Government noted that programs available to provincial court judges across the country are not uniform, and some of these judges work on a *per diem* basis.[134] Facilitating those programs requires each province to enact legislation permitting section 96 judges to elect supernumerary status, although this would not be required for prothonotaries.[135] Finally, the Government stated that the workload requirements identified by Chief Justice Crampton are more a matter for discussion between the Court and the Government than for the Commission.[136]

148. In Chief Justice Crampton's very helpful submissions, he outlined what were, essentially, workload and case management benefits of supernumerary status. These benefits would also provide a significant incentive for prothonotaries to remain with the Federal Court for a period of time, after which they would be eligible to retire with a full annuity. The Court would benefit from the continued application of their expertise and institutional knowledge. Chief Justice Crampton identified the possibility of supernumerary status as an attractive recruitment option.[137]

149. Chief Justice Crampton proposed a model in which prothonotaries would be entitled to elect supernumerary status for three years from the date of election. On the recommendation of the Chief Justice, and subject to re-appointment by the Governor in Council, this initial three-year term could be extended to a maximum period of ten years.[138]

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[132] Government's Reply Submission, *supra* note 27 at para 102.
[133] *Ibid* at para 103.
[134] *Ibid* at para 105.
[135] *Ibid* at para 104.
[136] *Ibid* at para 107.
[137] Submission of Chief Justice Paul Crampton, *supra* note 125 at 1-6.
[138] *Ibid* at 5-6.

(b) The Adams and Cunningham Reports

150. Neither Mr. Adams nor Mr. Cunningham made a recommendation about supernumerary status for prothonotaries.

(c) Analysis

151. The Prothonotaries ask us to propose a recommendation that the Minister of Justice and Chief Justice of the Federal Court either consider the possibility of granting supernumerary status under the *Judges Act* or create a senior Prothonotary program for those officers eligible for retirement. This is not inconsistent with the Government's position that any decision to implement such a program would be a policy decision.

152. Whether such a structure is put in place and its actual features is a matter for Parliament. The Commission cannot offer any detailed recommendations.

153. The relevant consideration under section 26(1.1) of the *Judges Act* is whether this option would help attract outstanding candidates for the prothonotary position.[139]

154. The Chief Justice's supernumerary model for prothonotaries potentially offers much shorter tenure than what is contemplated under the *Judges Act*. Accordingly, this proposed model might not entice applicants in the same way as supernumerary status under the *Judges Act.*

155. For these reasons, we would do no more than recommend that the Government of Canada examine the question of supernumerary or equivalent status for prothonotaries, with a view to enhancing the opportunities of recruiting outstanding candidates to these positions.

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[139] *Supra* note 1.

RECOMMENDATION 6

The Commission recommends that:

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

INCIDENTAL ALLOWANCE

156. Both Mr. Adams and Mr. Cunningham recommended an allowance of $3,000.[140] The Government rejected both of these earlier recommendations on the basis that all of prothonotaries' reasonable travel and related living expenses, including education and training costs, will continue to be paid by the Government.[141]

157. Before us, the Prothonotaries proposed an incidental allowance of $5,000.[142] They argued that Federal Court judges, whose reasonable travel and related living expenses, education, and training costs are paid by the Government, can also access an allowance of up to $5,000.[143]

158. The Government is now prepared to adopt the recommendations of both Mr. Adams and Mr. Cunningham and offer a non-taxable allowance of $3,000.[144]

159. As Mr. Cunningham's recommendation of a $3,000 allowance is recent, this Commission is prepared to recommend this figure, subject to it being revisited by subsequent Quadrennial Commissions in the event that it proves, in the future, to be inadequate.

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[140] Adams Report, *supra* note 18 at 65; Cunningham Report, *supra* note 19 at 33.
[141] Government Response to Cunningham Report, *supra* note 104 at 2.
[142] Prothonotaries' Submission, *supra* note 106 at para 121.
[143] *Ibid.*
[144] Government Reply Submission, *supra* note 27 at para 111.

RECOMMENDATION 7

The Commission recommends that:

> **Prothonotaries should receive a non-taxable allowance of $3,000 annually, retroactive to April 1, 2016, to be used for the payment of expenses related to their duties.**

REPRESENTATIONAL COSTS

160. Pursuant to section 26.3 of the *Judges Act*, a representative of the judiciary participating in the Commission Proceedings is entitled to be paid two-thirds of its costs on a solicitor-client basis, to be assessed in accordance with the *Federal Court Rules*.[145] Prothonotaries are eligible for two-thirds of their costs by virtue of section 26.4 of the *Judges Act*.[146]

161. The Prothonotaries brought a preliminary motion requesting that we immediately recommend they receive full funding for the representational costs in respect of this Commission.[147]

162. In our Ruling dated February 18, 2016, we declined to make such an order and left the question of representational costs to be addressed during formal submissions.[148]

163. The request for full representational costs funding was fully argued in the preliminary motion and once again in formal written and oral submissions.

164. The Prothonotaries argued that, by virtue of the 2014 amendments to the *Judges Act*, they have been added to the Quadrennial Commission process, which is more complex than the previous, singularly-focused, Special Advisor process. Their costs are borne by six – in reality, the existing five – prothonotaries. This amounts to an undue burden on an individual basis,

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[145] *Supra* note 1.
[146] *Ibid.* This section was enacted in 2014.
[147] Letter dated January 19, 2016 from Andrew Lokan to the Commission.
[148] *Supra* note 22.

given the small number of prothonotaries, compared to the more than 1000 superior and appellate court judges who bear those parties' costs.[149]

165. The Government argued the Prothonotaries should not have full funding for representational costs, as giving this party unchecked discretion in deciding what legal costs should be incurred is not in the public interest. It says that the existing structure is adequate.[150]

166. The Commission is sensitive to the burden placed on the Prothonotaries.

167. The solution lies in better protection for members of this group on an individual basis, but with some overall safeguard against incurring unnecessary costs.

168. The assessment process under the *Federal Court Rules* is not a particularly desirable solution, given that the taxing officers of the Federal Court would be assessing the fees payable to the relatively small number of prothonotaries of the same court. This is less of an issue for the assessment of costs payable to judges under section 26.3 of the *Judges Act*, given the far larger number of judges and the smaller proportion of representational costs that each judge bears

169. We therefore recommend that 95% of the Prothonotaries' reasonable full indemnity costs be paid by the Government and, only if necessary, be assessed under the *Federal Court Rules*. We think it preferable, however, to amend the *Judges Act* to allow these costs to be assessed in the Ontario Superior Court of Justice at Ottawa.

[149] Prothonotaries' Submission, *supra* note 106 at paras 122-132.
[150] Government Reply Submission, *supra* note 27 at para 112.

RECOMMENDATION 8

The Commission recommends that:

Prothonotaries should be paid 95% of the reasonable full indemnity costs incurred before this Quadrennial Commission. Only if necessary should these costs be assessed under the *Federal Court Rules*. The Government should consider amendments to the *Judges Act* to permit these costs to be assessed in the Ontario Superior Court of Justice at Ottawa.

