Relevant portion of Transcript:

Senator Baker: When the Federal Court had a problem similar to that which the criminal justice system does today, they introduced Section 12 of the *Federal Courts Rules* to appoint prothonotaries, and they dealt with these preliminary matters in the Federal Court. Under civil rules in each province we have settlement conferences that take these matters out of the trial itself.

My question to Mr. Zaluski is: why couldn't we take the prothonotaries idea at Section 12.1 of the *Federal Courts Act* and put it in the *Criminal Code*, perhaps under case management judge, as we did in 2002? Is that the proper place to supplant a solution that solved the same problem in the Federal Court? Can it be done under section 551.1? Would that be the logical place to put such a suggestion?

Departmental Response

Parliament does not have the legislative authority to create a judicial officer, like a prothonotary, for the criminal courts.

The *Constitution Act, 1867* divides jurisdiction over criminal law and courts between Parliament and the provincial legislatures (ss. 91(27) and 92(14)). Parliament has jurisdiction over the criminal law and procedure, while the provincial legislatures have jurisdiction over courts of criminal jurisdiction.

In addition, s. 92(14) vests the province with authority to constitute and organize the courts, both civil and criminal, in the province. Parliament has no authority to legislate in respect of courts in the provinces – it only has authority to appoint the judges to the superior courts of the provinces under s. 96. The creation of an official, whether performing case management, or quasi-judicial functions, would fall within the jurisdiction of the province in relation to the organization and constitution of the courts.

While Parliament can confer some limited jurisdiction on officials within the provincial criminal courts, it has no authority to create such offices. That authority falls within the jurisdiction of the province in relation to the administration of justice.

Question from Senator Baker:

Should one crown be prosecuting all criminal offences on an information?

Departmental response:

Section 91(27) of the *Constitution Act, 1867* grants Parliament the exclusive power to legislate in respect of criminal law, including the procedure in criminal matters. Section 92(14) gives the provinces exclusive authority to legislate in relation to the administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction.

Section 2 of the *Criminal Code* contains the definition of *"Attorney General"* which provides (at paragraph (a)), the authority for provinces to conduct *Criminal Code* proceedings, subject to paragraphs (b.1) to (g), where the Attorney General of Canada possesses concurrent jurisdiction on specific *Criminal Code* offences (e.g., terrorism, fraud and criminal organization offences). This results in a shared jurisdiction where provincial crowns prosecute most *Criminal Code* offences as well as provincial offences; offences enacted under other federal statutes are prosecuted by federal crowns.

However, as noted by Brian Saunders, Director of Public Prosecution Service of Canada (PPSC), in his testimony on February 17, 2016, paragraph 2(b) of the *Criminal Code* gives the Attorney General of Canada jurisdiction for criminal offences in the territories therefore federal crowns prosecute all criminal offences in those jurisdictions.

Mr. Saunders also mentioned that where federal and provincial investigations result in charges being laid against an accused person, the PPSC has arrangements in place with provincial prosecution services to grant the authority to prosecute to one prosecution service in light of the type of offence and circumstances surrounding the case, to ensure the most efficient use of prosecutorial resources. This results in one crown prosecuting all the charges in that specific case.

Relevant portion of Transcript:

Senator Joyal: Do you have, Mr. Zaluski, statistics on the average term of a Superior Court judge and Court of Appeal judge in Canada, and how many decide to resign at 65?

Mr. Zaluski: Thank you, Senator Joyal. I don't have those statistics with me, but I believe I should be able to provide that information to the committee.

Senator Joyal: You understand what I have in mind. In other words, what is the average term of a judge, and how many really decide to opt out after 65 or become supernumerary?

Mr. Zaluski: I think what we would be able to provide is the proportion that elect to go supernumerary, when they are eligible or at some later point, before taking full retirement. We would be able to provide you with that information.

Departmental Response:

Since 2000, the median term of service for superior court judges (trial and appellate) is almost 21 years from first appointment to retirement. This excludes deaths in office and retirements due to disabilities, but includes supernumerary service prior to full retirement.

