

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

JOINT SUBMISSION

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

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OVERVIEW

1. Judicial independence is a fundamental principle of our democracy and legal tradition.
2. Judicial independence and judicial compensation are inextricably linked. As the Supreme Court of Canada confirmed, financial security, both in its individual and institutional dimensions, is, with security of tenure and administrative independence, one of the three core characteristics of judicial independence.
3. The Constitution of Canada requires the existence of a body that is interposed between the judiciary and the other branches of the State, whose constitutional function is to depoliticize the process of determining changes in judicial compensation. For Canada's 1206 federally-appointed judges and seven Federal Court prothonotaries, the Judicial Compensation and Benefits Commission (the "**Commission**") is that body.
4. This submission to the Commission is made on behalf of the Canadian Superior Courts Judges Association (the "**Association**") and the Canadian Judicial Council (the "**Council**"). The recommendations sought in this submission seek to balance the exceptional, yet temporary economic circumstances created by the COVID-19 pandemic with the constitutional obligation to provide adequate judicial compensation and the statutory imperative to preserve Canada's ability to attract outstanding candidates to the Bench and to ensure that the judiciary is able to continue to serve Canadians in the new circumstances brought about by the pandemic.
5. The Association and Council seek a recommendation that the judicial salary be increased by 2.3% in each of the last two years of the current quadrennial cycle, exclusive of statutory indexing based on the IAI. In recognition of the current financial position of the federal Government, this proposed increase, effective only in the last two years of the current quadrennial cycle, is less than half of the increase in the judicial salary that would otherwise be required based on the relevant comparators.
6. Separately, the Association and Council seek a recommendation that the incidental and representational allowances provided for in the *Judges Act* be increased so as to bring them in line with the needs of individual judges as well as inflation. A minor amendment to the life insurance program available to retired chief justices is also proposed so as to align it with the approach set out in s. 43(1) of the *Judges Act*. Finally, the Association and Council seek a recommendation providing for full reimbursement of the judiciary's

participation costs in cases where, outside of the quadrennial inquiry, a matter is referred for inquiry by the Commission under s. 26(4) of the *Judges Act*.

7. Consistent with Recommendation 11 of the Levitt Commission, later endorsed by the Rémillard Commission, the Association and Council are embarking upon the Commission's current inquiry determined to promote, and to contribute in establishing, a collaborative, non-adversarial relationship with the Government in relation to the Commission process.

I. INTRODUCTION

8. The submission of the Association and Council is organized as follows. In the first section of this submission, the respective objects of the Association and Council are described, notably in connection with the process for the determination of judicial compensation and benefits. In the Background section, which is complemented by an Appendix, a brief history of the Commission is recounted. The following section, entitled "The Commission's Mandate", is self-explanatory. In the Issues section, the Association and Council briefly address process and set out their position on substantive issues.
9. The Association and Council's submission includes two expert reports. The first, attached as Exhibit A to these submissions, is from Professor Doug Hyatt, the judiciary's economic expert. His report discusses the Government's assessment of the state of the Canadian economy. It also sets out the impact of inflation on the low-income cut-off traditionally applied to data on self-employed lawyer incomes provided to the parties by the Canada Revenue Agency ("**CRA**") and the representational and incidental allowances provided for in the *Judges Act*. The second report, attached as Exhibit B to these submissions, is from Mr. Stéphane Leblanc, Tax Partner at EY Canada and Mr. André Pickler, Tax Manager at EY Canada. This report discusses the usage of professional corporations by members of private practice and its impact on the CRA data on self-employed lawyer incomes.

II. THE ASSOCIATION AND COUNCIL

10. The Association is successor to the Canadian Judges Conference, which was founded in 1979 and incorporated in 1986. Its objects include:

- (i) the advancement and maintenance of the judiciary as a separate and independent branch of government;
 - (ii) liaison with the Council to improve the administration of justice and to complement its functions through conferences and various educational programs;
 - (iii) taking such actions and making such representations as may be appropriate in order to assure that the salaries and other benefits guaranteed by s. 100 of the *Constitution Act, 1867*,¹ and provided by the *Judges Act*² are maintained at levels and in a manner which is fair and reasonable and which reflect the importance of a competent and dedicated judiciary;
 - (iv) seeking to achieve a better public understanding of the role of the judiciary in the administration of justice;
 - (v) monitoring and, where appropriate, seeking to enhance the level of support services made available to the judiciary in cooperation with the Council; and
 - (vi) addressing the needs and concerns of supernumerary and retired judges.
11. As of the end of 2020, 1,030 of Canada's federally appointed judges were members of the Association.
12. In furtherance of the Association's objects that relate to judicial salaries and other benefits, a Compensation Committee was established to study and make recommendations to the Association's Executive Committee and Board of Directors in respect of issues regarding judicial compensation.
13. The Council was established by Parliament in 1971. It consists of the Chief Justice of Canada and the Chief Justices and Associate Chief Justices of the provincial and territorial superior courts, the Federal Court of Appeal, the Federal Court, the Tax Court of Canada and the Court Martial Appeal Court of Canada.

¹ Reproduced in the Joint Book of Documents ("JBD") prepared jointly with the Government [JBD at tab 1].

² *Judges Act*, RSC 1985, c J-1, as amended [JBD at tab 3].

14. The objects of the Council are to promote and improve efficiency, uniformity and quality of judicial service in superior courts.³ As part of its mandate, the Council has established a Judicial Salaries and Benefits Committee.
15. The Council and the Association have made joint submissions, written and oral, to each of the five Triennial Commissions (1982-1996) and to the five Quadrennial Judicial Compensation and Benefits Commissions (the “**Drouin Commission**”, the “**McLennan Commission**”, the “**Block Commission**”, the “**Levitt Commission**”, and the “**Rémillard Commission**”). The Drouin Commission issued its report (the “**Drouin Report**”) on May 31, 2000. The McLennan Commission issued its report (the “**McLennan Report**”) on May 31, 2004. The Block Commission issued its report (the “**Block Report**”) on May 30, 2008. The Levitt Commission issued its report (the “**Levitt Report**”) on May 15, 2012. The Rémillard Commission issued its report (the “**Rémillard Report**”) on June 30, 2016.
16. The Association and Council have worked closely together in preparing this submission on behalf of federally appointed judges. The recommendations sought from this Commission by the federal judiciary have been approved by the leadership of both the Association and Council.

III. BACKGROUND

A. Judicial Independence and Judicial Compensation

17. Judicial independence is a fundamental principle of our democracy and legal tradition. This principle, whose historical origins can be traced back to the *Act of Settlement, 1701*,⁴ is incorporated in the Constitution of Canada through the preamble and the judicature sections of the *Constitution Act, 1867* and s. 11(d) of the *Canadian Charter of Rights and Freedoms*.⁵
18. Judicial independence and judicial compensation as a means to ensure financial security are inextricably bound to each other. In *Valente v The Queen*,⁶ *Reference Re Provincial*

³ The objects of the Council are set out in s. 60 of the *Judges Act* [JBD at tab 3].

⁴ *Act of Settlement, 1701*, (U.K.), 12-13. Will. III, c. 2.

⁵ For ease of reference, these provisions of the Constitution of Canada are reproduced in the JBD at tabs 1 and 2.

⁶ *Valente v The Queen*, [1985] 2 SCR 673 [*Valente*] [Book of Exhibits and Documents of the Association and Council (“**BED**”) at tab 2].

Court Judges (“**PEI Reference**”),⁷ *Bodner v Alberta* (“**Bodner**”),⁸ and more recently in *Nova Scotia (Attorney General) v Judges of the Provincial Court and Family Court of Nova Scotia*⁹ and *British Columbia (Attorney General) v Provincial Court Judges’ Association of British Columbia*,¹⁰ the Supreme Court of Canada confirmed that financial security, both in its individual and institutional dimensions, is, with security of tenure and administrative independence, one of the three core characteristics of judicial independence.¹¹

19. It is important to keep in mind that financial security through adequate judicial compensation ultimately benefits the public, as emphasized by Chief Justice Lamer in the *PEI Reference*:

I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public.¹²

20. Under s. 100 of the *Constitution Act, 1867*, the Parliament of Canada has the duty to fix the compensation of federally appointed judges. Section 100 provides as follows:

The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

21. The Triennial Commission chaired by David W. Scott, Q.C. (the “**Scott Commission**”) observed in its 1996 report that judges are in a unique position in that their remuneration is the subject of an obligation imposed on Parliament by the Constitution. The Scott Commission explained the value of this responsibility:

Western democracies rooted in English constitutional tradition have been at pains to ensure that judicial independence, which ensures

⁷ *Reference Re Provincial Court Judges*, [1997] 3 SCR 3 [*PEI Reference*] [JBD at tab 4].

⁸ *Bodner v Alberta*, 2005 SCC 44 [*Bodner*] [JBD at tab 6].

⁹ *Nova Scotia (Attorney General) v Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21 [*NS Provincial Judges*] [JBD at tab 8].

¹⁰ *British Columbia (Attorney General) v Provincial Court Judges’ Association of British Columbia*, 2020 SCC 20 [*BC Provincial Judges*] [JBD at tab 7].

¹¹ *Valente*, *supra* at 704 [BED at tab 2]; *PEI Reference*, *supra* at paras. 115-122 [JBD at tab 4]; *Bodner*, *supra* at paras. 7-8 [JBD at tab 6]; *BC Provincial Judges*, *supra* at para. 31 [JBD at tab 7]; *NS Provincial Judges*, *supra* at para. 29 [JBD at tab 8].

¹² *PEI Reference*, *supra* at para. 193 [JBD at tab 4].

accountability on the part of the executive branch of Government, is uncontaminated by uncertainty (and thus preoccupation) on the part of the judges with their economic security. Under our Constitution the obligation is upon Parliament to “fix and provide” the salaries and benefits of judges. It is implicit in this constitutional imperative that the process be undertaken in an environment in which judicial independence is enhanced and the consequences of dependency eliminated.¹³

22. The process for determining judicial compensation, which is now provided in the *Judges Act*, has changed over time. The Association and Council have prepared for the Commission’s information a summary of the history of this process in Appendix A.

B. The Establishment of the Current Commission

23. Under s. 26 of the *Judges Act*, as amended, this Commission was required to commence its inquiry on June 1, 2020. In April 2020, the parties advised the Commission of their intention jointly to request a postponement of the start date of the inquiry in light of the uncertainty prevailing at the time by reason of the COVID-19 pandemic. On June 1, 2020, the parties jointly requested a postponement of 6 months, to December 1, 2020. The Commission granted this request on June 10, 2020.

IV. THE COMMISSION’S MANDATE

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

Commission

26(1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges’ benefits generally.

Factors to be considered

(1.1) In conducting its inquiry, the Commission shall consider

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

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

¹³ Scott Report (1996) at 6 [BED at tab 24].

- (c) the need to attract outstanding candidates to the judiciary; and
- (d) any other objective criteria that the Commission considers relevant.

25. The Commission's inquiry concerns the salary and benefits available to federally appointed judges. These judges sit on the superior courts and courts of appeal of the provinces and territories, the Federal Courts, the Court Martial Appeal Court of Canada, the Tax Court of Canada, and the Supreme Court of Canada.
26. Section 96 of the *Constitution Act, 1867* authorizes the Governor General to appoint the judges of the superior courts of each province and territory. These are courts of inherent and general jurisdiction. They have jurisdiction over any matter that is not otherwise assigned to a different court or tribunal. The superior courts deal with a wide range of subject-matters, from constitutional, administrative, civil, family, and commercial disputes to criminal prosecutions and bankruptcy and insolvency cases. Each province and territory also has a court of appeal to consider appeals from the decisions of the superior courts (and other first-instance courts and tribunals) of each province and territory.
27. Section 101 of the *Constitution Act, 1867* confers on the federal Parliament the power to establish "any additional courts for the better administration of the law of Canada". A court established under this provision was the Exchequer Court of Canada, which was replaced by the Federal Court. The jurisdiction of the Federal Court is set out in the *Federal Courts Act*. That Act also sets out the jurisdiction of the Federal Court of Appeal.
28. The Court Martial Appeal Court of Canada was created pursuant to the *National Defence Act* in 1959. Its main function is to hear appeals from courts martial, which are military trial courts. The judges of the Court Martial Appeal Court are cross-appointed from the Federal Court of Appeal, the Federal Court, and the superior courts of the provinces and territories (including courts of appeal).
29. The Tax Court of Canada has exclusive original jurisdiction to hear and determine appeals and references to the Court on matters arising from federal legislation set out in the *Tax Court of Canada Act*.
30. Section 101 of the *Constitution Act, 1867* confers on the federal Parliament the authority to establish a "General Court of Appeal for Canada". Pursuant to this authority, the Supreme Court of Canada was created in 1875. The Supreme Court of Canada hears

appeals from the decisions of the highest courts of final resort of the provinces and territories, as well as from the Federal Court of Appeal and the Court Martial Appeal Court of Canada.

31. These are the federally appointed members of the judiciary whose salary and benefits are the subject of this Commission's inquiry.
32. The *Judges Act* does not equate "adequacy" of judicial salaries and benefits with the minimum necessary to guarantee the financial security of judges. Rather, the Commission must inquire into the adequacy of salaries and benefits with the dual purpose of ensuring public confidence in the independence of the judiciary and attracting outstanding candidates to the Bench.
33. The Commission must also bear in mind that the judicial function is truly unique and that acceptance of a judicial appointment undeniably involves "a certain loss of freedom". As Justice Gonthier explained in *Therrien (Re)*, on behalf of a unanimous Court:

3. The Role of the Judge: "A Place Apart"

108 The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies: *Beauregard, supra*, at p. 70, and *Reference re Remuneration of Judges of the Provincial Court, supra*, at para. 123. Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.

109 If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them (Justice Jean Beetz, Introduction of the first speaker at the conference marking the 10th anniversary of the Canadian Institute for the Administration of Justice, observations collected in *Mélanges Jean Beetz* (1995), at pp. 70-71).

110 Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains:

Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.

(Canadian Judicial Council, *Ethical Principles for Judges* (1998), p. 14)

111 The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens. This is eloquently expressed by Professor Y.-M. Morissette:

[TRANSLATION] [T]he vulnerability of judges is clearly greater than that of the mass of humanity or of “elites” in general: it is rather as if his or her function, which is to judge others, imposed a requirement that he or she remain beyond the judgment of others.

(“Figure actuelle du juge dans la cité” (1999), 30 R.D.U.S. 1, at pp. 11-12)

In *The Canadian Legal System* (1977), Professor G. Gall goes even further, at p. 167:

The dictates of tradition require the greatest restraint, the greatest propriety and the greatest decorum from the members of our judiciary. We expect our judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society which must fulfil this standard of public expectation and, at the same time, accept numerous constraints. At any rate, there is no question that a certain loss of freedom accompanies the acceptance of an appointment to the judiciary.¹⁴

¹⁴ *Therrien (Re)*, 2001 SCC 35 at paras. 108-111 [emphasis added] [BED at tab 1].

V. ISSUES

34. The Association and Council set out below the issues that they submit for this Commission's consideration. The recommendations sought by the judiciary are provided at the end of the relevant discussion. The Association and Council begin with a word on process, as to which the Commission is entrusted with an important role.

A. Process

35. The Quadrennial Commission is the guardian of its own process. In 2008, the Block Commission recognized that the Commission has the authority and duty to address process issues as they emerge:

37. The parties nevertheless require access to a forum where concerns related to process can legitimately be raised. It is our view that Quadrennial Commissions, by virtue of their independence and objectivity, are well-placed to serve as that forum and to offer constructive comments on process issues as they arise. While the structure and mandate of the Commission are outlined in statute, any question of process that affects the independence, objectivity or effectiveness of the Commission is properly within its mandate. It is entirely appropriate and arguably imperative that the Commission serve as guardian of the Quadrennial Commission process and actively safeguard these Constitutional requirements.¹⁵

36. In 2012, the Levitt Commission addressed a number of procedural issues that it believed "go to the very heart of the effectiveness of the mechanisms contemplated by the Supreme Court of Canada" in *Bodner* and the *PEI Reference*.¹⁶ The Levitt Commission rejected the Government's position that it did not have any jurisdiction to deal with process issues, finding that each Quadrennial Commission has an important role to play in overseeing the evolution of the process and "actively safeguarding the constitutional requirements."¹⁷
37. The Levitt Commission, in light of "growing concern" that the Commission process was losing credibility with the judiciary, went on to make four recommendations that it hoped would help strengthen the process.¹⁸ In particular, the Levitt Commission recommended that when consensus has emerged around a particular issue during a previous

¹⁵ Block Report (2008) at para. 37 [JBD at tab 11].

¹⁶ Levitt Report (2012) at para. 85 [JBD at tab 12].

¹⁷ Levitt Report (2012) at para. 88 [JBD at tab 12].

¹⁸ Levitt Report (2012) at para. 92 [JBD at tab 12]. See also Block Report (2012) at para. 201 [JBD at tab 11].

Commission inquiry, that, in the absence of demonstrated change, the Commission should take this consensus into account and it should be reflected in the parties' submissions.¹⁹ This view has also been expressed by the Block and Rémillard Commissions.²⁰

38. Most recently, the Rémillard Commission reiterated the need for the parties to “pursue as collaborative and cooperative a process – and reaction to the recommendations – as possible.”²¹ It joined past Commissions “in urging that great care be taken to preserve the integrity of the Quadrennial Commission process.”²²

B. Substantive Issues

39. As substantive issues to be addressed by the Commission, the Association and Council raise the issues of judicial salaries, the incidental allowance, the representational allowance, a distinct modality of the life insurance program provided for retired chief justices, and the judiciary's entitlement to reimbursement of the costs of participating in a Minister's referral to the Commission under s. 26(4) of the *Judges Act*.

1. Judicial Salaries

40. For the reasons elaborated below, the Association and Council ask that the Commission recommend an increase of 2.3% on each of April 1, 2022 and April 1, 2023, exclusive of statutory indexing based on the IAI. This request balances the exceptional, yet temporary economic circumstances created by the COVID-19 pandemic with the constitutional obligation to provide adequate judicial compensation and the statutory imperative to preserve Canada's ability to attract outstanding candidates to the judiciary.

a) The *Judges Act* criteria

41. In inquiring about the adequacy of judicial salaries, the Commission must consider the four criteria set out in s. 26(1.1)(a) to (d) of the *Judges Act*. Each of those criteria is addressed below.

¹⁹ Levitt Report (2012) at para. 111 [JBD at tab 12].

²⁰ Block Report (2008) at paras. 21 and 201 [JBD at tab 11]; Rémillard Report (2016) at para. 26 [JBD at tab 13].

²¹ Rémillard Report (2016) at para. 218 [JBD at tab 13] citing Levitt Report (2012) at paras. 112-117 [JBD at tab 12].

²² Rémillard Report (2016) at para. 243 [JBD at tab 13].

i) *The prevailing economic conditions in Canada and the financial position of the federal Government*

42. The first statutory criterion to be considered pursuant to s. 26(1.1)(a) of the *Judges Act* has two dimensions, “the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government”.
43. The judiciary is cognizant of this statutory criterion and has shown itself sensitive, in the past, to economic and fiscal constraints that appeared relevant to the Government’s consideration of the Commission’s salary recommendations. This is exemplified by the Association’s reaction to the Government’s response to the Block Report.²³
44. On February 11, 2009, the Government invoked the economic crisis that began in late 2008 (many months after the issuance of the Block Report) to justify its refusal to implement, at that time, the increases to the judicial salary that had been recommended by the Block Commission. On that same day, the Association issued a press release stating that the federally appointed judiciary recognized that the Canadian economy was facing unprecedented challenges that called for various temporary measures, although it emphasized that the applicable constitutional principles would require that the Block Commission’s recommendations be reconsidered once the economic situation improved.
45. The Canadian economy once again finds itself facing historic circumstances associated with the economic impact of the COVID-19 pandemic. In sharp contrast with the global financial crisis of 2008, however, or with the structural deficits of the 1990s, the near-term deficits incurred by the Government in order to fight the pandemic are due to an unusual exogenous shock, the pandemic, and will be eliminated when the pandemic has dissipated.
46. As part of the preparations for this Commission, the Department of Finance provided a letter to the Department of Justice dated December 9, 2020 setting out the Government’s most recent assessment of the state of the Canadian economy and the Government’s current and future financial position.²⁴ The assessment was largely drawn

²³ See Appendix A, para. 52.

²⁴ Letter from Nick Leswick, Assistant Deputy Minister, Economic and Fiscal Policy Branch, Department of Finance Canada, dated December 9, 2020 [JBD at tab 24].

from the Government's latest *Fall Economic Statement* ("**FES**"), issued on November 30, 2020.²⁵

47. The Department of Finance provided the following assessments:
- "Real gross domestic product (GDP) declined in Canada by over 15 per cent between February and April 2020."
 - Recovery since March 2020 has varied greatly by sector and industry. Some have recovered, benefitting from pent-up demand, while others have plateaued beneath pre-pandemic levels. Those that continue to lag are those "still highly affected by public health restrictions and weaker demand due to COVID-19 related concerns and behavioural changes." These include food services and accommodation, arts and entertainment, tourism and transit.
 - "Unemployment is improving after the severe decline in March and April of 2020. [...] Unemployment rates are expected to remain close to 10 per cent on average in 2020 and to decline to 8.1 per cent in 2021".
 - "[T]he Government is forecasting a budgetary deficit of \$381.6 billion in 2020-21 due to the response to the ongoing COVID-19 pandemic and will progressively improve to reach a deficit of \$24.9 billion by 2025-26."
48. While the letter from the Department of Finance does not include the Government's projections for growth in real Gross Domestic Product, the broadest measure of economic activity, it refers to the FES where the Government's GDP projections can be found. These are based on the average, or "Consensus" forecasts of 13 financial sector and academic organizations. Over the period 2021-2025, the Consensus GDP forecasts predict an average growth in GDP of 2.9%, based on the following annual projections:²⁶

²⁵ Department of Finance Canada, *Fall Economic Statement 2020*, November 30, 2020 [Fall Economic Statement] [JBD at tab 25].

²⁶ Report of Prof. Doug Hyatt at 2 [Appendix A] citing *Fall Economic Statement* at 120 [JBD at tab 25].

<u>Year</u>	<u>Consensus/Government</u>
2021	4.8%
2022	3.2%
2023	2.3%
2024	2.1%
2025	1.9%

49. In the FES, the Government characterized the “temporary” fiscal deficits that will be incurred fighting the pandemic as being distinct from both structural deficits or recessions that reflect weakness in the economy:

The government will have Canadians’ backs through this crisis, doing whatever it takes. But this pandemic will not last forever and promising vaccine candidates are a bright light at the end of the tunnel. That means that the government’s fiscally expansive approach to fighting the COVID-19 pandemic need not and will not be infinite. It is limited and temporary. Canadians understand that the crisis demands targeted and time-limited support to keep people and business afloat.

While this extraordinary spending will cause significant deficits in the short term, on par with the scale of effort required to deal with this once-in-a-century kind of crisis, such deficits are distinct from the structural deficits of the 1990s. This is time-limited spending to prevent households from going broke and businesses from laying off workers and permanently shutting their doors. This time-limited spending is essential to ensure that once COVID-19 is under control the economy is able to quickly recover to pre-pandemic levels. The COVID-19 recession is unique in the sense that its origin cannot be traced to any fundamental weakness in the economy. It is the result of an entirely exogenous shock that has hurt Canadians and Canadian businesses through no fault of their own. The government understands that it must step in to support people and sustain that support until the pandemic is over in order to avoid even worse economic outcomes.²⁷

50. The economic expert for the judiciary, Professor Doug Hyatt, notes that the distinction drawn in the FES is important, as “[t]he near-term deficits are due to an unusual exogenous shock (the pandemic) and will be eliminated when the pandemic has dissipated.”²⁸ He continues:

The exogenous fiscal shock brought about by the pandemic should, therefore, not be treated in the same way as shocks that create permanent irreversible structural damage to the economy. The costs of responding to a “once-in-a-century” shock should properly be addressed

²⁷ Fall Economic Statement at 97 [JBD at tab 25] [emphasis added].

²⁸ Report of Prof. Doug Hyatt at 3 [Appendix A].

by amortizing the costs of the shock over time, and not by offsetting reductions to otherwise normal Government expenditures (including normal growth in Judicial salaries) immediately following the end of the pandemic to pay the costs. Such actions would be self-defeating to the goal of future economic growth.²⁹

51. As mentioned above and as noted by Professor Hyatt, the Government projects significant GDP growth throughout the rest of the Commission's term. The most recent projections by the University of Toronto's Rotman School of Management Policy and Economic Analysis Program, originating from a highly respected, independent economic forecasting group, are even stronger, with average growth in real GDP of 3.2% from 2021 to 2025.³⁰
52. In light of the constitutional role of the judiciary as an independent branch of government and the framework applicable to the fixing of judicial compensation, it would be wrong in principle to consider the expenditure on judicial salaries as being simply one of many competing priorities on the public purse, as the Government attempted to cast the issue before the Block Commission.
53. The Block Commission rejected such a characterization and expressed its agreement with the submission made on behalf of the Canadian Bar Association to the effect that judicial independence is not a mere government priority, competing with other government priorities, but rather a constitutional imperative. Were the Commission to consider judicial salaries on the same footing with other government priorities, it would be placed in a highly politicized process. As the Block Commission concluded:

57. We agree with the views expressed by the Canadian Bar Association. The Government's contention that the Commission must consider the economic and social priorities of the Government's mandate in recommending judicial compensation would add a constitutionally questionable political dimension to the inquiry, one that would not be acceptable to the Supreme Court, which has warned that commissions must make their recommendations on the basis of "objective criteria, not political expediencies". [...]

²⁹ *Ibid.*

³⁰ The Policy and Economic Analysis Program at the Rotman School of Management, University of Toronto, predicts 6.0% GDP growth in 2021, 3.8% in 2022, and 2.4% in 2023. The Government's own forecasts in the Fall Economic Statement predict 4.8% GDP growth in 2021, 3.2% in 2022, and 2.3% in 2023. Report of Prof. Doug Hyatt at 2 [Appendix A].

58. With regard to the Government's contention that any increases in judicial compensation must be reasonable and justifiable in light of the expenditure priority that the Government has accorded to attracting and retaining professionals of similarly high qualities and capacity within the federal public sector, we find no such requirement in the statutory criteria that the Commission must consider. In fact, were the Commission required to justify compensation increases in this way, it would make the Commission accountable to the Government and allow the Government to set the standard against which increases must be measured. This would be an infringement on the Commission's independence. Since the maintenance of the financial security of the judiciary requires that judicial salaries be modified only following recourse to an independent commission, any measure that would have the effect of threatening or diminishing the Commission's independence would conflict with this constitutional requirement.³¹

54. Prevailing economic conditions and the financial position of the Government are but two of the elements that the Commission must consider. As part of its inquiry, the Commission must also consider, pursuant to s. 26(1.1) of the *Judges Act*, the role of financial security of the judiciary in ensuring judicial independence and the need to attract outstanding candidates to the judiciary. To these we now turn.

ii) The role of financial security in ensuring judicial independence

55. The second criterion to be considered by the Commission is "the role of financial security of the judiciary in ensuring judicial independence". In relation to this factor, the Drouin Commission stated:

We strongly affirm the importance of an independent judiciary, and we recognize the role that financial security plays as a fundamental component of independence as set out in the second enumerated factor under subsection 26(1.1).³²

56. In the *PEI Reference* case, Chief Justice Lamer sought to demonstrate the link between financial security for judges and the concept of the separation of powers. He said:

What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. [...]

[...]

³¹ Block Report (2012) at paras. 57-58 [JBD at tab 11].

³² Drouin Report (2000) at 8 [JBD at tab 9].

The depoliticized relationships I have been describing create difficult problems when it comes to judicial remuneration. On the one hand, remuneration from the public purse is an inherently political concern, in the sense that it implicates general public policy. [...]

On the other hand, the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. The three core characteristics of judicial independence – security of tenure, financial security, and administrative independence – are a reflection of that fundamental distinction, because they provide a range of protections to members of the judiciary to which civil servants are not constitutionally entitled.³³

57. The role and responsibilities of judges are *sui generis*, as the Government acknowledged in its submissions to the Drouin Commission.³⁴ Indeed, and as noted by Justice Gonthier for a unanimous Court in *Therrien (Re)*, cited above, judges occupy a unique position in our society and that uniqueness in all of its manifestations must be taken into account by the Commission. Those manifestations include the following:
- (i) Federally appointed judges are the only persons in Canadian society whose compensation, by constitutional requirement, must be set by Parliament. Once a judge accepts a judicial appointment, he or she becomes dependent on Parliament in respect of salaries and benefits.
 - (ii) Judges are prohibited from negotiating any part of their compensation arrangement with the party who pays their salaries, a restriction that applies to no other person or class of persons in Canada.
 - (iii) Judges are prohibited by the *Judges Act*³⁵ - with good reason - from engaging in any other occupation or business beyond their judicial duties. It follows that judges cannot supplement their income by embarking upon other endeavours.
 - (iv) Judges must divest themselves of any commercial endeavour that may involve litigious rights. This is a significant sacrifice that other members of society are not called upon to make.

³³ *PEI Reference Case*, *supra* at paras. 140 and 142-143 (emphasis in original) [JBD at tab 4].

³⁴ As cited in the Drouin Report (2000) at 13 [JBD at tab 9].

³⁵ *Judges Act*, s. 57(1) [JBD at tab 3]

- (v) Judges' compensation cannot be tied to performance or determined by commonly used incentives such as bonuses, stock options, at-risk pay, etc.
- (vi) Finally, there is no concept of promotion or merit in the discharge of judicial duties and there is no marketplace by which to measure the performance or compensation of individual judges.

iii) The need to attract outstanding candidates to the judiciary

58. In the submission of the Association and Council, this is at once the most important and the most challenging of the three statutory criteria. It is important because it is a *sine qua non* to preserving the quality of Canada's federally appointed judiciary. It is challenging because it involves comparison of the judicial salary, being an important consideration for potential candidates for judicial appointment, with comparators that are more complex than the judicial salary provided for in the *Judges Act*.

59. It is axiomatic that there is a correlation between the ability to attract talented individuals and adequate compensation. The Block Commission recognized this when it stated:

It is not sufficient to establish judicial compensation only in consideration of what remuneration would be acceptable to many in the legal profession. It is also necessary to take into account the level of remuneration required to ensure that the most senior members of the Bar will not be deterred from seeking a judicial appointment. To do otherwise would be a disservice to Canadians who expect nothing less than excellence from our judicial system – excellence which must continue to be reflected in the calibre of judicial appointments made to our courts.³⁶

60. The connection between talent and adequate compensation was the impetus for the Government's decision to strike the first Advisory Committee on Senior Level Retention and Compensation, which reported in 1998 (the "**Strong Committee**"). The Strong Committee had this to say about the correlation between compensation and the calibre of candidates:

In our view, compensation policy should be designed to attract and retain the appropriate calibre of employees to achieve an organization's objectives. Such compensation policy needs to be internally equitable, to be responsive to the economic and social environment, and to encourage and reward outstanding performance. Salary is usually the major driver of

³⁶ Block Report (2012) at para. 76 [JBD at tab 11]

such policy. Salary depends upon responsibility, individual performance and comparability with relevant markets. Typically, standard practices and techniques are used to evaluate each of these objectively and transparently.³⁷

61. While adequate compensation is required to attract outstanding candidates to the Bench, there are particularities in the setting of judicial compensation that the Commission must take into account. In the words of the McLennan Commission:

The considerations that go into the setting of judicial compensation and benefits are unique, in that so much of the usual process of determining compensation does not apply. Judges cannot speak out and bargain in the usual way. Compensation incentives usual in the private sector, such as bonuses, profit sharing, stock options, at-risk pay, recruitment and performance bonuses, together with the prospect of promotion, do not apply in the judicial context, although many of these financial incentives are increasingly common in the public sector.³⁸

62. The need to attract outstanding candidates to the Bench, coupled with the fact that appointees have traditionally predominantly come from private practice, explain the importance of self-employed lawyers' income as a comparator in the determination of judicial salaries. The McLennan Commission made the point succinctly when it said that "it is in the public interest that senior members of the Bar should be attracted to the Bench, and senior members of the Bar are, as a general rule, among the highest earners in private practice."³⁹

³⁷ Advisory Committee on Senior Level Retention and Compensation, First Report: January 1998 at 7 [BED at tab 12].

³⁸ McLennan Report (2004) at 5 [JBD at tab 10].

³⁹ McLennan Report (2004) at 32 [JBD at tab 10].

63. Although self-employed lawyers have traditionally been the source of the vast majority of appointments to the Bench, there has been in recent years a declining proportion of appointments from private practice, as illustrated by the following table:

Years	Percentage of appointees from private practice⁴⁰
1990-1999	73% ⁴¹
1997-2004	73% ⁴²
2004-2007	78% ⁴³
2007-2011	70% ⁴⁴
2011-2015	64% ⁴⁵
2015-2020	62% ⁴⁶

64. This is a worrisome trend, and all indications are that the decline in appointments from private practice reflects a drop in interest in judicial appointment among lawyers in private practice. A major cause of that drop in interest is necessarily the income gap between what outstanding candidates earn in private practice and the judicial salary.
65. If there were to be an argument seeking to justify the declining trend of appointments from private practice based on the need for greater diversity, it should be noted that at least as far as gender diversity is concerned, the decline evidenced in the above table

⁴⁰ The decline in the percentage of appointees from private practice is of the same order if appointments from the provincial bench are excluded, going from 82% in the period 1990 to 1999 to 71% in the period 2015 to 2020.

⁴¹ Drouin Report (2000) at 37 [JBD at tab 9].

⁴² McLennan Report (2004) at 17 [JBD at tab 10].

⁴³ Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated December 14, 2007 at para. 123 [BED at tab 5].

⁴⁴ Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated December 20, 2011 at para. 143 [BED at tab 6].

⁴⁵ Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated February 29, 2016 at 35, footnote 59 [BED at tab 10].

⁴⁶ This figure includes five individuals who are described as coming from the “private sector”, which is distinct from “private practice” since the former denotes in-house counsel. The total number of appointees stated to be from private practice for April 1, 2015 to October 2, 2020 was 189, for “sole practice” it was 38, and for private sector it was 5. The latter figure is not material. It was decided to include the “private-sector” lawyers in this category because the larger distinction is with appointments from the public sector. [JBD at tab 21(i)]

does not reflect any commensurate gains in that form of diversity.⁴⁷ In the 2015-2020 period, women constituted 54% of appointees from the public sector, but they constituted 56% of appointees from private practice.⁴⁸ Therefore, it is not the case that gender diversity has been served by a greater proportion of appointees coming from the public sector.

66. The apparent drop in interest in judicial appointments among highly qualified lawyers in private practice is reflected in the statistics on applicants made available to the parties by the Office of the Commissioner for Federal Judicial Affairs. According to these statistics, between March 2017 and October 2020, a large percentage of assessed applicants (63%) fell in the category of “unable to recommend” for a judicial appointment.⁴⁹ There has been a noticeable drop in interest in judicial appointment among highly qualified lawyers in private practice. In many provinces, the data shows a pool of applicants with a very large proportion falling into the category of “unable to recommend”. For example, British Columbia, Alberta, Saskatchewan, Newfoundland and Labrador, and the Tax Court of Canada have respective percentages of 70%, 65%, 71%, 65%, and 67% for the category of “unable to recommend”.⁵⁰ In British Columbia, only one of 64 assessed applicants was assessed as “highly recommended”. Out of a total of 106 assessed applicants in Alberta, the number of highly recommended applicants was 12.
67. The significant gap between the judicial salary and compensation in private practice is cited by some chief justices as one of the main reasons for the drop in interest among private sector practitioners in applying for a judicial appointment. The Association and Council will invite a member of the Council to appear before the Commission in order to elaborate on these trends.

⁴⁷ The data currently available to the parties does not provide correlations between other forms of diversity (ethnic, cultural, linguistic, disability) among appointees and their practice background.

⁴⁸ As set out in footnote 46, this figure includes five individuals who are described as coming from the “private sector”, which is distinct from “private practice” since the former denotes in-house counsel. [JBD at tab 21(j)]

⁴⁹ Based on applications and appointments data provided by the Commissioner for Federal Judicial Affairs for March 30, 2017 to October 23, 2020 [JBD at tab 20]. The last two columns on the right, related to appointments, do not include anyone who is found in the “Status of applicants” column. Applicants for the Federal Court and Federal Court of Appeal are assessed by the relevant provincial Judicial Advisory Committee (JAC), whereas the Tax Court of Canada has its own JAC, hence explaining why the latter court has its own statistics in the table.