CHAPTER 4 - OTHER ISSUES

STEP-DOWN AMENDMENTS

170. The Honourable J.E. (Ted) Richard filed written submissions, dated February 9, 2016 and March 7, 2016.[151] Justice Richard was appointed a judge of the Supreme Court of the Northwest Territories in September 1988. In April 1996, he became senior judge of the Court, a position equivalent to chief justice of the southern superior courts. In December 2007, he elected supernumerary status, and served as a supernumerary judge until his retirement on May 1, 2012. Since his retirement, he has been receiving a judicial annuity pursuant to the *Judges Act*, but he argued that, due to a legislative drafting error, this annuity is not in the correct amount. He maintained that his annuity should be based on his salary as a senior judge.[152]

171. The Block Commission agreed that "senior judges should receive the same treatment with regard to their retirement annuities as chief justices".[153]

172. Consequently, Recommendation 5 of the Block Commission provided that:

> The *Judges Act* be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as do chief justices who elect supernumerary status.[154]

173. However, in its formal response to the Block Commission Report, the Government declined to implement any of the Commission's recommendations. The Government did not comment on the merits of Recommendation 5.[155]

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[151] Submission of the Hon J.E. (Ted) Richard ["Richard Submission"]; Response to Government Submissions from the Hon J.E. Ted Richard.
[152] Richard Submission, *ibid*.
[153] *Supra* note 14 at para 180.
[154] *Ibid* at (page) 61.
[155] Response of the Government of Canada to the Report of the 2007 Judicial Compensation and Benefits Commission, Government's Book of Documents, tab 16.

174. The Levitt Commission agreed with the Block Commission's conclusion that "the adequacy of judicial remuneration requires similar treatment for similarly placed judges on the various courts".[156] Accordingly, Recommendation 4 of the Levitt Commission Report stated:

> The *Judges Act* should be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as chief justices of both trial and appellate courts who elect supernumerary status.[157]

175. Recommendation 5 of the Levitt Commission Report stated:

> The *Judges Act* should be amended so that the retirement annuity of a senior judge of a territorial court who ceases to perform the duties of a senior judge and performs only the duties of a puisne judge, receiving the salary of a puisne judge, be granted a retirement annuity based on the salary of a senior judge.[158]

176. The Government accepted Recommendations 4 and 5 of the Levitt Commission, and sections 43(1) and 43(2) of the *Judges Act* were amended in December 2012. However, the amendments were not made retroactive. [159]

177. The Honourable Ted Richard argued that the amendment to section 43(1) should be made retroactive to April 1, 2012, the effective date of other changes included in the December 2012 amending legislation.[160]

178. The Government agreed that "s. 43(2) should be amended to entitle the Honourable J.E. (Ted) Richard to an annuity based on his former position as Senior Judge of the Supreme Court of the Northwest Territories"[161] and that the *Judges Act* should also be amended to address the

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[156] *Supra* note 15 at para 72.
[157] *Ibid* at page 27.
[158] *Ibid* at page 28.
[159] Government Response to the 2011 Judicial Compensation and Benefits Commission, Judiciary's Book of Documents, Tab 10 at 2.
[160] Section 217 of the amending Act came into force on Assent: December 14, 2012.
[161] Government Submission, *supra* note 35 at para 169.

situation of a chief justice or senior judge who steps down to a different court as a puisne judge.[162]

179. We agree with the recommendations of the Block and Levitt Commissions that similarly-placed judges on various superior courts should receive similar treatment with respect to salary, benefits, and annuities, and that the situation with respect to the Honourable J.E.(Ted) Richard's annuity should be corrected.

RECOMMENDATION 9

The Commission recommends that:

> **The *Judges Act* should be amended to provide that the retirement annuity of a chief justice or senior judge who has stepped down to a different court as a puisne judge be based on the salary of a chief justice and that the 2012 amendments to section 43(1) and section 43(2) be made retroactive to April 1, 2012.**

REMOVAL ALLOWANCE

180. The Honourable Mr. Justice Robert P. Stack filed written submissions dated March 1, 2016. Mr. Justice Stack presided as the only Labrador resident judge of the Supreme Court of Newfoundland and Labrador until his transfer to St. John's in September 2013. In his submission, he noted that, to date, all of the judges appointed to preside in Labrador relocated from Newfoundland and then transferred back to the Island.[163]

181. Section 40(1)(c) of the *Judges Act* authorizes a removal allowance for a judge in any of the three territories who moves to another province or territory, subject to certain criteria relating to the time of the move relative to the judge's retirement. Section 40(1)(d) of the Act authorizes a removal allowance be paid to the survivor or child of a judge in any of the three territories who

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[162] *Ibid* at para 171. We note, however, that the relevant section of the *Judges Act, supra* note 1, is section 43(1), which refers to judges who have elected supernumerary status, rather than section 43(2), which refers to chief justices who have elected to cease to perform the functions of a chief justice and perform "only the duties of a judge". Section 43(2) does not refer to supernumerary judges.

[163] Submission of Justice Robert P Stack at 1-2 ["Stack Submission"].

has died in office, if the survivor or child lived with the judge at the time of death and moves within two years of the death.[164]

182. Due to Labrador's remoteness and the consequent challenges in recruiting superior candidates to sit there, Justice Stack argued that the removal allowances provided for in sections 40(1)(c)and (d) of the *Judges Act* should apply to relocations between Labrador and Newfoundland.[165]

183. The Government agreed 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".[166]

184. We agree that relocations between Labrador and Newfoundland are akin to relocations from a province to a territory and that the Labrador judge should be entitled to the removal allowance under sections 40(1)(c) and (d) of the *Judges Act*.

RECOMMENDATION 10

The Commission recommends that:

> **The *Judges Act* be amended to extend the entitlement to removal allowances as described in sections 40(1)(c) and (d) to a judge sitting in Labrador, effective April 1, 2016.**

COMPENSATION OF THE CHIEF JUSTICE OF THE COURT MARTIAL APPEAL COURT

185. Written submissions, dated February 24, 2016, were filed on behalf of the Honourable B. Richard Bell, Chief Justice of the Court Martial Appeal Court of Canada (CMAC). Chief Justice Bell was appointed a judge of the Federal Court, Court Martial Appeal Court of Canada, and Chief Justice of the CMAC on February 5, 2015. His functions on the CMAC are performed on a

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[164] *Supra* note 1.
[165] Stack Submission, *supra* note 164 at 1-2.
[166] Government Reply Submission, *supra* note 27 at para 124.

permanent, not *ad hoc* basis. Consequently, he seeks compensation and allowances equal to other chief justices of superior courts in Canada.[167]

186. Currently, the Chief Justice of the CMAC is paid as a Federal Court judge, with a representational allowance as prescribed under section 27 of the *Judges Act*. Chief Justice Bell is the only member of the Canadian Judicial Council and the only chief justice of a court governed by the Courts Administration Service Act who is remunerated at the rate of a *puisne* judge. Counsel for Chief Justice Bell submitted that his functions and responsibilities are equivalent to those of the other chief justices of superior courts in Canada.[168]

187. The Government agreed that the Chief Justice of the CMAC should receive the same annual salary as other superior court chief justices. Further, should the Chief Justice of the CMAC step down from that office, he or she should be entitled to an annuity, on retirement, based on the Chief Justice's salary.[169]

188. As with senior judges in the territories, we agree that the Chief Justice of the CMAC, who is similarly placed as the chief justices of other superior courts, should receive the same compensation and benefits as other chief justices.