Judges become eligible to elect supernumerary status either:

- after 15 years of service, when the sum of age and years of service is at least 80; or
- at age 70 after 10 years of service.

Supernumerary judges can sit until their mandatory retirement date at age 75, or for a maximum of 10 years, whichever comes first.

Among judges who retired since 2007, 89% of those who became eligible to elect supernumerary status did so before taking full retirement. This amounts to 75% of all judges who retired since 2007 having served for a period as a supernumerary judge.

There is a higher rate of supernumerary election in the superior trial courts (78%) than in appellate courts (63%).

Additional details regarding supernumerary election trends can be found in the attached annex.

Supernumerary Election Trends

Outside of the Supreme Court of Canada where judges may not sit as supernumeraries, there have been 423 retirements since 2007.[1] The pattern of supernumerary elections among this population (expressed as a proportion of 100 appointments) is illustrated below.

* The 16 out of every 100 appointees who retire prior to becoming eligible to elect supernumerary status includes 6 who die or retire through disabilities and 1 appointed at 65 or older who cannot achieve the eligibility criterion.

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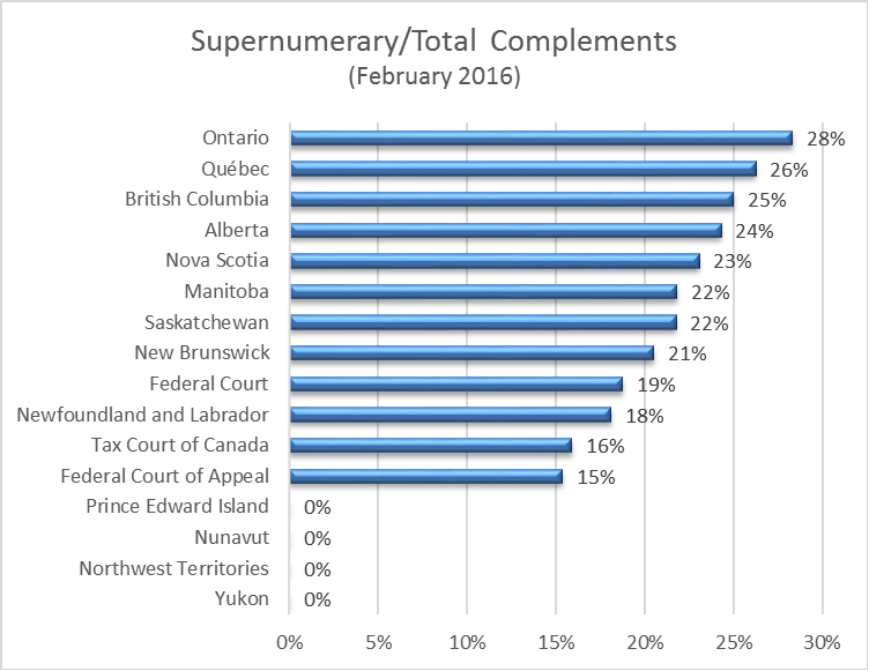
  or every 100 appointments, 84 judges sit long enough to reach supernumerary eligibility.
- Of those 84, 75 elect supernumerary status.
- The rate of supernumerary election can be expressed two ways: 75% of judges appointed or 89% of judges eligible to elect.
- The majority (82%) of judges who become supernumerary do so at age 65 or older. In this group, 78% elect immediately upon reaching eligibility and 66% sit as supernumeraries until they reach age 75.
- Among judges who elect supernumerary status under age 65, only 63% do so immediately, but 94% elect within a year. These judges sit as supernumeraries for an average of 4 years.