⁵⁰ *Ibid.*

68. The reason why the Canadian judiciary is respected and held in high esteem in Canada and throughout the world is because of the high quality of appointees to the Bench. To maintain this standing, the Commission must, through its recommendations, ensure that the applicant pool from which the Government makes appointments to the Bench is as large as possible with outstanding candidates having relevant experience and expertise, and this applicant pool must include highly qualified lawyers from private practice.

iv) Other objective criteria

69. Among the “other objective criteria” that past Commissions have considered in their determination of judicial salaries is the evolution of the role and responsibilities of Canadian judges.
70. In 2000, the Drouin Commission said the following about the role of the judiciary in modern Canadian society and its implication in the determination of judicial compensation:

In response to the *Charter of Rights and Freedoms* (the “*Charter*”), and the growing complexity of our social and economic relationships, the Judiciary is playing an increasingly public role in key decisions that affect us all. Moreover, the characteristics of the Judiciary have changed and continue to shift: judges are being appointed at a younger age, and more females are being appointed to the Bench. The caseload of judges has grown, as more cases move to the higher courts for determination. Many of these cases are high profile and controversial. They capture the public interest and become the focus of media attention. Judicial decisions often generate considerable political debate. The reality of these trends must be recognized when considering the salary and benefits that are adequate to secure judicial independence and attract outstanding candidates to the Bench.⁵¹

71. What was said more than twenty years ago remains true today. Some seven years after the Drouin Commission, the former Chief Justice of Canada, the Right Honourable Beverley McLachlin, highlighted some of the difficult challenges facing the judiciary and the justice system, including the increasing number of unrepresented litigants, the problem of long trials both in civil and criminal litigation, and the challenge presented by intractable, endemic social problems such as drug addiction and mental illness. She also noted that judicial independence as a foundational principle in our democracy can never be taken for granted. She observed:

⁵¹ Drouin Report (2000) at 10 [JBD at tab 9].

[...] Nothing is more important than justice and the just society. It is essential to flourishing of men, women and children and to maintaining social stability and security. You need only open your newspaper to the international section to read about countries where the rule of law does not prevail, where the justice system is failing or non-existent.

In this country, we realize that without justice, we have no rights, no peace, no prosperity. We realize that, once lost, justice is difficult to reinstate. We in Canada are the inheritors of a good justice system, one that is the envy of the world. Let us face our challenges squarely and thus ensure that our justice system remains strong and effective.⁵²

72. Judicial decisions at all levels are becoming increasingly complex and continue to be the focus of attention by the media and the public. The emergence of social media and a related popular culture of quick conclusions, condemnations, and piling on a target pose challenges for the judicial function. Judges are repeatedly called upon to adjudicate on sensitive and contentious matters of a socio-political nature. The Court is also called upon to adjudicate on matters between the State and its citizens – both in the form of judicial review and constitutional challenges. Vivid illustrations of this phenomenon can be found in the role played by courts in respect of the many difficult social and political issues confronting Canadian society today.
73. The importance of the judicial function and the ever increasing weight of the responsibilities imposed on federally appointed judges in today’s society must inform the Commission’s approach to its inquiry.

b) The IAI adjustments, a cornerstone of judicial financial security

74. The annual adjustment in judicial salaries based on the IAI as provided for in the *Judges Act* is, along with the judicial annuity, one of the cornerstones of judicial financial security. It is an integral part of the “social contract”⁵³ that the Government and lawyers appointed to the Bench can be considered to have entered into. In view of the constant risk of the politicization of the setting of judicial compensation, annual IAI adjustments have long been recognized as an essential tool to preserve judicial independence through financial security for the judiciary.

⁵² Chief Justice McLachlin, *The Challenges We Face*, Remarks presented to the Empire Club of Canada, Toronto, Ontario, March 8, 2007 [BED at tab 19].

⁵³ This is the expression used in the Scott Report (1996) at 14 to describe the expectations arising from the salary indexation provided by the *Judges Act* [BED at tab 24].

75. Except for statutory indexing based on the IAI, there has been no increase to the salary of puisne judges since April 1, 2004. As the Association and Council observed in their Reply Submission to the Levitt Commission dated January 27, 2012,⁵⁴ the Government's refusal to implement the salary recommendation of the McLennan Commission resulted in a loss of \$31,900 per judge in the 2004-2007 period, while the refusal to implement the recommendation of the Block Commission represented a loss of \$51,100 per judge in the 2008-2011 period. These losses do not take into account the cumulative and future impacts of compounding. Since 2004, a seventeen (17) year period, the only source of adjustment to judicial salaries has been the annual adjustments based on the IAI.
76. The Government has given advance notice to the Association and Council that it intends to propose to the Commission to recommend holding the cumulative increases of the IAI to 10% over the four years of the current quadrennial cycle. This is a highly problematic proposal to which the Association and Council are firmly opposed.
77. This proposal must be seen against other recent attempts to undermine this important component of the judicial compensation regime. The Government sought to convince the previous two Commissions to modify the IAI annual adjustments. Both attempts failed for principled reasons. Before the Levitt Commission, the Government submitted that the annual IAI adjustments should be capped at 1.5% (a percentage below the expected IAI figures for that quadrennial cycle). The Levitt Commission rejected the Government's submission as inconsistent with the history and purpose of the IAI adjustment:

The Government submissions characterized the IAI Adjustment as inflation protection without making any mention of its legislative history. In light of this history, the Drouin Commission made it clear that the IAI "is intended to, and in many years does, encompass more than changes in the cost of living as reflected in the consumer price index". In the Commission's view the legislative history indicates that the IAI Adjustment was intended to be a key element in the architecture of the legislative scheme for fixing judicial remuneration without compromising the independence of the judiciary and, as such, should not lightly be tampered with.⁵⁵

⁵⁴ Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated January 30, 2012 at 9-10 [BED at tab 9].

⁵⁵ Levitt Report (2012) at para. 46 [citation omitted, emphasis added] [JBD at tab 12].

78. Most recently, before the Rémillard Commission, the Government argued that the IAI should be replaced by the CPI as the appropriate measure for annual indexation of judicial salaries. The Rémillard Commission rejected this proposal and instead endorsed the Levitt Commission's discussion of the IAI adjustment. The Rémillard Commission echoed the caution that the IAI "should not be lightly tampered with":

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.

[...]

40. [...] The Commission accepts the evidence of Professor Hyatt and finds that it is entirely appropriate to adjust judge's 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.⁵⁶

79. The following is the set of projected IAI figures provided by the Office of the Chief Actuary for the years covered by the Commission's current mandate:⁵⁷

April 1, 2020: 2.7% (already applied)

April 1, 2021: 6.7% (soon to be applied)

April 1, 2022: 2.1%

April 1, 2023: 2.6%

80. It should be noted that past IAI projections have on occasion proven to be far off the mark. For example, during the Rémillard Commission, the projected IAI for April 1, 2017 was 2.2%. When commenting that "judicial compensation is sufficient to continue to attract outstanding candidates", the Rémillard Commission necessarily relied on this projection.⁵⁸ In reality, the projection turned out to have been wrong and the adjustment

⁵⁶ Rémillard Report (2016) at paras. 38 and 40 [JBD at tab 13].

⁵⁷ Letter from François Lemire, Office of the Chief Actuary, Office of the Superintendent of Financial Institutions, dated February 26, 2021 [JBD at tab 23].

⁵⁸ Rémillard Report (2016) at paras. 53, 84 [JBD at tab 13].

on April 1, 2017 ended up being 0.4%, rather than 2.2%. The cumulative IAI adjustment of 6.8% between 2015 and 2019 was significantly lower than the projected cumulative IAI adjustment of 9%.

81. The Association and Council will reply to the Government's proposal that this Commission cap the IAI in its reply submission, once the Government has filed its main submission on the issue.

c) The comparators

82. In considering the adequacy of judicial salaries in light of the statutory criteria cited above, past Commissions – both Triennial and Quadrennial – have considered two principal comparators: (a) a public-sector comparator, consisting of the compensation of the most senior deputy ministers (traditionally, the DM-3s), and (b) a private-sector comparator, consisting of the incomes of senior lawyers in the private practice of law in Canada.

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

i) Compensation of the most senior deputy ministers

84. We begin by recalling the origin and lineage of this key comparator, after which we explain why the so-called Block Comparator, as opposed to the DM-3 total average compensation, no longer can be used as the relevant point of comparison. We then describe the gap that needs to be bridged between the total average DM-3 compensation and the salary of puisne judges.

a) Origin and lineage

85. The use of the compensation of the most senior deputy ministers, the so-called DM-3 comparator, predates the Triennial and Quadrennial Commissions. In 1975, Parliament amended the *Judges Act* to make the salary level of puisne judges roughly equivalent with the midpoint salary of the most senior level of deputy ministers.

86. The first Triennial Commission, the Lang Commission, noted in its 1983 report that “the historic relationship between the salaries of superior court judges and deputy ministers

was restored in 1975”.⁵⁹ The Lang Commission went on to find that this relationship had deteriorated since the amendments because judicial salaries had failed to keep up with the salaries of the most senior level of deputy ministers. In order to restore the “historic relationship”, the Lang Commission recommended that judicial salaries be set by starting with the 1975 level and adjusting for inflation, an exercise that became known as the “1975 equivalency”.

87. The Guthrie Commission in 1987 and the Courtois Commission in 1990 both applied the “1975 equivalency” when recommending increases to judicial salaries. Apart from recognizing that the application of the “1975 equivalency” restored the “historic relationship” between the salaries of the most senior level of deputy ministers and the judiciary, both commissions noted that the salaries of senior deputy ministers provided the best comparator for assessing the adequacy of compensation for puisne judges.

Guthrie Commission:

As a result of 1975 amendments to the Judges Act, the salary level of superior court puisne judges was made roughly equivalent to the mid-point of the salary range of the most senior level (DM3) of federal deputy minister. This was not intended to suggest equivalence of factors to be considered in the salary determination process, for no other group shares with the judiciary the necessities of maintaining independence and of attracting recruits from among the best qualified individuals in a generally well-paid profession. In 1975, judicial salary equivalence to senior deputy ministers was generally regarded, however, as satisfying all of the criteria to be considered in determining judicial salaries. At that salary level, a sufficient degree of financial security was assured and there were few financial impediments to recruiting well-qualified lawyers for appointment to the bench.⁶⁰

Courtois Commission:

The reasons given by the Lang and Guthrie Commissions for recommending 1975 equivalence are still very much applicable, and we fully subscribe to them. Both previous Triennial Commissions relied in part on the fact that the salary level being recommended for superior court judges would restore the historical relationship of rough equivalence between the salaries of judges and those of senior deputy ministers in the federal Public Service. The salary level established by the 1975 amendments to the Judges Act did not result in a new, historically high,

⁵⁹ Lang Report (1983) at 5 [BED at tab 20].

⁶⁰ Guthrie Report (1987) at 8 [BED at tab 21].

salary level for judges, but simply allowed for inflation that had occurred in the years prior to 1975. The fairness of that level has not been disputed.

We note that 1975 equivalence would bring judges to within 2% of the mid-point of the salaries of the most senior level (DM-3) of federal deputy ministers. The DM-3 mid-point, we believe, reflects what the market place expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges.⁶¹

88. The Government advocated a move away from the “1975 equivalency” and the adoption of the current DM-3 comparator in its submissions before the next Triennial Commission, the Crawford Commission. The Government’s submissions supporting the continued use of the DM-3 comparator were as follows:

1975 was a long time ago, and much has changed in the meantime, not the least of which has been our economy. There seems to be little point in trying to tie judicial salaries to some arbitrary level set so long ago and in very different circumstances. Therefore, the government thinks it would be better to do away with both the concept and the terminology of 1975 equivalence, and instead deal with judicial salary levels on the basis that there should be a rough equivalence to the DM-3 midpoint.⁶²

89. The Crawford Commission in its 1993 report accepted the Government’s submission that the “1975 equivalency” was no longer a particularly helpful benchmark as a determinant of judges’ salaries. Instead, the Crawford Commission preferred, as suggested by the Government, to refer directly to a rough equivalence with the midpoint of the salary range of the most senior level of federal public servants, at the time the DM-3s. The Crawford Commission repeated the finding from the Courtois Report that “the DM-3 range and mid-point reflect what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges.”⁶³
90. This finding reflects the fact that the long-standing comparison that is made with the DM-3s is not based on the hypothesis that lawyers who might consider applying to the bench would also consider the upper echelons of the executive branch. Also, the comparison has nothing to do with some purported resemblance between the functions of DM-3s and those of superior court judges. Rather, the comparison is made because

⁶¹ Courtois Report (1990) at 10 [emphasis added] [BED at tab 22].

⁶² Government’s submission to the Crawford Commission, cited in the Drouin Report (2000) at 28 [emphasis added] [JBD at tab 9].

⁶³ Crawford Report (1993) at 11 [BED at tab 23].

of the “historic relationship between judicial salaries and the salaries of DM-3s”, going back to the Triennial Commission,⁶⁴ and because of a similarity in attributes. The Block Commission did a useful review of this historic relationship⁶⁵ and quoted the Courtois Commission’s observation that the comparison is based on attributes, as reproduced in the preceding paragraph.

91. The first Quadrennial Commission, the Drouin Commission, endorsed the principle of a relationship between judicial salaries and the remuneration of DM-3s in its 2000 report, although it did not believe that any one comparator should be determinative:

[W]e have concluded that the important aspect of the DM 3 comparator, for the purposes of our inquiry, is the maintenance of a relationship between judges’ salaries and the remuneration of those senior federal public servants whose skills, experience and levels of responsibilities most closely parallel those of the Judiciary.⁶⁶

92. In the same year as the Drouin Report, the Advisory Committee on Senior Level Retention and Compensation recommended in its Third Report dated December 2000 the creation of a DM-4 level.⁶⁷ The Committee stated that its recommendation for the creation of a DM-4 level “ensures greater equity between the most senior deputy ministers and the CEOs of some of the larger Crowns and sends an important message in terms of the government’s willingness to attract and retain qualified and experienced staff.”⁶⁸ As observed by the Block Commission, the DM-4 level “appears to be reserved for exceptional circumstances and positions of particularly large scope”.⁶⁹ For example, the DM-4s for 2019-2020 were the Clerk of the Privy Council, the Deputy Minister of Finance, and the Deputy Minister of Innovation, Science, and Economic Development.⁷⁰ The number of DM-4s being kept very small and reserved for positions of exceptional responsibility, the Association and Council has never insisted on comparing judicial salaries with the compensation of DM-4s and continue to consider DM-3s as representing the appropriate comparator group for what was historically considered the most senior level of deputy ministers. That said, because the members of the more

⁶⁴ Drouin Report (2000) at 22 [JBD at tab 9].

⁶⁵ Block Report (2008) at paras. 94-111 [JBD at tab 11].

⁶⁶ Drouin Report (2000) at 31 [JBD at tab 9].

⁶⁷ Advisory Committee on Senior Level Retention and Compensation, Third Report: Dec 2000 at 41 [BED at tab 13].

⁶⁸ *Ibid.*

⁶⁹ Block Report (2012) at para. 105 [JBD at tab 11].

⁷⁰ DM-4 Positions [JBD at tab 34].

recently created DM-4 category used to belong to the DM-3 group, it remains important for the Commission to keep an eye on changes both in the composition of the group and their total compensation.

93. The McLennan Commission in 2004 considered the salaries of DM-3s, although it noted that it believed that it was important “to look at a broader range of the most senior public servants whose qualities, character and abilities might be said to be similar to those of judges.”⁷¹
94. The Block Commission rejected the Government’s submission that it should consider a much wider public-sector comparator than DM-3s.⁷² Instead, the Block Commission was definitive about the need to maintain rough equivalence between the compensation of DM-3s and that of puisne judges, and issued a formal recommendation that the Commission and parties should consider the issue of DM-3 comparison to be settled. Reproduced below are two key passages of the Block Report dealing with the DM-3 comparator:

103. The DM-3 level, as can be seen, has been a comparator for nearly every previous commission, and we believe, like the Courtois Commission, that this “reflects what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges”.

[...]

201. Where consensus has emerged around a particular issue during a previous Commission inquiry, such as the relevance of the DM-3 as a comparator, “in the absence of demonstrated change”, we suggest that such a consensus be recognized by subsequent Commissions and arguably reflected in the approach taken to the question in the submissions of the parties.⁷³

95. The Levitt Commission, in 2012, similarly rejected the Government’s submission that it should consider a much wider public-sector comparator than DM-3s, and instead confirmed the appropriateness of using the DM-3 comparator:

⁷¹ McLennan Report (2004) at 30 [JBD at tab 10].

⁷² With respect to the newly created DM-4 level, which included only two individuals, the Block Commission (and the judiciary) saw no justification to use it as a comparator, seeing that it “appears to be reserved for exceptional circumstances and positions of particularly large scope”, Block Report (2012) at para. 105 [JBD at tab 11].

⁷³ Block Report (2008) at paras. 103 and 201 [JBD at tab 11].

27. Like its predecessors, the Commission determined that the scope of the chosen public sector comparator group is a matter of judgment to be made by reference to the objective of the Commission's enquiry as first framed by the Courtois Commission. While the Commission recognizes that the choice of the DM-3 group may not be regarded as ideal due to its small sample size and other comparability issues such as tenure in position this Commission, like the Drouin and Block Commissions, focussed on the purpose of the analysis as articulated above and concluded that the seniority of the group and the functions its members discharge make it the best choice as a public sector comparator group for the judiciary. This choice has the additional advantage of eliminating outliers both above and below the DM-3 category.⁷⁴

96. Most recently, the Rémillard Commission in 2016 rejected the Government's argument according to which a focus on the DM-3 comparator is not warranted and considering trends in public sector compensation generally would be a better approach.⁷⁵ Instead, the Rémillard Commission acknowledged that the DM-3 comparator should not be used in a "formulaic benchmarking" fashion and reaffirmed its use as a "reference point against which to test whether judges' salaries have been advancing appropriately in relation to other public sector salaries."⁷⁶

b) Block Comparator and average compensation

97. While the Triennial and Quadrennial Commissions have for the most part endorsed the DM-3 comparator as an accurate reflection of "what the marketplace expects to pay individuals of outstanding character and ability", there has been an evolution over the years as to what figure should constitute the DM-3 comparator.

98. As set out above, the initial Triennial Commissions used the midpoint of the 1975 salary range, adjusted for inflation, as the DM-3 comparator. The Crawford Commission adopted the Government's proposal to abandon the "1975 equivalency" and instead used the midpoint of the salary range as the DM-3 comparator. The Drouin Commission, as well as every Commission thereafter, updated the DM-3 comparator by adding the at-risk pay component to the salary component, in recognition of the fact that at-risk pay is an integral, and indeed increasing part of the total compensation of DM-3s. The Block Commission – as well as the Levitt and Rémillard Commissions – set the DM-3

⁷⁴ Levitt Report (2012) at para. 27 [JBD at, tab 12].

⁷⁵ Rémillard Report (2016) at para. 46 [JBD at, tab 13].

⁷⁶ Rémillard Report (2016) at para. 47 [JBD at, tab 13].

comparator as the midpoint of the salary range plus half of eligible at-risk pay (the “**Block Comparator**”).

99. The midpoint is the half-way point of a theoretical range, not the average or median figure of the actual salary paid. However, it appears that the midpoint, at its origin in 1975, was used as a proxy for the average, since in that era the Government did not publicly disclose the average compensation of DM-3s. Averages being available for some time now, and with the mid-point becoming increasingly untethered from the actual compensation of DM-3s, the question arises as to whether averages would better reflect the actual remuneration paid to DM-3s, on average. Since this question was canvassed by previous Commissions, the Association and Council recount its evolution and explains why, in light of the Government’s most recent compensation practices, it needs once again to be considered.
100. The Association and Council submitted before the Block Commission that the total average compensation of DM-3s was the more relevant figure for comparison. The Block Commission agreed that “[a]verage salary and performance pay may be used to demonstrate that judges’ salaries do retain a relationship to actual compensation of DM-3s”. Nonetheless, the Block Commission declined to adopt the total average compensation as the yard stick at that time because it believed that, due to the small number of DM-3s, any figure based on an average would fluctuate too much from year to year to assist the Commission in establishing any long-term comparison between the compensation of DM-3s and judges:

106. We also used the mid-point of the DM-3 salary range because it is an objective, consistent measure of year over year changes in DM-3 compensation policy. Average salary and performance pay may be used to demonstrate that judges’ salaries do retain a relationship to actual compensation of DM-3s. However, average salary and performance pay are not particularly helpful in establishing trends in the relativity of judges’ salaries to the cash compensation of DM-3s. They do not provide a consistent reflection of year over year changes in compensation. The DM-3 population is very small, varying between eight and ten people over the past few years, and average salaries and performance pay fluctuate from year to year. A person who has been promoted recently has a lower salary than one who has been in a position for many years. Turnover could cause significant changes in the averages over time. Similarly, a

few very high performers or low performers in a year could significantly affect the average performance pay.⁷⁷

101. The Association and Council did not ask the Levitt Commission to use the total average compensation as the DM-3 comparator, their position in principle being that the Levitt Commission should recommend the prospective implementation of all of the Block Commission salary recommendations. However, the judiciary noted that “there is a significant disparity between the midpoint and actual average figures over the years”,⁷⁸ adding the following proviso:

If DM-3 compensation continues to be at the upper end of the salary range and eligible at-risk percentage, future Quadrennial Commissions will likely decide to revisit the Block Commission’s use of the midpoint figure rather than the average.⁷⁹

102. The Association and Council submitted before the Rémillard Commissions that the relevant figure for the DM-3 comparator should be the total average compensation of DM-3s – that is, the average base salary plus the average at-risk pay. However, the Rémillard Commission did not accept the Association and Council’s submission, reiterating the Block Commission’s concern that moving to average salary and performance pay would not “provide a consistent reflection of year over year changes in compensation”:

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”. Moving to the total average compensation of a very small group would not meet those criteria. We agree with the Block Commission (2008), which rejected moving to average pay and performance pay because it would not “provide a consistent reflection of year over year changes in compensation”.

51. Any merit in comparing total average compensation would come from a comparison with a much larger group that could provide objectivity

⁷⁷ Block Commission (2008) at para. 106 [emphasis added] [JBD at tab 11].

⁷⁸ Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated December 20, 2011 at para. 117 [BED at tab 6].

⁷⁹ *Ibid* at footnote 90.

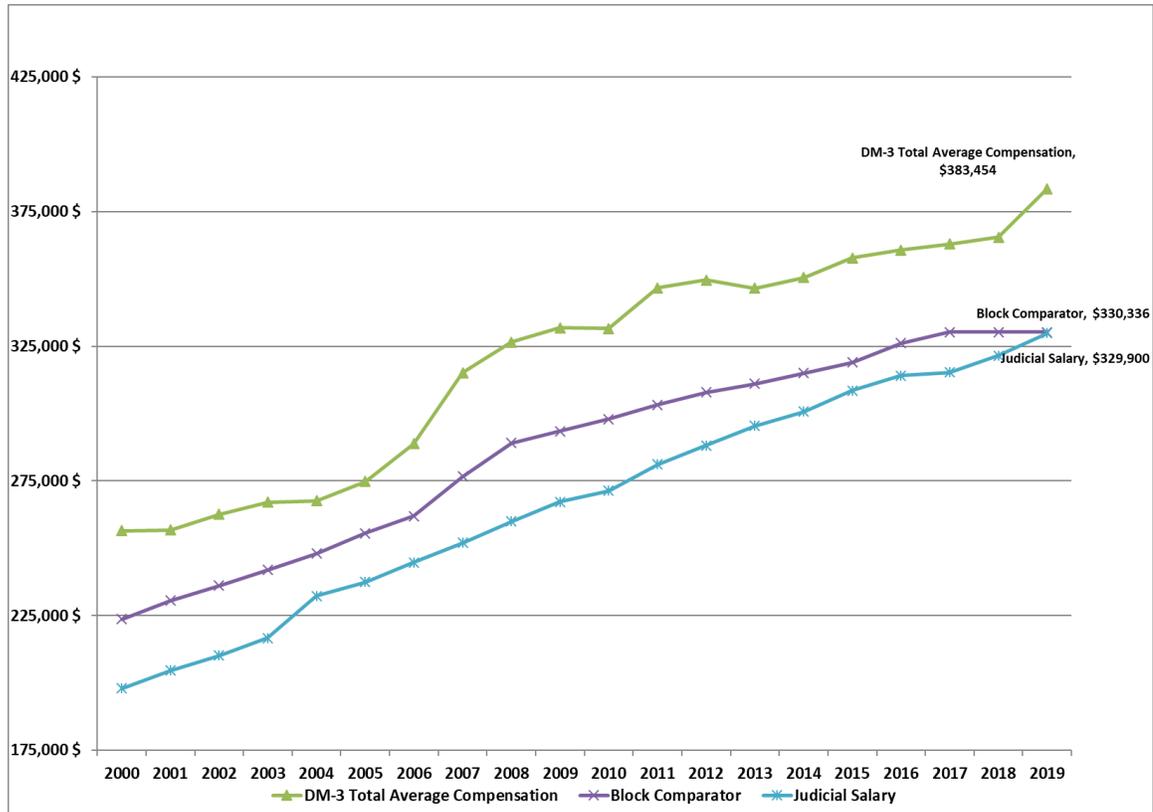
and consistency, without being inordinately influenced by the individual members of the group at any given time.⁸⁰

103. The circumstances that oblige the Association and Council to raise this question anew are the following. Since 2017, and for the first time since this metric is tallied, the salary portion of the compensation of DM-3s, and, as a result, the Block Comparator, has remained unchanged while the actual compensation of DM-3s has steadily increased. The consequence is that judicial salaries no longer retain a relationship with the actual compensation of DM-3s if the Block Comparator is used as the point of comparison.⁸¹ In 2019, DM-3 total average compensation was \$383,454, or \$53,554 greater than the judicial salary for the same year.
104. Two discernable trends are illustrated in the following graph: a disparity between the Block Comparator and the actual average DM-3 compensation figures, which disparity has persisted through the past three quadrennial cycles; and second, an increasing delta between the total average compensation of DM-3s and the judicial salary.

⁸⁰ Rémillard Commission (2016) at paras. 50-51 [JBD at tab 13].

⁸¹ Block Commission (2008) at para. 106 [JBD at tab 11].

Graph 1
Comparison of DM-3 Total Average Compensation, Block Comparator and Judicial Salary (2000-2019)



105. These trends have become much more pronounced since the last cycle because of the unprecedented and quite uncharacteristic flat-lining of the Block Comparator since 2017. The tables below show how both the DM-3 and DM-4 salary ranges (and therefore the mid-point) have remained static for the last four years.

DM-3 Salary Information

Date	Salary Range	Mid-Point Salary	Average Salary	Total Average Compensation
April 1, 2004	\$207,200 - \$243,800	\$225,500	\$239,980	\$267,670
April 1, 2005	\$213,500 - \$251,200	\$232,350	\$248,644	\$274,844
April 1, 2006	\$218,800 - \$257,500	\$238,150	\$255,178	\$288,848
April 1, 2007	\$223,600 - \$263,000	\$243,300	\$260,730	\$315,233
April 1, 2008	\$228,000 - \$268,300	\$248,150	\$268,011	\$326,580
April 1, 2009	\$231,500 - \$272,400	\$251,950	\$269,910	\$331,866
April 1, 2010	\$235,000 - \$276,500	\$255,750	\$274,992	\$331,557
April 1, 2011	\$239,200 - \$281,400	\$260,300	\$280,221	\$346,654
April 1, 2012	\$242,900 - \$285,700	\$264,300	\$285,700	\$349,623
April 1, 2013	\$245,400 - \$288,600	\$267,000	\$287,354	\$346,507
April 1, 2014	\$248,500 - \$292,300	\$270,400	\$288,709	\$350,518
April 1, 2015	\$251,600 - \$296,000	\$273,800	\$291,950	\$357,825
April 1, 2016	\$257,300 - \$302,700	\$280,000	\$298,200	\$360,778
April 1, 2017	\$260,600 - \$306,500	\$283,550	\$298,900	\$363,010
April 1, 2018	\$260,600 - \$306,500	\$283,550	\$298,143	\$365,514
April 1, 2019	\$260,600 - \$306,500	\$283,550	\$303,545	\$383,454
April 1, 2020	\$260,600 - \$306,500	\$283,550	\$304,450	Currently unavailable

DM-4 Salary Information

Date	Salary Range	Mid-Point Salary	Average Salary*
April 1, 2004	\$232,100 - \$273,100	\$252,600	-
April 1, 2005	\$239,100 - \$281,300	\$260,200	-
April 1, 2006	\$245,100 - \$288,400	\$266,750	-
April 1, 2007	\$250,300 - \$294,500	\$272,400	-
April 1, 2008	\$255,300 - \$300,400	\$277,850	-
April 1, 2009	\$259,200 - \$305,000	\$282,100	-
April 1, 2010	\$263,100 - \$309,600	\$286,350	-
April 1, 2011	\$267,900 - \$315,100	\$291,500	-
April 1, 2012	\$272,000 - \$319,900	\$295,950	-
April 1, 2013	\$274,700 - \$323,100	\$298,900	-
April 1, 2014	\$278,200 - \$327,200	\$302,700	-
April 1, 2015	\$281,700 - \$331,300	\$306,500	-
April 1, 2016	\$288,000 - \$338,800	\$313,400	-
April 1, 2017	\$291,700 - \$343,100	\$317,400	-
April 1, 2018	\$291,700 - \$343,100	\$317,400	-
April 1, 2019	\$291,700 - \$343,100	\$317,400	-
April 1, 2020	\$291,700 - \$343,100	\$317,400	

* Due to the sample size, DM-4s average salary has been suppressed by the Government.

106. Since the Block Comparator tracks the mid-point salary range and half of the eligible at-risk pay, regardless of the actual compensation received by DM-3s, the unprecedented flatlining of these components while the actual compensation progressed appears to have subverted the very purpose of the comparator. As a result of the static nature of the DM-3 salary range and Block Comparator, the gap between the Block Comparator and the DM-3 total average compensation (average salary plus total average performance pay) has grown to -13.9% (\$53,118) in 2019, the largest reported difference since 2000 (see table below).

Table 1
Comparison of Block Comparator and DM-3 Total Average Compensation, 2000-2019

Date	Block Comparator	DM-3 Total Average Compensation	Difference between Block Comparator and Total Average Compensation	
			Percentage	\$
April 1, 2000	\$223,630	\$256,574	-12.8%	-\$32,944
April 1, 2001	\$230,615	\$256,842	-10.2%	-\$26,227
April 1, 2002	\$236,060	\$262,610	-10.1%	-\$26,550
April 1, 2003	\$242,000	\$267,051	-9.4%	-\$25,051
April 1, 2004	\$248,050	\$267,670	-7.3%	-\$19,620
April 1, 2005	\$255,585	\$274,844	-7.0%	-\$19,259
April 1, 2006	\$261,965	\$288,848	-9.3%	-\$26,883
April 1, 2007	\$276,632	\$315,233	-12.2%	-\$38,601
April 1, 2008	\$289,095	\$326,580	-11.5%	-\$37,485
April 1, 2009	\$293,522	\$331,866	-11.6%	-\$38,344
April 1, 2010	\$297,949	\$331,557	-10.1%	-\$33,608
April 1, 2011	\$303,250	\$346,654	-12.5%	-\$43,405
April 1, 2012	\$307,910	\$349,623	-11.9%	-\$41,714
April 1, 2013	\$311,055	\$346,507	-10.2%	-\$35,452
April 1, 2014	\$315,016	\$350,518	-10.1%	-\$35,502
April 1, 2015	\$318,977	\$357,825	-10.9%	-\$38,848
April 1, 2016	\$326,200	\$360,778	-9.6%	-\$34,578
April 1, 2017	\$330,336	\$363,010	-9.0%	-\$32,674
April 1, 2018	\$330,336	\$365,514	-9.6%	-\$35,178
April 1, 2019	\$330,336	\$383,454	-13.9%	-\$53,118

107. Another observation of note is that the Block Commission's concern about the lack of reliability of total average compensation as a long-term reference has not been borne out. As can be seen, there have not been any significant yearly variations in the total average compensation. Instead, the total average compensation has gradually increased year to year, following the general trend line of the Block Comparator until 2017, albeit at a consistently higher rate.

108. The Block Commission's reliance on the midpoint of the salary range because "it is an objective, consistent measure of year over year changes in DM-3 compensation policy", no longer seems warranted.⁸² The Block Comparator, which has been allowed to stagnate for four years while DM-3 average compensation continues to increase, is no longer a reliable reference. Compensation policy is reflected more clearly in the trend of total average compensation.
109. Since the year 2000, the Block Comparator has been 7% to 13.9% lower than the total average compensation of DM-3s on a yearly basis, with an average yearly difference of 10.5%. In respect of every year except two over the past 20 years, the Block Comparator produces a figure that is at least 9% below the actual compensation, on average, of the individuals in the DM-3 category. It is therefore apparent that the total average compensation provides a more accurate reflection of the actual compensation of DM-3s than the Block Comparator.
110. What the Block Comparator allows the Commission to understand is that there is a range of compensation the Government is prepared to pay an individual in the DM-3 category, and that range has a midpoint. Neither the poles of the range nor the midpoint necessarily represent actual compensation levels for the individuals in the DM-3 category. By contrast, the total average compensation tells the Commission what the Government is actually paying individuals in the DM-3 category, an amount which, year after year, is significantly higher than the midpoint.
111. The table below shows that since the year 2000, the judicial salary of puisne judges has been 12% to 22.8% lower than the total average compensation of DM-3s on a yearly basis, with an average yearly difference of -16.7%. In 2019, the judicial salary was 14% lower than the DM-3 total average compensation. This far exceeds the already considerable 7.3% gap between the DM-3 comparator and the salary of puisne judges which the Levitt Commission acknowledged "tests the limits of rough equivalence".⁸³ This raises a serious question as to whether "judges' salaries do retain a relationship to actual compensation of DM-3s".⁸⁴ In turn, this materially undermines the validity of the

⁸² Block Report (2008) at para. 106 [JBD at tab 11].

⁸³ Levitt Report (2012) at para. 52 [JBD at tab 12].

⁸⁴ Block Report (2008) at para. 106 [emphasis added] [JBD at tab 11].

Block Comparator as a measure of rough equivalence between judicial salaries and DM-3 compensation.