RECOMMENDATION 11

The Commission recommends that:

> **The necessary legislative amendments should be made to provide, effective April 1, 2016 the Chief Justice of the Court Martial Appeal Court of Canada compensation and allowances equal to those of other superior court chief justices, including an annuity based on the Chief Justice's salary in cases where he or she has stepped down to a puisne judge position.**

[167] Submission of Chief Justice B Richard Bell at paras 2, 12.
[168] *Ibid* at paras 13-20.
[169] Government Reply Submission, *supra* note 27 at para 125.

PENSION CREDIT FOR A PROVINCIAL COURT JUDGE APPOINTED TO A SUPERIOR COURT

189. The Honourable Leonard S. Mandamin filed written submissions, dated March 8, 2016.[170] Mr. Justice Mandamin, who was appointed a Federal Court judge on April 27, 2007, had previously served for seven years as a judge of the Provincial Court of Alberta, from 1999 to 2007.[171]

190. Justice Mandamin proposed that we recommend that provincial court judges who are appointed to superior courts be able to transfer their years of service from the provincial pension plan to the judicial annuity under the *Judges Act*. He explained that the inability to transfer pension credit is a significant disincentive for provincial court judges seeking appointment to a superior court. Justice Mandamin, who is himself an Indigenous judge, also argued that this lack of portability is especially significant for the appointment of qualified Indigenous provincial court judges to superior courts.[172]

191. The Government agreed that the recruitment of Indigenous judges, as well as judges drawn from minority populations, is essential to ensuring that the federal judiciary reflect the diverse face of Canada.[173] However, it noted that allowing for portability in pension credit would require not only significant amendments to the *Judges Act* but would also "require coordinated amendments to provincial and territorial judicial pension legislation, which differ across jurisdictions, to ensure consistency."[174]

192. Nonetheless, the Government stated that it would consider any recommendations this Commission might make on the issue. The Government added that ensuring a more diverse judiciary and encouraging more Indigenous candidates to apply for the bench is likely best addressed through other policies.[175]

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[170] Submission of Hon Leonard S Mandamin.
[171] *Ibid.*
[172] *Ibid.*
[173] Government Reply Submission, *supra* note 27 at para 127.
[174] *Ibid* at paras 128, 131.
[175] *Ibid* at para 132.

193. We are sympathetic to the lack of pension portability and its potential to discourage provincial court judges from seeking appointment to the superior courts. We believe this is a matter worthy of study. However, in the absence of any detailed proposal for changing the federal judicial annuity scheme, and in the absence of any comment from the Association and Council on the matter, it would be premature for us to make any specific recommendation for change to the federal judicial annuity scheme.

RECOMMENDATION 12

The Commission recommends that:

> **The Government should consider whether portability of provincial judicial pension benefits to the federal judicial annuity scheme could be achieved as a means of removing a possible disincentive for provincial court judges seeking appointment to superior courts, while maintaining the financial security of federally-appointed judges.**

CHAPTER 5 – PROCESS MATTERS

APPOINTMENT OF COMMISSIONERS

194. The Association and Council raised a number of what they described as process matters, the first of which surrounds their complaint about the Government's initial appointee to this Commission.

195. The focus of this matter was the nomination of a retired Deputy Minister of Justice and the Association and Council's understanding that he had been directly involved in the Government's representation before the Levitt Commission and in other bilateral discussions with the representatives of the judiciary.[176]

196. The Association and Council consistently stated that they were not questioning the professionalism and integrity of the nominee in question.[177] We are of the same view.

197. When the Association and Council questioned this nomination, the nominee withdrew.

198. The Government sought to strike certain paragraphs of the Association and Council's principal submissions which referred to this.[178]

199. On March 22, 2016, we issued a Ruling with reasons denying the Government's motion.[179]

200. Although the Association and Council did not request a formal recommendation, they did request that we provide guidance for the future with respect to the nomination process.[180]

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[176] Association and Council Submission, *supra* note 28 at paras 46-49.
[177] See e.g. Ruling on Objection, *supra* note 23 at 1.
[178] Government's Objection to Paragraphs 46 to 49 and Exhibit B of the Judiciary's Principal Submissions.
[179] Ruling on Objection, *supra* note 23.
[180] Association and Council Submission, *supra* note 28 at para 48;

201. We consider that the matter, whatever its merits, was self-correcting at the nomination stage and see no useful purpose being served in further exploring this area. Accordingly, we will make no recommendation.

TIMING ISSUES

202. Section 26(2) of the *Judges Act* requires that the Commission commence its inquiry on October 1, 2015 and submit a report containing its recommendations within nine months after the date of commencement.[181]

203. The intervention of the general election in 2015 delayed the commencement of the Commission's inquiry. The Orders in Council appointing the Commissioners were not made until December 15, 2015. This, in addition to the challenges for Government counsel in obtaining instructions so soon after the election of a new Government, jeopardized the nine-month completion date for our report.

204. Even though section 26(5) of the *Judges Act* allows the Governor in Council, on the request of the Commission, to extend the time for submission of its report, granting an extension does not remedy the delay in establishing the Commission and consequent non-compliance with section 26(2) of the *Judges Act*.[182]

205. The Association and Council noted that, given the current confluence between the statutory start date of future Commissions and the fixed-date election period in the *Canada Elections Act*, this problem is likely to arise again in October 2019.[183]

206. The Association and Council's position is, notwithstanding an election period, the Government is required to comply with the Act and constitute future Commissions by October 1 in a relevant year.[184]

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[181] *Supra* note 1.
[182] *Ibid.*
[183] Association and Council Submission, *supra* note 28 at para 44.
[184] See e.g. *ibid* at paras 44-45.

207. The Government appreciated the issues that arose because of the election coinciding with the intended start date of the Commission, but made no specific recommendation for us to consider.[185]

208. We appreciate the exigencies which arise in an election year. However, the Quadrennial Commission process is constitutionally and statutorily mandated, and must be complied with.

209. The Government must consider alternatives, such as:

(a) adjusting the quadrennial period automatically for a fixed period in the face of a general election;

(b) requiring the Government to appoint the Commission notwithstanding an election; and,

(c) adjusting time periods under the *Judges Act* to accommodate the intervention of an election.

210. These are not easy alternatives to work with, considering the impossibility of predicting the length of an election campaign or the timing of an election call.