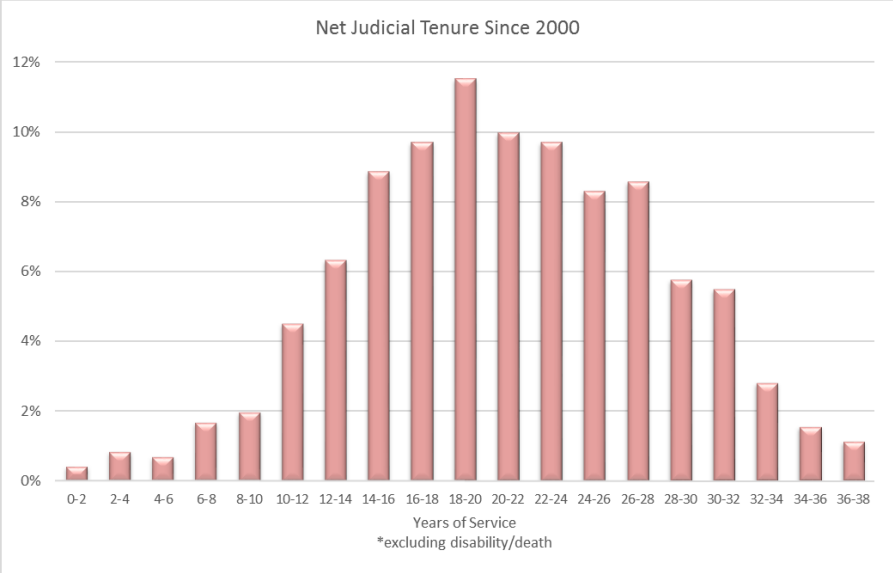
This is the pattern across all superior courts. However, the appeal courts differ from the trial courts in this regard:

- Whereas the overall rate of supernumerary election per appointment is 75%, it is 78% in the trial court and 63% in the appeal courts.
- While the overall rate of election given eligibility is 89%, it is 94% in the trial courts and 71% in the appeal courts.
- Supernumerary judges in the appeal courts also tend to retire sooner. Those electing under age 65 sit an average of 3 years after electing; when they elect supernumerary status at 65 or older, only 52% sit until they must retire at 75.

[1] Through September 23, 2015.

While supernumerary complements fluctuate a good deal over time, in the larger jurisdictions the ratio of supernumerary-to-total complements tends to be higher.





Altogether, judges serve for a median of almost 21 years from first appointment to retirement.

This excludes deaths in office and retirements due to disabilities.

Judges become eligible to elect supernumerary status when either of the following holds:

- *After 15 years of service when the sum of age and years of service is at least 80.*
- *At age 70 after 10 years of service.*

Consequently, judges appointed at age 65 or older never become eligible to elect.

Judges may sit as supernumeraries for up to 10 years or until they reach the compulsory retirement age of 75.

Question from the Chair (Senator Bob Runciman):

"To Senator Baker's earlier request, this is the kind of thing that you could provide to the committee. What is the ministry looking at going forward, not in specific terms but generally? It would be very helpful to us.

Departmental Response:

The Prime Minister has requested that the Minister of Justice conduct a review of the criminal justice system and sentencing reforms over the past decade with a mandate to assess the changes. The review will be broad-reaching in scope.

In her address to the Canadian Bar Association on February 21, 2016, the Minister of Justice characterized the reexamination of the criminal justice system as a "rethink" that must be both evidence and principle based.

More specifically, the Minister noted three areas to be examined. The first, is the impact of the criminal justice system on vulnerable segments of society such as Indigenous people and those with some combination of mental illness and addiction. She also, highlighted that criminal justice system efforts and resources must be dedicated to the "right things", to the crimes that are more serious in nature. Lastly, the Minister reflected that the criminal justice system must keep pace with the rapidly changing world and remain relevant to Canadians. As part of this effort, the review will include an analysis of improved use of information technology to make the system more efficient and timely as well as make better use of court resources. For example, an exploration of sentencing alternatives and bail reform will be undertaken.

The Department of Justice will continue to work with provincial and territorial partners as well as other key stakeholders to examine solutions to improve our criminal justice system and ensure that it is accessible, efficient and fair.