Table 2
Comparison of Judicial Salary and Total Average DM-3 Compensation, 2000-2019

Date	Judicial Salary	Total Average DM-3 Compensation	Difference between Judicial Salary and Total Average DM-3 Compensation	
			Percentage	\$
April 1, 2000	\$198,000	\$256,574	-22.8%	-\$58,574
April 1, 2001	\$204,600	\$256,842	-20.3%	-\$52,242
April 1, 2002	\$210,200	\$262,610	-20.0%	-\$52,410
April 1, 2003	\$216,600	\$267,051	-18.9%	-\$50,451
April 1, 2004	\$232,300	\$267,670	-13.2%	-\$35,370
April 1, 2005	\$237,400	\$274,844	-13.6%	-\$37,444
April 1, 2006	\$244,700	\$288,848	-15.3%	-\$44,148
April 1, 2007	\$252,000	\$315,233	-20.1%	-\$63,233
April 1, 2008	\$260,000	\$326,580	-20.4%	-\$66,580
April 1, 2009	\$267,200	\$331,866	-19.5%	-\$64,666
April 1, 2010	\$271,400	\$331,557	-18.1%	-\$60,157
April 1, 2011	\$281,100	\$346,654	-18.9%	-\$65,554
April 1, 2012	\$288,100	\$349,623	-17.6%	-\$61,523
April 1, 2013	\$295,500	\$346,507	-14.7%	-\$51,007
April 1, 2014	\$300,800	\$350,518	-14.2%	-\$49,718
April 1, 2015	\$308,600	\$357,825	-13.8%	-\$49,225
April 1, 2016	\$314,100	\$360,778	-12.9%	-\$46,678
April 1, 2017	\$315,300	\$363,010	-13.1%	-\$47,710
April 1, 2018	\$321,600	\$365,514	-12.0%	-\$43,914
April 1, 2019	\$329,900	\$383,454	-14.0%	-\$53,554

112. The Government is likely to point to the narrowing gap between the Block Comparator and the judicial salary and, on that basis, attempt to dispel concerns raised by the Association and Council with respect to the adequacy of judicial compensation. As

shown above, the Block Comparator simply does not reflect reality and therefore has lost any probative value.⁸⁵

113. Based on a review of the data that the judiciary has gathered over the past quadrennial cycles, it seems clear that when assessing the adequacy of judicial salaries, this Commission should look to the total average compensation of DM-3s for an indication of the compensation of the most senior deputy ministers, and a reflection of “what the marketplace expects to pay individuals of outstanding character and ability”.

c) *The gap between the DM-3 comparator and the judicial salary*

114. As of April 1, 2019:

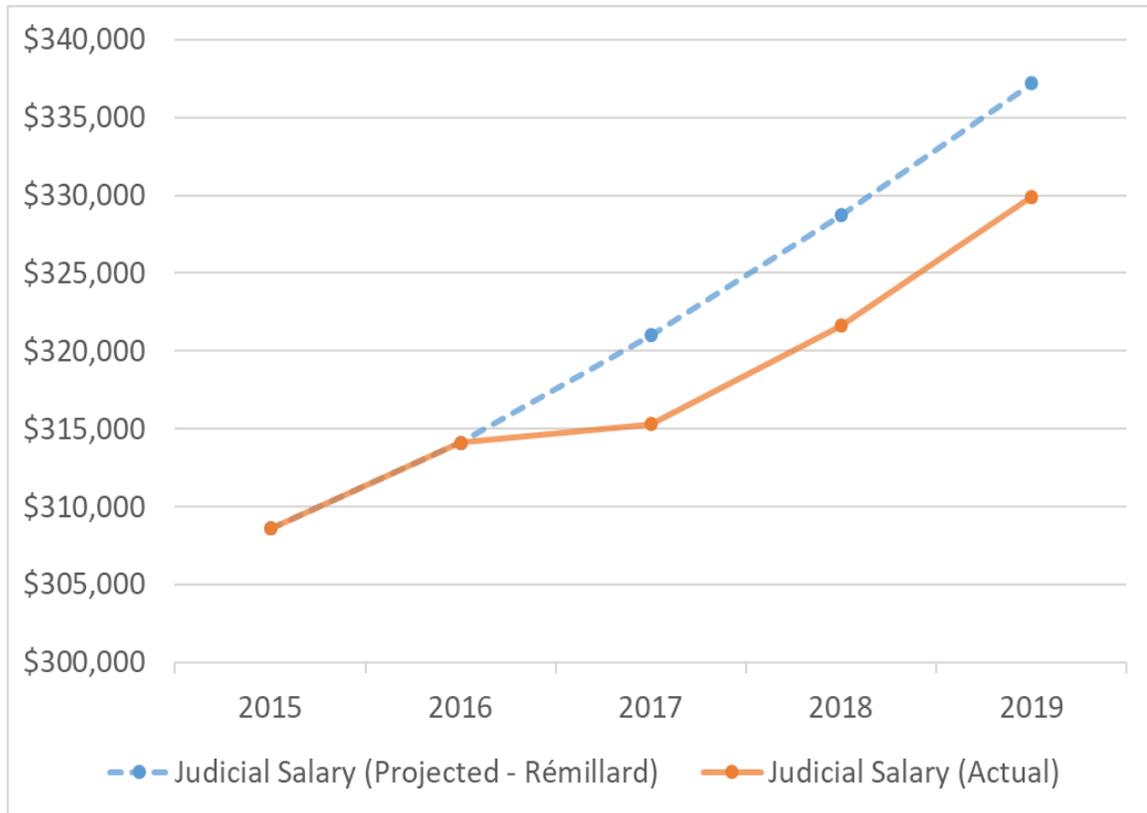
- (i) The salary of a puisne judge was \$329,900;
- (ii) The Block Comparator was \$330,336;
- (iii) The total average DM-3 compensation was \$383,454; and
- (iv) The gap between total average DM-3 compensation and the salary of a puisne judge was \$53,544, a -14% difference.

115. The projection relied upon by the Rémillard Commission when it formulated its salary recommendations was that the judicial salary would be \$337,200 as of April 1, 2019, and \$346,600 as of April 1, 2020.⁸⁶ This was based on projected IAI figures provided by the Office of the Chief Actuary to the parties at the time submissions were made, but which did not end up being the actual IAI figures in the following years. In fact, the actual salaries as of April 1, 2019 and April 1, 2020 were \$329,900 and \$338,800, respectively. Therefore, as shown in the graph below, the assumption about projected judicial salaries relied upon by the Rémillard Commission in concluding that an increase in the judicial salary was not necessary turned out to be different from reality.

⁸⁵ Any narrowing of the gap between the Block Comparator and the judicial salary is attributable to the annual statutory indexation based on the IAI as provided for in s. 25 of the *Judges Act*, an annual adjustment that the Government now proposes to cap.

⁸⁶ Rémillard Report (2016) at para. 53 [JBD at tab 13].

Graph 2
Comparison of Judicial Salary as Projected before Rémillard Commission and
Actual Judicial Salary
(2015-2020)



116. As set out above, the total average DM-3 compensation is already significantly above both the salary of puisne judges (\$53,544) and the Block Comparator (\$53,118). There will still be a significant gap between total average DM-3 compensation and the judicial salary at the end of the current quadrennial cycle in 2023-24 if the status quo is maintained. As can be seen in Table 3 below (at p. 44), the gap between total average DM-3 compensation and the judicial salary is projected to continue in 2023 when it will be -8.5%.⁸⁷

⁸⁷ Had the Rémillard Commission recommended the increase that the judiciary had requested at that time, namely a total of 7% distributed over the four years as 2% for 2016, 2% for 2017, 1.5% for 2018, and 1.5% for 2019, and had it been implemented, the judicial salary on April 1, 2019 would have been \$353,414 (inclusive of the actual IAI increases of 1.8%, 0.4%, 2%, and 2.6% for each of those years). The gap would have still been -\$30,040, or -7.8% by 2019.

117. As of April 1, 2020, the first year of the current cycle:
- (i) The salary of a puisne judge was \$338,800;
 - (ii) The Block Comparator, as a result of the uncharacteristic flatlining of the mid-point salary range, was \$330,336; and
 - (iii) While the total average DM-3 compensation for 2020-2021 is not currently available since performance pay will be determined after the end of the fiscal year, the total for the previous year, as from April 1, 2019, was \$383,454.
 - (iv) The salary of a puisne judge would have been \$346,600 if the IAI projections on which the Rémillard Commission relied had been accurate.

118. Table 3 below shows:

- (i) The actual salaries for puisne judges for 2019 and 2020, and projected salaries from 2021 to 2023, indexed according to the IAI projections provided by the Office of the Chief Actuary;⁸⁸ and
- (ii) The actual total average compensation for DM-3s for 2019, and the projected total average compensation from 2020 to 2023, applying an annual increase of 1.7% to the average base salary of DM-3s (without performance pay) from 2021-2023 and an annual increase of 4.0% to the average performance pay earned from 2020-2023, the former increase based on the annual growth of the average salary of DM-3s without performance pay from 2000 to 2020, and the latter based on the annual growth of the average performance pay earned from 2000-2019.⁸⁹

⁸⁸ The Office of the Chief Actuary has forecasted IAI as follows: 2021, 6.7%; 2022, 2.1%; 2023, 2.6%. Letter from François Lemire, Office of the Chief Actuary, Office of the Superintendent of Financial Institutions, dated February 26, 2021 [JBD at tab 23]. While s. 23 of the *Judges Act* requires the rounding down of judicial salaries to the nearest multiple of one hundred dollars, the projections in this submission rely on the exact projected figures to provide the Commission with the most accurate assessment of the likely gap between the judicial salary and the relevant comparators, and the percentage increase requested to reduce this gap. It should be noted that projections from the Office of the Chief Actuary do not always materialize accurately, as evidenced by the experience in the years after the Rémillard Commission. The issue of IAI projections is discussed above.

⁸⁹ The rate of increase is calculated from the 2000-2001 fiscal year because that was the year that the Government fully implemented the Strong Committee's recommended increases to at-risk pay for DM-3s.

Table 3
Comparison of Judicial Salary and DM-3 Total Average Compensation
2020-2023 (Actual and Projected)

Date	Judicial Salary	DM-3 Total Average Compensation	Difference between Judicial Salary and DM-3 Total Average Compensation	
April 1, 2019	\$329,900	\$383,454	-14%	-\$53,554
April 1, 2020	\$338,800	\$387,555 ⁹⁰	-12.6%	-\$48,755
April 1, 2021	\$361,500	\$396,055	-8.7%	-\$34,555
April 1, 2022	\$369,091	\$404,776	-8.8%	-\$35,685
April 1, 2023	\$378,687	\$413,725	-8.5%	-\$35,038

119. As set out above, as of April 1, 2023:

- The salary of puisne judges, applying the projected statutory indexation, will be \$378,687; and
- The projected total average compensation of DM-3s will be \$413,725.

This means that the status quo would leave judicial salaries at the end of the current quadrennial cycle, in 2023-2024, at \$35,038, or -8.5%, less than the total average compensation of DM-3s. This is higher than the already considerable 7.3% gap that the Levitt Commission said “tests the limits of rough equivalence”,⁹¹ as discussed above.

120. The foregoing analysis, bolstered by the self-employed lawyers’ income comparator, indicates that the Commission should recommend an increase in the judicial salary, as discussed further below in section d) (at p. 55).

⁹⁰ The average base salary for DM-3s in 2020 was \$304,450.

⁹¹ Levitt Report (2012) at para. 52 [JBD at tab 12].

ii) Self-employed lawyers' income

121. The incomes of self-employed private practitioners have been considered by nearly all judicial compensation commissions as an important comparator in the setting of adequate judicial salaries. This comparator has particular relevance in view of the third criterion provided in s. 26(1.1) of the *Judges Act*, namely “the need to attract outstanding candidates to the judiciary”, since lawyers in private practice have long been the primary source of candidates to the Bench.⁹²
122. As in the past, the CRA was mandated by the Government and the judiciary to assemble a database consisting of the 2015 to 2019 tax returns of individuals identified by CRA as self-employed lawyers. This database was then used to generate statistics based on specific parameters.
123. Unfortunately, the CRA data on self-employed lawyers' incomes is incomplete as a point of comparison by virtue of the fact that a significant proportion of lawyers in private practice today constitute professional corporations through which they earn their professional income. There were 17,871 professional corporations among lawyers across Canada in 2019, representing 27% of practising and insured lawyers in Canada. This represents almost a three-fold increase since 2010 in the number of registered professional corporations as a percentage of the total number of practising and insured members of the various law societies in Canada. The income earned through these professional corporations is not reflected in the CRA data, which represents a dramatic underreporting of actual incomes of self-employed lawyers. This is discussed in greater detail in a section below.
124. Past Commissions have considered the CRA data focusing on the 44-56 age group (53 is the average age of appointment⁹³), at the 75th percentile, with a low-income

⁹² Based on data compiled from information provided to the principal parties by the Commissioner for Federal Judicial Affairs, between 2011 and 2020 approximately 63% of judicial appointees were from private practice, down from a proportion of approximately 75% in the period from 1990 to 2007, and 70% between 2007 and 2011. See above at para. 63.

⁹³ Based on data provided by the Commissioner for Federal Judicial Affairs for March 30, 2017 to October 23, 2020 [JBD at tab 21(a)].

exclusion of \$60,000, for Canada as a whole and the top 10 census metropolitan areas (“CMAs”),⁹⁴ where the majority of judges are appointed from.⁹⁵

125. However, there are compelling reasons why the Commission may no longer consider the CRA data based on these parameters. First, while the traditional parameters, namely 44-56 age band, 75th percentile, \$60,000 low-income exclusion, Canada and top 10 CMAs, have been endorsed by previous Commissions (albeit in varying degrees),⁹⁶ it can be concluded based on the evidence being presented with this submission that the \$60,000 low-income cut-off is woefully inadequate for its intended purpose, and the CMA parameter should be given much greater weight than the Canada parameter. Second, and this applies across the board for any of the CRA data, there is a demonstrated shortcoming of the CRA data by reason of the non-inclusion of professional corporations, through which high-earning members of the profession increasingly practise. These two points are discussed below.

a) *The appropriate low-income exclusion and the required focus on the top 10 CMAs*

126. The rationale behind the low-income exclusion is that lawyers in private practice who earn below a certain threshold are not suitable candidates for the judiciary since that low income reflects a lack of success or time commitment that is incommensurate with the demands of a judicial appointment.⁹⁷
127. Seventeen years ago, the McLennan Commission (2004) decided that the appropriate low-income cut-off was \$60,000. It justified the increase from a \$50,000 low-income exclusion, which the Drouin Commission (2000) had relied upon four years before, as follows:

⁹⁴ The top 10 CMAs are Toronto, Montréal, Vancouver, Calgary, Edmonton, Ottawa-Gatineau, Winnipeg, Québec, Hamilton, and Kitchener – Cambridge – Waterloo.

⁹⁵ Based on data provided by the Commissioner for Federal Judicial Affairs for April 30, 2015 to October 23, 2020 68% of appointees have been appointed from the top 10 CMAs [JBD at tab 21(d)].

⁹⁶ Drouin Report (2000) at 38-41 [JBD at tab 9]; McLennan Report (2004) at 40-49 [JBD at tab 10]; Levitt Report (2012) at para. 43 [JBD at tab 12]; Rémillard Report (2016) at paras. 59-70 [JBD at tab 13].

⁹⁷ See e.g. Annex B to the Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council before the Levitt Commission entitled “Report of Robert Levasseur and Larry Moate” dated January 27, 2012 at 3: “[...] as the exclusion selection criteria implies, lawyers who are not really committed to their profession or are not successful should not be candidates to join the judiciary” [BED at tab 8].

With respect to the appropriate level of exclusion mentioned above, our view is that it would be more appropriate to increase the level to \$60,000. It is unlikely that any in the pool of qualified candidates will have an income level lower than \$60,000. The salaries of articling students range from \$40,000 to \$66,000 in major urban centres and the salaries of first-year lawyers range from \$60,000 to \$90,000 in those same centres, and are often augmented by bonuses. Earnings for more senior associates are significantly higher.⁹⁸

128. The amount of \$60,000 has been applied as the low-income cut-off since 2004. After seventeen years, an adjustment to take into account evolving market conditions as well as inflation is now required.
129. According to the 2021 Legal Salary Guide by Robert Half Legal, the salary for a first-year associate at the 75th percentile,⁹⁹ based on that firm's experience placing lawyers, was \$81,000.¹⁰⁰ According to the same source, the salaries of first-year lawyers are even higher in Calgary, Edmonton, Vancouver, Ottawa, Toronto, and Montreal.¹⁰¹ An article published two and a half years ago confirms that at large firms in Toronto, first-year associates at that time earned "almost uniformly" a salary of \$110,000.¹⁰² It follows then, as the McLennan Commission concluded in 2004, that it is unlikely that any self-employed lawyers in the pool of qualified candidates will have an income level lower than \$80,000, if not \$100,000.
130. The Association and Council are advised by their economic expert that adjusting the low-income cut-off would also be appropriate to account for inflation since the year 2004, the year when the low-income cut-off of \$60,000 was first applied. Professor Doug Hyatt explains that, if the low-income cut-off had been increased to match inflation as measured by the percentage change in the Consumer Price Index since 2004, it would now be \$79,200. He notes that raising the low-income cut-off on this basis would be

⁹⁸ McLennan Report (2004) at 43 [JBD at tab 10].

⁹⁹ According to the Salary Guide, candidates at the 75th percentile are those in high demand with above-average experience, most or all of the necessary skills, and who may have specialized certifications [BED at tab 28].

¹⁰⁰ Robert Half Legal, Legal Salary Guide 2021 at 22 [BED at tab 28]. The information provided in the Robert Half Legal Salary Guide, which is published annually, is based on "thousands of job searches, negotiations and placements managed by Robert Half's staffing and recruiting managers" (see <https://www.newswire.ca/news-releases/are-you-underpaid-survey-released-with-robert-half-2019-salary-guides-finds-47-per-cent-of-canadian-workers-feel-shortchanged-691858491.html>).

¹⁰¹ Robert Half Legal, Legal Salary Guide 2021 at 25 [BED at tab 28].

¹⁰² Daniel Fish, First-year salaries on Bay Street reach new heights, *Precedent magazine*, December 4, 2018 (<https://lawandstyle.ca/career/on-the-record-first-year-salaries-on-bay-street-reach-new-heights/>) [BED at tab 27].

consistent with the approach taken to indexing Canadian personal income tax brackets. If the adjustment were calculated using the IAI, which represents the change in the earnings of employed Canadians, the low-income cut-off would be \$87,000.¹⁰³ Both measures, representing the overall increase in the cost of living and the overall wage increase since 2004, confirm that an increase of the low-income cut-off to \$80,000 is both amply justified and necessary.

131. Indeed, Prof. Hyatt's analysis of the CRA data suggests that increasing the low-income cut-off to \$80,000 would exclude a sizable number of senior lawyers who may be semi-retired and are therefore unsuited for judicial appointment. The data indicates that, as of 2019, there were 1,100 self-employed lawyers earning between \$60,000 and \$80,000 per year. Nearly half of these lawyers (48%) are between the ages of 55 and 69.¹⁰⁴

¹⁰³ Report of Prof. Doug Hyatt at 4 [Appendix A].

¹⁰⁴ *Ibid.*

132. When the low-income exclusion figure is adjusted to \$80,000, the CRA data is the following:

Table 4
Comparison of salary of puisne judges with CRA net professional income of self-employed lawyers at 75th percentile (Net professional income ≥ \$80,000, Age group – 44-56) Canada and top ten CMAs, 2015 to 2019

Year	75 th Percentile Income ¹⁰⁵		Salary of Puisne Judges		
			\$	Adjustment in the salary of <i>puisne</i> judges needed to match the net professional income of self-employed lawyers at 75 th Percentile	
	Canada	Top ten CMAs		Canada	Top ten CMAs
2015	\$430,000	\$490,000	\$308,600	39.3%	58.8%
2016	\$400,000	\$450,000	\$314,100	27.3%	43.3%
2017	\$430,000	\$480,000	\$315,300	36.4%	52.2%
2018	\$490,000	\$570,000	\$321,600	52.4%	77.2%
2019	\$480,000	\$550,000	\$329,900	45.5%	66.7%

133. As can be seen from the above tables, even without accounting for the incomes earned by high-earning lawyers through professional corporations, there is a considerable discrepancy between the judicial salary and the income of self-employed lawyers (\$220,100 in the top 10 CMAs in 2019). Even when the judicial salary is grossed up by a percentage representing the value of the judicial annuity, as considered by the Rémillard

¹⁰⁵ The figures provided by CRA for 75th percentile incomes from 2015-2019 have been rounded to the nearest 10,000 by CRA for privacy reasons. A method for arriving at the figure for the 75th percentile before the Rémillard Commission was to calculate the mean of the 15th and 16th tiles (75th and 80th percentiles, respectively) in a 20-tile table (see Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated March 29, 2016 at paras. 105ff [BED at tab 11]). If a similar approach were applied with the current data, where the 15th and 16th tiles would be used in the 20-tile table for the All Canada figures and the 8th tile would be used for the 10-tile table for the CMA figures, instead of using the rounded figures for the 75th percentile provided by CRA, on average the numbers set out in Table 4 are 1.3% lower for 75th Percentile Income (Canada) than they would be if the methodology from the 2016 Reply Submission were adopted. There is no material difference for 75th Percentile Income (Top ten CMAs).

Commission,¹⁰⁶ there remains a significant gap between the resulting grossed up amount of judicial salary and the income of self-employed lawyers as captured by the CRA data, particularly in the top ten CMAs (\$119,151), as shown in the table and graphical representation below.

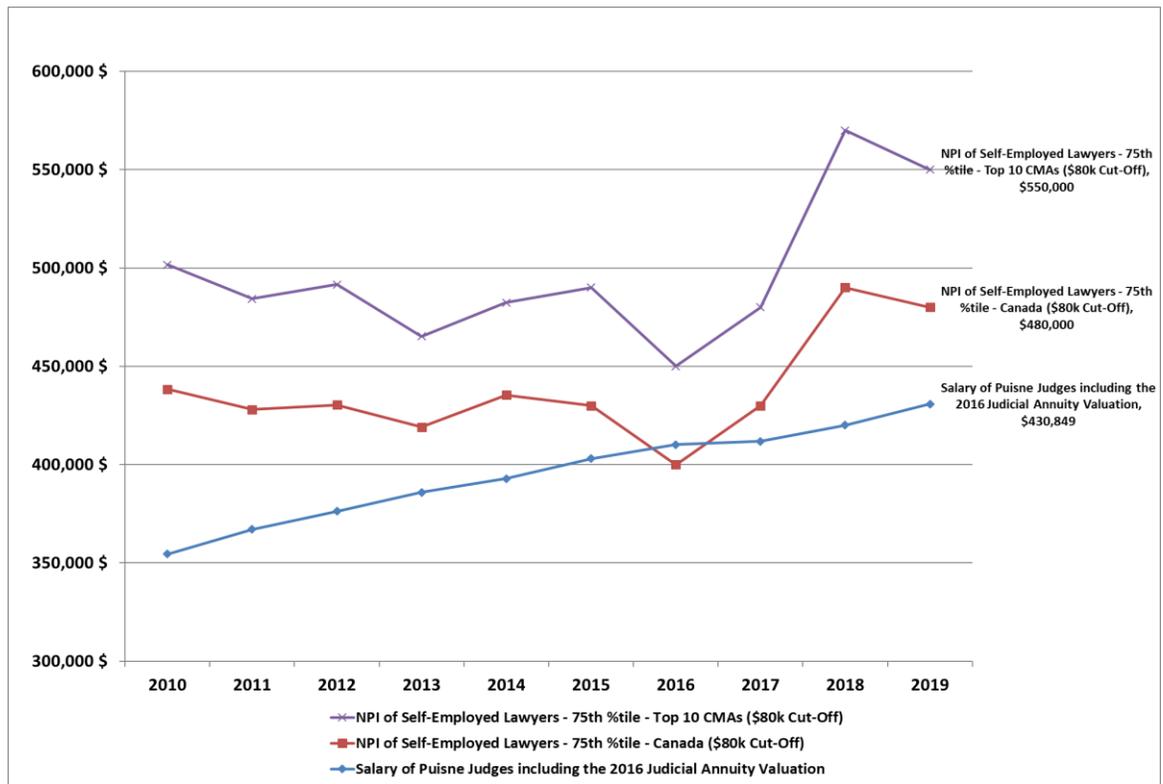
Table 5
Comparison of salary plus annuity of puisne judges
with CRA net professional income of
self-employed lawyers at 75th percentile
(Net professional income ≥ \$80,000, Age group – 44-56)
Canada and top ten CMAs, 2015 to 2019

Year	75 th Percentile Income ¹⁰⁷		Salary of Puisne Judges		
			\$ Includes Annuity valuation of 30.6%	Adjustment in the salary of <i>puisne</i> judges needed to match the net professional income of self-employed lawyers at 75 th Percentile	
	Canada	Top ten CMAs			Canada
2015	\$430,000	\$490,000	\$403,032	6.7%	21.6%
2016	\$400,000	\$450,000	\$410,215	-2.5%	9.7%
2017	\$430,000	\$480,000	\$411,782	4.4%	16.6%
2018	\$490,000	\$570,000	\$420,010	16.7%	35.7%
2019	\$480,000	\$550,000	\$430,849	11.4%	27.7%

¹⁰⁶ Rémillard Report (2016) at paras. 72-74 [JBD at tab 13]. The Association and Council’s expert, Mr. Newell, arrived at the value of 30.6% while the Government’s expert arrived at the value of 32% plus 4.5% for the disability benefit. The Commission set aside the latter in discussing the valuation, and concluded that the 30.6% and 32% “assessments are remarkably close” (para. 72).

¹⁰⁷ *Supra* note 105.

Graph 3
Comparison of salary plus annuity of puisne judges with CRA net professional income (“NPI”) of self-employed lawyers at 75th percentile (Net professional income ≥ \$80,000, Age group – 44-56) Canada and top ten CMAs 2015 to 2019



134. The particularly significant gap between the judicial salary and the income of self-employed lawyers in the top ten CMAs warrants this Commission’s attention. More than two thirds (68%) of appointees between April 30, 2015 to October 2, 2020 have been appointed from the top 10 CMAs.¹⁰⁸ The need consistently to attract outstanding candidates for judicial appointments from these regions cannot be ignored.

135. The Rémillard Commission declined to give more than “very limited weight” to the difference between salaries in the top 10 CMAs and those in the rest of the country given the lack of evidence of recruitment problems in the top 10 CMAs. This is a source

¹⁰⁸ Based on data provided by the Commissioner for Federal Judicial Affairs for April 30, 2015 to October 23, 2020 [JBD at tab 21(d)].

of concern for the Association and Council considering the high proportion of appointees that are necessarily recruited from those regions.

136. The issue of attracting outstanding candidates to the judiciary was addressed in a separate section, above. As previously stated, there has been a noticeable drop in interest in a judicial appointment among highly qualified lawyers in private practice at least partially attributable to the gap between judicial salaries and the incomes of lawyers in private practice. This issue exists in particular in some of the top 10 CMAs.

b) Impact of professional corporations

137. The Commission must take into account the fact that the actual gap between the judicial salary and the income of self-employed lawyers is, in reality, larger than can be shown by the CRA data on self-employed lawyers, as this data dramatically underestimates the real incomes of self-employed lawyers. As the Rémillard Commission has acknowledged, the CRA data on self-employed lawyer incomes “does not capture self-employed lawyers who structure their practices as professional corporations.”¹⁰⁹ Data obtained from the Federation of Law Societies shows that there has been significant growth in the use of professional corporations across Canada since 2010. As shown in the table below, in 2018 the number of professional corporations existing across Canada represented 27% of practising and insured law society members.¹¹⁰

¹⁰⁹ Rémillard Report (2016) at para. 58(a) [JBD at tab 13].

¹¹⁰ This excludes members of the Chambre des notaires du Québec. The Federation has advised that it will obtain figures for 2019 law society membership by end of April 2021 [JBD at tab 40].

Table 6
Comparison of Registered Professional Corporations (PCs)
and Insured/Practicing Law Society Members
2010 to 2019

Year	Registered PCs	Insured and practicing law society members	Registered PCs as percentage of insured and practicing law society members
2010	5,368	55,902	10%
2011	9,763	59,599	16%
2012	10,749	58,166	18%
2013	12,080	59,070	20%
2014	9,445	59,605	16%
2015	15,239	60,924	25%
2016	16,041	60,924	26%
2017	16,764	63,010	27%
2018	17,066	63,956	27%
2019	17,871	-	-

138. These figures show that the number of registered professional corporations for practising lawyers as a percentage of the total number of insured and practising lawyers has effectively tripled since 2010, and reached a total number of 17,871 in 2019.
139. That the CRA data fails to capture self-employed lawyer income earned by professional corporations – a vehicle increasingly used by legal professionals across Canada – greatly undermines any attempt to characterize the CRA data as probative evidence establishing the level of compensation required to attract outstanding candidates to the judiciary. The expert evidence provided by Stéphane Leblanc, Tax Partner at EY Canada and André Pickler, Tax Manager at EY Canada, confirms that lawyers who can afford to put earnings aside have an interest in constituting a professional corporation. Depending on the lifestyle of the given lawyer, income at a level of between \$200,000 and \$300,000 enters the zone in which a professional corporation can be fiscally

beneficial.¹¹¹ Needless to say, the higher the income, the greater the benefit in having that income retained in a corporation. Relatedly, higher income is correlated with seniority and expertise.

140. As such, the CRA data fails to capture income earned by the senior members of entire firms, or indeed of the entire legal profession in certain regions such as metropolitan areas where the profession's members earn high incomes.
141. Before the Rémillard Commission, the Association and Council took the position that the gap between self-employed lawyer incomes as shown by the CRA data and judicial salaries would be even greater if the income of lawyers practising through professional corporations were taken into account.¹¹² This view is supported by the expert evidence provided by Mr. Leblanc and Mr. Pickler.¹¹³
142. Other evidentiary elements further corroborate the fact that the CRA data under-reports the actual income of self-employed lawyers.¹¹⁴ For example, in the context of a recent inquiry into gender disparity at major law firms in Canada, the *Globe and Mail* cited average compensation levels at a national law firm. At the firm in question, female partners earned on average 25% less than male partners, that percentage translating into an average of \$200,000 less. This means that male partners earned on average \$800,000 and female partners earned on average \$600,000.¹¹⁵
143. In light of the significant gap between self-employed lawyer incomes as represented in the CRA data and the judicial salary, and considering the increasing number of high-earning lawyers excluded from this data given their use of professional corporations, it is unsurprising that the judiciary is experiencing difficulty, in some regions, in attracting outstanding candidates from private practice to the Bench.

¹¹¹ Report of Stéphane Leblanc and André Pickler at 1-3 [Appendix B].

¹¹² Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated February 29, 2016 at para. 122 [BED at tab 10].

¹¹³ Report of Stéphane Leblanc and André Pickler at 3 [Appendix B].

¹¹⁴ We note that given competitive and privacy reasons, it is difficult to obtain compensation information for senior lawyers in private practice, as has recently been confirmed by the *Globe and Mail*. R. Doolittle, "Major Canadian law firms willing to release wage-gap data", *Globe and Mail* (25 February 2021) [BED at tab 31].

¹¹⁵ R. Doolittle & C. Dobby, "Female partners earned 25 percent less than their male colleagues at a major Toronto law firm, document shows", *Globe and Mail* (9 February 2021) [BED at tab 30].

144. Moreover, although self-employed lawyers have been the source, traditionally, of the vast majority of appointments to the Bench, there is a declining proportion of appointments from private practice (approximately 75% between 1990 and 2007, 70% between 2007 and 2011, and approximately 63% between 2011 and 2020), as set out in the section above regarding the need to attract outstanding candidates to the judiciary.
145. It follows from the foregoing that the real gap between the incomes earned by self-employed lawyers and the judicial salary is significantly greater than that reflected in the CRA data. The CRA data does not form a reliable basis, in that it is not complete, to calculate the appropriate comparator from private practice. The real gap between the incomes earned by self-employed lawyers and the judicial salary is an obstacle to garnering interest in a judicial appointment from outstanding members of the Bar. This trend strikes at the heart of the criterion set out in the *Judges Act* regarding the need to attract outstanding candidates to the judiciary.

d) Salary recommendation sought by the Association and Council

146. Based on the comparators, whether it be the DM-3 comparator or the income of self-employed lawyers, the current judicial salary is inadequate and must be increased. The statutory criterion of attracting outstanding candidates to the Bench demands it.
147. The judicial salary lags significantly behind the total average compensation of DM-3s, which most accurately reflects the actual compensation of DM-3s, on average. As of April 1, 2019, the gap between total average DM-3 compensation and the salary of a puisne judge was \$53,544, a difference of -14%. Assuming the judicial salary is adjusted in accordance with the projected IAI, it is projected to reach \$378,687 by April 1, 2023. The projected total average compensation for DM-3s will by then be \$413,725. A gap of \$35,038 (-8.5%) will remain. This is higher than the already significant 7.3% gap that the Levitt Commission said “tests the limits of rough equivalence”.¹¹⁶
148. In such circumstances, the Association and Council submit that based on the statutory criteria, the Commission should, at a minimum, recommend an increase of the judicial salary to partially bridge the significant gap that exists between the judicial salary and the DM-3 comparator. This gap will continue to exist for the foreseeable future. It bears

¹¹⁶ Levitt Report (2012) at para. 52 [JBD at tab 12].

repeating that the total average compensation of DM-3s is the remuneration of those senior public servants whose skills, experience and levels of responsibilities most closely parallel those of the judiciary.

149. The case for such a salary increase is further bolstered by the fact that incomes among self-employed lawyers are significantly higher than the judicial salary. As set out above in the section on the income of self-employed lawyers, the income of those self-employed lawyers who did not constitute a professional corporation was \$550,000 in 2019 at the 75th percentile, in the top 10 CMAs, with a \$80,000 low-income cut-off, in the 44-56 age group. With the judicial salary at \$329,900 in 2019, an increase of 66.7% would have been required to match the income of lawyers who represent the most significant pool from which outstanding candidates should be selected. Even when the judicial annuity is factored in at a value of 30.6%, the gap in 2019 between the judicial salary and the income of self-employed lawyers (who did not constitute a professional corporation) under the above parameters could only be bridged with an increase of 27.7% in the judicial salary.
150. The figures for the incomes of self-employed lawyers are even higher in reality. The CRA data relied upon dramatically understates the figures since it does not capture the income of the large number lawyers who constituted a professional corporation. Among the insured and practising lawyer population across the country, 27% had a professional corporation.
151. It bears repeating that the majority of judicial appointments have traditionally come from private practice, as it should be. In circumstances where provincial and federal governments, and their various administrative bodies, are recurring parties to litigation before the courts, it is important that the majority of judges who decide disputes between the State and citizens come from backgrounds that put them at a distance from the State. This is an important ingredient to foster the continued confidence of Canadians in their outstanding judiciary.
152. As discussed already, over the decades there has been a downward trend in the percentage of appointments from private practice. This raises concerns with respect to the breadth of the pool of outstanding candidates willing to apply for judicial appointment. The decline of appointments from that sector of the legal world has little to

do with the diversity imperative and much to do with the judicial salary being an obstacle to attracting lawyers in private practice to the bench.

153. The Association and Council are conscious of the current economic conditions, and notably the financial position of the Government. While these need to be taken into account by the Commission, the Commission also has a duty of vigilance in respect of the statutory criterion of Canada's continued ability to attract outstanding candidates to the Bench.
154. Both the DM-3 comparator and the self-employed lawyer comparator support the need for an increase in the judicial salary. The judiciary requests that the Commission apply an approach that involves consideration of the \$35,038 gap that is projected to exist on April 1, 2023 between the judicial salary and total average compensation of DM-3s, and, in light of the financial position of the Government, recommend an increase to the judicial salary of puisne judges so that half of that gap, an amount of \$17,519, be reduced by the end of the current cycle.
155. The \$17,519 reduction in the gap between the projected judicial salary of April 1, 2023, and the projected DM-3 total average compensation on that date, requires an increase of 4.6%¹¹⁷ to the 2023 projected judicial salary of \$378,687. In light of the current economic conditions and the financial position of the Government, the judiciary is not requesting an increase as of April 1, 2020 or 2021, but rather proposes that the increase be split over the last two years of the period covered by the Commission's current inquiry, so that the judicial salary is increased by 2.3%¹¹⁸ on each of April 1, 2022 and April 1, 2023, exclusive of statutory indexing based on the IAI. As can be seen in the following table, the proposed increase would leave judicial salaries at 4.2% less than the projected total average compensation of DM-3s by the end of the current quadrennial cycle.

¹¹⁷ The un-rounded % increase would be 4.62625%.

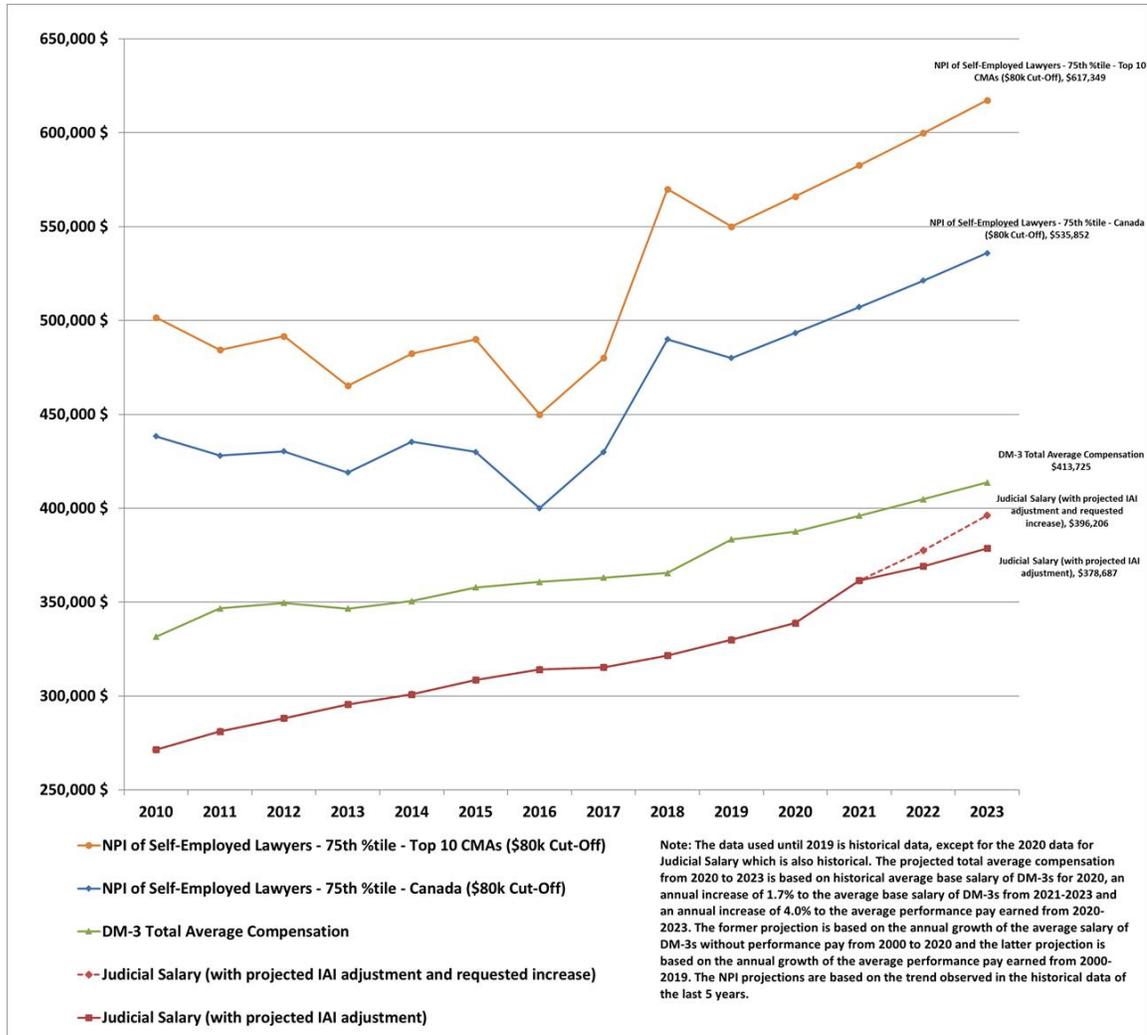
¹¹⁸ The un-rounded % increase would be 2.34058%.