RECOMMENDATION 13

The Commission recommends that:

The Government should explore means of ensuring that the time periods set out in section 26(2) of the *Judges Act* are complied with in a manner consistent with the guidelines set out by the Supreme Court of Canada.

MOTION COSTS

211. In oral argument, the Association and Council alluded to difficulties caused by the longer and more complicated Commission process, given the preliminary motions brought by the Government.

[185] Government Reply Submission, *supra* note 27 at para 11.

212. Although counsel for the Association and Council stated he was not seeking an amendment to section 26.3 of the *Judges Act*, he suggested some other form of reimbursement would be warranted. The notion was somewhat vague.

213. Section 26.3 of the *Judges Act* provides adequate reimbursement of representational costs related to participation in the Commission's inquiry.[186]

214. We do not consider that any other form of reimbursement for representational costs is warranted at this time.

COOPERATION AND COLLABORATION AMONGST THE PARTIES

215. At the heart of the Association and Council's process issue submissions was the sense that the Government does not respect the Quadrennial Commission process or Commissions' recommendations.

216. While we note the Levitt Commission's comments with respect to the need for a less adversarial process, we were struck by the degree of cooperation exhibited between the various parties, and most particularly between the Association and Council and the Government.

217. For example, these parties agreed to have their expert actuaries consult to identify the differences between their respective positions on the current value of the judicial annuity.

218. We endorse the Levitt Commission's comments that the parties should pursue as collaborative and cooperative a process – and reaction to the recommendations – as possible.[187]

219. We see no need for a specific recommendation other than to encourage the parties to continue to operate in as cooperative and collaborative a way as they can.

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[186] *Supra* note 1.
[187] *Supra* note 15 at paras 112-117.

CHAPTER 6 – FUTURE STUDIES

PRE-APPOINTMENT INCOME STUDY

220. The Government brought a preliminary motion to the Commission, asking us to undertake a study of the pre-appointment income of sitting judges appointed between 2004 and 2014.[188] It argued that the data would be relevant to, and highly probative of, a central question before us, namely, whether judges' salaries are adequate to attract outstanding candidates to the judiciary.[189]

221. After hearing from the parties, we issued a Ruling on February 18, 2016, declining to order or request that study at that preliminary stage.[190] We left open the possibility for further study of the request in the context of the full inquiry.

222. The Government later renewed the request for a pre-appointment income study to be conducted during the course of the quadrennial period, and the Association and Council continued to oppose the request.[191]

223. As part of the Commission process, the Canada Revenue Agency produced data on the income of self-employed lawyers for the purposes of the self-employed lawyers' income comparator referred to in Chapter 2 of this Report.

224. The Government asked the Commission to obtain, over this quadrennial period, full pre-appointment income of self-employed lawyers to assist in the next Quadrennial Commission process.

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[188] Submissions o the Government of Canada on the Proposal for a pre-Appointment Income Study.
[189] *Ibid* at para 1. And see Government Submission, *supra* note 35 at paras 135-138, 174-176.
[190] *Supra* note 22.
[191] See e.g. Government Reply Submission, *supra* note 27 at para 55; Association and Council Reply Submission, *supra* note 51 at paras 97-98.

225. The Block Commission rejected a snapshot of appointees' pre-appointment salaries as not "particularly useful in helping to determine the adequacy of judicial salaries".[192] It concluded that such a study would not tell whether judicial salaries deter outstanding candidates who are in the higher income brackets of private practice from applying for judicial appointment.[193]

226. The Block Commission did, however, conclude that it would be helpful to study whether judicial salaries deter outstanding candidates in the higher income brackets from applying to the judiciary. Ideally, that information would be obtained through a targeted survey of individuals at the higher end of the earning scale who could be objectively identified as potential outstanding candidates for judicial appointment. The Block Commission urged the Government and the Association and Council to consult on the design and execution of such studies if sought in the future, to provide future Commissions with information that both parties agree is reliable and useful.[194]

227. At the preliminary motion stage, and in the formal submissions, both the Association and Council and the Prothonotaries resisted the recommendation for a pre-appointment income study.[195] The Association and Council argued it would be irrelevant, self-serving, and incomplete. It relied on the expert evidence of Sandra Haydon, who stated that such a study would be neither reliable nor useful to the Commission. Ms. Haydon also stated that the income of a particular individual appointee is itself highly contextual and not a fair or reasonable predictor of future income based on a substantially different occupation.[196]

228. The criteria that this Commission must consider under section 26(1.1) of the *Judges Act* include the need to attract outstanding candidates to the judiciary. While a high income may be one indication of an outstanding candidate, the Quadrennial Commission process would benefit

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[192] Supra note 14 at para 90.
[193] *Ibid.*
[194] *Ibid.*
[195] Response of the Federal Court Prothonotaries to the Proposal by the Government of Canada for a Pre-Appointment Income Study; Response of the Canadian Superior Court Judges Association and the Canadian Judicial Council to the Proposal of the Government of Canada for a pre-Appointment Income Study; Association and Council Reply Submission, *supra* note 51 at paras 97-98.
[196] Association and Council Reply Submission, *ibid* at paras 97-98.

from objective evidence, in an agreed form of study, of high-income-earning lawyers in private practice, as described at paragraph 90 of the Block Commission Report.

229. The pre-appointment income of those accepting an appointment does not tell us much about why other attractive candidates do not put their names forward and whether this is connected to a significant compensation reduction were they to accept a judicial appointment.

230. We agree with the Block Commission that a targeted survey of individuals who are at the higher end of the earning scale, and who could be objectively identified as outstanding potential candidates for judicial appointments, should be the focus of such a study. Linking that information with an analysis of whether the number of high-earning appointees is increasing or decreasing over time would be useful.

231. The Government and the Association and Council should consult on the design and execution of those types of studies to ensure that future Commissions receive useful information derived in a manner agreed upon by the parties.

232. Given the need for consultation and agreement on such an approach, we will not make a formal recommendation at this time.

QUALITY OF LIFE STUDY

233. The Government proposed that this Commission undertake a quality of life study during the quadrennial period to examine the intangible aspects of judicial life that factor into applying to the bench.[197]

234. The Government explained that understanding non-compensation based motivators for accepting a judicial appointment would assist in the Commission's work.[198]

[197] Government Submission, *supra* note 35 at para 173, 177-179.
[198] *Ibid* at paras 177-178.

235. The Association and Council responded that this Commission focuses on salary and benefits rather than quality of life. They relied on Ms. Haydon's opinion that such a study is "unheard of" in a compensation context. This type of study would address matters of personal motivation not relevant to the compensation-setting exercise.[199]

236. Lastly, the Association and Council observed that the Government's proposal lacked details.[200]

237. We do not have sufficient information before us to make any formal recommendation.

238. We do observe that the type of study identified by the Block Commission in response to the request for a pre-appointment income study could embrace some of the intangible concepts contemplated by a quality of life study.

239. Ultimately, whether that is of more use to the Government in identifying appointees as opposed to determining the adequacy of judicial compensation is a matter which will have to be left for future consideration.

[199] Association and Council Reply Submissions, *supra* note 51 at para 104.
[200] *Ibid* at para 100.

CHAPTER 7 – CONCLUSION

240. As Canadians, we can be justifiably proud of the outstanding calibre of this country's judges. The judiciary plays an important role in safeguarding the personal liberty and the rule of law, upon which so much of our way of life is founded. In conducting this inquiry, we have taken very seriously the important role that judges' compensation plays in ensuring an independent and outstanding judiciary and have applied ourselves diligently to the task of assessing the adequacy of that compensation in the context of the criteria under the *Judges Act.*

241. Our recommendations represent our considered and unanimous views of what best serves the public interest with respect to judicial compensation and benefits for this quadrennial period.

242. The high quality submissions and expert evidence presented to us by all parties contributed greatly to our efforts and were invaluable in helping us reach our conclusions. We were heartened by the degree of collaboration demonstrated by the parties in this process, even when they took opposing views on particular issues. We commend them for this and express our hope that this spirit of cooperation will continue into the future.

243. We join past Commissions in urging that great care be taken to preserve the integrity of the Quadrennial Commission process. A robust and timely response by the Government to the Quadrennial Commission process is an essential component of maintaining that integrity and ensuring the judiciary's continued confidence in the process.

Gil Rémillard
Chair

Margaret Bloodworth
Commissioner

Peter Griffin
Commissioner

CHAPTER 8 – LIST OF RECOMMENDATIONS

This Commission recommends:

1. Judges' salaries should continue to be adjusted annually on the basis of increases in the Industrial Aggregate Index, in accordance with the current *Judges Act*.

2. Effective April 1, 2016, the salary of federally-appointed puisne judges in all Canadian trial courts should be set, inclusive of statutory indexation, at $314,100

3. No salary differential should be paid to puisne appellate judges.

4. Salary differentials should continue to be paid to the Chief Justice of Canada, the judges of the Supreme Court of Canada, and the chief justices, associate chief justices, and senior judges of the trial and appellate courts.

Effective April 1, 2016, judges' salaries should be set, inclusive of statutory indexation, at the following levels:

Supreme Court of Canada:	
Chief Justice	**$403,800**
Puisne Judges	**$373,900**
Federal Court of Appeal and Provincial and Territorial Courts of Appeal:	
Chief Justices	**$344,400**
Associate Chief Justices	**$344,400**
Puisne Judges	**$314,100**
Federal Court, Tax Court, and Trial Courts:	
Chief Justices	**$344,400**
Senior Associate Chief Justices and Associate Chief Justices	**$344,400**
Senior Judges	**$344,400**
Puisne Judges	**$314,100**

5. The salaries of Federal Court prothonotaries be increased, retroactive to April 1, 2016, to 80% of Federal Court judges' salaries, or $251,300.

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

7. Prothonotaries should receive a non-taxable allowance of $3,000 annually, retroactive to April 1, 2016, to be used for the payment of expenses related to their duties.

8. Prothonotaries should be paid 95% of the reasonable full indemnity costs incurred before the Quadrennial Commission. Only if necessary should these costs be assessed under the *Federal Court Rules*. The Government should consider possible amendments to the *Judges Act* to permit these costs to be assessed in the Ontario Superior Court of Justice at Ottawa.

9. The *Judges Act* should be amended to provide that the retirement annuity of a chief justice or senior judge who has stepped down to a different court as a puisne judge be based on the salary of a chief justice and that the 2012 amendments to section 43(1) and section 43(2) be made retroactive to April 1, 2012.

10. The *Judges Act* should be amended to extend the entitlement to removal allowances as described in sections 40(1)(c) and (d) to a judge sitting in Labrador, effective April 1, 2016.

11. The necessary legislative amendments should be made to provide, effective April 1, 2016 the Chief Justice of the Court Martial Appeal Court of Canada compensation and allowances equal to those of other superior court chief justices, including an annuity based on the Chief Justice's salary in cases where the he or she has stepped down to a puisne judge position.

12. The Government should consider whether portability of provincial judicial pension benefits to the federal judicial annuity scheme could be achieved as a means of removing a possible disincentive for provincial court judges seeking appointment to superior courts, while maintaining the financial security of federally-appointed judges.

13. The Government should explore means of ensuring that the time periods set out in section 26(2) of the *Judges Act* are complied with in a manner consistent with the guidelines set out by the Supreme Court of Canada.

APPENDIX A

Department of Justice Canada | Ministère de la Justice Canada

News Release

Judicial Compensation and Benefits Commission Appointments

Ottawa, December 18, 2015 – The Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, today announced the appointments of Margaret Bloodworth, Peter Griffin, and Gil Rémillard to the Judicial Compensation and Benefits Commission.

Margaret Bloodworth of Ottawa is appointed a member as recommended by the Minister of Justice and Attorney General of Canada.

Ms. Bloodworth, a native of Winnipeg, received her LLB from the University of Ottawa and was called to the bar in 1979.

Ms. Bloodworth had a distinguished career with the federal public service that spanned more than 30 years. She held senior positions with several departments, including serving as deputy minister at Transport Canada, Defence, and Public Safety and as Associate Secretary to the Cabinet and National Security Advisor from 2006 till her retirement in 2008. Ms. Bloodworth is a member of the Order of Canada and has received many awards and honours, including the Public Service of Canada Outstanding Achievement Award and the Vanier Medal of the Institute of Public Administration of Canada. She is a Senior Fellow at the University of Ottawa's School of Public and International Affairs.

Peter Griffin of Toronto is appointed a member as recommended by the judiciary.

Mr. Griffin obtained his LLB from Queen's University's Law School in 1977 and was admitted to the bar in 1980.

Mr. Griffin is Managing Partner at Lenezner Slaght and one of the firm's founding partners. He is widely recognized as one of the top litigators in Canada, particularly in the areas of corporate commercial litigation, class actions, securities matters, insolvency, and professional liability. In some 35 years as a member of Ontario's legal community, he has appeared before all levels of court in the province and before the Supreme Court of Canada. A past president of the Advocates' Society, Mr. Griffin is also a Fellow of the American College of Trial Lawyers, where he serves as chair of the Ontario Committee. He is a frequent speaker at conferences and programs on legal issues, including the challenges of cross-border litigation.

Gil Rémillard of Montreal is appointed Chair as nominated by the other two members of the Judicial Compensation and Benefits Commission.

Mr. Remillard earned his LLL from the University of Ottawa in 1968 and a doctorate in law from the Université de Nice in 1972.

Mr. Rémillard has distinguished himself throughout his long career for his work in the academic world as well as in public life. He was a professor at Laval University for some 13 years before he turned to politics. From 1985 to 1994, he held several positions within the Quebec government, including Minister of International Relations, Minister of Public Security and Minister of Intergovernmental Affairs. As Minister of Justice, he was responsible for the implementation of the new Civil Code of Quebec. A member of the Order of Canada, Mr. Rémillard has been awarded the Médaille du Barreau du Québec and has also been invited by a number of foreign governments to assist in reforming their legal systems.