Table 7
Comparison of Judicial Salary with proposed increases and DM-3 Total Average Compensation, 2019-2023 (actual and projected)

Date	Judicial Salary	DM-3 Total Average Compensation	Difference between Judicial Salary and DM-3 Total Average Compensation	
April 1, 2019	\$329,900	\$383,454	-14%	-\$53,554
April 1, 2020	\$338,800	\$387,555	-12.6%	-\$48,755
April 1, 2021	\$361,500	\$396,055	-8.7%	-\$34,555
April 1, 2022	\$377,553	\$404,776	-6.7%	-\$27,223
April 1, 2023	\$396,206	\$413,725	-4.2%	-\$17,519

156. The above projections assume that the statutory indexation based on the IAI as provided for in s. 25 of the *Judges Act* will remain unchanged through the present quadrennial cycle.
157. The following is a graphical representation of the judicial salary with the requested increase until 2023, as compared to the judicial salary with only the projected IAI adjustment, the projected DM-3 total average compensation, and the projected income of self-employed lawyers within the 44-56 age band, at the 75th percentile, with \$80,000 low-income cut-off, for all of Canada and the top 10 CMAs based on the CRA data.

Graph 4
Comparison of projected Judicial Salary, projected Judicial Salary with requested increase, projected DM-3 total average compensation, projected net professional income (“NPI”) of self-employed lawyers 2010-2023



158. The impetus for the proposed increase is both to seek equivalence with senior deputy ministers, and to avoid an exacerbation of the already-significant gap between the judicial salary and the income of self-employed lawyers. The issue of attracting outstanding candidates from private practice will continue to be a challenge, especially in certain parts of the country, but the requested increase will go some distance in mitigating the problematic situation evidenced by the declining appointments from private practice and the assessment conveyed by certain chief justices about the difficulty in recruiting quality candidates from private practice.

159. The Association and Council submit that the criteria under s. 26(1.1) of the *Judges Act*, and the data relevant to the two key comparators for the establishment of the judicial salary for puisne judges, justify that this Commission make the following salary recommendation:

Recommendation: That the judicial salary be increased by 2.3% on each of April 1, 2022 and April 1, 2023, exclusive of statutory indexing based on the IAI.

2. Incidental Allowance

160. Subsection 27(1) of the *Judges Act* provides each judge with an incidental allowance “for reasonable incidental expenditures that the fit and proper execution of the office of judge may require”.
161. An incidental allowance of \$1,000 per annum per judge was created in 1980. It was increased to \$2,500 in 1989 and then doubled to \$5,000 in 2000. It has not been increased since. In light of the needs of judges, intensified especially by the transition to routine remote judging as the new normal, and in light of the effects of inflation since 2000, the Association and Council request that the Commission make a recommendation for an increase in the incidental allowance.
162. The incidental allowance is an entitlement to the reimbursement of reasonable expenses incurred by sitting judges. As such, it is not a component of judicial compensation. This entitlement is administered by the Office of the Commissioner for Federal Judicial Affairs, which audits every claim pursuant to recently reviewed guidelines.¹¹⁹ Claims for reimbursement must adhere to the following principles: value for money, accountability, transparency, and respect for judicial independence.¹²⁰ Judges who do not make use of the allowance, or who use only part of it, do not receive anything on account of the unused portion of the allowance.

¹¹⁹ Office of the Commissioner for Federal Judicial Affairs, Guidelines on the Incidental Allowance dated April 1, 2020 [BED at tab 25].

¹²⁰ *Ibid.*

163. The current level of the incidental allowance is insufficient for a large number of judges. The Office of the Commissioner for Federal Judicial Affairs issues *Guidelines on the Incidental Allowance*, which set out classes or categories of reimbursable expenses:¹²¹

- **Electronic and other office equipment**

Computer, printer, scanner, shredder, laptop, cell phone, tablet, and accessories for same, software and office supplies

- **Telecommunications**

Monthly cell phone usage, home internet and other wireless service fees for research and writing

- **Memberships and legal publications**

Membership fees to legal and judicial organizations (such as the Canadian Bar Association, the Canadian Superior Courts Judges Association, the International Association of Women Judges); books and subscriptions to publications for legal research and writing

- **Formal court attire**

Purchase and dry-cleaning and repair of judicial robes, waistcoats, wing collar shirts or blouses, black or grey trousers or skirts, tabs and studs

- **Judicial education and other outreach functions**

Costs for participation in conferences and seminars otherwise not reimbursed under the conference allowance, including registration, transportation, accommodations and meals, and other related costs, paid in accordance with the *Guidelines on the Conference Allowance*; costs related to judicial outreach or public education, such as speaking at a school or university; attending meetings of the Bar, swearing-in or swearing-out of judges, moot-courts, law clerk recruitment events, paid in accordance with the *Guidelines on the Travel Allowance*

¹²¹ *Ibid.* See also the list set out at https://www.fja.gc.ca/JudgesExpenses-DepensesJuges/incidentals-faux_frais/index-eng.html.

- **Other reasonable expenses**

Includes home security systems installation and monitoring; briefcases and suitcases for judicial travel; framing of official documents; hearing aids and glasses if not covered in insurance plans; parking at the courthouse

164. It is obvious that expenses under the foregoing six classes/categories can easily exceed the current \$5,000 limit for the incidental allowance. Two examples can be given from the above. First, expenditure on legal publications can be extensive given that superior court judges must remain current on a wide range of subject areas. Many judges need to adjudicate on issues in areas ranging from civil/commercial and insolvency to family and criminal law. Additionally, judges are required to complete 10 days of continuing education each year. These expenses must often be claimed as an incidental expense if they cannot be claimed under s. 41 (“Meeting, conference and seminar expenses”) and the relevant chief justice directs that they be claimed as an incidental expense.
165. Second, expenditure on telecommunications such as high-speed internet has become indispensable since the advent of remote judging and given the need to handle hearings through online platforms and to receive voluminous documents electronically. This has become especially costly for judges living or working in rural or under-served areas. The Association was informed that over half of judges recently canvassed spent more than \$120 per month (\$1,440 a year) on home internet costs. This represents close to 30% of the amount of the current allowance.
166. The Association and Council understand, based on discussions with the Commissioner for Federal Judicial Affairs, that, by way of example, in 2017-2018 nearly half of incidental expenses were related to technology required for the exercise of judicial functions. This usage would have been unimaginable in 2000, when the incidental allowance was fixed at \$5,000. The share of the incidental allowance spent on technology will only increase with increasingly remote and flexible working arrangements in the wake of the pandemic and as those arrangements become a permanent way of administering the judicial process.
167. An increase in the incidental allowance is also justified when considered in light of the judiciary’s rapid transition to remote work and virtual hearings, which are expected to continue beyond the pandemic. It is not only a question of the costs of high-speed

internet access, but also all the other expenses of maintaining a home office such as upgraded computers, printers, printer cartridges, earphones, etc.

168. The transition to remote work represents a “new normal”. By way of example, the federal Government recently introduced Bill C-23, *An Act to amend the Criminal Code and the Identification of Criminals Act and to make related amendments to other Acts (COVID-19 response and other measures)*. Bill C-23 proposes a number of permanent amendments to the *Criminal Code* which would remove a number of restrictions on remote hearings to “enhance the efficiency and effectiveness of criminal proceedings during the COVID-19 pandemic and in its aftermath” (Government Background Document). The proposed amendments make permanent changes that would (1) allow for the use of electronic means for the purpose of jury selection; (2) expand, for the accused and offenders, the availability of remote appearances; and (3) provide for the participation of prospective jurors in the jury selection process by videoconference.
169. These changes have been embraced by the judiciary and are entirely consistent with the recommendations of the Canadian Bar Association’s *Task Force Report on Justice Issues Arising from COVID-19*. The Task Force put forward the following recommendation:

1. All dispute resolution bodies (courts, tribunals, boards, etc.) should permanently implement the following measures to improve access to justice, modernize and address long-standing challenges in the justice system:

a) Remote (video, online, telephone) proceedings should be available for settlement conferences, examinations for discovery, various hearings, motions, trials and appeals. Remote proceedings should continue especially for procedural, uncontested, shorter and less complex matters. While the court, tribunal or other dispute resolution body should ultimately decide if a matter is to proceed remotely, the parties should be given an opportunity to be heard and present their position on proceeding remotely.¹²²

¹²² Canadian Bar Association, No Turning Back: CBA Task Force Report on Justice Issues Arising from COVID-19, February 2021 at 11 [BED at tab 29].

170. The Task Force recognized that these permanent changes required significant investment:

There is also no sugar coating the investments and resources required to implement the new measures, practices, and technologies discussed in this report. We recognize the recommendations in this report come with a high price tag. We also appreciate the financial challenges and pressures governments face, especially amid the pandemic. However, given the social and economic costs of an ill-resourced justice system and a clear return on investment in an accessible and modern justice system, we suggest investment in this area is justified.¹²³

171. The judiciary rose to the challenge posed by COVID-19, as it should have, to ensure that the justice system remains functional and responsive to the citizenry despite the severe logistical challenges that arose at the outset of the pandemic. Members of the judiciary have faced additional expenses associated with this unexpected transition to a remote working environment. This includes the costs associated with technology for virtual hearings and charges for increased internet and phone usage.

172. As virtual proceedings become increasingly commonplace, and the judiciary adapts to remote and flexible environments for the long-term, those judges who have incurred and will continue in the future to incur reasonable additional expenses should be entitled to reimbursement through an increased incidental allowance.

173. As shown in the table below, between 2016 and 2020 more than 70% of judges reached close to the maximum of the incidental allowance (using \$4,000 or more).

Fiscal Year	Incidental Allowance Usage (Percentage of Judges)				
	\$5,000	\$4,000-\$4,999	\$1,001-\$3,999	\$1-1,000	\$0
2016/2017	42.2%	28.1%	26.1%	2.1%	1.5%
2017/2018	45.3%	27.1%	23.5%	2.1%	2.1%
2018/2019	45.2%	25.9%	24.3%	3.0%	1.6%
2019/2020	45.3%	23.7%	25.1%	3.7%	2.2%

174. An important point to keep in mind when analyzing the above statistical table is that lower use of the incidental allowance by some judges does not justify penalizing those

¹²³ *Ibid* at 22 [BED at tab 29].

who need more of it. That need is real, and the interests of justice are served by responding to that need.

175. To serve its purpose, the incidental allowance must be responsive to the additional expenses that have been and will continue to be incurred by members of the judiciary as part of the justice system's modernization.
176. When the incidental allowance was raised previously, it was because the Drouin Commission agreed that "Incidental Allowances should be adjusted upward to better reflect the cost of goods in today's marketplace."¹²⁴ This observation is especially apt in the current period.
177. In addition to the above, inflation alone since 2000 would justify an increase of this allowance. According to Professor Hyatt, if the incidental allowance were adjusted in accordance with the increase in CPI since 2000, it would be set at \$7,245.¹²⁵ Indeed, failure to adjust the amount of the incidental allowance to take account of inflation is a *de facto* reduction of the allowance.
178. As an ancillary point, the Association and Council request that the Commission recommend a change in the French terminology for the incidental allowance from the expression "faux frais" to "frais de fonction", since the former is an expression that does not aptly reflect the concept of an incidental allowance, and indeed gives the misleading impression that the expense in question is "false" or "artificial".

Recommendation: That the incidental allowance provided under s. 27(1) of the *Judges Act* be increased from \$5,000 to \$7,500 per judge per year. That the expression "faux frais" in the French version of the *Judges Act* be replaced with the expression "frais de fonction".

3. Representational Allowances

179. Subsection 27(6) of the *Judges Act*, provides that some judges may receive, as a representational allowance, reimbursement of reasonable travel and other expenses incurred in discharging their extra-judicial obligations and responsibilities.

¹²⁴ Drouin Report (2000) at 56 [JBD at tab 9].

¹²⁵ Report of Prof. Doug Hyatt at 5 [Appendix A].

180. The representational allowance for appellate chief justices was set at \$12,500 in 2000 by the Drouin Commission. The Drouin Commission also set the representational allowance for first-instance chief justices and associate chief justices at \$10,000. The McLennan Commission in 2004 set the representational allowance for regional senior judges at \$5,000. The representational allowances have not been increased since those dates. An increase in the representational allowance is warranted in light of inflation.
181. The representational allowance available under the *Judges Act* recognizes the special responsibility of chief justices and other senior judges in administering their courts in a manner that sustains public awareness and confidence in the judiciary.
182. We note that the appellate chief justices have the designation of chief justice of the province and are the leader of the judicial branch in that province. Throughout the year, appellate chief justices, first-instance chief justices, associate chief justices, and regional senior judges will incur expenses associated with representing the judicial branch and their courts in discharging special extra-curricular obligations that devolve on their office, including holding, arranging and attending events within the courts, the broader legal community, within government and the public. Chief justices, associate chief justices, and regional senior judges do not have access to any other funding for such expenses incurred in the performance of their office.
183. According to Professor Hyatt, if the representational allowances were adjusted in accordance with the increase in CPI since 2000 (for appellate chief justices, first-instance chief justices and associate chief justices) or 2004 (for regional senior judges), they would be valued as follows: \$18,113 for appellate chief justices, \$14,490 for first-instance chief justices and associate chief justices, and \$6,600 for regional senior judges.¹²⁶ A recommendation should also be made for corresponding increases for the allowance available to puisne judges of the Supreme Court of Canada and the Chief Justice of Canada under s. 27(6) of the *Judges Act*. Similar to the incidental allowance, failure to adjust the amount of the representational allowance to take account of twenty years of inflation is a *de facto* reduction to the amount of the allowance.

¹²⁶ Report of Prof. Doug Hyatt at 5 [Appendix A].

184. The Association and Council note that the representational allowance is an entitlement to the reimbursement of reasonable expenses associated with the exercise of extra-judicial duties by chief justices, associate chief justices and regional senior judges, subject to the auditing mandate of the Commissioner for Federal Judicial Affairs within the framework of recently reviewed guidelines.¹²⁷ As such, it is not a component of judicial compensation and judges who do not make use of the allowance, or who use only part of it, do not receive anything on account of the unused portion of the allowance.

Recommendation: That the representational allowance provided for under s. 27(6) of the *Judges Act* be increased as follows: from \$18,750 to \$25,000 under s. 27(6)(a); from \$12,500 to \$17,500 under s. 27(6)(c); from \$10,000 to \$15,000 under ss. 27(6)(b), (d), (e) and (f); and from \$5,000 to \$7,500 under s. 27(6)(g).

4. Life Insurance for Retired Chief Justices

185. The Council takes this opportunity to raise a discrete issue regarding life insurance for retired chief justices for the attention of the Commission.
186. When a chief justice steps down and elects supernumerary status, they receive the salary of a puisne judge. However, s. 43(1) of the *Judges Act* provides that where a chief justice has elected supernumerary status, they will receive an annuity based on the salary of a chief justice upon retirement, even though this was not their most recent salary. The annuity level reflects the higher-earning position as opposed to the most recent position.
187. This approach has not been reflected in the insurance program available to the judiciary. Pursuant to s. 41.2 of the *Judges Act*, the Treasury Board has established an insurance program for judges, which includes post-retirement life insurance (the “**Program**”). In contrast to the annuity scheme for former chief justices, the Program provides that post-retirement life insurance is equal to the final salary in the first year of retirement, and it decreases by 25% annually to a minimum of 25% of the adjusted final salary in the fourth year of retirement. The Program does not provide an exception for chief justices who stepped down from the position and who then elected supernumerary status, and

¹²⁷ Office of the Commissioner for Federal Judicial Affairs, Guidelines on the Representational Allowance dated April 1, 2020 [BED at tab 26].

whose final salary is that of a puisne judge. In other words, it creates a disincentive for chief justices to elect supernumerary status in a way that the *Judges Act* is designed explicitly to avoid with respect to the annuity.

188. The Council requests that the Commission recommend that the Treasury Board amend the Program to reflect the approach taken at s. 43(1) of the *Judges Act* and provide that post-retirement life insurance in the first year of retirement for those chief justices having elected supernumerary status will equal the salary of a chief justice.

Recommendation: That the Treasury Board amend the insurance program available to the judiciary to provide that post-retirement life insurance in the first year of retirement for those chief justices having elected supernumerary status will equal the salary of a chief justice.

5. Costs Associated with the Judiciary's Participation in a Referral to the Commission under s. 26(4) of the *Judges Act*

189. As reflected below in the section of the Association and Council's submission on costs, the Association and Council do not seek any variation to s. 26.3(2) of the *Judges Act*, pursuant to which the judiciary is entitled to reimbursement of two-thirds of the costs arising from its participation in the Commission's quadrennial inquiries. However, based on recent experience, the Association and Council do raise as an issue for the Commission's consideration the question of costs related to the judiciary's participation in referrals to the Commission under s. 26(4) of the *Judges Act*.
190. On May 31, 2019, the Minister of Justice referred an inquiry to be undertaken by the Rémillard Commission under s. 26(4) of the *Judges Act*. The Minister, in a letter addressed to the Commission, with copy to the Association, the Council, and the Prothonotaries of the Federal Court, asked the Commission to undertake an inquiry on the following matter:

[T]he effects on the adequacy of federal judicial compensation and benefits, if any, of an amendment to the *Judges Act* that would stop the accrual of pensionable service for any judge whose removal from office has been recommended by the Canadian Judicial Council.

191. The Association considers that the judiciary has a legal and constitutional duty, under the *Judges Act*, to participate in the work of the Commission, and to identify considerations relevant to a Commission's inquiry. That is so, whether the inquiry

concerns an infinitesimal number of judges, as was the case for the May 2019 referral, or all federally appointed judges, as is the case for quadrennial inquiries. Indeed, the very legitimacy of an inquiry pursuant to a Minister's referral depends on the judiciary's participation. Accordingly, on July 18, 2019, the Association made considered submissions in connection with the proposed amendment to the *Judges Act*.

192. The Association asked the Commission to recommend that the Government reimburse the Association's full costs to participate in the inquiry. The Rémillard Commission declined to make such a recommendation, referring to the provision for reimbursement of two-thirds of the judiciary's representational costs set out in s. 26.3(2) of the *Judges Act*.
193. The Association is a voluntary, non-profit organization. The financing of its activities, in the pursuit of its public interest objects, entirely depends on the annual membership dues of its members.
194. The Association's participation in the quadrennial inquiry of the Commission is a significant item of the Association's budget, which is built on an annual basis so as to accumulate sufficient funds to meet that expense every four (4) years. Those funds are necessary to cover the one-third of representational costs incurred during the quadrennial inquiry and not reimbursed by the Government under s. 26.3(2) of the *Judges Act*.
195. By contrast to the predictable expenditure on quadrennial inquiries, any given referral by the Minister to the Commission pursuant to s. 26(4) of the *Judges Act* is unexpected. Both the referral and its timing result from a unilateral decision by the Government. The expense associated with the Association's participation cannot be built into the Association's budget in the same way as its participation in the quadrennial inquiry of the Commission.
196. Even so, the Association, as the representative organization of the federally-appointed judiciary, is obliged to participate in the work of the Commission, and to identify considerations relevant to a Commission's inquiry. In such circumstances, it is submitted that fairness requires that the Association be fully reimbursed for the costs associated with its participation in a referral process initiated by the Minister, a process in which the Government participates with legal representation funded by the public purse.

197. For these reasons, the Association requests that the Commission recommend that the *Judges Act* be amended so as to provide that notwithstanding ss. 26.3(1) and (2) of the *Judges Act*, a representative of the judiciary (identified under s. 26.3(1)) who participates in an inquiry of the Commission pursuant to a referral under s. 26(4) is entitled to be paid the full costs of their participation in the inquiry, as determined under s. 26.3(3).

Recommendation: That the *Judges Act* be amended so as to provide that notwithstanding ss. 26.3(1) and (2) of the *Judges Act*, a representative of the judiciary (identified under s. 26.3(1)) who participates in an inquiry of the Commission pursuant to a referral under s. 26(4) is entitled to be paid the full costs of their participation in the inquiry, as determined under s. 26.3(3).

VI. COSTS

198. Under s. 26.3(2) of the *Judges Act*, the judiciary is entitled to reimbursement of two-thirds of the costs arising from its participation in the Commission's inquiry. The Block Commission recommended that this remain unchanged while the Levitt and Rémillard Commissions did not make any recommendation concerning the judiciary's costs.¹²⁸ The Association and Council do not at this stage seek to change this provision.

VII. SUMMARY OF RECOMMENDATIONS SOUGHT

199. The following is a summary of the recommendations sought by the judiciary:

Recommendation: That the judicial salary be increased by 2.3% on each of April 1, 2022 and April 1, 2023, exclusive of statutory indexing based on the IAI.

Recommendation: That the incidental allowance provided under s. 27(1) of the *Judges Act* be increased from \$5,000 to \$7,500 per judge per year. That the expression "faux frais" in the French version of the *Judges Act* be replaced with the expression "frais de fonction".

Recommendation: That the representational allowance provided for under s. 27(6) of the *Judges Act* be increased as follows: from \$18,750 to \$25,000 under

¹²⁸ The Rémillard Commission did consider a request by the Prothonotaries for full representational costs and recommend that 95% of their reasonable full indemnity costs be paid by the Government.

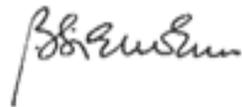
s. 27(6)(a); from \$12,500 to \$17,500 under s. 27(6)(c); from \$10,000 to \$15,000 under ss. 27(6)(b), (d), (e) and (f); and from \$5,000 to \$7,500 under s. 27(6)(g).

Recommendation: That the Treasury Board amend the insurance program available to the judiciary to provide that post-retirement life insurance in the first year of retirement for those chief justices having elected supernumerary status will equal the salary of a chief justice.

Recommendation: That the *Judges Act* be amended so as to provide that notwithstanding ss. 26.3(1) and (2) of the *Judges Act*, a representative of the judiciary (identified under s. 26.3(1)) who participates in an inquiry of the Commission pursuant to a referral under s. 26(4) is entitled to be paid the full costs of their participation in the inquiry, as determined under s. 26.3(3).

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

Montréal, March 29, 2021



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**APPENDIX A:
SUMMARY OF THE HISTORY OF
THE TRIENNIAL AND QUADRENNIAL COMMISSION PROCESSES**

1. Prior to 1981, advisory committees reviewed judges' compensation and made recommendations to the Government.¹²⁹ As noted by the Drouin Commission, this process was unsatisfactory because the advisory committee recommendations "generally were unimplemented or ignored", and "the process merely amounted to petitioning the government to fulfill its constitutional obligations."¹³⁰
2. In 1982, the Triennial Commission process was established. Under s. 19.3 of the *Judges Act* as it read at the time, the Triennial Commission was required to inquire into the adequacy of judicial compensation and to make recommendations to the Minister of Justice. The objective of the Triennial Commission process was to depoliticize the determination of judicial salaries and benefits in order to preserve judicial independence.
3. There was no obligation on the part of the Government under the Tribunal Commission process to respond or act upon the recommendations made by Triennial Commissions.
4. This proved to be a fundamental shortcoming, and no one disputes that the Triennial Commission process was a failure. The salary recommendations of the five Triennial Commissions were generally ignored, left unimplemented and often became the subject of a politicized debate.¹³¹
5. It is relevant to cite what the Scott Commission said, in 1996, in the twilight of the Triennial Commission process:

The purpose of the Commission was to ensure that, through the creation of a body which would be independent both of the judiciary and Government, Parliament would be presented with an objective and fair set of recommendations dictated by the public interest, having the effect of maintaining the independence of the judiciary while at the same time attracting those pre-eminently suited for judicial office. The theory was that, by way of such recommendations, emanating from regularly

¹²⁹ Two advisory committees were chaired by Irwin Dorfman, Q.C. (report issued on November 22, 1978) and Jean de Grandpré (report issued on December 21, 1981) respectively.

¹³⁰ Drouin Report (2000) at 2 [JBD at tab 9].

¹³¹ The reports of the Triennial Commissions were as follows: Lang Report (1983), Guthrie Report (1987), Courtois Report (1990), Crawford Report (1993), and Scott Report (1996) [BED at tabs 20-24].

convened independent commissions, the process would be de-politicized and judicial independence would be thus maintained.

While the idea was sound, the underlying assumptions appear to have been naïve. The result has been a failure in practice to meet the desired objectives. Since the first Triennial, there have been four Commissions (Lang (1983), Guthrie (1986), Courtois (1989) and Crawford (1992)). In spite of extensive inquiries and exhaustive research in each case, recommendations as to the establishment of judicial salaries and other benefits have fallen almost totally upon deaf ears. The reasons for this state of affairs have been largely political.¹³²

6. Previously, the Crawford Commission in 1993 had lamented Government delays in acting upon recommendations made by the Commission:

The respect shown for the concept of judicial independence in the design of the Triennial Commission process has been tainted by the business-as-usual attitude of successive Governments once the Commission reports have been presented to Ministers of Justice and tabled in Parliament. This failure to act with reasonable promptness cannot but lead to the entire review process losing credibility. This Commission notes, for example, that the legislation (Bill C-50) comprising the Government's response to the 1989 Commission on Judges' Salaries and Benefits (the Courtois Commission), was not introduced in Parliament until December 1991, and that by the end of the mandate of the current Commission, this relatively uncomplicated legislation had not yet been enacted.¹³³

7. The regrettable state of affairs of this important process was commented upon by former Chief Justice Lamer in 1994, in an address to the Council of the Canadian Bar Association, when he said that the Triennial Commission "looks good on paper, but it has one problem. It doesn't work. Why? Because the Executive and Parliament have never given it a fair chance."¹³⁴

A. The *PEI Reference*

8. In 1997, the Supreme Court of Canada in the *PEI Reference* explained that the Constitution requires the existence of a body such as a commission that is interposed between the judiciary and the other branches of the State. The constitutional function of

¹³² Scott Report (1996) at 7 [BED at tab 24].

¹³³ Crawford Report (1993) at 7 [BED at tab 23].

¹³⁴ The Honourable Chief Justice Lamer, "Remarks by the Rt. Honourable Antonio Lamer, P.C., Chief Justice of Canada, to the Council of the Canadian Bar Association Annual Meeting" (20 August 1994) at 10 [unpublished] [BED at tab 18].

this body is to depoliticize the process of determining changes to or freezes in judicial compensation.

9. This objective is achieved by entrusting that body with the specific task, at regular intervals, of issuing a report on the salaries and benefits of judges to the executive and the legislature. The Court said that the body must be independent, objective, and effective in order to be constitutional.¹³⁵ Any changes to judicial salaries without prior recourse to this body would be unconstitutional.¹³⁶
10. The existence of this body also ensures that the judiciary does not find itself in a position of having to negotiate its salary directly with the government, something that is fundamentally at odds with judicial independence.¹³⁷
11. A necessary component of the effectiveness of this body is the timely implementation of its recommendations, or a prompt response from the government in question providing legitimate reasons for a refusal to implement.¹³⁸

B. The Quadrennial Commission Process and the First Quadrennial Commission

12. Acting upon the constitutional imperative enunciated by the Supreme Court of Canada in the *PEI Reference*, Parliament amended the *Judges Act* in 1998 and established the Quadrennial Commission. A key aspect of these amendments was the requirement that the Minister of Justice respond to the recommendations of the Quadrennial Commission within six (6) months of receiving them. Since the mandate of the Commission began on September 1, and since it was required to issue its report within nine (9) months from the start of its mandate, the deadline for the issuance of the Minister's response was the end of November of the subsequent year.¹³⁹
13. The first Quadrennial Commission was chaired by Mr. Richard Drouin, QC, in 1999. The other members were Ms. Eleanore Cronk (now of the Ontario Court of Appeal) and

¹³⁵ *PEI Reference, supra* at paras. 169-175 [JBD at tab 4]; see also *Bodner, supra* at para. 16 [JBD at tab 6].

¹³⁶ *PEI Reference, supra* at para. 147 [JBD at tab 4].

¹³⁷ *PEI Reference, supra* at para. 186 [JBD at tab 4].

¹³⁸ *PEI Reference, supra* at paras. 179-180 [JBD at tab 4].

¹³⁹ As discussed below, Parliament amended the *Judges Act* in 2012 following the Levitt Report to change the start of the Commission's mandate to October 1, and to reduce the time in which the Minister of Justice must respond to the recommendations of the Quadrennial Commission to within four (4) months. In 2017, following the Rémillard Report, Parliament amended the *Judges Act* to change the start of the Commission's mandate from October 1 to June 1.

Mr. Fred Gorbet. The Drouin Report was issued on May 31, 2000. It was an impressive, well-reasoned report by any standard. The Drouin Commission took note that the Triennial Commissions had failed despite the goal of depoliticizing the process.¹⁴⁰

14. The Government's response to the Drouin Report marked an improvement as compared to previous Government responses to Triennial Commission reports. On December 13, 2000, the Government responded to the Drouin Report pursuant to s. 26(7) of the *Judges Act*. The Government accepted all but two of the Drouin Commission's recommendations,¹⁴¹ and amendments to the *Judges Act* implementing the Government's Response were adopted expeditiously, in June 2001.

C. The McLennan Commission

15. The second Quadrennial Commission, the McLennan Commission, was established in September 2003. It was chaired by Roderick McLennan, Q.C., and its two members were Gretta Chambers, C.C. and Earl Cherniak, Q.C. As required by the *Judges Act*, the Commission issued its report on May 31, 2004.
16. The principal issue of contention between the judiciary and the Government before the McLennan Commission was the determination of the amount of judicial salary. When the McLennan Commission began its inquiry, the salary of a puisne judge was \$216,600.

¹⁴⁰ Drouin Report (2000) at 2 [JBD at tab 9].

¹⁴¹ The two exceptions were eligibility for supernumerary status and reimbursement of costs of the judiciary before the Quadrennial Commission. Supernumerary judges are judges who are eligible to retire but choose instead to continue sitting. Their workload is determined in consultation with their respective chief justices. Sometimes the workload is full-time, and often is nearly so. In no event is it less than 50% of a full-time workload. The Drouin Commission had recommended that, effective April 1, 2000, judges have the right to elect supernumerary status for a period not exceeding ten years upon attaining eligibility for a full pension (Recommendation 8). In her response to the Drouin Report, the Minister indicated that the Government was not prepared to accept Recommendation 8 at that time. The reasons given included the need to consult the provinces and territories, the fact that the Supreme Court of Canada would soon consider, in *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405, important constitutional issues relating to the status of supernumerary judges, and, more generally, the need for better information concerning the contribution of supernumerary judges. The judgment of the Supreme Court of Canada in *Mackin* was released on February 14, 2002. As for the intended consultations with the provincial and territorial governments, it was expected that they would be carried out in a timely fashion. In the event, it was only on August 19, 2003, that the judiciary was advised that the Government had decided to accept Recommendation 8. Moreover, the Government took the position that the necessary amendments to the *Judges Act* would only be made as part of the overall package of amendments that would follow the Government's response to the report of the subsequent commission, the McLennan Commission. Those amendments were only made in December 2006, six and a half (6½) years after the Drouin Commission's recommendation. In the meantime, judges who were eligible for this recommendation were deprived of its benefit. It is worth noting that, unlike a delay in the implementation of a salary recommendation, the delay in implementing Recommendation 8 could not be, and was not, remedied retroactively.

17. The Association and Council submitted to the Commission, based on the level of remuneration of traditional comparators, as applied in the Drouin Report, that the salary of a puisne judge should be increased to \$253,880 as of April 1, 2004, plus annual salary increments of \$3,000 in 2005, 2006 and 2007, in addition to indexation according to the Industrial Aggregate Index (“IAI”) provided in the *Judges Act*. For its part, the Government proposed an increase to \$226,300 as of April 1, 2004, inclusive of IAI for 2004, plus annual salary increments of \$2,000 in 2005, 2006 and 2007, in addition to IAI for 2005, 2006 and 2007. As the McLennan Commission observed, when the \$2,000 annual salary increments contemplated by the Government are taken into account, the Government’s proposal represented an increase of 7.25% over those years, in addition to IAI in 2005, 2006 and 2007.¹⁴²
18. The McLennan Commission recommended an increase for the salary of puisne judges to \$240,000 as of April 1, 2004, inclusive of IAI in that year, plus IAI effective April 1 in each of the next three years, as already provided for in the *Judges Act*. The Commission did not recommend annual salary increments, as proposed by the Government and supported by the Association and Council, in addition to IAI.
19. The Commission’s recommendation represented a one-time 10.8% increase for the four-year period commencing April 1, 2004, in addition to IAI in the years 2005, 2006 and 2007, as compared to the 7.25% increase proposed by the Government.

1. The Government’s response to the McLennan Report

20. The Government’s response to, and delayed partial implementation of, the McLennan Report was a source of grave concern for the judiciary. As elaborated below, the Association and Council observed that politicization was creeping into the process yet again, and was undermining the nascent and still fragile Quadrennial Commission process, much as the Triennial Commission process was undermined and ultimately came to fail.

¹⁴² McLennan Report (2004) at 23 [JBD at tab 10].

21. On November 20, 2004, the Minister of Justice issued the Government's response (the "**First Response**") to the McLennan Report, as required by s. 26(7) of the *Judges Act*.¹⁴³ The First Response accepted all but one¹⁴⁴ of the recommendations of the McLennan Commission.
22. With respect to judicial salary, the Minister stated in the First Response that the McLennan Commission had "engaged in a careful balancing of all the [statutory] factors"¹⁴⁵ and provided "thorough and thoughtful"¹⁴⁶ explanations for its conclusions. The Minister noted that the salary increase recommended by the McLennan Commission "appears reasonable".¹⁴⁷
23. On May 20, 2005, the Government introduced Bill C-51 to implement its acceptance of the McLennan Commission's recommendations, notably its salary recommendation. The Bill passed first reading and was supposed to be referred to committee after second reading. However, the Bill died on the order paper when Parliament was dissolved on November 29, 2005.

2. The newly elected Government's second response to the McLennan Report

24. A new Government was elected on January 23, 2006. Shortly after the new Government came to power, the then Minister of Justice purported to issue a second response to the McLennan Report on May 29, 2006 (the "**Second Response**").¹⁴⁸ On May 31, 2006, the Government tabled Bill C-17 in the House of Commons, which would implement the recommendations of the McLennan Report only to the extent that they were accepted in the Second Response.

¹⁴³ Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (November 20, 2004) [JBD at tab 10(a)].

¹⁴⁴ The Government refused to accept the McLennan Commission's recommendation that the judiciary be reimbursed for 100% of its disbursements and 66% of its legal fees. Instead, the Government's First Response proposed that the reimbursement be a total of 66% for all costs.

¹⁴⁵ Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (November 20, 2004) at 3 [JBD at tab 10(a)].

¹⁴⁶ Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (November 20, 2004) at 2 [JBD at tab 10(a)].

¹⁴⁷ Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (November 20, 2004) at 4 [JBD at tab 10(a)].

¹⁴⁸ Second response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (May 29, 2006) [BED at tab 10(b)].