The Judicial Compensation and Benefits Commission was established under the Judges Act to examine at least every four years the adequacy of the salaries and benefits of the federally appointed judiciary. The Commission consists of three members: one is nominated by the judiciary and another by the federal Minister of Justice, and these two then nominate a Chairperson.

Additional information on the Judicial Compensation and Benefits Commission can be found at http://www.quadcom.gc.ca/.

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Contacts

- Media Relations
  Department of Justice
  613-957-4207

Date modified: 2015-12-18

Gil Rémillard

Gil Rémillard currently serves as counsel with Dentons in Montreal. With degrees in philosophy, political science and economics and a doctorate in law, Gil Rémillard has put his skills to use in teaching as well as in private law practice and politics. From 1973 to 1985, he was a professor at the Université Laval law faculty and served as counsel to both the provincial and the federal governments. From 1985 to 1994, he was a Quebec government minister under Robert Bourassa.

As Quebec Justice Minister for over five years, Gil Rémillard presided over the completion of the new *Civil Code of Québec*, which has been in effect since January 1, 1994. From 1994 to 2016, Mr. Rémillard taught at École Nationale d'Administration publique (ÉNAP) in Quebec City and was counsel with Fraser Milner Casgrain, now Dentons Canada LLP. From 2008 to 2011, he was chair of the board of Université de Sherbrooke. From 2009 to 2012, he was Secretary General of the bilateral committee for the Quebec-France agreement on mutual recognition of professional qualifications.

Mr. Rémillard serves on a number of boards of directors and chairs the International Economic Forum of the Americas. He is also a member of the board of the Institute for Canadian Citizenship (ICC). He has published a number of works, including "Le fédéralisme Canadien", volumes I and II, and has been a visiting professor at a number of universities in Canada and abroad.

Mr. Rémillard, who is dyslexic himself, encourages a variety of organizations in support of children with learning disabilities.

Margaret Bloodworth, CM, LLB

Margaret Bloodworth is a former senior federal public servant, most recently Associate Secretary to the Cabinet and National Security Advisor to the Prime Minister (2006-2008). Prior to that, she was the first Deputy Minister of Public Safety (2003-2006), Deputy Minister of Defence (2002-2003) and Deputy Minister of Transport (1997-2002).

Currently she is chair of the boards of the Council of Canadian Academies and Cornerstone Housing for Women, Vice Chair and Chair of the Nominating and Governance Committee of the Canada Foundation for Innovation and a member of the board of the Community Foundation of Ottawa where she chairs the Grants Committee. She is an honorary Senior Fellow of the Graduate School of Public and International Affairs at the University of Ottawa.

She is a member of the Order of Canada. She has received the Upper Canada Law Society Medal, the Public Service of Canada Outstanding Achievement Award, the Vanier Medal of the Institute of Public Administration of Canada, honorary degrees from the University of Winnipeg and Carleton University, an honorary diploma from the Canadian Coast Guard College and charter membership in the Common Law Honour Society of the University of Ottawa.

She is a graduate of the University of Winnipeg and the University of Ottawa and was admitted to the Ontario bar in 1979.

Peter Griffin

Peter Griffin is Managing Partner of Lenczner Slaght. His civil litigation practice focuses on class actions, commercial disputes, shareholder and oppression litigation, insolvency litigation, securities litigation, audit and accounting issues and professional liability matters.

Mr. Griffin graduated from Queen's University with an LL.B. in 1977. He was admitted to the Ontario Bar in 1980.

Mr. Griffin is recognized as one of the leading 500 lawyers in Canada in the Lexpert / American Lawyer Guide in class action litigation, corporate commercial litigation, directors' and officers' liability litigation and securities litigation. Mr. Griffin was recognized in the Lexpert Guide to the 100 Most Creative Lawyers in Canada.

Most recently Mr. Griffin was voted one of the 25 most influential lawyers in Canada for 2014 by Canadian Lawyer Magazine.

Mr. Griffin's broad experience and involvement in the cases of the day have led to his extensive participation at law schools and continuing education programmes throughout the Province.

Mr. Griffin is past President of The Advocates' Society 2012-2013. He is a Fellow of the American College of Trial Lawyers and Chair of its Ontario Committee.

APPENDIX B

Judicial Compensation and Benefits Commission

Commission d'examen de la rémunération des juges

NOTICE

The Judicial Compensation and Benefits Commission was established in 1999 to inquire every four years into the adequacy of the salaries and other amounts payable to federally-appointed judges under the *Judges Act* and into the adequacy of judges' benefits generally. In 2014, the *Act* was amended to provide that for the purposes of the inquiry the prothonotaries of the Federal Court be considered as judges. Under the provisions of the *Act*, the Commission must submit a report containing its recommendations to the Minister of Justice, who shall respond to the report within four months after receiving it.

The Commission invites parties wishing to comment on matters within the Commission's mandate to forward their written submissions, in either official language, preferably in electronic format, to: info@quadcom.gc.ca. Paper versions of submissions will also be accepted at the Commission's offices at 99 Metcalfe Street, 8th floor, Ottawa, Ontario, K1A 1E3. Parties wishing to make an oral presentation at the Commission's hearings in Ottawa should indicate so when they file their written submission.

The Commission has received notice that the Government of Canada intends to raise a preliminary issue concerning the commissioning of a study on Pre-Appointment Income and that Federal Court prothonotaries intend to raise as a preliminary issue their request for full representational funding. Accordingly, the following schedule is established:

- 19 January 2016- deadline for filing submissions on preliminary issues
- 20 January 2016 - deadline for filing notice of any extraordinary issue
- 29 January 2016 - deadline for filing responses on preliminary issues
- 8 February 2016, 2:30 pm EST - teleconference if required on preliminary issues
- 29 February 2016 - deadline for the Government, the judiciary and prothonotaries to file their main submissions
- 11 March 2016 - deadline for other parties to file their main submissions
- 29 March 2016 - deadline for filing responses to submissions
- 5 and 6 April 2016 - oral hearing in Ottawa

All submissions will be posted on the Commission's web site at www.quadcom.gc.ca.

APPENDIX C

News Release

Judicial Compensation and Benefits Commission | Commission d'examen de la rémunération des juges

Quadrennial Judicial Compensation and Benefits Commission Begins Inquiry

Ottawa, Ont. – January 25, 2016

The quadrennial Judicial Compensation and Benefits Commission, has begun its inquiry into the adequacy of the salaries and benefits paid to federally-appointed judges and to prothonotaries of the Federal Court. The Commission welcomes comments from the public. A Notice setting out filing deadlines and directions for parties wishing to send in submissions can be found on the Commission's Website at www.quadcom.gc.ca.

Quick Facts

- The inquiry is held every four years, pursuant to s. 26 of the *Judges Act*.
- The first Quadrennial Commission was established in September 1999, with subsequent Commissions in 2003, 2007 and 2011. This is the fifth Commission.
- The Commission consists of three members appointed by the Governor in Council. One member is nominated by the judiciary, and in the case of this Commission that member is Mr. Peter Griffin. The second member is nominated by the Minister of Justice and Attorney General of Canada. In this instance, that member is Ms. Margaret Bloodworth. These two members together nominated Mr. Gil Rémillard to act as the Chair of the Commission.
- In conducting its inquiry, the Commission examines the various submissions it receives keeping in mind the following factors:
    1. the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
    2. the role of financial security of the judiciary in ensuring judicial independence;
    3. the need to attract outstanding candidates to the judiciary; and
    4. any other objective criteria that the Commission considers relevant.
- Under the provisions of the *Judges Act* the Commission must submit a report containing its recommendations to the Minister of Justice, who shall respond to the report within four months of receiving it.

Contact

Louise Meagher
Executive Director
Judicial Compensation and Benefits Commission
613-992-5446
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Search for related information by keyword

Judicial Compensation and Benefits Commission Law

Date modified: 2016-01-25

APPENDIX D

Judicial Compensation and Benefits Commission

Commission d'examen de la rémunération des juges

99 Metcalfe Street
Ottawa, Ontario K1A 1E3

Chairperson/Président
Gil Rémillard

Members/Membres
Margaret Bloodworth
Peter Griffin

Executive Director/Directrice exécutive
Louise Meagher

Tel./Tél. : 613-995-5300
e-mail/courriel: info@quadcom.gc.ca

Ruling Respecting Preliminary Issues: Pre-Appointment Income Study and Representational Costs of Prothonotaries

February 18, 2016
Gil Rémillard (Chair); Margaret Bloodworth (Commissioner); Peter Griffin (Commissioner)

Pre-appointment income study: Counsel for the Attorney General of Canada has requested that the Commission undertake a study of the pre-appointment income of sitting judges appointed between the years 2004 and 2014 by the Federal Government according to a methodology to be established by the Commission in conjunction with the parties and Canada Revenue Agency. Canada Revenue Agency would be asked by the Commission to provide the requested information in accordance with that methodology. The parties accept that this would require between two and four months from initiation to complete.

The Commission received written submissions from counsel for the Attorney General, counsel for the Canadian Superior Courts Judges Association and the Canadian Judicial Council and from counsel for the Federal Court of Canada Prothonotaries.

Representational costs of Prothonotaries: Counsel for the Prothonotaries has requested that the Commission immediately recommend that the prothonotaries receive full funding for their representational costs in connection with the Commission process.

The Commission received written submissions from counsel for the Prothonotaries and counsel for the Attorney General.

The Commission convened a telephone conference call on February 8, 2016 to hear oral submissions from counsel on both requests and reserved its decision.

The Commission has carefully considered the written and oral submissions of counsel on both issues and, after due deliberation, has determined as follows:

With respect to the pre-appointment income study, the Commission is not prepared to undertake or order such a study at this time for the following reasons:

1. **At this point, the Commission has received a preliminary indication of the issues that it will have to consider. It has not yet received the detailed submissions in accordance with its established schedule or conducted the formal hearings that will enable the Commission to focus on the exact positions taken by the Attorney General, the Judiciary, the Prothonotaries or any other parties, and the arguments and evidentiary support for them. To commission such a study at this time is premature;**

2. Without the benefit of a fully developed set of submissions and a record, the benefits of such a study are not established on what is now before us; and

3. **The delay attendant upon such a process will inevitably cause the Commission to be unable to report to the Minister of Justice within the time set by the provisions of the *Judges Act.* If the Minister of Justice is to be requested to permit a delay to its report, the Commission requires a clearer justification for doing so than exists at present.**

Accordingly, the Commission declines to order or request a pre-appointment income study at this stage of its proceedings.

With respect to the representational costs for Prothonotaries, the Commission is not prepared to make such a recommendation at this time.

Counsel for the Prothonotaries has raised a number of reasons why he argues that the cost allocation applicable in the *Judges Act* is not reasonable or fair to apply to the Prothonotaries. These include:

1. the disproportionate burden of the costs that members of the group must bear in relation to judges due to their small numbers,

2. the smaller remuneration base, including the lack of an incidental allowance, from which Prothonotaries have to meet the costs and

3. the apparent lack of equity in comparison with Military Judges who are compensated for the total costs of the pay review process applicable to them.

However, in light of the provisions of section 26.3 of the *Judges Act*, the Commission is not satisfied that it is appropriate to make such a recommendation at this early stage in the Commission's process, separate from the report and recommendations that will follow its consideration of detailed written submissions and oral submissions at formal hearings.

Accordingly the Commission declines to issue a recommendation on representational costs for Prothonotaries at this stage of the proceedings.

APPENDIX E

Judicial Compensation and Benefits Commission

Commission d'examen de la rémunération des juges

99 Metcalfe Street
Ottawa, Ontario K1A 1E3

Chairperson/Président
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Members/Membres
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Ruling Respecting Preliminary Issue: Objection to Paragraphs 46-49 and Exhibit B of the Judiciary's Principal Submissions.

March 22, 2016

Gil Rémillard (Chair); Margaret Bloodworth (Commissioner); Peter Griffin (Commissioner)

The Government of Canada has requested that the Commission strike paragraphs 46-49 and Exhibit B of the Judiciary's principal submission, filed on February 29, 2016. In the alternative, it requests that the revised submission (with a redacted version of paragraphs 46-49) filed on March 2, 2016 be considered as the Judiciary's submission and that Exhibit B be marked as a confidential exhibit.

The Commission received written submissions, dated March 8, 2016 and March 11, 2016, from counsel for the Attorney General, and written submissions dated March 10, 2016 from counsel for the Canadian Superior Courts Judges Association and the Canadian Judicial Council. The Commission has carefully considered the written submissions.

The paragraphs and Exhibit in question reflect the circumstances surrounding the proposed nominee of the Government to this Commission and the objection to that nomination by the Judiciary. Pending the decision on the Government's objection, the Judiciary's revised submissions formed part of the public record and Exhibit B was treated as confidential.

The Government objects to the paragraphs and Exhibit on three grounds:

1. relevance to the Commission's inquiry;

2. prejudicial impact on the proposed nominee's reputation; and

3. adverse impact on candour and trust between the parties.

The Commission considers it important to note at the outset that the Judiciary has been explicit in its endorsement of the undoubted integrity of the individual involved, something which this Commission fully accepts and likewise endorses. In the Commission's view there is no question as to the integrity of the proposed nominee and nothing surrounding the events referred to in the paragraphs and Exhibit suggests otherwise.