25. The Second Response contradicted the First Response. The Government no longer accepted the salary recommendation set out in the McLennan Report. In its Second Response, the Government proposed an increase to judicial salaries of 7.25% as of April 1, 2004.¹⁴⁹ There was no mention of the fact that this increase was the exact percentage increase that the Government had proposed in its submission to the McLennan Commission in 2003-2004. In effect, the Government's Second Response unilaterally imposed what the Government had proposed in the first place, as if the Commission process had been of no consequence.
26. The Second Response stated that the McLennan Commission's recommendations must be analyzed in light of the mandate and priorities upon which the Government had recently been elected.¹⁵⁰ A summary list of the new Government's budget priorities and measures of "fiscal responsibility" was given in the Second Response.¹⁵¹ It further stated that Canadians expect that expenditures from the public purse should be reasonable and generally proportional to these economic pressures and priorities, and that the McLennan Commission's salary recommendation did not pay heed to this reality.¹⁵²
27. Significantly, the Government did not attempt to argue that the economic conditions in Canada were not as strong as when the First Response had been made. In fact, the Second Response was delivered at a time when economic conditions in Canada were very strong, with a real economic growth of 2.8% for 2006¹⁵³ and the Government having a budgetary surplus of \$4.7 billion¹⁵⁴ in the first quarter of 2006 and of \$13.2 billion for the fiscal year 2005-2006.¹⁵⁵

¹⁴⁹ Second response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (May 29, 2006) at 2 [BED at tab 10(b)].

¹⁵⁰ Second response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (May 29, 2006) at 4, 6 [BED at tab 10(b)].

¹⁵¹ Second response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (May 29, 2006) at 6 [BED at tab 10(b)].

¹⁵² Second response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (May 29, 2006) at 7 [BED at tab 10(b)].

¹⁵³ Statistics Canada, Catalogue #13-016-X, Economic accounts key indicators, Canada, at 22. The indicator is the real gross domestic product (GDP) [BED at tab 16].

¹⁵⁴ Department of Finance Canada, "The Fiscal Monitor", January to March 2006. The budgetary surplus was \$1.7 billion in January 2006 and \$4.1 billion in February 2006. In March 2006, there was a budgetary deficit of \$1.1 billion [BED at tab 15].

¹⁵⁵ Department of Finance Canada, "Fiscal Reference Tables", October 2011 [BED at tab 17].

28. On June 2, 2006, counsel for the Association wrote to the Minister of Justice to protest the issuance of the Second Response and to invite the Government to reconsider the position adopted in the Second Response. The Association also expressed the hope that Bill C-17 would be amended in the committee stage.
29. The Association's letter also made the point that the so-called reasons put forward in the Second Response were not "legitimate reasons" for departing from the Commission's salary recommendation, as required by the relevant constitutional jurisprudence.¹⁵⁶
30. On July 31, 2006, the Minister of Justice responded by simply stating that the Government had regard for the principles set out in the *PEI Reference* and *Bodner* in developing its Second Response.¹⁵⁷ The Minister omitted to respond to the Association's point that the Second Response was statutorily and constitutionally invalid as a question of process, and constitutionally invalid as a question of substance.
31. The Second Response was implemented through Bill C-17,¹⁵⁸ which received Royal Assent on December 14, 2006.¹⁵⁹ Puisne judges' salary was fixed retroactively at \$232,300 as of April 1, 2004, rather than at \$240,000 had the McLennan Commission's recommendation and the First Response been implemented. At the beginning of the following Quadrennial Commission cycle, the salary for puisne judges, statutorily adjusted by the IAI, was \$252,000 as of April 1, 2007, rather than \$262,240 had the McLennan Commission's recommendation and the First Response been implemented.

¹⁵⁶ The Supreme Court in the *PEI Reference*, *supra* at para. 183 spoke of the need for the government to provide a "legitimate reason" for refusing to accept commission recommendations [JBD at tab 4]. The Supreme Court had occasion to elaborate on that requirement in *Bodner*, *supra* at paras. 23-27 [JBD at tab 6].

¹⁵⁷ The statement in *Bodner*, *supra* that the process appears to be working satisfactorily at the federal level (para. 12), requires context. *Bodner* addressed the nascent commissions in four provinces, set up in response to the *PEI Reference*, *supra*. It was decided at a point in time (July 2005) after the Government's First Response to the McLennan Report had been given, and before the Second Response (May 2006). Accordingly, it was possible at that time for the Supreme Court to point to the Quadrennial Commission process for federally appointed judges as appearing to be working satisfactorily. Subsequent events proved otherwise.

¹⁵⁸ *An Act to amend the Judges Act and certain other Acts in relation to courts*, S.C. 2006, c. 11.

¹⁵⁹ The fact that the majority opposition parties did not amend Bill C-17 cannot be taken as Parliamentary acceptance of the way in which the Government conducted itself. Opposing Bill C-17 or proposing to amend it with the risk of defeating it carried with it the probability of the proverbial Pyrrhic victory: the Bill would have been defeated, thereby communicating Parliament's displeasure with the conduct of the Government, but the judiciary would be left with the status quo, which was even less than what the newly elected Government was prepared to accept in its Second Response. This would have been particularly unfair to judges eligible to elect supernumerary status pursuant to a recommendation from the Drouin Report in 2000 that had yet to be implemented. The dilemma was set out in Senator Jaffer's speeches in the Senate on December 6 and December 13, 2006 [BED at tab 4].

3. The inconsistency of the Second Response with applicable constitutional principles

32. The *Judges Act* does not contemplate multiple government responses. The Association and Council are firmly of the view that multiple responses undermine the cardinal constitutional requirement of effectiveness and are inconsistent with the Supreme Court's rationale for requiring of government that it formally respond, with diligence, to a Commission report. While the First Response was issued under, in accordance with, and within the time-limit set out in the *Judges Act*, the Second Response has no status whatsoever under the *Judges Act*¹⁶⁰ or the constitutional process expounded in the *PEI Reference*.
33. The Second Response, by a newly elected government, also served to politicize the Quadrennial Commission process since such a response was sought to be justified on the basis of the new Government's priorities. The Association and Council submit that the Second Response was, in essence, the expression of a newly elected Government's disagreement, for political reasons, with a previous government's formal response to the McLennan Report.¹⁶¹
34. The Association and Council also considered that the inordinate delay of 2½ years between the issuance of the McLennan Report and the implementation of the flawed Second Response undermined the effectiveness of the process, in addition to depriving members of the judiciary of the time value of the salary increase that the Government finally accepted and the actual time lost for those judges who would have been able to elect supernumerary status earlier had the Government implemented that recommendation more promptly.
35. The Association and Council submitted these concerns to the Block Commission, which agreed that they were well-placed. The Block Report stated in this regard:

¹⁶⁰ Section 26(7) of the *Judges Act* provides: "The Minister of Justice shall respond to a report of the Commission within six months after receiving it." The statute makes no allowance for a further report. The Block Commission expressed serious concern about the issuance of more than one response, see Block Report (2008) at paras. 42-45 [JBD at tab 11].

¹⁶¹ The Block Commission correctly observed that judicial independence cannot be seen as just another government priority, and that there was no statutory justification for increases in judicial compensation to be measured against the "expenditure priority that the Government has accorded to attracting and retaining professionals of similarly high qualities and capacity within the federal public sector", Block Report (2008) at para. 58 [JBD at tab 11].

42. Without commenting on the substance of the second Government response, we wish to express our concern with the issuance of more than one response in principle. As the Association and the Council note, such a practice is not provided for under the current process. Not only does the issuance of a second response not conform to the current process, it also has significant Constitutional implications.

43. Apart from concerns about whether a second response may have the effect, real or perceived, of threatening the apolitical nature of the Commission process, it also has the very real effect of introducing an additional step and therefore additional delay in a process that imposes strict timelines on all parties involved. In this case, the second response was issued 18 months after the first response, and 18 months after the expiry of the legislative deadline for responding to a Commission report under the *Judges Act*. Although the Government tabled draft legislation almost immediately after issuing the second response, this still resulted in an additional four-month delay which could have been avoided had the new Government moved to re-introduce legislation reflecting the first response upon being elected.

44. The Commission acknowledges the potential challenges of advancing a legislative agenda faced by a minority government. This does increase the possibility that legislation tabled to enact the Government responses to Commission recommendations could die on the order table, as occurred in November 2005. Should this occur again in the future, we submit that the integrity of the Commission process is only maintained if the newly elected Government proceeds with the process of implementation, even where the election has resulted in a change of Government. Any deviation from the process as currently outlined raises questions about whether a Commission's recommendations have had a meaningful effect on the legislative outcome and risks undermining the integrity of the Commission process.

45. While the Commission's effectiveness is most important in the context of the preservation of judicial independence, on a related note, the perceived effectiveness of the Commission is likely to influence the ability of the parties to convince nominees to accept appointment to future Commissions. Advisory committees, Triennial Commissions and Quadrennial Commissions have been populated by individuals who considered it an honour to serve the public interest in this capacity; the current Commission is no exception. However, continuing to attract suitable members for future Commissions will depend to a large extent on the ability to assure them that they will be participating in a process that is independent, objective and effective.¹⁶²

¹⁶² Block Report (2008) at paras. 42-45 [JBD at tab 11]. See also the evidence of Mr. E. Cherniak, QC to the House of Commons Standing Committee on Justice and Human Rights (Meeting No. 24, October 24, 2006), 39th Parliament, 1st Session [BED at tab 3].

D. The Block Commission

36. The third Quadrennial Commission, the Block Commission, was established in October 2007. It was chaired by Sheila Block, and its two members were Paul Tellier, C.C., Q.C. and Wayne McCutcheon. The Commission issued its report on May 30, 2008.
37. Apart from process issues related to the serious concerns expressed by the judiciary with the Government's lack of solicitude for the Quadrennial Commission process, as exemplified by its tabling of the Second Response, discussed above, the principal issue before the Block Commission was the determination of the judicial salary for the puisne judges. The Commission also made a number of other substantive recommendations.

1. Salary and other substantive recommendations

38. When the Block Commission began its inquiry, the salary of a puisne judge was \$252,000. The Association and Council proposed a salary increase of 3.5% as of April 1, 2008, and 2% for 2009, 2010, and 2011, in addition to IAI. Under this proposal, the salary of puisne judges at the end of the Block Commission's mandate, *i.e.* as of April 1, 2011, would have been \$302,800. The actual salary of puisne judges as at April 1, 2011, was \$281,100.
39. The Government proposed a salary increase of 4.9% as of April 1, 2008, inclusive of IAI, which was 3.2% on that date, for a proposed net increase of 1.7%. For the subsequent years, it proposed nothing except to leave IAI in place. IAI was 2.8% on April 1, 2009, 1.6% on April 1, 2010, and 3.6% on April 1, 2011. Under the Government's proposal, the salary of puisne judges would thus have been \$286,000 as of April 1, 2011.
40. The Government's proposed increase as of April 1, 2008, of 4.9% inclusive of IAI, necessarily meant that the Government was of the view that, as of April 1, 2008, some kind of increase was indeed appropriate, even though it was not of the same order of magnitude as that proposed by the Association and Council.
41. The Block Commission reviewed the various comparators proposed by the parties, ultimately deciding that DM-3s and lawyers in private practice were the appropriate comparator groups to arrive at recommendations on judicial salaries. The Block Commission rejected the Government's position that the most relevant comparator

group was all of the strata among the most senior federal public servants, namely EX 1-5, DM 1-4, and Senior LA (lawyer cadre).

42. The Block Commission also rejected as unhelpful the Government's attempt to use the pre-appointment income data of judges as support for the argument that current judicial salaries are not a disincentive to attracting significant numbers of judges who enjoyed high pre-appointment incomes. The judiciary had objected to the collection and use of this data because of concerns for individual privacy, the unreliability of the data and its lack of relevance.
43. The Block Commission came to the conclusion that the appropriate comparator among senior deputy ministers, namely DM-3s and DM-4s, was the midpoint of the DM-3 salary range plus one-half of the maximum performance pay¹⁶³ for which DM-3s are eligible. As for lawyers in private practice, the Block Commission noted that there was no certainty that the Government would continue to be successful in attracting outstanding judicial candidates from the senior Bar in Canada if the income spread between lawyers in private practice and judges were to increase markedly.
44. Using the comparator of the midpoint of the DM-3 salary range¹⁶⁴ plus one-half of eligible performance pay, the Block Commission noted that the resulting figure for DM-3s was \$276,632 for the 2007-2008 fiscal year. The salary of puisne judges was \$252,000 in that year, or 91% of the DM-3 comparator.¹⁶⁵
45. To achieve "rough equivalence" with the DM-3 salary range midpoint plus one-half eligible performance pay, the Block Commission recommended an increase of 4.9%, inclusive of IAI, for a salary of \$264,300 effective April 1, 2008, and an increase of 2% for each of 2009, 2010, and 2011, in addition to IAI.

¹⁶³ In the July 2011 report of the Advisory Committee on Senior Level Retention and Compensation, the Committee used the expression "performance pay" as a synonym for at-risk pay, although the Government continues to refer to the variable part of the compensation paid to DMs, including bonuses, as "at-risk pay" [BED at tab 14].

¹⁶⁴ "Midpoint" should not be confused with median. The midpoint figure is simply the halfway point of the theoretical salary range, whereas the median figure would be the actual salary of the person falling in the middle of the range of persons arranged from lowest to highest. The average salary is a different concept from both the midpoint and the median in that it reflects the relative weight of the range of salaries given that it takes into account the combination of the salary figures and the number of people earning them.

¹⁶⁵ Block Report (2008) at para. 119 [JBD at tab 11].

46. If the Block Commission's recommendation had been implemented, the salary for puisne judges in the 2011-2012 fiscal year would have been \$302,800, a figure roughly equivalent to the figure of \$303,249.50, which was the midpoint of the DM-3 salary range plus one-half of eligible performance pay for 2011-2012. The actual salary of puisne judges for 2011-2012 was \$281,100. For comparison purposes, the overall *average* DM-3 compensation for the 2010-2011 fiscal year was \$331,557.
47. In addition to its salary recommendation, the Block Commission made recommendations regarding the retirement annuity of senior judges of the territorial courts, representational allowances, and an appellate differential.

2. Observations and recommendations as to process

48. The Block Commission made a number of important observations relating to process, an overriding one being that Quadrennial Commissions should serve as the guardian of the Quadrennial Commission process. The Block Commission expressed the view that process-related issues should be the subject neither of direct discussions between the Government and the judiciary, which are inadvisable, nor of litigation before the courts, if at all possible, the latter being an option that must be "carefully weighed".¹⁶⁶ The Block Commission added:

37. The parties nevertheless require access to a forum where concerns related to process can legitimately be raised. It is our view that Quadrennial Commissions, by virtue of their independence and objectivity, are well-placed to serve as that forum and to offer constructive comments on process issues as they arise. While the structure and mandate of the Commission are outlined in statute, any question of process that affects the independence, objectivity or effectiveness of the Commission is properly within its mandate. It is entirely appropriate and arguably imperative that the Commission serve as guardian of the Quadrennial Commission process and actively safeguard these Constitutional requirements.

49. In addition to its concerns with the issuance of the Second Response, another important observation contained in the Block Report relates to the need to respect, and reflect in the future submissions of the parties, the consensus that has emerged around particular

¹⁶⁶ Block Report (2008) at paras. 33 ff [JBD at tab 11].

issues during a previous Commission inquiry.¹⁶⁷ The Block Commission gave as an example of such an issue the relevance of DM-3 as a comparator.

3. The Government's response to the Block Report

50. Under the *Judges Act*, the Minister of Justice was required to respond to the Block Report by November 30, 2008, six months after receiving it. This statutory deadline came and went without a response being made by the Minister, as required by the Act.¹⁶⁸
51. On February 11, 2009, well beyond the strict statutory deadline, the Minister of Justice issued a response declining to implement, at that time, any of the recommendations made by the Block Commission. Importantly, the Minister's response did not reject any of the Commission's recommendations. Rather, the Minister invoked the economic crisis that began in late 2008 as the reason for the Government's decision.
52. The Association issued a press release on February 11, 2009, stating that federally appointed judges recognized that the Canadian economy was facing unprecedented challenges calling for various temporary measures. However, it emphasized that the applicable constitutional principles would require that the Block Commission's recommendations be reconsidered once the economic situation improved. The Association also expressed its deep concern about the Minister of Justice's failure to respect the statutory deadline for issuing his response to the Block Report.

E. The Levitt Commission

53. The fourth Quadrennial Commission, the Levitt Commission, was established in December 2011. It was chaired by Brian Levitt, and its two members were Paul Tellier, C.C., Q.C., and Mark Siegel. The Commission issued its report on May 15, 2011.
54. As with the Block Commission, the principal issue before the Levitt Commission was the determination of the judicial salary for puisne judges. Integral to the Commission's consideration of this issue, however, was the Government's unexpected request that the Commission recommend that the annual adjustments to judicial salaries based on the

¹⁶⁷ Block Report (2008) at paras. 21 and 201 [JBD at tab 11]

¹⁶⁸ *Judges Act*, s. 26(7) [JBD at tab 3].

IAI be capped at 1.5%. The Levitt Commission also articulated a number of concerns with the future of the Commission process itself.

1. Salary and other substantive recommendations

55. The salary of a puisne judge was \$281,100 when the Levitt Commission began its inquiry. The Association and Council proposed that the Levitt Commission adopt, prospectively commencing in the first year of the quadrennial period, the Block Commission's recommendations. This would have resulted in a 4.9% increase as of April 1, 2012 inclusive of IAI, and increases of 2% for each of 2013, 2014 and 2015, in addition to IAI.
56. The Government proposed that judicial salaries be maintained at their current level, and that salary adjustments based on the IAI be limited to an annual increase of 1.5% for the quadrennial period. The Government admitted that it expected that this proposal would result in a reduction in individual judicial salaries in real terms.¹⁶⁹
57. The Levitt Commission rejected the Government's proposed cap on IAI. The Levitt Commission found that the legislative history of IAI "clearly indicates that it was intended to be a key element of the architecture of the process for determining judicial remuneration without affecting judicial independence and, as such, not to be lightly tampered with."¹⁷⁰ The Levitt Commission further found that the cost of retaining the existing statutory indexation as opposed to imposing a 1.5% cap would have only a marginal incremental cost to the public purse.
58. The Levitt Commission then considered the parties' arguments on the appropriate comparator groups and concluded that a "rough equivalence" with the DM-3 salary range midpoint plus one-half eligible performance pay was a "useful tool in arriving at a judgment as to the adequacy of judicial remuneration, because this concept reflects the judgmental (rather than mathematical) and multi-faceted nature of the enquiry."¹⁷¹

¹⁶⁹ Submission of the Government of Canada to the Levitt Commission, December 23, 2011, footnote 10 [BED at tab 7].

¹⁷⁰ Levitt Report (2012) at para. 51 [JBD at tab 12].

¹⁷¹ Levitt Report (2012) at para. 48 [JBD at tab 12].

59. The Levitt Commission rejected the Government's argument that it should depart from the practices of previous Quadrennial Commissions and consider all persons paid from the public purse, or at least consider the average salary of deputy ministers without variable pay, if it felt the need to use a public sector comparator group. Aside from questioning the merits of the Government's argument, the Levitt Commission found that adopting a comparator group that was consistent with comparator groups used by previous Quadrennial Commissions furthered the goals of the *Judges Act*.

30. The Government took exception to the Commission's position with respect to recommendation 14 of the Block Commission as applied to the selection of the public sector comparator group. Recommendation 14 stated that:

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

While the Commission reached its conclusion based on its own work, it also concluded that the Government's position in this regard is counterproductive to the attainment of one of the objectives for judicial compensation mandated by the Judges Act, namely the attraction of outstanding candidates to the judiciary. The more certainty about the conditions of employment that can be provided to a candidate contemplating a mid-life career change to the judiciary, the lower will be the barriers to attracting the most successful candidates. By introducing an unnecessary degree of uncertainty about future remuneration, the Government's position that the comparator group is to be re-litigated anew every four years sacrifices efficacy on the altar of process.

31. It is the Commission's position that, while the appropriate public sector comparator group is a proper subject for submissions to a Quadrennial Commission, the onus of establishing the need for change lies with the party seeking it. The Commission believes that this approach strikes an appropriate balance between certainty, on the one hand, and flexibility to respond to changing circumstances, on the other. In this instance, the Government has failed to discharge that onus in regards to its argument that the DM-3 comparator be displaced by a broader comparator group, or no comparator at all.

60. Using the comparator of the midpoint of the DM-3 salary range plus one-half of eligible performance pay, the Levitt Commission noted that the resulting figure for DM-3s was \$303,249.50 for the 2011-2012 fiscal year. The salary of puisne judges was \$281,100 in that year, or 7.3% less than the DM-3 comparator.

61. The Levitt Commission noted that while the 7.3% gap between the DM-3 comparator and the salary of puisne judges “tests the limits of rough equivalence”, the salary of puisne judges did not require any further adjustments as long as IAI was maintained in its current form for the quadrennial period.
62. In addition to its salary recommendation, the Levitt Commission recommended, as had the Block Commission, that puisne judges sitting on provincial and federal appellate courts receive a salary differential of 3% above puisne judges sitting on provincial and federal trial courts and made further recommendations concerning supernumerary status, representational allowances and annuities for certain categories of the judiciary.

2. Observations and recommendations as to process

63. Along with making recommendations on substantive matters, the Levitt Commission addressed a number of procedural issues that it believed “go to the very heart of the effectiveness of the mechanisms contemplated by the Supreme Court of Canada” in *Bodner* and the *PEI Reference*.¹⁷²
64. The Levitt Commission rejected the Government’s position that it did not have any jurisdiction to deal with process issues, finding that each Quadrennial Commission has an important role to play in overseeing the evolution of the process and “actively safeguarding the constitutional requirements.”¹⁷³
65. The Levitt Commission stated that it was evident there was “growing concern that the Commission process is losing credibility with a key stakeholder group, namely the judiciary, and, accordingly, that the Quadrennial process is in grave danger of ending up where the Triennial process did.”¹⁷⁴ The Levitt Commission was so concerned about the fate of the Quadrennial Commission process that it specifically asked the Government and the judiciary to file post-hearing submissions addressing the question “[w]hat should be done to avoid that the Quadrennial Commission process suffer the same fate as the Triennial Commission [...]?”

¹⁷² Levitt Report (2012) at para. 85 [JBD at tab 12].

¹⁷³ Levitt Report (2012) at para. 88 [JBD at tab 12].

¹⁷⁴ Levitt Report (2012) at para. 92 [JBD at tab 12].

66. The Levitt Commission made four recommendations that it hoped would help strengthen the process. First, the Levitt Commission recommended that the Government, when drafting its response, take into account not just the perspective of reasonable, informed members of the public but the judiciary as well. The Levitt Commission was concerned that any response that ignored the judiciary's perspective would only further exacerbate the existing credibility issues:

The Commission does not believe that the constitutional objectives of this process can be met if the Government does not feel a need to be concerned that a reasonable, informed judge be satisfied that throughout the process the Government participated in good faith and in a respectful and non-adversarial manner that reflects the public interest nature of the proceedings. The judiciary constitutes a stakeholder in this process with a weighty interest. This process can be successful only if both the Government and the judiciary, acting reasonably, believe it is effective. Additionally, in omitting any focus on the judiciary, the Government's submission betrays what the Commission believes is at the root of the judiciary's growing dissatisfaction with the process.¹⁷⁵

67. Second, the Levitt Commission emphasized the importance of the Government's response complying with the Supreme Court of Canada's decision in *Bodner*, and warned that failure to do so could lead to litigation.
68. Third, the Levitt Commission recommended that when consensus has emerged around a particular issue during a previous Commission inquiry, that, in the absence of demonstrated change, the Commission should take this consensus into account and it should be reflected in the parties' submissions. The Levitt Commission found that this position was entirely consistent with the Supreme Court of Canada's decision in *Bodner*. The Levitt Commission rejected the Government's position that a Commission could only adopt a previous Commission's recommendations if it reviewed the transcript of evidence before that Commission.
69. Finally, the Levitt Commission commented on what it saw as the "troubling" adversarial nature of the Quadrennial Commission process. The Levitt Commission accordingly recommended that the Government and the judiciary examine methods whereby the Commission process can be made less adversarial and more effective.

¹⁷⁵ Levitt Report (2012) at para. 99 [JBD at tab 12].

70. The Levitt Commission concluded its report by reiterating its concern about the future of the Quadrennial process:

In closing, the Commission wishes to reiterate its concern for the current health and future of the Quadrennial process. The Commission believes that a robust and timely response by the Government to this Report is essential to maintain the confidence of the judiciary in the process. The Commission also believes that a joint “lessons learned” exercise based on the four Commission processes which have taken place over the past twelve years would be both timely and legal. The Commission hopes and expects that such an exercise would result in both the Government and the judiciary “recommitting” to the Quadrennial process, and believes it likely that the exercise would result in a more efficient process and a greater satisfaction of all stakeholders with the outcome of future Quadrennial Commission processes.¹⁷⁶

3. The Government’s response to the Levitt Report

71. On October 12, 2012, the Minister of Justice issued the Government’s response to the Levitt Report.
72. The Government accepted the Levitt Commission’s recommendations that judicial salaries should continue to be automatically indexed every April 1 based on IAI, that all retirement benefits currently enjoyed by chief and associate chief justices should be extended to the three senior northern judges, and that the senior family law judge in Ontario should receive the same representational allowance as all Ontario senior regional judges.
73. The Government rejected the Commission’s recommendation that judges of appellate courts receive a salary differential.
74. The Government did not respond in detail to the Levitt Commission’s process recommendations. The Government reiterated its position that each Quadrennial Commission must consider the parties’ arguments anew and not simply adopt the recommendations of previous Commissions. With respect to the recommendation calling for respect of the consensus around particular issues that may have emerged during a previous Commission inquiry, – which quite plainly meant to refer to a consensus arising out of the report(s) of previous Quadrennial Commission(s) –, the Government’s

¹⁷⁶ Levitt Report (2012) at para. 121 [JBD at tab 12].

response contained the surprising observation that no consensus could arise on any issue unless the *main parties* were in agreement, an observation that is ill-founded as a matter of simple logic.

75. The Government's response stated that it would amend the *Judges Act* to improve the timeliness of the Commission process by reducing the time for the Government's response from six months to four months and establishing an express obligation on the Government to introduce implementing legislation in a timely manner. Finally, the Government stated that it was "open to exploring with the judiciary approaches that would make the process less adversarial and thereby improve its overall effectiveness."

4. Amendments to the *Judges Act*

76. The Government made the above-mentioned amendments to the *Judges Act* through the omnibus *Jobs and Growth Act, 2012*. The amendments to the *Judges Act* changed the Quadrennial Commission's start date from September 1 to October 1, reduced the Minister of Justice's time to respond to the Quadrennial Commission's report from six (6) months to four (4) months, and specified that the Minister had to introduce a bill to implement the response "within a reasonable period."
77. In 2014, through the *Economic Action Plan 2014 Act, No. 2*, the Government amended the *Judges Act* and the *Federal Courts Act* to include Federal Court prothonotaries within the scope of the Quadrennial Commission's statutory mandate.

F. The Rémillard Commission

78. The fifth Quadrennial Commission, the Rémillard Commission, was established in December 2015. It was chaired by Gil Rémillard, and its two members were Margaret Bloodworth and Peter Griffin. The Commission issued its report on June 30, 2016.
79. The principal issue before the Rémillard Commission was the determination of the judicial salary for puisne judges. As part of its inquiry, the Rémillard Commission had to consider whether to recommend, as proposed by the Government, that the indexation of judicial salaries be based on the CPI rather than the IAI.

1. Salary and other substantive recommendations

80. The salary of a puisne judge was \$308,600 when the Rémillard Commission began its inquiry. The Association and Council proposed that the Rémillard Commission recommend an 2% increase on April 1, 2016 and April 1, 2017, and a 1.5% increase on April 1, 2018 and April 1, 2019, in addition to the annual IAI adjustment.
81. The Government proposed that judicial salaries be maintained at their current level. They also submitted that annual salary adjustments should be based on the CPI rather than the IAI, as set out in the *Judges Act*.
82. The Rémillard Commission rejected the Government's proposed replacement of the IAI adjustment with the CPI. The Rémillard Commission reaffirmed the Levitt Commission's warning that "the IAI adjustment as intended to be a key element in the legislative architecture governing judges' salaries and should not be lightly tampered with."¹⁷⁷ The Rémillard Commission recognized that the IAI adjustment reflected a choice to "adjust salaries in accordance with the measure that reflects changes in the average income of Canadian, not in accordance with the index that measures only changes in the cost of living, as is done for retirement annuities."¹⁷⁸
83. The Rémillard Commission also rejected the Government's attempt to focus on broader trends in public sector compensation rather than the DM-3 comparator. The Rémillard Commission recognized that "the DM-3 comparator remains worthwhile for its long-term use, consistency, and objectivity."¹⁷⁹
84. Using the comparator of the midpoint of the DM-3 salary range plus one-half of eligible performance pay, the Rémillard Commission noted that the 7.3% gap between the DM-3 comparator and judges' salaries had reduced significantly to about 2% in 2015, with the gap projected to close completely during the Rémillard Commission's term. The Rémillard Commission noted that these figures suggested that "indexation in accordance with the IAI is serving its intended function."¹⁸⁰

¹⁷⁷ Rémillard Report (2016) at para. 38 [JBD at tab 13]. See also Levitt Report (2012) at para. 51 [JBD at tab 12].

¹⁷⁸ Rémillard Report (2016) at para. 42 [JBD at tab 13].

¹⁷⁹ Rémillard Report (2016) at para. 52 [JBD at tab 13].

¹⁸⁰ Rémillard Report (2016) at para. 56 [JBD at tab 13].

85. The Rémillard Commission concluded that judicial compensation was sufficient to continue to attract outstanding candidates, reiterating that “the IAI is currently achieving the objective it was intended to: ensuring that judges’ salaries keep pace with increases in the salaries of Canadians, whom judges serve.”¹⁸¹
86. The Rémillard Commission also concluded that the gap between the average private sector lawyer’s income and judge’s salary, including the value of the judicial annuity, appears to be closing. It recommended that effective April 16, 2016, the judicial salary should be set at \$314,100.

2. Observations and recommendations as to process

87. Along with making recommendations on substantive matters, the Rémillard Commission recommended that the Government consider alternatives to avoid future election periods jeopardizing the nine-month completion date for the Commission’s report, set out at s. 26(2) of the *Judges Act*. The intervention of the general election in 2015 had delayed the commencement of the Commission’s inquiry. In making its recommendation, the Rémillard Commission reaffirmed that “the Quadrennial Commission process is constitutionally and statutorily mandated, and must be complied with.”¹⁸²
88. While the Rémillard Commission did not make any further recommendations as to process, it did endorse the Levitt Commission’s comments on the need for the parties to “pursue as collaborative and cooperative a process – and reaction to the recommendations – as possible.”¹⁸³
89. The Rémillard Commission concluded as follows :

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.¹⁸⁴

¹⁸¹ Rémillard Report (2016) at para. 84 [JBD at tab 13].

¹⁸² Rémillard Report (2016) at para. 208 [JBD at tab 13].

¹⁸³ Rémillard Report (2016) at para. 218 [JBD at tab 13] citing Levitt Report (2012) at paras. 112-117 [JBD at tab 12].

¹⁸⁴ Rémillard Report (2016) at para. 243 [JBD at tab 13].

3. The Government's response to the Rémillard Report

90. On October 31, 2016, the Minister of Justice issued the Government's response to the Rémillard Report.
91. The Government accepted the Rémillard Commission's compensation-related recommendations. In particular, "in light of the Commission's careful analysis of the arguments and evidence on the issue", the Government accepted the recommendation that judges' salaries should continue to be adjusted annually on the basis of increases in the IAI.
92. The Government also took up the Rémillard Commission's recommendation to explore means of ensuring that the statutory time periods set out in the *Judges Act* are complied with. The Government's response stated that it would amend the *Judges Act* to set June 1, 2020 as the date for the commencement of the next Commission's inquiry, with subsequent commissions to commence on June 1 every four years thereafter. The Government was of the view that fixed start dates for the Commission process were the best way to ensure compliance with statutory time periods.

4. Amendments to the *Judges Act*

93. The Government implemented the recommendations made in the Rémillard Commission's June 2016 report through the omnibus *Budget Implementation Act, 2017, No. 1*. Notably, the amendments to the *Judges Act* changed the Quadrennial Commission's start date from October 1 to June 1.

5. Inquiry on Proposed Amendment to the *Judges Act*

94. On May 31, 2019, the Minister of Justice requested, pursuant to s. 26(4) of the *Judges Act*, that the Rémillard Commission conduct an inquiry and report on the effect on the adequacy of federal judicial compensation and benefits of a proposed amendment to the *Judges Act* that would stop the accrual of pensionable service for any judge whose removal from office has been recommended by the Council. The Association made submissions in support of the proposed amendments.
95. The Rémillard Commission concluded that the proposed amendment would not impact the adequacy of the salaries and other amounts payable under the *Judges Act* or the adequacy of judges' benefits generally. Moreover, it found the proposed amendment

would have no impact on the ability to recruit outstanding candidates for the judiciary. Instead, it concluded that the proposed amendment would be a reasonable measure to contribute to continued public confidence in the judicial system. The Commission expressed reservations about the Minister's proposal to apply the changes on the day they come into force to judges who are already the subject of a recommendation for removal.

96. On February 27, 2020, the Government accepted the Rémillard Commission's recommendations, stating its intent to implement the proposed amendments to the *Judges Act*, but only so as to apply to judges whose removal is recommended on or after the day it comes into effect.

EXHIBIT A – REPORT OF PROFESSOR DOUG HYATT

- A.1 CV of Professor Doug Hyatt
- A.2 PEAP Memo 2021-3, Policy and Economic Analysis Program (PEAP, Rotman School of Management, University of Toronto dated March 19, 2021
- A.3 Statistics Canada, “Gross domestic product, income and expenditure, fourth quarter 2020”, *The Daily*, Tuesday, March 2, 2021
- A.4 Consumer Price Index for Canada, Statistics Canada CANSIM series number V41690973

J.E.P. Research Associates Ltd.

32 Douglas Drive
Toronto, ON M4W 2B3

March 29, 2021

Mr. Pierre Bienvenu, Ad. E.
Norton Rose Fulbright Canada LLP
1 Place Ville Marie, Suite 2500
Montréal, Québec
H3B 1R1

Dear Mr. Bienvenu:

Re: Judicial Compensation and Benefits Commission

I enclose my report in this matter.

Sincerely,



Douglas E. Hyatt
Professor

March 29, 2021

A Report in the Matter of the Judicial Compensation and Benefits Commission

Prepared for Mr. Pierre Bienvenu of Norton Rose Fulbright Canada LLP

by

J.E.P. Research Associates Ltd.*

* Professor Douglas E. Hyatt

I am a Professor in the Joseph L. Rotman School of Management and the Centre for Industrial Relations, both of the University of Toronto. I was the Academic Director of Professional MBA Programs at the Rotman School of Management and was the Associate Chair of Economics for Management Studies in the Division of Management at the University of Toronto at Scarborough. I have a B.A. degree (economics), an M.A. degree (economics), and a Ph.D. (industrial relations), all from the University of Toronto.

I have been asked to address the following three topics:

1. Comment upon the Government of Canada's economic projections as set out in the December 9, 2020 letter of Nick Leswick, Assistant Deputy Minister, Economic and Fiscal Policy Branch, Department of Finance Canada to Christopher Rupar, Ligation Branch, Department of Justice Canada.
2. Comment on the \$60,000 low-income cut-off used for calculating salary statistics for self-employed lawyers based upon Canada Revenue Agency (CRA) data.
3. Update the value of the incidental allowance and the four levels of the representational allowance to reflect the impact of inflation.

I have relied on my general knowledge of economics and economic statistics. I have also consulted or reviewed the following:

1. Letter of Mr. Nick Leswick dated December 9, 2020;
2. Letter of François Lemire dated February 26, 2021;
3. Department of Finance Canada, Fall Economic Statement dated November 30, 2020;
4. "Request 2020-375 – Quadrennial Judicial Compensation and Benefits Commission (Quad Comm)" CRA methodological note, undated, and related CRA data;
5. PEAP Memo 2021-3, Policy and Economic Analysis Program (PEAP), Rotman School of Management, University of Toronto dated March 19, 2021;
6. Statistics Canada, "Gross domestic product, income and expenditure, fourth quarter 2020", *The Daily*, Tuesday, March 2, 2021; and
7. Consumer Price Index for Canada, Statistics Canada CANSIM series number V41690973.