With respect to the grounds for objection raised by the Government, the Commission finds as follows:

1. It is premature for the Commission to conclude that the question of process surrounding the appointment of nominees is irrelevant to the questions it must decide;

2. There is no question as to the integrity of the individual involved. Prior involvement by an individual on behalf of a party before a commission or tribunal is the type of activity that may dictate that individual's recusal from a decision-making role. In most circumstances, as in this one, there is no suggestion of actual bias. It is the appearance of impartiality which is at issue; and

3. The nomination of a member to the Commission, whether it be by the Government or the Judiciary, is part of the process of a public proceeding. The Commission is not convinced that there is any confidence or privilege which would attach to the documents in question.

The courts have recognized limited circumstance in which documents filed in a public proceeding would be sealed or struck in the manner requested by counsel for the Attorney General. In the view of the Commission, none of those circumstances apply here.

Accordingly, the request of the Attorney General is denied. The original version of paragraphs 46-49 of the Judiciary's principal submission is reinstated and Exhibit B will form part of the public record.

Given its findings on ground 2 above, the Commission does not consider it necessary to accede to the Government's request that the proposed nominee be invited to comment.

APPENDIX F

Judicial Compensation and Benefits Commission

Commission d'examen de la rémunération des juges

NOTICE

March 31, 2016

Due to unforeseen circumstances resulting in its counsel being unable to appear at the hearings scheduled for April 5 and 6, 2016, the Government has requested an adjournment.

Having considered the Government's request, and on consent of the parties scheduled to appear, the Commission has adjourned the hearings to April 28 and 29, 2016.

APPENDIX G

Judicial Compensation and Benefits Commission
Hearing Participants

The Judicial Compensation and Benefits Commission

- Gil Rémillard
  Chair of the Commission

- Margaret Bloodworth
  Commissioner

- Peter Griffin
  Commissioner

- Louise Meagher
  Executive Director

Representing the Government of Canada

- Anne Turley
  Senior General Counsel
  Department of Justice
  Litigation Branch
  (lead counsel for preparation of written submissions
  and in preliminary matters)

- Christopher Rupar
  Senior General Counsel
  Office of the Assistant Deputy Attorney General
  Justice Canada

- Kirk Shannon
  Counsel
  Civil Litigation
  Justice Canada

- Stephen Zaluski
  General Counsel and Director
  Judicial Affairs, Courts and Tribunal Policy
  Justice Canada
  Observer

- Adair Crosby
  Senior Counsel and Deputy Director
  Judicial Affairs, Courts and Tribunal Policy
  Justice Canada
  Observer

Representing the Canadian Superior Court Judges Association and the Canadian Judicial Council

- Pierre Bienvenu, Ad E
  Senior Partner
  Norton Rose Fulbright Canada LLP

- Azim Hussain
  Partner
  Norton Rose Fulbright Canada LLP

- Jamie Macdonald
  Associate
  Norton Rose Fulbright Canada LLP

- The Hon. Mr. Justice J.C. Marc Richard
  President, Canadian Superior Court Judges Association
  Observer

- The Hon. Madam Justice Susan Himel
  Vice-President, Canadian Superior Court Judges Association
  Observer

- Frank McArdle
  Executive Director, Canadian Superior Court Judges Association
  Observer

- The Hon. Madam Justice Julie Dutil
  Secretary, Canadian Superior Court Judges Association
  Observer

- The Hon. Madam Justice Lynne C. Leitch
  Past president of the Canadian Superior Court Judges Association and
  Chair of the Association's Compensation Committee
  Observer

- The Hon. Mr. Justice T. Mark McEwan
  Past President, Canadian Superior Court Judges Association
  Observer

- The Hon. Mr. Justice David H. Jenkins
  Chair of the Judicial Salaries and Benefits Committee of the Canadian Judicial Council
  Observer

Representing the Federal Court Prothonotaries

- Andrew K. Lokan
  Counsel
  Paliare Roland Rosenberg Rothstein LLP

- Roger Lafrenière
  Federal Court Prothonotary
  Observer

Representing the Canadian Bar Association

- Janet M. Fuhrer
  President
  Canadian Bar Association

- Hugh Wright
  Vice-Chair Judicial Compensation and Benefits Commission
  Canadian Bar Association

- Sara MacKenzie
  Lawyer, Legislation and Law Reform
  Canadian Bar Association

Representing Canadian Appellate Judges

- The Hon. Joseph Nuss Q.C./c.r., Ad. E.
  Senior Counsel
  Woods LLP

- The Hon. Madam Justice Marie St-Pierre
  Québec Court of Appeal
  Observer

- The Hon. Madam Justice Marina Paperny
  Court of Appeal of Alberta
  Observer

Representing the Federal Court

- The Hon. Paul Crampton
  Chief Justice of the Federal Court

APPENDIX H

LIST OF DOCUMENTS RECEIVED

From the Government of Canada represented by the Department of Justice of Canada

- Pre-submission Letter on Issues to be Raised
- Submission on the Proposal for a Pre-appointment Study
- Main Submission
- Government's Objection to Paragraphs 46 to 49 and Exhibit B of the Judiciary's Principal Submission
- Government's Reply on the Objection to Paragraphs 46 to 49 and Exhibit B of the Judiciary's Principal Submission
- Book of Documents (Volumes 1 and 2)
- Supplementary Book of Documents
- Joint Book of Documents (Volumes 1 and 2)
- Response to the Request for Full Funding by Federal Court Prothonotaries
- Reply Submissions
- 2016 Salary Adjustment issued by FJA on March 31, 2016
- Post hearing letter dated May 2, 2016
- Letter from Newell and Pannu dated May 26, 2016

From the Canadian Superior Courts Judges Association and the Canadian Judicial Council

- Pre-submission Letter on Issues to be Raised
- Main Submission
- Book of Documents
- Response to the proposal by the Government of Canada for a Pre-appointment Income Study
- Submission in response to the Government of Canada's Motion dated March 8, 2016 (Objection to Paragraphs 46 to 49 and Exhibit B)
- Reply Submission
- Reply Book of Exhibits and Documents
- Post hearing letter dated May 6, 2016
- Letter from Newell and Pannu dated June 15, 2016

From the Federal Court Prothonotaries

- Pre-submission Letter on Issues to be Raised
- Submission on the Funding for Representational Costs
- Main Submission
- Book of Documents
- Response to the Proposal by the Government of Canada for a Pre-appointment Income Study
- Reply Submission
- Submission from Chief Justice Paul Crampton regarding Supernumerary Status for the Federal Court Prothonotaries

Others

- Submission from the Honorable J.E. (Ted) Richard
- Response to the Government Submission from the Honorable J.E. (Ted) Richard
- Submission on behalf of Chief Justice B. Richard Bell
- Submission from Justice Robert P. Stack
- Submission from the Canadian Bar Association
- Submission from the Association of Ontario Superior Court Judges
- Submission on behalf of Canadian Appellate Judges
- Submission from Justice Gordon L. Campbell
- Submission from the Hon. Leonard S. Mandamin
- Submission from the Superior Courts Chief Justices Trial Forum
- Submission from Chief Justice Paul Crampton