I organize my report into three sections.

- I THE GOVERNMENT'S ECONOMIC AND FISCAL PROJECTIONS
- II THE LOW-INCOME CUT-OFF IN THE CRA DATA
- III UPDATING THE INCIDENTAL AND REPRESENTATIONAL ALLOWANCES

I THE GOVERNMENT'S ECONOMIC AND FISCAL PROJECTIONS

The Government's projections, set out in the December 9, 2020 letter of Nick Leswick, focus on inflation as measured by the Consumer Price Index, industrial aggregate wage growth and the Government of Canada's budget deficit. The time horizon for the projections is 2020 to 2025.

Not included in the letter are the Government's projections for growth in real Gross Domestic Product, the broadest measure of economic activity. However, Mr. Leswick indicates that the figures in his letter are derived from the Fall Economic Statement, November 30, 2020, which sets out the Government's GDP growth projections. The Government appears to base its GDP forecast on the consensus (i.e., average) forecasts of 13 financial sector and academic organizations.

The Policy and Economic Analysis Program (PEAP) at the Rotman School of Management, University of Toronto, is a highly respected, independent economic forecasting group (and is one of the forecasters included in the Government's consensus forecast). The following compares the consensus/Government GDP forecasts with those of PEAP (the PEAP forecast is current as at March 19, 2021).

<u>Year</u>	<u>Consensus/ Gov't</u>	<u>PEAP</u>
2021	4.8%	6.0%
2022	3.2%	3.8%
2023	2.3%	2.4%
2024	2.1%	2.0%
2025	1.9%	2.0%

Over the forecast period, the average growth in real GDP is 2.9 percent per the Government of Canada and 3.2 percent per PEAP. There remains uncertainty with respect to the roll-out of vaccines, the re-opening of the economy, and unreliable economic data, however the more recent PEAP forecasts (as at March 19, 2021) reflect more current information than what is reflected in the consensus forecasts relied upon by the Government.

Over the 2021 to 2025 period, the Government of Canada projects that the IAI will increase at an average annual rate of 2.8 percent.

With respect to the Government's fiscal position, the Department of Finance projects sizeable budget deficits of 17.5 percent in the 2020-21 fiscal year, declining steadily to 0.9 percent of GDP by 2025-26.

At page 97 of the Fall Economic Statement, the Government highlights an important characterization of the "temporary" fiscal deficits that will be incurred fighting the pandemic as distinct from "structural" deficits. The near-term deficits are due to an unusual exogenous shock (the pandemic) and will be eliminated when the pandemic has dissipated. Structural deficits persist even when the economy is stable and are due to underlying persistent economic or fiscal (e.g., insufficient taxation) causes.

"The government will have Canadians' backs through this crisis, doing whatever it takes. But this pandemic will not last forever and promising vaccine candidates are a bright light at the end of the tunnel. That means that the government's fiscally expansive approach to fighting the COVID-19 pandemic need not and will not be infinite. It is limited and temporary. Canadians understand that the crisis demands targeted and time-limited support to keep people and business afloat.

While this extraordinary spending will cause significant deficits in the short term, on par with the scale of effort required to deal with this once-in-a-century kind of crisis, such deficits are distinct from the structural deficits of the 1990s. This is time-limited spending to prevent households from going broke and businesses from laying off workers and permanently shutting their doors. This time-limited spending is essential to ensure that once COVID-19 is under control the economy is able to quickly recover to pre-pandemic levels. The COVID-19 recession is unique in the sense that its origin cannot be traced to any fundamental weakness in the economy. It is the result of an entirely exogenous shock that has hurt Canadians and Canadian businesses through no fault of their own. The government understands that it must step in to support people and sustain that support until the pandemic is over in order to avoid even worse economic outcomes."

The exogenous fiscal shock brought about by the pandemic should, therefore, not be treated in the same way as shocks that create permanent irreversible structural damage to the economy. The costs of responding to a "once-in-a-century" shock should properly be addressed by amortizing the costs of the shock over time, and not by offsetting reductions to otherwise normal Government expenditures (including normal growth in Judicial salaries) immediately following the end of the pandemic to pay the costs. Such actions would be self-defeating to the goal of future economic growth.

II THE LOW-INCOME CUT-OFF IN THE CRA DATA

I understand that the low-income cut-off (LICO) used to determine mean and median earnings of self-employed lawyers has been, since 2004, \$60,000.

Had the LICO been increased to match inflation as measured by the percentage change in the Consumer Price Index (CPI – all items), it would now be \$79,200, an increase of 32.0 percent.

Had the LICO been increased to match the growth in the IAI (up to and including 2019), it would now be \$87,000.

The CRA data on lawyers salaries provides earnings measures for lawyers between the ages of 35 and 69, based upon alternative LICOs of \$60,000 and \$80,000. In 2019, the CRA earnings estimates are based on 10,890 lawyers with salaries of greater than \$60,000. The sample based on those with earnings above \$80,000 consists of 9,780 lawyers. Consequently, the earnings data include 1,100 lawyers who earn between \$60,000 and \$80,000 per year in 2019 (the most recent available data). This is equivalent to $[1,100 \div 10,890 =]$ 10.2 percent of the total sample of lawyers with salaries of greater than \$60,000.

Of the 1,100 lawyers earning between \$60,000 and \$80,000 per year, 47.7 percent (530 lawyers) are between the ages of 55 and 69, 20.7 percent (230 lawyers) are between the ages of 47 and 54, and 31.5 percent (350 lawyers) are between the ages of 35 and 46. (I note further that 34.2 percent of those earning between \$60,000 and \$80,000 are between the ages of 44 and 56).

These data suggest that the \$60,000 LICO includes a sizable number of senior lawyers who may be working at a semi-retirement pace.

Average, median and 75th percentile earnings of lawyers between the ages of 35 and 69 based upon LICOs of, alternatively, \$60,000 and \$80,000 are as follows.

	<u>Mean</u>	<u>Median</u>	<u>75th Percentile</u>
\$60,000 LICO	\$308,090	\$202,000	\$360,000
\$80,000 LICO	\$335,100	\$223,000	\$390,000

I note further that raising the LICO with CPI inflation would be consistent with the approach taken to indexing Canadian personal income tax brackets to inflation.

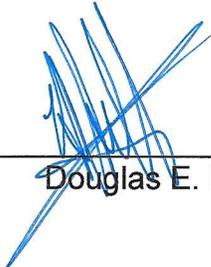
III UPDATING THE INCIDENTAL AND REPRESENTATIONAL ALLOWANCES

I understand that the incidental and representational allowances have not been updated since the year 2000. The exception is the representational allowance for Regional Senior Judges, which has not been updated since 2004.

The CPI for Canada has increased by 44.9 percent since 2000 and by 32.0 percent since 2004.

Consequently, the updated allowance amounts are as follows:

	<u>Current</u>	<u>Updated</u>
Incidental allowance:	\$ 5,000	\$ 7,245
<u>Representational allowances</u>		
Chief Justice of Canada:	\$18,750	\$27,169
Appellate Chief Justices:	\$12,500	\$18,113
First-Instance Chief Justices and Associate Chief Justices and Puisne Judges of the Supreme Court of Canada:	\$10,000	\$14,490
Regional Senior Judges:	\$ 5,000	\$ 6,600



Douglas E. Hyatt

CURRICULUM VITAE

March 2021

A. BIOGRAPHICAL INFORMATION

NAME: Douglas Edward Hyatt

OFFICE ADDRESS:

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 University of Toronto
 105 St. George Street
 Toronto, Ontario.
 Canada. M5S 3E6

TELEPHONE:

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CITIZENSHIP: Canadian

B. PROFESSIONAL ACTIVITIESDEGREES:

Ph.D., 1992, University of Toronto, Industrial Relations.

M.A., 1987, University of Toronto, Economics.

B.A., 1984, University of Toronto, Economics.

Ph.D. Thesis: "Issues in the Compensation of Injured Workers: Returns to Risk, Work Incentives and Accommodation."

Ph.D. Supervisor: Dr. Morley Gunderson

PROFESSIONAL EMPLOYMENT

July 2006 to present: Professor, Rotman School of Management and Centre for Industrial Relations, University of Toronto.

October 2009 to present: Academic Director (Rotman), Master of Science in Business Research and Doctor of Business Administration Program, Henley Business School, University of Reading.

August 2015 to June 2018: Academic Director, Professional MBA Programs (Morning and Evening MBA, Executive MBA and OMNIUM Global Executive MBA), Rotman School of Management, University of Toronto.

July 2013 to June 2017: Member, Academic Board of Governing Counsel, University of

	Toronto.
July 2002 to June 2006:	Professor, Rotman School of Management, Centre for Industrial Relations, University of Toronto and Division of Management, University of Toronto at Scarborough.
July 2001 to June 2004:	Associate Chair, Division of Management, University of Toronto at Scarborough.
July 2002:	Visiting Professor, Department of Management, University of Melbourne.
July 1997 to June 2002:	Associate Professor, Division of Management, Scarborough College, Rotman School of Management, and Centre for Industrial Relations, University of Toronto.
July 2000 to June 2001:	Visiting Associate Professor, School of Health Administration and Policy, College of Business, Arizona State University.
September 1997 to June 2000:	Senior Scientist, Institute for Work and Health.
January 1998 to December 1998:	Director of Research, Royal Commission on Workers' Compensation in British Columbia.
September 1995 to September 1997:	Scientist and Coordinator of Networks of Centres of Excellence program (HEALNet), Institute for Work and Health.
September 1995 to June 1997:	Visiting Professor, Centre for Industrial Relations, University of Toronto.
August 1992 to June 1997:	Assistant Professor, Department of Economics and Industrial Relations Program, University of Wisconsin - Milwaukee.
April 1995 to August 1995:	Research Coordinator, Ontario Royal Commission on Workers' Compensation.
July 1994 to June 1995:	Visiting Assistant Professor, Centre for Industrial Relations, University of Toronto.
June 1989 to July 1992:	Economist, Ontario Workers' Compensation Board.
May 1991 to December 1991:	Instructor, Industrial Relations, University of Toronto.
January 1988 to March 1989:	Instructor, Personnel Association of Ontario.
October 1986 to September 1988:	Economist, Ontario Ministry of Treasury and Economics.

ACADEMIC HONOURS

- Executive MBA Program, Professor of the Year: EMBA 20 (2003), EMBA 21 (2004), EMBA 22 (2004), EMBA 23 (2005), EMBA 24 (2005), EMBA 25 (2006), EMBA 26 (2006), EMBA 27 (2007), EMBA 28 (2008), EMBA 29 (2009), EMBA 30 (2010), EMBA 31 (2011), EMBA 32 (2012), EMBA 33 (2013), EMBA 34 (2014), EMBA 35 (2015)
- Global Executive MBA Program, Professor of the Year: OMNIUM 2 (2006), OMNIUM 3 (2007), OMNIUM 4 (2008), OMNIUM 5 (2010), OMNIUM 8 (2013), OMNIUM 9 (2014), OMNIUM 10 (2015), OMNIUM 15 (2020)
- Rotman School of Management Excellence in Teaching Award: 2003; 2004; 2005; 2006; 2007; 2008; 2009; 2010; 2011; 2012; 2013; 2014; 2015; 2016; 2017; 2018
- 2016: University of Toronto, The Morley Gunderson Prize for Outstanding Professional Achievement
- 2006: Roger Martin and Nancy Lang Award for Excellence in Teaching, Rotman School of Management, University of Toronto.
- 2001-2002: Plumptre Faculty Research Award
- 1989-1992: Social Sciences and Humanities Research Council Doctoral Fellowship
- 1990-1991: Meredith Fellowship in Workers' Compensation
- 1988-1989: Ontario Graduate Scholarship

PROFESSIONAL AFFILIATIONS AND RELATED ACTIVITIES

- Research Associate: Institute for Policy Analysis, University of Toronto
- Member of: The American Economic Association
The Canadian Economics Association
- Member of: Ontario Workplace Safety and Insurance Board, President's Actuarial Advisory Committee, 2011 to present.
- Advisor to: Ontario Rules of Civil Procedure Rule 53 Subcommittee.

RESEARCH GRANTS

- Ontario Ministry of Labour. Research Opportunities Program (2014 – 2016). "A Survey of Factors Affecting Safety Performance in the ICI Construction Sector." (With Brenda McCabe).
- "Assessment of the Human and Economic Burden of Workplace Cancer." Multisector Team Grants in Prevention Research, Canadian Cancer Society, 2012-2016, \$998,872, co-investigator.
- Workplace Safety and Insurance Board Research Advisory Council (2003-2005). "Attitudes and Incident Causal

- Modeling for Construction.” (With Brenda McCabe, Catherine Loughlin, and Susan Tighe). \$252,000.
- Social Sciences and Humanities Research Council of Canada (2003-2006). “An Analysis of the Production of Quality in Child Care.” \$45,055.
- Department of Health and Human Services (1999). “Work-Related Musculoskeletal Disorders: Evaluating Interventions Among Office Workers.” (With Donald Cole, Sheilah Hogg-Johnson and Harry Shannon) \$400,000 US.
- Child Care Visions, Human Resources Development Canada (1997). “A Policy-Evaluation Model of the Child Care Sector.” (With Gordon Cleveland, Morley Gunderson and Michael Krashinsky) \$275,000.
- Institute for Work and Health (1997). “Administrative Issues in Workers' Compensation.” (With Morley Gunderson) \$21,800.
- Donner Foundation (1996). “New Perspectives on Workers' Compensation Policy in Ontario.” (With Morley Gunderson) \$125,000.
- W.E. Upjohn Institute for Employment Research (1996). “Pay at Risk: Increasing Compensation Risks for Workers in the United States and Canada.” (With John Turner, Robert Friedland and Sophie Korczyk) \$36,625 US.
- Human Resources Development Canada (1995). “Demand and Supply Side Child Care Subsidies.” (With Gordon Cleveland) \$13,000.
- Human Resources Development Canada (1995). “Child Care, Lone Parents, Social Assistance and the Employment Decision.” (With Gordon Cleveland) \$30,000.
- Human Resources Development Canada (1994). “An Assessment of the Impact of Child Care Cost, Availability and Quality on Mothers' Employment.” (With Gordon Cleveland) \$25,000.
- Graduate School Research Committee Award Program, University of Wisconsin - Milwaukee (1993-1994). “Labor Market Outcomes of Vocational Rehabilitation.” \$8,365 US.
- Health and Welfare Canada (Child Care Initiatives Fund) (1992). “Child Care 2000.” (With Gordon Cleveland) \$325,412.
- Statistics Canada (1991). “A Policy Simulation Model of the Child Care Choices of Working Mothers in Ontario.” (With Gordon Cleveland) \$75,000.

C. PUBLICATIONS AND WORK-IN-PROGRESS

(a) Refereed Journal Publications

“Correlations Between Interpersonal Conflicts at Work and Construction Safety Performance: Two Ontario Cross-Sectional Studies.” *Proceedings of the Canadian Society of Civil Engineering 2019 Annual Conference*, 2019, CON5-1 to CON5-8, (with Y. Chen and B. McCabe).

“Benchmarking Construction Safety Performance at a Global Level: A Case Study of US, Canada and New Zealand.” *Proceedings of the Canadian Society of Civil Engineering 2019 Annual Conference*, 2019, CON11-1 to CON11-8, (with Y. Chen A. Shahi, B. McCabe, A Hanna, Mahdi Safa, and Majeed Safa).

“A Resilience Safety Climate Model Predicting Construction Safety Performance.” *Safety Science*, 2018 109 (November), 434-445 (with Y. Chen and B. McCabe).

“Impact of Individual Resilience and Safety Climate on Safety Performance and Psychological Distress of Construction Workers: A Case Study of the Ontario Construction Industry.” *Journal of Safety Research*, No. 61 (2017), 167-176 (with Y. Chen and B. McCabe).

“The Relationship Between Individual Resilience, Interpersonal Conflicts at Work, Safety Performance and Stresses of Construction Workers.” *Journal of Construction Engineering and Management*, 2017, 143(8) (with Y. Chen, and B. McCabe).

“Demographic and Indication-Specific Variables Have Limited Association with Social Network Engagement: Evidence from 24,954 Members of 4 Health Care Support Groups.” *Journal of Medical Internet Research*, 2017, 19(2): e40 (with T. Van Mierlo, X. Li, and A. Ching).

“Safety Performance in the Construction Industry: A Quasi-Longitudinal Study.” *Journal of Construction Engineering and Management*, 2017, 143(4) (with B. McCabe, E. Alderman, Y. Chen and A. Shahi).

“Behavioral Economics, Wearable Devices, and Cooperative Games: Results from a Population-based Intervention to Increase Physical Activity.” *Journal of Medical Internet Research: Serious Games*, 2016 [vol. 4, issue 1 | e1 (with T. Van Mierlo, A. Ching, R. Fournier and R. Dembo).

"Employing the Gini Coefficient to Measure Participation Inequality in Treatment Focused Digital Health Social Networks." *Network Modeling Analysis in Health Informatics and Bioinformatics*, 2016, 5:32, DOI 10.1007/s13721-016-0140-7 (with T. Van Mierlo, and A. Ching).

“Mapping Power Distributions in Digital Health Networks: Methods, Interpretations and, Practical Implications.” *Journal of Medical Internet Research*, 2015; 17(6):e160, with T. Van Mierlo and A. Ching.

“Wearables, Gamified Group Challenges and Behavioral Incentives: A Preliminary Study of An Engagement Program to Increase Physical Activity.” *iProc*, 2015; 1(1):e1 (with T. Van Mierlo, A. Ching, R. Fournier and R. Dembo).

“Managing the supply of physicians’ services through intelligent incentives.” *Canadian Medical Association Journal* 184:E77-E80 (January 10, 2012, published ahead of print November 28, 2011) (with B. Golden and R Hannam).

“Consequences of the Performance Appraisal Experience.” *Personnel Review*, 39, No. 3 (2010), 375-396 (with M. Brown and J. Benson).

“Workplace Violence and the Duration of Workers’ Compensation Claims.” *Relations Industrielles/ Industrial Relations*, 63, No. 1 (2008), 57-84 (with M. Campolieti and J. Goldenberg).

“Determinants of Stress in Medical Practice: Evidence from Ontario.” *Relations Industrielles/ Industrial Relations*, 62, No. 2 (2007), 226-257 (with M. Campolieti and B. Kralj).

- “Experience Rating, Work Injuries and Benefit Costs: Some New Evidence.” *Relations Industrielles/Industrial Relations*, 61, No. 1 (2006), 118-145 (with M. Campolieti and T. Thomason).
- “Further Evidence for Interpreting the "Monday Effect" in Workers' Compensation.” *Industrial and Labor Relations Review*, 59, No. 3 (2006), 438-450 (with M. Campolieti).
- “Strike Incidence and Strike Duration: Some New Evidence from Ontario.” *Industrial and Labor Relations Review*, 58, No. 4 (2005), 610-630, (with M. Campolieti and R. Hebdon).
- “Child Care Subsidies, Welfare Reforms and Lone Mothers.” *Industrial Relations*, 42, No. 2, (2003), 251-269, (with G. Cleveland).
- “Symposium: The Effect of Work-Family Policies on Employees and Employers.” *Industrial Relations*, 42, No. 2, (2003), 139-144, (with R. Drago).
- “Union Impacts in Low-Wage Services: Evidence From Canadian Child Care.” *Industrial and Labor Relations Review*, 56, No. 2 (2003), 295-305, (with G. Cleveland and M. Gunderson).
- “Child Care Workers’ Wages: New Evidence on Returns to Education, Experience, Job Tenure and Auspice.” *Journal of Population Economics*, 15, No. 3 (2002), 575-597, (with G. Cleveland).
- “Workplace Risks and Wages: Canadian Evidence from Alternative Models.” *Canadian Journal of Economics*, 34, No. 2 (2001), 377-395, (with M. Gunderson).
- “The Impact of Representation (and Other Factors) on Employee-Initiated Workers' Compensation Appeals.” *Industrial and Labor Relations Review*, 53, No. 4 (July 2000), 665-683, (with B. Kralj).
- “Privatization of Workers’ Compensation: Will the Cure Kill the Patient?” *International Journal of Law and Psychiatry*, 22, No. 5-6 (1999), 547-565, (with M. Gunderson).
- “Implications of Small Bargaining Units and Independent Unions for Bargaining Disputes: A Look into the Future?” *Relations industrielles/Industrial Relations*, 54, No. 3 (Summer 1999), 503-526, (with R. Hebdon and M. Mazerolle).
- “Free Trade, Global Markets, and Alternative Work Arrangements.” *Proceedings of the 51st Annual Meetings of the Industrial Relations Research Association (refereed papers in labor economics)*, 1999, 152-160, (with K. Roberts).
- “The Effects of Industrial Relations Factors on Health and Safety Conflict.” *Industrial and Labor Relations Review*, 51, No. 4 (July 1998), 579-593, (with R. Hebdon).
- “Do Employees Actually Bear the Risk in Defined Benefit Pension Plans?” *Canadian Labour and Employment Law Journal*, 5, No. 1, (1997), 125-138, (with J.E. Pesando).
- “Do Injured Workers Pay for Reasonable Accommodation?” *Industrial and Labor Relations Review*, 50, No. 1, (October 1996), 92-104, (with M. Gunderson).
- “Work Disincentives of Workers' Compensation Permanent Partial Disability Benefits: Evidence for Canada.” *Canadian Journal of Economics*, 29, No. 2 (May 1996), 289-308.

“Collective Bargaining in the Public Sector: Comment.” *American Economic Review*, 86, No. 1 (March 1996), 315-326 (with M. Gunderson and R. Hebdon).

“The Distribution of Investment Risk in Defined Benefit Pension Plans: A Reconsideration.” *Relations industrielles/Industrial Relations*, 51, No. 1 (Winter 1996), 136-157 (with J. Pesando).

“Child Care Costs and the Employment Decision of Women: Evidence for Canada.” *Canadian Journal of Economics*, 29, No. 1 (February 1996), 132-151 (with G. Cleveland and M. Gunderson).

“On the Edge: Single Mothers' Employment and Child Care Arrangements for Young Children.” *Canadian Journal of Research in Early Childhood Education. Special Issue on Child Care*, 5, No. 1, (February 1996), 13-25 (with G. Cleveland).

“Workplace Innovation in the Public Sector: The Case of the Office of the Ontario Registrar General.” *Journal of Collective Negotiations in the Public Sector*, 25, No. 1 (1996), 63-81 (with R. Hebdon).

“Reasonable Accommodation Requirements Under Workers' Compensation in Ontario.” *Relations industrielles/Industrial Relations*, 50, No. 2, (Spring 1995), 341-360 (with M. Gunderson and D. Law).

“The Impact of Workers' Compensation Experience Rating on Employer Appeals Activity.” *Industrial Relations*, 34, No. 1, (January 1995), 95-106 (with B. Kralj).

“Determinants of Child Care Choice: A Comparison of Results for Ontario and Quebec.” *Canadian Journal of Regional Science*, 16, No. 1 (1993), 53-67 (with G. Cleveland).

“Determinants of Fertility in Urban and Rural Kenya: Estimates and a Simulation of the Impact of Education Policy.” *Environment and Planning A*, 25 (1993), 371-382 (with W. Milne).

“Re-Employment and Accommodation of Injured Workers under Ontario's Workers' Compensation Act.” *Journal of Individual Employment Rights*, 1, No. 3 (1992), 253-262.

“Early Retirement Pensions and Employee Turnover: An Application of the Option Value Approach.” *Research in Labor Economics*, 13 (1992), 321-337 (with J. Pesando and M. Gunderson).

“Wage-Pension Trade-Offs in Collective Agreements.” *Industrial and Labor Relations Review*, 46, No. 1 (October 1992), 146-160 (with M. Gunderson and J. Pesando).

“Countercyclical Fertility in Canada: Some Empirical Results.” *Canadian Studies in Population*, 18, No. 1 (1991), 1-16 (with W. Milne).

“Can Public Policy Affect Fertility?” *Canadian Public Policy*, 17, No. 1 (March 1991), 77-85 (with W. Milne).

(b) Refereed Monographs

“New Evidence about Child Care in Canada: Use Patterns, Affordability and Quality.” *Choices*, Institute for Research on Public Policy (IRPP), 4, No. 12 (October 2008), (with G. Cleveland, B. Forer, C. Japel and M. Krashinsky).

“Pay Differences between the Government and Private Sectors: Labour Force Survey and Census Estimates.” CPRN Discussion Paper No. W|10, February 2000, (with Morley Gunderson and Craig Riddell).

“Subsidizing Child Care for Low-Income Families: A Good Bargain for Canadian Governments?” Choices, Institute for Research on Public Policy (IRPP), 4, No. 2 (May 1998), (with Gordon Cleveland).

“Using the NLSCY to Study the Effects of Child Care on Child Development.” Research Paper T-97-6E, Applied Research Branch, Strategic Policy, Human Resources Development Canada, September 1997 (with G. Cleveland). Also available in French as Research Paper T-97-6F.

“Subsidies to Consumers or Subsidies to Providers: How Should Governments Provide Child Care Assistance?” Research Paper R-97-7E, Applied Research Branch, Strategic Policy, Human Resources Development Canada, May 1997 (with G. Cleveland). Also available in French as Research Paper R-97-7F.

“Child Care, Social Assistance and Work: Lone Mothers with Preschool Children.” Working Paper W-96-2E, Applied Research Branch, Strategic Policy, Human Resources Development Canada, March 1996 (with G. Cleveland).

(c) Edited Volumes and Special Journal Issues

Symposium: The Effect of Work-Family Policies on Employees and Employers. *Industrial Relations*, Volume 42, No. 2 (April 2003).

Workers' Compensation: Foundations for Reform. (Toronto, Ont.: University of Toronto Press), 2000 (with M. Gunderson).

New Approaches to Disability in the Workplace. Industrial Relations Research Association, (Ithaca, NY: Cornell University Press for the IRRA), 1998 (with J.F. Burton Jr. and T. Thomason).

Public Sector Employment in a Time of Transition. Industrial Relations Research Association, (Ithaca, NY: Cornell University Press for the IRRA), 1996, (with D. Belman and M. Gunderson).

(d) Chapters in Books

“Consequences of the Performance Appraisal Experience.” In New Perspectives in Employee Engagement in Human Resources. (Bingley, United Kingdom: Emerald Gems Series, Emerald Group Publishing Limited) 2015, (with M. Brown).

“Does Vocational Rehabilitation Have Much Impact on Helping People Return to Work.” In D. Taras and K. Williams-Whitt (eds.) Perspectives on Disability and Accommodation. (Victoria, B.C.: National Institute of Disability Management and Research), 2011, 225-244, (with M. Campolieti).

“Strikes and Dispute Resolution.” In M. Gunderson, A. Ponak and D. Taras (eds.), Union-Management Relations in Canada, sixth edition. (Don Mills, Ontario: Addison-Wesley Publishers Limited), 2009, 322-360, (with M. Gunderson, and R. Hebdon).

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“Working with Young Children: Comments,” presented at the Good Child Care Symposium, Toronto, Ontario, May 30, 1999.

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“Legal Structure, Dispute Resolution and Compensation in the Canadian Public Sector,” presented at the World Congress of the International Industrial Relations Association, Washington, D.C., June 1, 1995.

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"Employer Appeals of Workers' Compensation Board Decisions: The Impact of Experience Rating," (with B. Kralj) presented at the meetings of the Canadian Industrial Relations Association, University of Victoria, Victoria B.C., June 4, 1990.

"The Impact of Early Retirement Pensions on Employee Turnover: Evidence from The Ontario Public Service," (with J. Pesando and M. Gunderson) presented at the meetings of the Canadian Economics Association, University of Victoria, Victoria B.C., June 3, 1990.

"Estimating the Impact of Desired Family Size on Fertility Behaviour: Preliminary Results for Kenya," (with W. Milne) presented at the meetings of the Canadian Economics Association, Laval University, Quebec City, Quebec, June 4, 1989.

"Time Series Estimation of Fertility: Public Policy and the Opportunity Cost of Children," (with W. Milne) presented at a joint session of the Canadian Economics Association and the Canadian Population Association, McMaster University, Hamilton, Ontario, June 5, 1987.



PEAP Memo 2021-3

March 19, 2021

Subject: New Forecast for Canada – Much More Optimistic Than Our Recent Outlooks

Attached is our new Canadian economic forecast based on Statistics Canada's 2020Q4 national accounts release, as well as subsequent data and policy announcements, and coronavirus developments.

It was almost exactly one year ago that instead of sending out our usual quarterly forecast for the Canadian economy based on the new national economic accounts, we instead sent out a memo that included the following:

“Producing an economic forecast for Canada in the face a rapidly changing environment of the coronavirus and the drop in oil prices in our minds is untenable. There is no doubt that second quarter GDP will fall, indeed probably quite dramatically (although given survey challenges, how accurate Statistics Canada's first estimate will be is certainly a question). But how long will the downturn last and will there be a significant snapback? We just do not know and to publish point estimates for growth in the coming quarters seems foolhardy. And frankly, not very helpful for PEAP members' planning purposes since each day might produce information that radically changes our outlook.”

While in the intervening time period we have indeed produced a number of quarterly forecasts, much uncertainty remains even a year later. Statistics Canada, rightly, keeps reminding us that “Given the unprecedented economic situation in 2020, revisions for this period are expected to be higher than normal”. COVID-19 variants remain a real concern. The less-than-stellar rollout of approved vaccines, together with sometimes confusing guidelines, have also contributed to the difficulty in getting a good handle on the quarterly pattern of the continued recovery. But it would appear that there is little doubt that the recovery will continue to take hold. Vaccines are indeed getting into arms at an increasing pace. Canadian governments (at all levels) continue to provide support to individuals and businesses, the U.S. has passed a huge new stimulus package that will meaningfully support growth, and both the U.S. Fed and the Bank of Canada have sent clear signals that they will continue to backstop growth, even if there are some short-term inflation impacts.

We admit to feeling somewhat misled by the national monthly GDP at basic prices data (including Statistics Canada's recent commitment to providing a “flash” estimate for the upcoming month) in both 2020Q3 (monthly numbers overestimated growth) and 2020Q4 (monthly numbers underestimated growth). Given the challenges facing Statistics Canada, however, it is difficult to feel too aggrieved. We do continue to use the data together with other monthly indicators including numbers from the labour force survey, international trade data and housing starts estimates, as a guide to how we expect the very short term to play out.

In aggregate, the monthly data indicate a much stronger 2021Q1 than we were expecting in January. We have struggled to understand why the data seem to be so strong (and we will not even pretend that we understand the housing market) and have concerns that the data will be revised or are merely part of monthly fluctuations. However, if the data do indeed hold up, and the 1st quarter is anywhere near as strong as we have it, then it should be the case that growth for 2021 should be much higher than we have been expecting in recent forecast memos/conference presentations. We do not expect “the third wave” of COVID-19 to derail this recovery. Indeed, while we certainly do not believe that we will recover all of the GDP that has been lost as a result of COVID-19, we do expect to recover much more of it over the forecast period than in any of our forecasts since January 2020. Key to this recovery will be how, or indeed if, households, when they are allowed to, spend the “forced” savings that have accumulated over the past year. Given measurement issues, some may have indeed already found its way into the housing investment numbers. We have not been overly aggressive in drawing down household savings, which could mean that the recovery might be even more robust than what we currently forecast.

After falling by 5.4% in 2020, given our new forecasted quarterly growth path (and recent history), we now expect real GDP to grow by 6.0% in 2021 (compared to 4.0% in our late January forecast), and a still robust 3.8% in 2022 (compared to the previous 4.4%). But given probable data revisions, and of course other possible COVID-19 developments, the numerical outcomes could be and probably will be somewhat to very different.

FOCUS Model - Policy and Economic Analysis Program
CANADA: Base Forecast - March 19, 2021

Summary of Forecast	History				Forecast								History				Forecast				
	2020:1	2020:2	2020:3	2020:4	2021:1	2021:2	2021:3	2021:4	2022:1	2022:2	2022:3	2022:4	2018	2019	2020	2021	2022	2023	2024	2025	2026
Real Gross Domestic Product (Chained \$12 Bill)	2073.3	1836.2	1999.5	2045.9	2067.3	2096.7	2122.5	2142.8	2163.3	2180.2	2195.1	2210.1	2063.9	2102.3	1988.7	2107.3	2187.1	2240.2	2285.7	2331.5	2379.2
Real Gross Domestic Product (%ch)	-1.9	-11.4	8.9	2.3	1.0	1.4	1.2	1.0	1.0	0.8	0.7	0.7	2.4	1.9	-5.4	6.0	3.8	2.4	2.0	2.0	2.0
Expenditure by Households	-1.8	-14.1	13.1	-0.1	-0.2	2.0	2.1	1.3	1.3	0.9	0.8	0.8	2.5	1.6	-6.1	4.8	5.1	3.0	2.3	2.1	2.2
Expenditure by NPISH	-0.3	-13.0	7.5	4.1	1.1	0.1	0.1	0.1	0.4	0.4	0.4	0.4	3.0	2.7	-4.7	4.4	1.2	1.6	1.6	1.6	1.6
Expenditure by Governments	-0.4	-3.6	3.8	1.8	0.6	0.7	0.2	0.1	0.1	0.1	0.1	0.2	3.2	1.7	-0.2	3.6	0.7	0.9	1.4	1.6	1.9
Investment Expenditure	-0.8	-16.0	16.3	2.6	0.4	1.7	1.3	0.9	1.7	1.4	1.2	1.3	1.3	0.3	-5.3	7.6	5.5	3.7	2.4	2.0	1.8
Residential Structures	-0.5	-15.6	30.7	4.3	1.8	-0.1	-2.6	-2.7	-0.4	-0.2	0.0	0.0	-1.7	-0.2	3.9	12.0	-3.9	0.2	0.6	0.9	1.1
Non-Residential Structures	0.0	-15.4	-0.2	-2.7	-2.4	3.3	5.5	5.0	4.7	3.7	2.7	2.7	2.7	1.1	-11.2	-2.5	17.9	7.8	4.5	3.2	2.4
Machinery and Equipment	-3.2	-22.3	17.6	7.0	0.3	4.3	5.2	3.4	2.7	2.1	2.0	2.0	3.7	1.0	-16.4	14.3	12.5	5.9	3.3	2.4	2.3
Intellectual Property	-0.4	-8.9	5.8	0.5	0.7	2.3	3.4	2.1	0.8	0.8	0.8	0.8	5.2	-1.9	-3.8	5.6	6.0	2.7	2.3	2.3	2.3
Exports	-2.7	-17.7	14.7	1.2	4.3	1.2	3.0	2.1	0.9	0.7	0.7	0.7	3.7	1.3	-9.8	10.2	5.4	2.7	2.5	2.5	2.5
Imports	-2.2	-23.0	21.6	2.6	1.5	2.4	4.2	2.5	1.4	1.0	0.9	0.8	3.4	0.4	-11.3	11.3	7.5	3.2	2.7	2.4	2.5
Inventory - Non-Farm (Chained \$12 Bill)	0.2	-34.9	-30.7	-1.9	1.0	5.0	9.0	14.0	16.0	18.0	18.5	18.5	15.6	17.1	-16.8	7.2	17.8	18.6	18.7	19.0	19.3
Inventory - Farm (Chained \$12 Bill)	2.4	3.7	-4.1	1.9	-0.2	-0.2	-0.2	-0.2	-0.2	-0.2	-0.2	0.0	-0.2	1.7	1.0	-0.2	-0.2	0.1	0.3	0.3	0.3
Residual Error (Chained \$12 Bill)	0.5	0.4	-1.2	1.5	1.2	1.0	0.8	0.5	0.2	0.0	0.0	0.0	0.5	0.1	0.3	0.9	0.1	0.0	0.0	0.0	0.0
Gross Domestic Product (\$ Bill)	2276.0	2001.3	2231.5	2307.4	2355.2	2401.3	2440.3	2473.8	2509.7	2542.0	2571.5	2601.3	2231.2	2310.7	2204.1	2417.7	2556.1	2672.1	2784.6	2898.9	3018.2
Gross Domestic Product (%ch)	-2.9	-12.1	11.5	3.4	2.1	2.0	1.6	1.4	1.5	1.3	1.2	1.2	4.2	3.6	-4.6	9.7	5.7	4.5	4.2	4.1	4.1
Implicit Price Deflator for GDP (%ch)	-1.0	-0.7	2.4	1.0	1.0	0.5	0.4	0.4	0.5	0.5	0.5	0.5	1.8	1.7	0.8	3.5	1.9	2.1	2.1	2.1	2.0
Unemployment Rate	6.4	13.1	10.1	8.8	8.6	7.8	7.5	7.2	7.0	6.8	6.6	6.4	5.9	5.7	9.6	7.8	6.7	6.2	5.8	5.8	5.8
Employment (%ch)	-1.4	-11.4	8.5	2.4	-0.2	1.4	0.9	0.8	0.8	0.7	0.7	0.7	1.6	2.2	-5.1	4.4	3.4	2.0	1.5	1.0	0.8
Labour Force (%ch)	-0.7	-4.5	4.9	0.9	-0.4	0.6	0.6	0.5	0.6	0.5	0.5	0.5	1.0	2.0	-1.1	2.4	2.2	1.4	1.1	1.0	0.8
Participation Rate (%ch)	64.8	61.8	64.7	65.1	64.7	65.0	65.2	65.4	65.5	65.6	65.6	65.6	65.3	65.6	64.1	65.1	65.6	65.6	65.4	65.3	65.0
3-Month Treasury Bill Rate (%)	1.2	0.2	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.2	0.2	1.4	1.7	0.4	0.1	0.2	0.7	2.5	3.1	3.1
10-Year Gov't of Canada Bond Rate (%)	1.1	0.5	0.6	0.7	1.2	1.6	1.7	1.7	1.9	2.1	2.3	2.5	2.3	1.6	0.7	1.6	2.2	3.0	3.9	4.3	4.3
Inflation Rate - CPI (%)	0.0	-0.7	0.7	0.8	0.8	0.7	0.3	0.5	0.6	0.6	0.5	0.5	2.3	1.9	0.7	2.3	2.1	2.1	2.0	2.0	2.0
Annual Wage per Employee - Pvt (%ch)	0.1	2.9	-0.6	0.1	0.5	0.1	0.2	0.4	0.6	0.6	0.6	0.6	3.9	2.5	3.7	1.3	2.0	2.7	2.9	3.3	3.3
Real Ann Wage per Emp - Pvt (%ch)	0.0	3.7	-1.2	-0.7	-0.2	-0.6	-0.1	-0.1	0.0	0.0	0.2	0.2	1.6	0.5	2.9	-1.0	-0.1	0.6	0.8	1.2	1.3
Labour Productivity (%ch)	-0.5	-0.1	0.4	-0.1	1.2	0.0	0.3	0.1	0.2	0.0	-0.1	0.0	0.9	-0.3	-0.3	1.5	0.4	0.4	0.5	1.0	1.2
Exchange Rate (US \$/Cdn \$)	0.744	0.722	0.751	0.767	0.790	0.790	0.785	0.780	0.778	0.779	0.780	0.780	0.772	0.754	0.746	0.786	0.779	0.782	0.785	0.788	0.791
Terms of Trade (%ch)	-4.8	-2.7	6.1	1.7	2.1	0.3	0.1	0.1	0.2	0.1	0.1	0.1	0.7	-0.1	-3.5	6.1	0.5	0.7	0.8	0.5	0.4
Balance on Current Account (\$ Bill)	-65.4	-34.3	-42.0	-29.1	-15.0	-25.0	-35.0	-40.0	-44.0	-46.5	-48.0	-49.0	-52.2	-47.4	-42.7	-28.7	-46.9	-50.3	-50.5	-50.0	-49.0
Consolidated Government Balance (\$ Bill)	-63.5	-443.8	-259.3	-173.5	-149.4	-126.6	-100.2	-67.6	-56.5	-45.8	-38.5	-30.6	6.2	12.5	-235.0	-110.9	-42.8	-12.2	2.1	11.0	14.8
Federal Gov't Balance (NA Basis) (\$ Bill)	-48.9	-409.0	-283.7	-146.7	-120.8	-110.0	-83.8	-55.7	-50.3	-48.4	-38.3	-33.0	7.4	2.4	-222.1	-92.6	-42.5	-24.0	-18.5	-16.4	-14.3
Federal Balance as % of GDP	-2.1	-20.4	-12.7	-6.4	-5.1	-4.6	-3.4	-2.3	-2.0	-1.9	-1.5	-1.3	0.3	0.1	-10.1	-3.8	-1.7	-0.9	-0.7	-0.6	-0.5
Ratio: Federal Debt to GDP (%)	25.6	34.6	34.3	34.9	35.5	35.9	36.2	36.3	36.3	36.3	36.3	36.1	26.7	25.3	32.4	36.0	36.3	35.8	35.1	34.3	33.5
Prov'l Gov't Balance (NA Basis) (\$ Bill)	-26.6	-61.3	5.3	-46.8	-50.2	-36.0	-32.9	-25.6	-24.3	-15.5	-18.1	-15.3	-16.5	-5.5	-32.4	-36.2	-18.3	-9.4	-4.9	-2.2	-0.6
Household Savings Rate (%)	5.1	27.8	13.7	12.7	12.3	10.1	7.4	4.9	4.3	3.9	3.7	3.5	0.8	1.4	14.8	8.7	3.9	3.0	2.7	2.6	2.6
Real Household Disposable Income (%ch)	1.3	12.7	-5.0	-1.5	-0.4	-0.1	-0.4	-0.9	0.9	0.7	0.8	0.7	1.5	2.2	9.0	-1.7	1.1	2.6	2.4	2.5	2.5
Net Operating Surplus - Corporations (%ch)	-10.3	-14.7	37.1	-0.7	7.5	3.3	2.9	1.9	0.6	0.2	0.1	0.2	3.8	0.6	-6.1	24.7	4.6	1.1	2.4	2.7	3.4
U.S. Real GDP Growth (%)	-1.3	-9.0	7.5	1.0	1.7	2.8	1.0	1.0	0.8	0.7	0.7	0.6	3.0	2.2	-3.5	6.6	3.8	2.4	2.1	2.1	2.0
U.S. Inflation (GDP Deflator) (%)	0.4	-0.5	0.9	0.5	0.4	0.5	0.6	0.6	0.5	0.5	0.5	0.5	2.4	1.8	1.2	2.0	2.2	2.1	2.1	2.1	2.1
U.S. 3-Month Treasury Bill Rate (%)	1.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.2	0.2	1.9	2.1	0.4	0.1	0.2	0.9	2.7	3.3	3.3
U.S. 10-Year Gov't Bond Rate (%)	1.4	0.7	0.7	0.9	1.3	1.7	1.8	1.9	2.1	2.3	2.5	2.7	2.9	2.1	0.9	1.7	2.4	3.2	4.1	4.5	4.5
U.S. Unemployment Rate (%)	3.8	13.0	8.8	6.7	6.2	5.7	5.2	4.7	4.5	4.3	4.2	4.1	3.9	3.7	8.1	5.4	4.3	4.0	4.0	4.0	4.0

Percentage changes are period to period

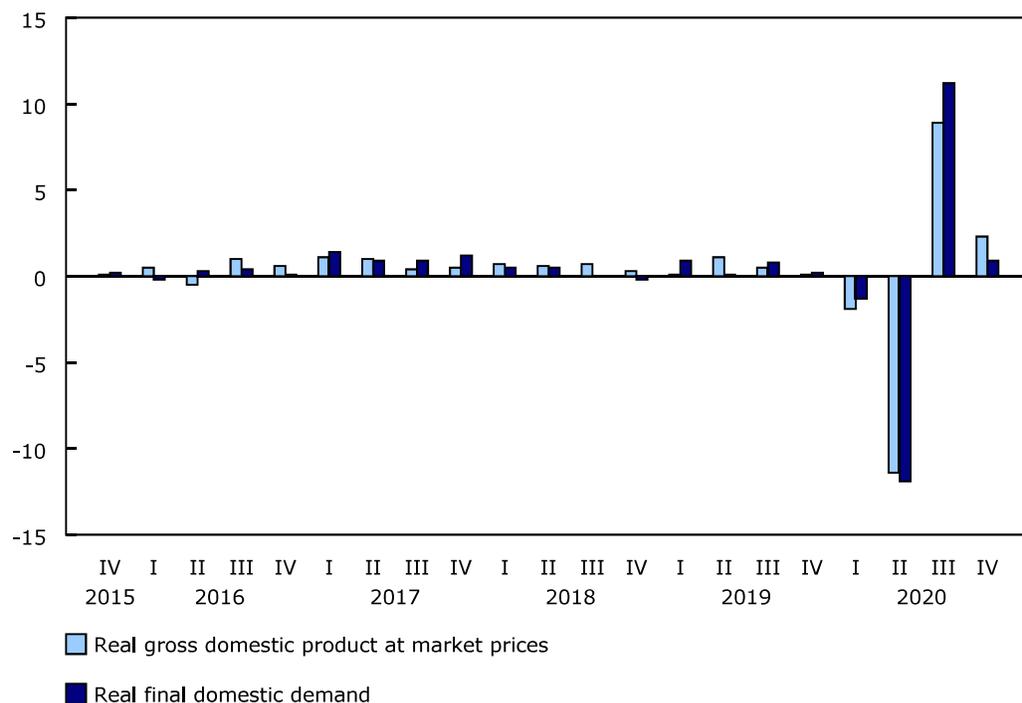
Gross domestic product, income and expenditure, fourth quarter 2020

Released at 8:30 a.m. Eastern time in *The Daily*, Tuesday, March 2, 2021

Real gross domestic product (GDP) grew 2.3% in the fourth quarter of 2020, following record fluctuations in the previous two quarters. In 2020, real GDP shrank 5.4%, the steepest annual decline since quarterly data were first recorded in 1961. Final domestic demand rose 0.9% in the fourth quarter, but was down 4.5% for 2020 overall.

Chart 1
Gross domestic product and final domestic demand

quarterly % change, chained (2012) dollars



Source(s): Table 36-10-0104-01.

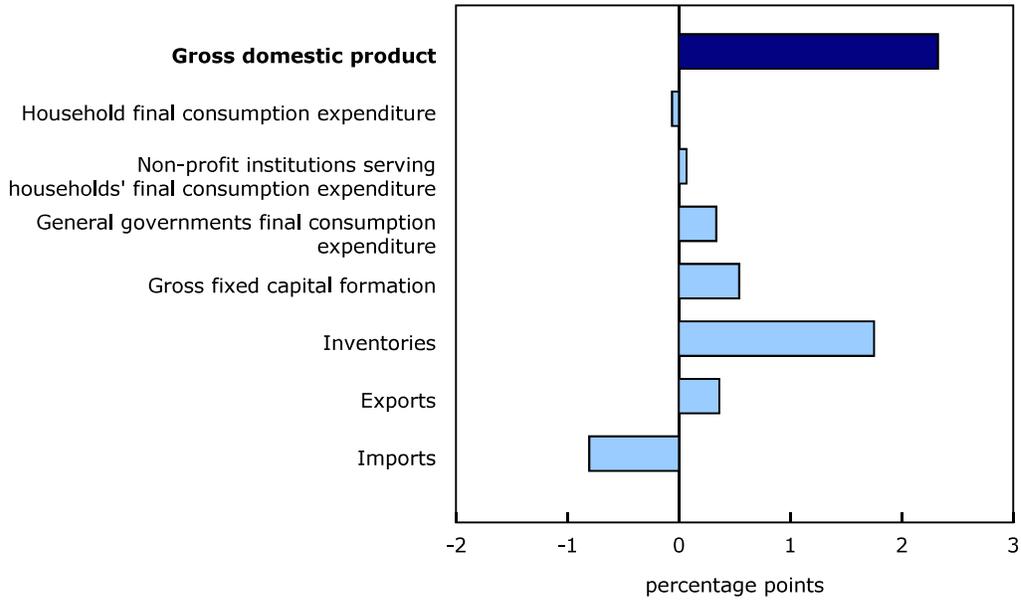
Growth in real GDP was strengthened by a large change in business inventories, as well as increases in government final consumption expenditure, business investment in machinery and equipment, and housing investment. Housing investment increases coincided with low mortgage rates and rising demand for housing.

The large inventory drawdowns that were a drag on third-quarter GDP growth were absent in the fourth quarter as inventories recorded a small accumulation. For non-farm business inventories, the sizeable shift was concentrated in the retail sector, with accumulation observed for motor vehicle, building supply and sporting goods retailers. Accumulation of cannabis stocks largely contributed to the increase in farm inventories. The economy-wide stock-to-sales ratio fell from 0.843 in the third quarter to 0.836 in the fourth quarter.



Chart 2

Contributions to percentage change in real gross domestic product, fourth quarter of 2020



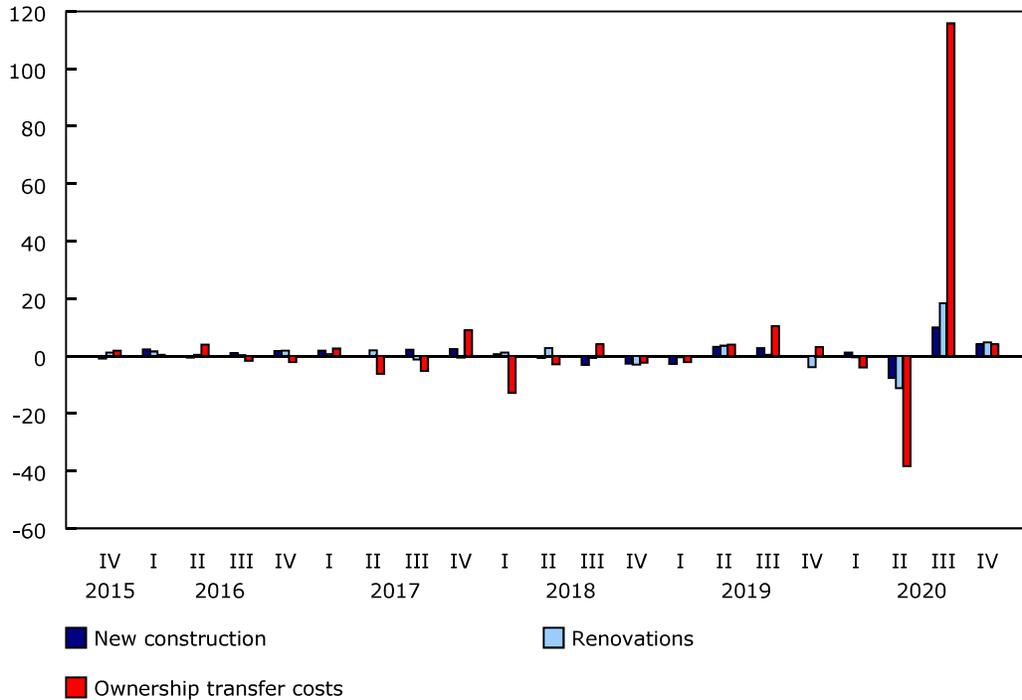
Source(s): Table [36-10-0104-01](#).

Housing investment continues to rise

Housing investment increased 4.3% in the fourth quarter, after rising 30.7% in the third quarter.

Chart 3 Housing investment

quarterly % change, chained (2012) dollars



Source(s): Table 36-10-0108-01.

The increases were broad-based: new construction grew 4.1%, renovations rose 4.8% and ownership transfer costs were up 4.1%. A substantial increase occurred in new construction of both single-family and multiple-unit dwellings, especially in Ontario and Alberta. The increase in ownership transfer costs was widespread, as home resale activity continued to rise across the country. Compared with 2019, housing investment was up 3.9% in 2020, while household residential mortgage debt expanded significantly over the same period.

Business investment slackens

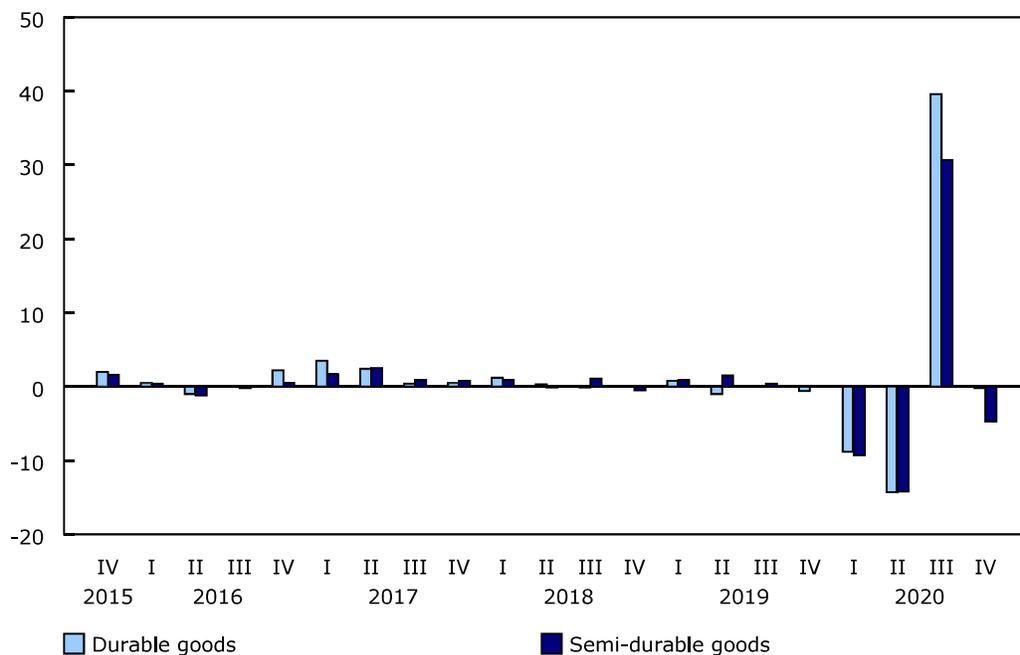
Business investment in engineering structures rose 1.6% in the fourth quarter, but investment in non-residential buildings fell 10.9%. This reflected weak demand for office buildings and shopping malls as remote working and online shopping became more common. Increased investment in machinery and equipment (+7.0%) coincided with higher imports of industrial machinery and equipment. Nevertheless, investment in machinery and equipment was down 16.4% in 2020.

Household spending edges down

Household spending edged down 0.1% in the fourth quarter, after a 13.1% increase in the third quarter. Spending was down 6.1% in 2020, compared with 2019.

Chart 4
Household final consumption: durable and semi-durable goods

quarterly % change, chained (2012) dollars



Source(s): Table 36-10-0104-01.

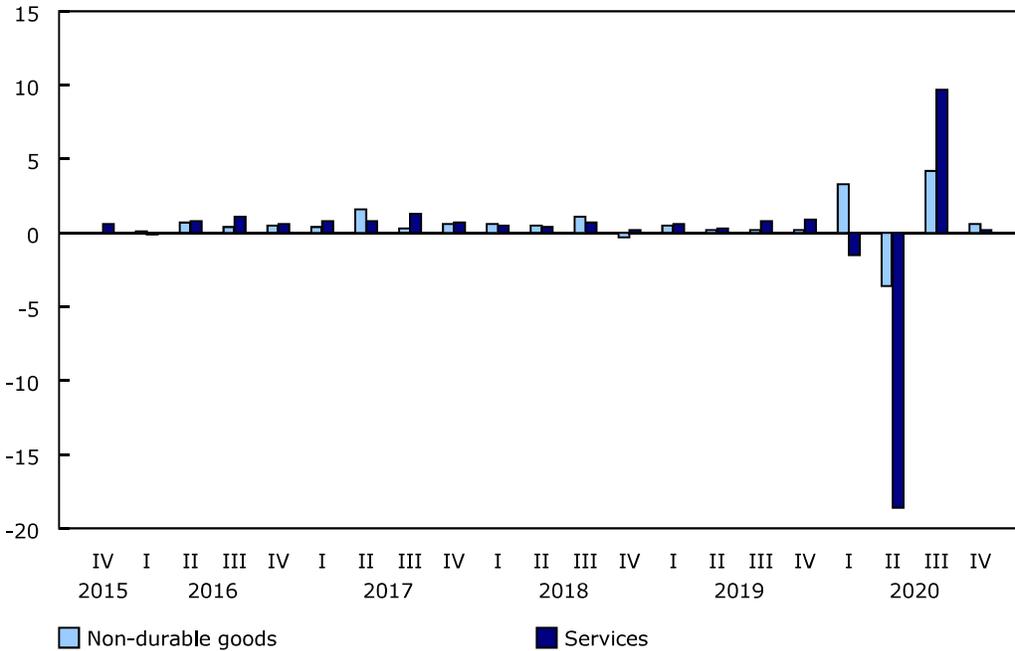
Outlays for durable goods declined 0.2%, after the record increase (+39.6%) in the third quarter, which followed drops in the second quarter related to the COVID-19 pandemic. Decreases in purchases of new trucks, vans and sport utility vehicles (-3.5%), and new passenger cars (-6.4%) were partly offset by increased sales of used motor vehicles (+4.0%). This reflected consumers' tendency to opt for used goods at times of economic uncertainty.

Excluding these purchases, outlays for durable goods rose 1.6% in the fourth quarter. Household spending on major appliances (+9.0%) and furniture (+2.4%) rose, coinciding with stronger housing investment. Overall, spending on durable goods was down 3.7% in 2020.

Outlays for semi-durable goods fell 4.7% in the fourth quarter, after sharp fluctuations in the previous two quarters. Decline in clothing and footwear (-8.9%) was partly offset by increases in games, toys and hobbies (+0.7%), and equipment for sport, camping and open-air recreation (+6.9%). These movements reflected shifts in spending patterns in the wake of the pandemic. Spending on semi-durable goods was down 7.8% in 2020.

Chart 5
Household final consumption: non-durable goods and services

quarterly % change, chained (2012) dollars



Source(s): Table 36-10-0104-01.

Outlays for non-durable goods rose 0.6%, after rising 4.2% in the third quarter. As consumers spent more time at home and less time travelling, expenditures on food (+3.1%), licensed cannabis (+17.0%) and pharmaceutical products (+7.1%) rose. Expenditures on fuels and lubricants (-5.4%) dropped, owing to reduced use because of new restrictions in British Columbia, Ontario and Quebec in the fourth quarter. Overall, spending on non-durable goods was up 3.1% in 2020 compared with 2019.

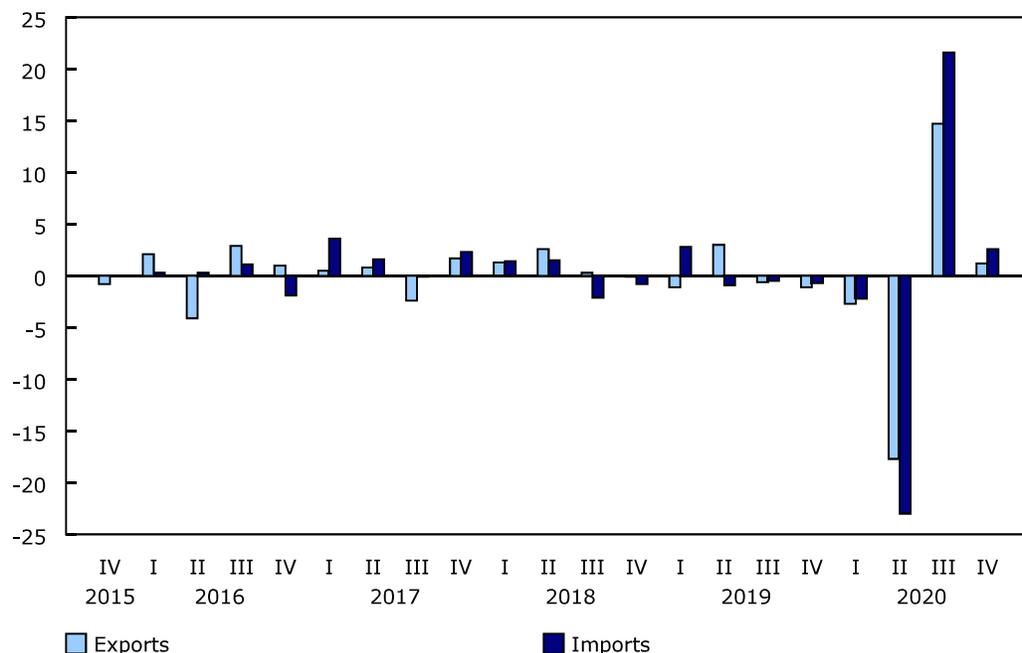
Growth in outlays on services slowed from 9.7% in the third quarter to 0.2% in the fourth. Increases in outpatient services (+6.7%), and insurance and financial services (+1.8%) were more than offset by lower spending on food, beverage and accommodation services (-11.1%), and personal grooming services (-7.5%), owing to closures and limited openings of bars, restaurants and salons. Overall, outlays for services were down 10.3% in 2020.

Export and import volumes slow

Growth in export volumes slowed from 14.7% in the third quarter to 1.2% in the fourth, reflecting reduced international demand, owing to slowdowns in the economies of major trading partners in the fourth quarter, notably the United States (+1.0%), the United Kingdom (+1.0%), the Netherlands (-0.1%), Germany (+0.1%) and Italy (-2.0%).

Chart 6 Exports and imports

quarterly % change, chained (2012) dollars



Source(s): Table 36-10-0104-01.

Exports of energy products (+6.1%) and metal and non-metallic mineral products (+10.8%) increased. Growth in the latter stemmed mainly from unwrought gold, silver, and platinum group metals, and their alloys; this surge reflected exports of refined gold to the United Kingdom, related to the Brexit-induced period of economic uncertainty. Export volumes were down 9.8% in 2020, compared with the volumes in 2019.

Import volumes rose 2.6% in the fourth quarter, following record fluctuations in the previous two quarters. Increases in imports of consumer goods (+5.5%), motor vehicles and parts (+5.3%), and industrial machinery and equipment (+8.3%) were partly offset by a decline in imports of metal and non-metallic mineral products (-10.7%). Overall, import volumes in 2020 were down 11.3%, compared with the volumes in 2019.

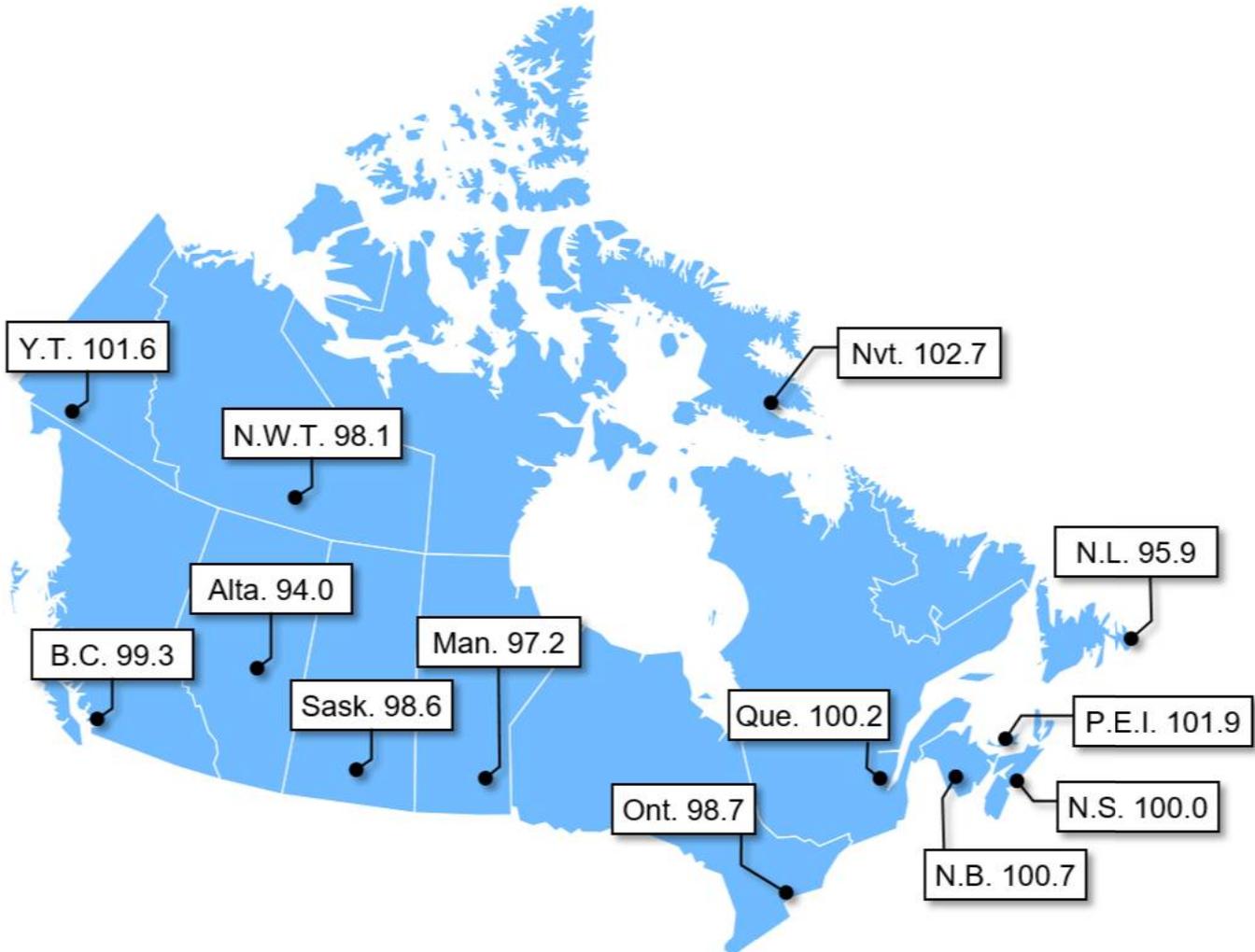
Terms of trade improve

The ratio of the price of exports to the price of imports—the terms of trade—rose 1.7%, primarily because of a 2.4% increase in prices of exported crude oil and crude bitumen in the fourth quarter. However, for 2020 overall, terms of trade declined by 3.4%, owing largely to a 38.6% drop in prices of exported crude oil and crude bitumen.

Nominal gross domestic product rises

The GDP implicit price index, which reflects the overall price of domestically produced goods and services, rose 1.1% in the fourth quarter. Consequently, growth in nominal GDP (+3.4%) was higher than that of real GDP. Compared with 2019, nominal GDP was down 4.6% in 2020.

Map 1 – Compensation of employees in 2020 compared with 2019 (index 2019=100)



Source: Statistics Canada, Table 36-10-0205-01, March 2021.

Compensation of employees rose 2.5% in the fourth quarter, following a 7.7% increase in the third. Despite this growth in the second half of 2020, compensation was 1.6% lower over the year compared with 2019. The Canada Emergency Wage Subsidy represented 3.3% of total compensation of employees in the fourth quarter, down from 7.3% in the third. Declines varied by region and were particularly sharp in the two oil-rich provinces, Alberta and Newfoundland and Labrador, reflecting the impact of lower prices of crude oil and crude bitumen in 2020.

Households end the year with third consecutive double-digit savings rate

Household disposable income dropped 1.0% in the fourth quarter, mainly because of a 17.2% decline in other benefits received from governments, such as the Canada Emergency Response Benefit. Despite this decline, disposable income was up 10.0% compared with 2019, the largest increase on record in nearly four decades, as governments took extraordinary economic support measures during the year. By the fourth quarter, the extent of this support had diminished considerably; nonetheless, government transfers still exceeded their pre-pandemic levels from the fourth quarter of 2019 by a sizeable margin (+33.2%).

The continued rebound in compensation, albeit at a reduced pace, coupled with still-elevated government transfers and stagnant consumption, kept the savings rate in double-digit territory for the third consecutive quarter. Canadians recorded a similar amount of savings in 2020 as in the previous seven years combined. Some of this savings made its way into currency and deposits of Canadian households, with growth in this asset nearing \$160.0 billion over the first three quarters of the year. The savings rate for the fourth quarter stood at 12.7%, while the savings rate for 2020 was 15.1%. Transfers from governments exceeded losses in wages and self-employment income, resulting in lower-income and younger households recording some of the largest [increases in savings](#).

Support program expenditures continue to fuel government borrowing

Overall, government revenues were far outstripped by expenditures throughout 2020, with the fourth quarter showing a marked increase from the second-quarter peak in governments' net borrowing of \$443.8 billion.

Government revenue remained fairly flat over 2020, the notable exception being the second quarter, when a decline in tax revenue on both income and products reduced government coffers. By the fourth quarter, these components had regained lost ground, but annual government revenue was 3.9% lower than the preceding year.

Note to readers

Revisions

Gross domestic product (GDP) data for the fourth quarter have been released along with revised data from the first to third quarter of 2020. These releases incorporate new and revised data, as well as updates on seasonal trends. Given the unprecedented economic situation in 2020, revisions for this period are expected to be higher than normal.

Support measures by governments

To alleviate the economic impact of the COVID-19 pandemic, governments implemented a number of programs, including the Canada Emergency Wage Subsidy and the Canada Emergency Response Benefit. For a comprehensive explanation of how government support measures were treated in the compilation of the estimates, see "[Recording COVID-19 measures in the national accounts](#)" and "[Recording new COVID measures in the national accounts](#)."

Details of some of the more significant government measures can be found in the footnotes of tables [36-10-0103-01](#), [36-10-0112-01](#), [36-10-0115-01](#), [36-10-0118-01](#), and [36-10-0477-01](#).

For information on seasonal adjustment, see [Seasonally adjusted data – Frequently asked questions](#).

For more information on GDP, see the video "[What is Gross Domestic Product \(GDP\)?](#)"

Percentage change

Percentage changes for expenditure-based statistics (such as household spending, investment, and exports) are calculated from volume measures that are adjusted for price variations. Percentage changes for income-based statistics (such as compensation of employees and operating surplus) are calculated from nominal values; that is, they are not adjusted for price variations.

Unless otherwise stated, growth rates represent the percentage change in the series from one quarter to the next; for instance, from the third quarter of 2020 to the fourth quarter of 2020.

Real-time tables

Real-time tables [36-10-0430-01](#) and [36-10-0431-01](#) will be updated on March 8.

Next release

Data on GDP by income and expenditure for the first quarter of 2021 will be released on June 1, 2021.

Sustainable development goals

On January 1, 2016, the world officially began implementing the [2030 Agenda for Sustainable Development](#)—the United Nations' transformative plan of action that addresses urgent global challenges over the following 15 years. The plan is based on 17 specific sustainable development goals.

Data on gross domestic product, income and expenditure are an example of how Statistics Canada supports the reporting on the global sustainable development goals. This release will be used to measure the following goals:



Table 1
Gross domestic product by income account – Seasonally adjusted at annual rates

	Third quarter 2019	Fourth quarter 2019	First quarter 2020	Second quarter 2020	Third quarter 2020	Fourth quarter 2020	Third quarter 2020	Fourth quarter 2020
	quarter-to-quarter % change						millions of dollars	
Compensation of employees	1.3	1.3	-1.2	-8.6	7.7	2.5	1,167,340	1,196,668
Gross operating surplus	-1.4	0.6	-4.6	-6.9	15.2	-0.5	623,968	620,720
Gross mixed income	1.7	1.8	0.8	-2.2	3.2	1.4	283,192	287,068
Taxes less subsidies on production	1.7	-0.3	-18.2	-121.5	205.3	224.7	19,152	62,196
Taxes less subsidies, on products and imports	1.1	-0.4	-6.4	-16.7	13.7	4.3	136,504	142,364
Statistical discrepancy (millions of dollars)	-2,108	-416	1,252	16	1,876	-3,028	1,384	-1,644
Gross domestic product at market prices	0.5	1.0	-2.9	-12.1	11.5	3.4	2,231,540	2,307,372

Source(s): Table 36-10-0103-01.

Table 2
Real gross domestic product by expenditure account, quarterly change – Seasonally adjusted at annual rates, chained (2012) dollars

	Third quarter 2019	Fourth quarter 2019	First quarter 2020	Second quarter 2020	Third quarter 2020	Fourth quarter 2020	Third quarter 2020	Fourth quarter 2020
	quarter-to-quarter % change						millions of dollars	
Final consumption expenditure	0.5	0.5	-1.5	-11.4	10.3	0.4	1,588,439	1,595,217
Household final consumption expenditure	0.6	0.5	-1.8	-14.1	13.1	-0.1	1,137,117	1,135,859
Non-profit institutions serving households' final consumption expenditure	0.9	0.6	-0.0	-13.6	7.8	4.5	29,840	31,188
General governments final consumption expenditure	0.4	0.5	-0.8	-4.4	4.0	1.5	421,401	427,753
Gross fixed capital formation	1.9	-0.9	-0.3	-13.7	14.5	2.3	436,880	447,012
Business gross fixed capital formation	1.8	-1.0	-0.8	-16.0	16.3	2.6	351,027	359,992
Residential structures	3.4	-0.7	-0.5	-15.6	30.7	4.3	156,314	163,068
Non-residential structures, machinery and equipment	0.7	-1.5	-1.2	-17.9	5.9	1.0	157,280	158,899
Intellectual property products	1.0	-0.0	-0.4	-8.9	5.8	0.5	35,831	36,017
General governments gross fixed capital formation	2.3	-0.3	2.1	-3.3	7.8	1.4	83,974	85,131
Investment in inventories (millions of dollars)	-9,468	36	-9,826	-31,719	-7,427	38,529	-36,808	1,721
Exports of goods and services	-0.6	-1.1	-2.7	-17.7	14.7	1.2	617,230	624,807
Less: imports of goods and services	-0.5	-0.7	-2.2	-23.0	21.6	2.6	611,263	627,163
Statistical discrepancy (millions of dollars)	1,923	361	-1,121	-15	-1,684	2,694	-1,236	1,458
Gross domestic product at market prices	0.5	0.1	-1.9	-11.4	8.9	2.3	1,999,452	2,045,925
Final domestic demand	0.8	0.2	-1.3	-11.9	11.2	0.9	2,023,946	2,041,230

Source(s): Table 36-10-0104-01.

Table 3
Real gross domestic product by expenditure account, annualized change – Seasonally adjusted at annual rates, chained (2012) dollars

	Third quarter 2019	Fourth quarter 2019	First quarter 2020	Second quarter 2020	Third quarter 2020	Fourth quarter 2020	Third quarter 2020	Fourth quarter 2020
	quarter-to-quarter % change, annualized				millions of dollars			
Final consumption expenditure	2.1	2.0	-5.9	-38.5	47.8	1.7	1,588,439	1,595,217
Household final consumption expenditure	2.2	2.0	-7.1	-45.6	63.4	-0.4	1,137,117	1,135,859
Non-profit institutions serving households' final consumption expenditure	3.5	2.5	-0.0	-44.4	35.1	19.3	29,840	31,188
General governments final consumption expenditure	1.6	1.9	-3.1	-16.5	16.9	6.2	421,401	427,753
Gross fixed capital formation	7.9	-3.6	-1.3	-44.4	72.1	9.6	436,880	447,012
Business gross fixed capital formation	7.5	-4.1	-3.3	-50.2	82.7	10.6	351,027	359,992
Residential structures	14.4	-2.9	-2.2	-49.2	191.4	18.4	156,314	163,068
Non-residential structures, machinery and equipment	2.8	-5.9	-4.5	-54.5	25.8	4.2	157,280	158,899
Intellectual property products	4.1	-0.1	-1.4	-31.0	25.1	2.1	35,831	36,017
General governments gross fixed capital formation	9.6	-1.3	8.5	-12.4	35.3	5.6	83,974	85,131
Investment in inventories (millions of dollars)	-9,468	36	-9,826	-31,719	-7,427	38,529	-36,808	1,721
Exports of goods and services	-2.5	-4.2	-10.4	-54.2	73.1	5.0	617,230	624,807
Less: imports of goods and services	-2.1	-2.9	-8.5	-64.9	118.8	10.8	611,263	627,163
Statistical discrepancy (millions of dollars)	1,923	361	-1,121	-15	-1,684	2,694	-1,236	1,458
Gross domestic product at market prices	1.8	0.4	-7.5	-38.5	40.6	9.6	1,999,452	2,045,925
Final domestic demand	3.3	0.7	-4.9	-39.9	52.8	3.5	2,023,946	2,041,230

Source(s): Table 36-10-0104-01.

Table 4
Real gross domestic product by expenditure account – Seasonally adjusted at annual rates

	Third quarter 2020	Fourth quarter 2020	Fourth quarter 2020		
			Contributions to percent change in real gross domestic product	Contributions to percent change in implicit price indexes	Annualized contributions to percent change in real gross domestic product
	millions of chained (2012) dollars		percentage points		
Final consumption expenditure	1,588,439	1,595,217	0.342	0.277	1.416
Household final consumption expenditure	1,137,117	1,135,859	-0.062	0.275	-0.257
Goods	558,699	556,135	-0.123	0.163	-0.510
Durable goods	169,796	169,514	-0.014	0.056	-0.058
Semi-durable goods	90,207	85,927	-0.196	0.013	-0.812
Non-durable goods	298,206	300,022	0.087	0.093	0.360
Services	581,474	582,666	0.061	0.112	0.253
Non-profit institutions serving households' final consumption expenditure	29,840	31,188	0.069	0.010	0.286
General governments final consumption expenditure	421,401	427,753	0.335	-0.008	1.387
Gross fixed capital formation	436,880	447,012	0.541	0.217	2.239
Business gross fixed capital formation	351,027	359,992	0.484	0.194	1.999
Residential structures	156,314	163,068	0.391	0.164	1.619
Non-residential structures, machinery and equipment	157,280	158,899	0.083	-0.004	0.339
Non-residential structures	98,817	96,193	-0.132	0.010	-0.547
Machinery and equipment	58,095	62,163	0.214	-0.015	0.886
Intellectual property products	35,831	36,017	0.010	0.035	0.041
Non-profit institutions serving households' gross fixed capital formation	2,013	1,985	-0.001	0.001	-0.004
General governments gross fixed capital formation	83,974	85,131	0.059	0.022	0.244
Investment in inventories	-36,808	1,721	1.750	0.042	7.248
Exports of goods and services	617,230	624,807	0.362	0.399	1.495
Goods	518,047	523,179	0.243	0.373	1.006
Services	99,300	101,701	0.118	0.026	0.489
Less: imports of goods and services	611,263	627,163	0.805	-0.115	3.338
Goods	528,193	540,759	0.622	-0.056	2.576
Services	87,339	90,661	0.184	-0.059	0.762
Statistical discrepancy	-1,236	1,458	0.135	0.000	0.559
Gross domestic product at market prices	1,999,452	2,045,925	2.324	1.050	9.619
Final domestic demand	2,023,946	2,041,230	0.883	0.494	3.655

Source(s): Tables 36-10-0104-01 and 36-10-0106-01.

Table 5
Canadian economic accounts key indicators – Seasonally adjusted

	Third quarter 2019	Fourth quarter 2019	First quarter 2020	Second quarter 2020	Third quarter 2020	Fourth quarter 2020
Economy-wide						
Real gross domestic income (index 2012=100)	113.5	113.8	109.9	96.6	107.0	110.1
Gross domestic product deflator (index 2012=100)	109.9	110.9	109.8	109.0	111.6	112.8
Terms of trade (index 2012=100)	94.7	95.2	90.6	88.1	93.6	95.2
Household sector						
Household disposable income (millions of dollars)	1,280,168	1,297,208	1,315,952	1,473,096	1,411,416	1,397,720
Household net saving (millions of dollars)	20,424	26,048	67,104	410,016	193,316	177,048
Household saving rate (%)	1.6	2.0	5.1	27.8	13.7	12.7
Government sector						
General government disposable income (millions of dollars)	515,660	525,284	454,360	62,540	263,132	360,360
General government net saving (millions of dollars)	32,084	35,140	-38,128	-422,396	-235,088	-145,184
Corporate sector						
Non-financial corporations' net operating surplus (millions of dollars)	249,380	249,884	220,140	184,856	265,088	262,656
Financial corporations' net operating surplus (millions of dollars)	41,240	41,176	41,008	38,016	40,504	40,844
Non-financial corporations' net saving (millions of dollars)	-11,364	-9,556	-33,400	-61,172	25,120	18,120
Financial corporations' net saving (millions of dollars)	37,336	41,072	42,756	31,220	30,864	25,568
National						
National net saving (millions of dollars)	76,260	90,440	36,932	-37,112	19,508	74,120
National saving rate (%)	4.0	4.7	2.0	-2.3	1.1	3.9

Source(s): Tables [36-10-0105-01](#), [36-10-0106-01](#), [36-10-0111-01](#), [36-10-0112-01](#), [36-10-0118-01](#) and [36-10-0116-01](#).

Table 6
Real gross domestic product by expenditure account, year-over-year change – Seasonally adjusted at annual rates, chained (2012) dollars

	2015	2016	2017	2018	2019	2020	2019	2020
	year-over-year % change						millions of dollars	
Final consumption expenditure	2.1	2.0	3.3	2.6	1.7	-4.7	1,640,706	1,562,821
Household final consumption expenditure	2.3	1.9	3.8	2.5	1.6	-6.1	1,184,887	1,112,476
Non-profit institutions serving households' final consumption expenditure	4.7	9.0	0.4	3.3	3.0	-4.8	31,699	30,190
General governments final consumption expenditure	1.4	1.8	2.1	2.9	2.0	-1.1	424,474	419,604
Gross fixed capital formation	-5.2	-4.7	3.3	1.8	0.3	-3.6	442,650	426,793
Business gross fixed capital formation	-6.4	-5.4	2.7	1.3	0.3	-5.3	362,266	343,107
Residential structures	3.8	3.9	2.3	-1.7	-0.2	3.9	139,772	145,193
Non-residential structures, machinery and equipment	-11.3	-12.3	1.9	3.1	1.1	-13.1	185,783	161,377
Intellectual property products	-11.5	-1.7	8.8	5.2	-1.9	-3.8	37,142	35,728
General governments gross fixed capital formation	1.5	-0.1	6.5	4.3	0.3	4.3	78,457	81,865
Investment in inventories (millions of dollars)	-9,178	-779	18,014	-3,714	3,280	-34,299	18,766	-15,533
Exports of goods and services	3.4	1.4	1.4	3.7	1.3	-9.8	675,019	608,603
Less: imports of goods and services	0.8	0.1	4.6	3.4	0.4	-11.3	674,511	598,454
Statistical discrepancy (millions of dollars)	-300	2,116	-2,039	1,275	-374	146	137	283
Gross domestic product at market prices	0.7	1.0	3.0	2.4	1.9	-5.4	2,102,304	1,988,721
Final domestic demand	0.3	0.5	3.3	2.5	1.4	-4.5	2,081,607	1,988,173

Source(s): Table [36-10-0104-01](#).

Available tables: [12-10-0134-01](#), [12-10-0135-01](#), [34-10-0163-01](#), [36-10-0103-01](#) to [36-10-0109-01](#) , [36-10-0111-01](#), [36-10-0112-01](#), [36-10-0114-01](#) to [36-10-0118-01](#) , [36-10-0121-01](#) to [36-10-0132-01](#) , [36-10-0135-01](#), [36-10-0205-01](#), [36-10-0369-01](#), [36-10-0477-01](#), [36-10-0484-01](#), [36-10-0608-01](#), [36-10-0610-01](#) and [36-10-0611-01](#).

Definitions, data sources and methods: [survey numbers 1901](#), [2602](#), [2820](#) and [5169](#).

The document, "[Recording new COVID measures in the national accounts](#)," which is part of *Latest Developments in the Canadian Economic Accounts* ([13-605-X](#)), is available.

The data visualization product "[Infrastructure Statistics Hub](#)," which is part of *Statistics Canada – Data Visualization Products* ([71-607-X](#)), is now available.

The [Economic accounts statistics](#) portal, accessible from the *Subjects* module of our website, features an up-to-date portrait of national and provincial economies and their structure.

The *User Guide: Canadian System of Macroeconomic Accounts* ([13-606-G](#)) is available.

The *Methodological Guide: Canadian System of Macroeconomic Accounts* ([13-607-X](#)) is available.

For more information, or to enquire about the concepts, methods or data quality of this release, contact us (toll-free 1-800-263-1136; 514-283-8300; STATCAN.infostats-infostats.STATCAN@canada.ca) or Media Relations (613-951-4636; STATCAN.mediahotline-ligneinfomedias.STATCAN@canada.ca).

CANSIM SERIES V41690973

TABLE NUMBER: [18100004](#)

TABLE TITLE: CONSUMER PRICE INDEX, MONTHLY, NOT SEASONALLY ADJUSTED

Data Sources: **IMDB (Integrated Meta Data Base) Numbers:**

- [2301 - CONSUMER PRICE INDEX](#)

SERIES TITLE: CANADA [11124]; ALL-ITEMS (2002=100)

SERIES FREQUENCY: Monthly

SCALING FACTOR: units

DECIMALS: 1

Year	Jan/May/Sep	Feb/Jun/Oct	Mar/Jul/Nov	Apr/Aug/Dec
1914	6.0	6.0	6.0	6.0
	5.9	6.0	5.9	6.0
	6.0	6.1	6.1	6.1
1915	6.1	6.1	6.1	6.1
	6.1	6.1	6.1	6.1
	6.1	6.1	6.3	6.3
1916	6.4	6.5	6.5	6.5
	6.5	6.6	6.6	6.6
	6.8	6.9	7.1	7.2
1917	7.4	7.4	7.6	7.6
	7.9	8.0	8.0	8.0
	8.0	8.2	8.2	8.3
1918	8.4	8.5	8.6	8.6
	8.7	8.8	8.9	9.2
	9.2	9.3	9.4	9.4
1919	9.5	9.4	9.4	9.4
	9.7	9.7	9.8	10.0
	10.0	10.0	10.1	10.2
1920	10.6	10.8	11.2	11.3
	11.6	11.8	11.8	11.7
	11.5	11.5	11.3	11.2
1921	11.0	10.8	10.5	10.2
	10.0	9.7	9.7	9.7
	9.7	9.7	9.4	9.4
1922	9.4	9.3	9.2	9.2
	9.1	9.1	9.1	9.2
	9.2	9.2	9.2	9.2
1923	9.2	9.2	9.3	9.2
	9.2	9.2	9.1	9.2
	9.2	9.2	9.2	9.2
1924	9.2	9.2	9.2	9.0
	8.9	8.8	8.8	9.0
	9.0	9.0	9.1	9.1
1925	9.2	9.2	9.2	9.1
	9.0	9.0	9.0	9.1
	9.1	9.2	9.2	9.3

1926	9.2	9.2	9.2	9.2
	9.2	9.2	9.2	9.2
	9.2	9.2	9.2	9.2
1927	9.2	9.2	9.1	9.0
	9.0	9.0	9.1	9.0
	9.0	9.0	9.1	9.1
1928	9.2	9.2	9.1	9.1
	9.0	9.0	9.0	9.2
	9.2	9.2	9.2	9.2
1929	9.2	9.2	9.2	9.1
	9.2	9.2	9.2	9.2
	9.2	9.3	9.3	9.4
1930	9.4	9.4	9.3	9.2
	9.2	9.2	9.2	9.2
	8.9	8.9	8.9	8.8
1931	8.7	8.6	8.5	8.4
	8.3	8.2	8.1	8.2
	8.1	7.9	7.9	7.9
1932	7.8	7.6	7.6	7.6
	7.4	7.4	7.4	7.4
	7.4	7.3	7.3	7.3
1933	7.2	7.2	7.1	7.1
	7.1	7.1	7.1	7.2
	7.2	7.1	7.1	7.1
1934	7.2	7.2	7.3	7.3
	7.2	7.2	7.2	7.2
	7.2	7.2	7.2	7.2
1935	7.2	7.2	7.2	7.2
	7.2	7.2	7.2	7.2
	7.3	7.3	7.4	7.4
1936	7.4	7.4	7.4	7.3
	7.3	7.3	7.4	7.4
	7.4	7.5	7.5	7.5
1937	7.6	7.6	7.6	7.6
	7.6	7.6	7.6	7.7
	7.7	7.8	7.8	7.8
1938	7.7	7.7	7.8	7.8
	7.7	7.7	7.8	7.8
	7.7	7.6	7.6	7.6
1939	7.6	7.6	7.6	7.6
	7.6	7.6	7.6	7.6
	7.6	7.8	7.8	7.8
1940	7.8	7.8	7.9	7.9
	7.9	7.9	8.0	8.0
	8.1	8.1	8.1	8.2
1941	8.2	8.2	8.2	8.2
	8.2	8.4	8.5	8.6
	8.7	8.7	8.8	8.7
1942	8.7	8.7	8.8	8.8
	8.8	8.8	8.9	8.9
	8.8	8.9	9.0	9.0
1943	8.8	8.8	8.8	9.0
	9.0	9.0	9.1	9.1
	9.2	9.2	9.2	9.2
1944	9.1	9.1	9.1	9.1
	9.1	9.1	9.1	9.1
	9.1	9.1	9.1	9.0

1945	9.0	9.1	9.1	9.1
	9.1	9.2	9.2	9.2
	9.2	9.2	9.2	9.2
1946	9.2	9.2	9.2	9.2
	9.2	9.4	9.5	9.6
	9.6	9.7	9.7	9.7
1947	9.7	9.7	9.8	9.9
	10.1	10.2	10.3	10.3
	10.6	10.8	10.9	11.1
1948	11.2	11.4	11.4	11.5
	11.6	11.8	11.8	11.9
	12.1	12.1	12.1	12.1
1949	12.1	12.1	12.1	12.1
	12.1	12.1	12.1	12.2
	12.2	12.3	12.3	12.2
1950	12.1	12.2	12.3	12.3
	12.3	12.3	12.4	12.5
	12.7	12.9	12.9	12.9
1951	13.0	13.3	13.4	13.6
	13.6	13.9	13.9	14.0
	14.1	14.2	14.3	14.3
1952	14.4	14.3	14.2	14.2
	14.1	14.1	14.1	14.1
	14.1	14.1	14.1	14.1
1953	14.1	14.0	13.9	13.9
	13.9	13.9	13.9	14.1
	14.1	14.2	14.1	14.1
1954	14.1	14.1	14.0	14.0
	14.0	14.1	14.1	14.2
	14.2	14.2	14.2	14.1
1955	14.1	14.1	14.1	14.1
	14.1	14.1	14.1	14.1
	14.2	14.2	14.2	14.2
1956	14.2	14.1	14.1	14.1
	14.1	14.3	14.4	14.5
	14.4	14.5	14.6	14.6
1957	14.6	14.6	14.6	14.7
	14.7	14.8	14.8	14.9
	15.0	15.0	15.0	14.9
1958	15.0	15.0	15.1	15.1
	15.1	15.1	15.1	15.1
	15.3	15.3	15.3	15.3
1959	15.3	15.3	15.2	15.2
	15.3	15.1	15.3	15.3
	15.5	15.5	15.5	15.5
1960	15.5	15.5	15.4	15.5
	15.5	15.5	15.5	15.5
	15.5	15.7	15.7	15.7
1961	15.7	15.7	15.7	15.7
	15.7	15.7	15.7	15.7
	15.7	15.7	15.7	15.7
1962	15.7	15.7	15.7	15.8
	15.8	15.9	15.9	16.0
	15.9	16.0	16.0	16.0
1963	16.0	16.0	16.0	16.0
	16.0	16.0	16.2	16.3
	16.2	16.2	16.3	16.3

1964	16.3	16.3	16.3	16.4
	16.4	16.4	16.5	16.5
	16.5	16.5	16.5	16.6
1965	16.6	16.6	16.6	16.7
	16.7	16.9	16.9	16.9
	16.9	16.9	17.0	17.1
1966	17.1	17.2	17.3	17.4
	17.4	17.5	17.5	17.6
	17.6	17.6	17.6	17.7
1967	17.7	17.7	17.8	17.9
	18.0	18.1	18.2	18.3
	18.3	18.3	18.3	18.4
1968	18.5	18.5	18.6	18.6
	18.6	18.7	18.9	19.0
	19.0	19.0	19.2	19.2
1969	19.2	19.2	19.3	19.6
	19.6	19.7	19.8	19.9
	19.9	19.9	19.9	20.1
1970	20.2	20.2	20.2	20.3
	20.3	20.3	20.5	20.5
	20.4	20.4	20.4	20.3
1971	20.4	20.5	20.5	20.7
	20.7	20.8	21.0	21.2
	21.1	21.2	21.2	21.3
1972	21.4	21.5	21.6	21.7
	21.7	21.7	22.0	22.2
	22.3	22.3	22.3	22.4
1973	22.6	22.8	22.8	23.1
	23.2	23.4	23.7	24.0
	24.1	24.2	24.4	24.5
1974	24.7	24.9	25.2	25.4
	25.9	26.1	26.3	26.6
	26.8	27.1	27.3	27.6
1975	27.6	27.9	28.0	28.2
	28.5	28.8	29.2	29.5
	29.6	29.8	30.1	30.2
1976	30.3	30.5	30.6	30.7
	30.9	31.1	31.3	31.3
	31.5	31.7	31.8	31.9
1977	32.2	32.4	32.8	33.0
	33.4	33.5	33.9	33.9
	34.2	34.5	34.7	34.9
1978	35.1	35.4	35.7	35.8
	36.3	36.6	37.1	37.2
	37.1	37.6	37.8	37.9
1979	38.1	38.6	39.0	39.3
	39.7	39.9	40.2	40.3
	40.7	41.0	41.4	41.6
1980	41.8	42.3	42.6	42.9
	43.4	43.9	44.2	44.7
	45.0	45.4	46.0	46.2
1981	46.9	47.4	48.0	48.3
	48.7	49.5	49.9	50.3
	50.7	51.2	51.6	51.8
1982	52.2	52.8	53.5	53.8
	54.5	55.1	55.4	55.6
	55.9	56.3	56.6	56.6

1983	56.5	56.8	57.4	57.4
	57.5	58.1	58.4	58.7
	58.7	59.1	59.1	59.2
1984	59.6	59.9	60.0	60.2
	60.2	60.6	60.8	60.8
	60.9	61.1	61.4	61.4
1985	61.7	62.1	62.2	62.5
	62.7	63.0	63.3	63.3
	63.4	63.6	63.8	64.1
1986	64.4	64.7	64.9	64.9
	65.3	65.4	65.9	66.0
	66.0	66.4	66.7	66.8
1987	67.0	67.3	67.5	67.9
	68.3	68.5	68.9	69.0
	69.0	69.2	69.5	69.6
1988	69.7	70.0	70.4	70.6
	71.0	71.2	71.6	71.7
	71.8	72.2	72.3	72.3
1989	72.7	73.2	73.6	73.8
	74.6	74.9	75.4	75.5
	75.6	75.9	76.1	76.1
1990	76.7	77.2	77.5	77.5
	77.9	78.2	78.5	78.6
	78.8	79.5	80.0	79.9
1991	82.0	82.0	82.3	82.3
	82.7	83.1	83.2	83.3
	83.1	83.0	83.3	82.9
1992	83.3	83.3	83.6	83.7
	83.8	84.0	84.2	84.2
	84.2	84.3	84.7	84.7
1993	85.0	85.3	85.2	85.2
	85.4	85.4	85.6	85.7
	85.7	85.9	86.3	86.1
1994	86.1	85.4	85.4	85.4
	85.2	85.4	85.7	85.8
	85.9	85.7	86.2	86.3
1995	86.6	87.0	87.2	87.5
	87.7	87.7	87.9	87.7
	87.8	87.7	88.0	87.8
1996	88.0	88.1	88.5	88.7
	89.0	89.0	89.0	89.0
	89.1	89.3	89.7	89.7
1997	89.9	90.1	90.2	90.2
	90.3	90.5	90.5	90.6
	90.6	90.6	90.5	90.4
1998	90.9	91.0	91.1	91.0
	91.3	91.4	91.4	91.4
	91.2	91.6	91.6	91.3
1999	91.5	91.6	92.0	92.5
	92.7	92.9	93.1	93.3
	93.6	93.7	93.6	93.7
2000	93.5	94.1	94.8	94.5
	94.9	95.5	95.8	95.7
	96.1	96.3	96.6	96.7
2001	96.3	96.8	97.1	97.8
	98.6	98.7	98.4	98.4
	98.6	98.1	97.2	97.4

2002	97.6	98.2	98.9	99.5
	99.7	99.9	100.5	100.9
	100.9	101.2	101.5	101.1
2003	102.0	102.8	103.1	102.4
	102.5	102.5	102.6	102.9
	103.1	102.8	103.1	103.2
2004	103.3	103.5	103.9	104.1
	105.0	105.1	105.0	104.8
	105.0	105.2	105.6	105.4
2005	105.3	105.7	106.3	106.6
	106.7	106.9	107.1	107.5
	108.4	107.9	107.7	107.6
2006	108.2	108.0	108.6	109.2
	109.7	109.5	109.6	109.8
	109.2	109.0	109.2	109.4
2007	109.4	110.2	111.1	111.6
	112.1	111.9	112.0	111.7
	111.9	111.6	111.9	112.0
2008	111.8	112.2	112.6	113.5
	114.6	115.4	115.8	115.6
	115.7	114.5	114.1	113.3
2009	113.0	113.8	114.0	113.9
	114.7	115.1	114.7	114.7
	114.7	114.6	115.2	114.8
2010	115.1	115.6	115.6	116.0
	116.3	116.2	116.8	116.7
	116.9	117.4	117.5	117.5
2011	117.8	118.1	119.4	119.8
	120.6	119.8	120.0	120.3
	120.6	120.8	120.9	120.2
2012	120.7	121.2	121.7	122.2
	122.1	121.6	121.5	121.8
	122.0	122.2	121.9	121.2
2013	121.3	122.7	122.9	122.7
	123.0	123.0	123.1	123.1
	123.3	123.0	123.0	122.7
2014	123.1	124.1	124.8	125.2
	125.8	125.9	125.7	125.7
	125.8	125.9	125.4	124.5
2015	124.3	125.4	126.3	126.2
	126.9	127.2	127.3	127.3
	127.1	127.2	127.1	126.5
2016	126.8	127.1	127.9	128.3
	128.8	129.1	128.9	128.7
	128.8	129.1	128.6	128.4
2017	129.5	129.7	129.9	130.4
	130.5	130.4	130.4	130.5
	130.8	130.9	131.3	130.8
2018	131.7	132.5	132.9	133.3
	133.4	133.6	134.3	134.2
	133.7	134.1	133.5	133.4
2019	133.6	134.5	135.4	136.0
	136.6	136.3	137.0	136.8
	136.2	136.6	136.4	136.4
2020	136.8	137.4	136.6	135.7
	136.1	137.2	137.2	137.0
	136.9	137.5	137.7	137.4

2021

138.2
n/a
n/a

n/a
n/a
n/a

n/a
n/a
n/a

n/a
n/a
n/a

EXHIBIT B – REPORT OF STÉPHANE LEBLANC AND ANDRÉ PICKLER

B.1 Biographical Note, Stéphane Leblanc



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26 March 2021

Fiscal Advantages of Incorporation for Lawyers

Dear Mtre. Bienvenu,

In connection with the representation of the Canadian Superior Courts Judges Association and the Canadian Judicial Council before the Judicial Compensation and Benefits Commission, we have been mandated to provide an overview of the tax structure of a professional corporation for a lawyer, to discuss the income level at which a professional corporation can be fiscally advantageous and to provide an explanation as to why the income generated by lawyers practising through a professional corporation is not reflected in the data provided to the Parties and the Commission by the CRA.

Tax Structure of a Professional Corporation

It is a common fiscal structure for a partner at a law firm or a sole practitioner to incorporate a professional corporation which will hold their interest in the partnership or sole proprietorship. The partnership will pay the partner's share of income to the professional corporation, or the sole proprietorship will earn income directly through the professional corporation, and the income will be taxed in the hands of the professional corporation at corporate income tax rates. The professional corporation will then be able to distribute the income in the form of salary or dividends to the individual based on their income needs. The individual will be taxed at progressive tax rates but only on the income they decide to withdraw from the corporation.

The main advantage of setting up this fiscal structure would be the benefits from tax deferral and potential tax savings in the future. The tax deferral is realized by leaving some of the income in the professional corporation which will be only taxed at a rate between 17.5% and 31%¹ instead of being taxed in the hands of an individual at progressive rates with the top marginal rate that range between 44.5% and 54% depending on the province of residence. The tax deferral can lead to potential tax savings if the funds are taken out of the professional corporation by the individual during their retirement when they are earning less income and thus utilizing the progressive tax rates and being taxed at a lower tax rate than if they were to have withdrawn the full amount of income during the year it was earned in the professional corporation.

¹ Rate will depend on the provincial allocation of the active business income earned by the law firm.



Another advantage of incorporating a professional corporation for a lawyer at a national law firm would be to take advantage of tax savings if they live in a province that has lower tax rates compared to the rest of Canada. For example, a lawyer working at a national law firm and living in Alberta who has a professional corporation would have their income taxed at lower rates as compared to the non-incorporated lawyer in the same firm and same province, who will see some of their income being taxed in the various provinces across Canada where the firm has offices, resulting in a higher effective tax rate given that provinces like Ontario and Quebec have tax rates that are higher than Alberta.

Due to the tax deferral made possible by implementing a professional corporation, a lawyer would potentially have higher after-tax income available to be invested. As illustrated in the attached appendix, an individual will be able to invest more after-tax income by earning the income through a professional corporation than if they would have earned the income directly. As illustrated in scenario 2 of the attached appendix, the more income that is left in the professional corporation the more tax is deferred and the lawyer is left with greater funds to invest.

For example, \$500,000 of earnings from a partnership or sole proprietorship would be taxed at 26.5% within the professional corporation while the same \$500,000 of earnings would be taxed at roughly 47% if earned directly by the sole practitioner or through a partnership. This tax deferral would leave \$102,500 more investable cash that can be later withdrawn from the corporation and taxed at lower progressive tax rates. Depending on rates of returns from the investments, the tax deferral can lead to substantially more money to invest and more income that can be later distributed to the individual.

In the past, professional corporations (and family trusts) were also used in a tax structure commonly used by lawyers to enable income splitting with their spouses and/or adult children for the income to be taxed at lower tax rates. This tax advantage of income splitting has been greatly reduced by the adoption of the new tax on split income rules ("TOSI") that were introduced in 2018. These complex new TOSI rules effectively limit the ability for a lawyer to be able to split their income with family members. If the TOSI rules apply, it would mean that the split income would be taxed at the highest marginal tax rate thus eliminating any potential tax savings from income splitting.

Income Level at Which Incorporation is Advantageous

It is important for a lawyer to consider the initial set-up expenses for the incorporation of a professional corporation, annual administrative costs and the various tax compliance costs that will be incurred by the professional corporation. There is no specific amount of income level at which it would be beneficial for a lawyer to incorporate. It depends on the financial needs of each individual and the capacity for savings. For it to be advantageous to a lawyer to incorporate, they would need to be earning an income that is high enough to cover their personal expenses, mortgage, personal loan, personal RRSP contribution and have adequate funds leftover to invest.

In our experience, lawyers in private practice earning an income of \$200,000 to \$300,000 or more generally consider it beneficial to incorporate a professional corporation. While income data might not reveal this to be high income among self-employed lawyers in Canada, at this income level, many individuals have enough income to cover their personal expenses and can utilize the excess income to invest. If the individual lawyer earns less than \$200,000 or, on account of current expenses, is unable to retain income inside the professional



corporation, it would reduce the benefit of incorporation. Conversely, in our experience it is unlikely for a lawyer earning an income of less than \$200,000 to find it advantageous to incorporate their practice.

Potential Understatement of Income Levels

It is our understanding that to assist with the inquiries of the Judicial Compensation and Benefits Commission, the Government mandates the Canada Revenue Agency (“CRA”) to provide data regarding self-employed lawyers income. Per our discussion with you and according to the CRA document entitled “Request 2020-375-Quadrennial Judicial compensation and Benefits Commission (Quad Comm)”, we understand that the data provided by the CRA does not capture the earnings of professional corporations through which lawyers in private practice are practising, nor the salary or dividends received by those lawyers from their professional corporation.

The information provided by the CRA regarding the income of self-employed lawyers would only capture the income that an individual lawyer would declare as self-employment income on their personal income tax returns form T2125. It is our understanding that this covers professional income earned directly by lawyers from their participation in a law firm partnership or sole practice. Once a lawyer establishes a corporation, then as of the first full year of the incorporation, all the revenue from his/her practice is earned by the corporation. The data regarding the income levels of self-employed lawyers thus reported, in our opinion, most certainly understates these income levels as a result of the increasing number of lawyers choosing to practice through a professional corporation whose income is not reflected in this data, and the fact that those lawyers, for the reasons just explained, are higher earning lawyers. Moreover, as mentioned already, the CRA data would not capture any income earned by the professional corporations nor any salaries nor dividends paid by professional corporations to lawyers. Frequently, lawyers later in their careers have accumulated enough savings to have the potential to leave a large portion of the income earned from their partnership within their professional corporation. Based on our experience, it is our view that the income that is not included in the data provided by CRA is certainly from high income earning lawyers.

In order to obtain an accurate picture of the true income level of self-employed lawyers in Canada, it would be necessary to also examine the income earned by self-employed lawyers who practice through a professional corporation. This is so because, based on information otherwise available to the Commission, an increasing number of lawyers choose to practice through a professional corporation.

If you have any further questions, please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink that reads "Ernst & Young LLP". The signature is written in a cursive, flowing style.

Stéphane Leblanc, CPA, CA / Andre Pickler, CPA, CGA
Partner / Manager
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Appendix ²

Fiscal Advantages of Incorporation for Lawyers

Based on Quebec Tax rates

Scenario 1

Assuming lawyer earning \$500,000 and needs a pre-tax income of \$200,000 to cover all personal expense

Income paid to incorporated lawyer		Income paid to non-incorporated lawyer	
Income in Professional Corp.	\$ 500,000		
Corporate income tax - 26,5% *	<u>(79,500)</u>		
Income available to be distributed to individual	\$ 420,500	Personal income	\$ 500,000
Salary paid out of the professional corp.	(200,000)	Personal income tax	(237,045)
		Personal needs after tax**	<u>(122,412)</u>
Total income available to invest	<u>\$ 220,500</u>	Total income available to invest	<u>\$ 140,543</u>

Scenario 2

Assuming lawyer earning \$500,000 and needs a pre-tax income of \$100,000 to cover all personal expense

Income paid to incorporated lawyer		Income paid to non-incorporated lawyer	
Income in Professional Corp.	\$ 500,000		
Corporate income tax - 26,5% *	<u>(106,000)</u>		
Income available to be distributed to individual	\$ 394,000	Personal income	\$ 500,000
Salary paid out of the professional corp.	(100,000)	Personal income tax	(237,045)
		Personal needs after tax***	<u>(71,040)</u>
Total income available to invest	<u>\$ 294,000</u>	Total income available to invest	<u>\$ 191,915</u>

*Taxable income = earnings less salary paid

**Amount of \$200,000 before tax

***Amount of \$100,000 before tax

² Income rates based on active business income earned in the province of Quebec



Appendix³

Fiscal Advantages of Incorporation for Lawyers

Based on Ontario Tax rates

Scenario 1

Assuming lawyer earning \$500,000 and needs a pre-tax income of \$200,000 to cover all personal expense

Income paid to incorporated lawyer		Income paid to non-incorporated lawyer	
Income in Professional Corp.	\$ 500,000		
Corporate income tax - 26,5% *	(79,500)		
Income available to be distributed to individual	\$ 420,500	Personal income	\$ 500,000
Salary paid out of the professional corp.	(200,000)	Personal income tax	(229,225)
		Personal needs after tax**	(130,508)
Total income available to invest	<u>\$ 220,500</u>	Total income available to invest	<u>\$ 140,267</u>

Scenario 2

Assuming lawyer earning \$500,000 and needs a pre-tax income of \$100,000 to cover all personal expense

Income paid to incorporated lawyer		Income paid to non-incorporated lawyer	
Income in Professional Corp.	\$ 500,000		
Corporate income tax - 26,5% *	(106,000)		
Income available to be distributed to individual	\$ 394,000	Personal income	\$ 500,000
Salary paid out of the professional corp.	(100,000)	Personal income tax	(229,225)
		Personal needs after tax***	(76,292)
Total income available to invest	<u>\$ 294,000</u>	Total income available to invest	<u>\$ 194,483</u>

*Taxable income = earnings less salary paid

**Amount of \$200,000 before tax

***Amount of \$100,000 before tax

³ Income rates based on active business income earned in the province of Ontario

**Stéphane Leblanc, CPA, CA**

Associé, fiscalité EY Private

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- ▶ M. Leblanc, associé en fiscalité, possède plus de 29 ans d'expérience au sein d'EY où il œuvre actuellement auprès de sociétés en croissance du marché entrepreneurial entre autre dans différents secteurs dont de la construction, du commerce de détail, du transport, de la technologie, des communications et du divertissement.
- ▶ Il est membre du groupe Services consultatifs en fiscalité aux entreprises, où il conseille des sociétés canadiennes, entre autres en matière de planification fiscale et de réorganisation, de fusions et acquisitions, comptabilisation des impôts et aide à la négociation de différends auprès des autorités fiscales. Il conseil également les entrepreneurs et les familles en affaires avec leur planification fiscale et successorale et l'utilisation de fiducie.
- ▶ M. Leblanc est impliqué dans la communauté fiscale, il a notamment été président de l'APFF, et commente fréquemment l'actualité fiscale dans les médias Québécois et est membre de comités de fiscalité pour l'ordre des CPA du Québec et pour la Chambre de commerce du Montréal métropolitain.