

***Judicial Compensation
and Benefits Commission***



***Commission d'examen de la
rémunération des juges***

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BY EMAIL ONLY

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The members of the Judicial Compensation and Benefits Commission have asked me to communicate the following:

This Quadrennial Commission received correspondence from counsel for the Judiciary on February 13, 2023 seeking guidance on Recommendation 8.5.(c) of the Report and Recommendations of this Commission, which was delivered on August 30, 2021. As a result, the Commission requested written submissions from the Judiciary, Government and any other interested party, but reserved on the question of whether an oral hearing was necessary.

The following submissions were received:

Submissions of the Judiciary – April 6, 2023

The Judiciary asked that the Commission defer implementation of Recommendation 8.5.(c) arguing that:

- (a) The recommendation was issued without giving parties an opportunity to be heard;
- (b) The recommendation departs from the findings of previous Commissions;
- (c) The parties should first be given an opportunity to consult and attempt to agree; and
- (d) Absent agreement, if the Government wishes to raise the issue of pre-appointment income (PAI) data before this or a future Commission, then it should make a full and transparent proposal.

Submissions of the Government – May 10, 2023

The Government argued that once this Commission released its report and the Government issued its response accepting the recommendations, judicial review was the only remedy available to the Judiciary and that remedy has not been pursued. The Government welcomed the Commission’s guidance regarding the implementation of Recommendation 8.5.(c).

The Government undertook not to take steps to unilaterally gather PAI data, but asserted that it is committed to working with the Commission participants and other relevant entities to gather this information. It also made a proposal on how to implement Recommendation 8.5.(c).

Submissions of the Associate Justices of the Federal Court – May 10, 2023

The Associate Justices of the Federal Court supported the submissions of the Judiciary.

Reply Submissions of the Judiciary – May 19, 2023

The Judiciary argued that the caselaw does not support the position taken by the Government. It argued that the Government’s proposed data survey is unreliable and is not a full and transparent proposal.

The Judiciary argued that Recommendation 8.5.(c) does not take into account the conclusions of the Block and Rémillard Commissions, that the collection of this data would not be useful and that the parties should consult and agree on the design and execution of the study.

The Judiciary is not seeking an order revoking Recommendation 8.5.(c). Rather it is reaching out to the Commission seeking its guidance regarding implementation of this recommendation and requesting that implementation “... be deferred until such time as the parties have consulted and agreed on an approach to PAI data that is in keeping with the conclusions of the Block and Rémillard Commissions.”

Recommendation 8.5.(c)

Recommendation 8.5.(c) reads as follows:

Recommendation 8

The following preparatory work should begin now so that the Seventh Quadrennial Commission has before it adequate and appropriate additional data from which to work:

...

5. In addition to the data currently available, the Office of the Commissioner for Federal Judicial Affairs begin preparation now of statistical data for each province and territories as to:

...

- (c) compensation levels of appointees immediately prior to their appointment;

...

all during the current quadrennial period and **provide data over a sufficient time span to identify material trends.** [emphasis added]

This Recommendation was arrived at by this Commission in the context of being “now at a crossroad in terms of the quality of the data upon which a future Quadrennial Commission must rely to make a careful assessment of the criteria set under section 26(1.1) of the *Judges Act*” [para 299 of its Report and Recommendations] and as set forth in paragraphs 30 to 58, paragraph 159 and paragraphs 301 and 302 of its Report and Recommendations, all of which are reproduced in Annex A to this letter.

Prior Quadrennial Commissions

(a) Block Commission

The Block Commission did not reject the use of a pre-appointment compensation survey in the judicial compensation setting environment. It did not believe that a snapshot of appointees’ salaries prior to appointment is particularly useful in helping to determine the adequacy of judicial salaries. It went on to say that ideally, this information would be obtained through a targeted survey of individuals who are at the higher end of the earning scale and who could be objectively identified as outstanding potential candidates for judicial appointment. Acknowledging the difficulties inherent in the design and implementation of any such survey, it was left to the Government and the Judiciary, if it was to be sought in the future, to consult on its design and execution to ensure that future commissions are provided with information that both parties agree is reliable and useful.

(b) Rémillard Commission

In its Ruling Respecting Preliminary Issues, the Rémillard Commission addressed the request of the Government (at the outset of the process) that a pre-appointment income study be commissioned which was likely to entail a delay in the commencement of the formal Commission process. In rejecting the request for such a study, the Rémillard Commission was not prepared to undertake or order it at that time noting that without the benefit of a fully developed set of submissions and a record, the benefits of such a study were not established on the material before it and would delay the ability of the Rémillard Commission to report to the Minister of Justice within the time set by the provisions of the *Judges Act*.

Each commission has had to grapple with the question of the adequacy of information supporting the private sector comparator and the increasing inadequacy of available data regarding private sector salary levels.

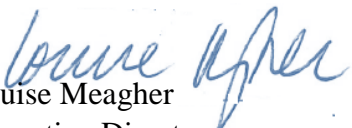
Conclusion

Our Report and Recommendations was delivered to the Minister of Justice on August 30, 2021. On December 29, 2021, the Minister of Justice and Attorney General of Canada released the government's response to the Report and accepted all of the Commission's recommendations. It further stated that:

“The federal government will act in the near future to implement the recommendations, including through the introduction of the necessary amendments to the *Judges Act*.”

At this late stage in the life of this Commission and in light of the acceptance of the Report and Recommendations of this Commission by the federal government at the end of 2021, the Commission declines the invitation to enter into a reconsideration or deferral of Recommendation 8.5.(c). As contemplated by the commission process and prior quadrennial commission reports, the parties should take the continuing opportunity to consult and work with each other to achieve what can be achieved with respect to Recommendation 8.5.(c) in time to meaningfully assist future commissions. Specific guidance on a particular aspect of any approach or proposal that results from their cooperation can always be sought.

Yours truly,


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CHAPTER 2 - JUDGES' SALARIES

A. ADEQUACY OF THE DATA AVAILABLE TO THE COMMISSION

1. Private Practice Income Levels

- [30] Having adequate and reliable data is essential for the Commission to conduct its inquiry into the adequacy of judges' salaries and benefits, taking into account the criteria prescribed in section 26(1.1) of the *Judges Act*.
- [31] As in previous Quadrennial Commission inquiries, the parties obtained a base file of data from the Canada Revenue Agency ("CRA") for use before the Commission.
- [32] That data focused on the reported compensation levels of self-employed lawyers over the years 2015-2019.
- [33] The available data shows that there has been a decrease in the reported numbers of self-employed lawyers from 18,740 in 2015 to 15,510 by 2019 (before any filters are applied to the data) but a substantial increase in the use of professional corporations by practising lawyers across Canada. In 2019, there were 17,871 such corporations, representing a threefold increase in the use of professional corporations by practising lawyers since 2010. In 2018, this group comprised 27% of practising and insured law society members.¹⁸
- [34] The professional income earned through these professional corporations is not reflected in the available CRA data.
- [35] As far back as the 2004 McLennan Commission, it was recognized that those lawyers who have established personal corporations and are no longer reporting self-employed professional income "are probably those with the higher incomes".¹⁹
- [36] Expert evidence before this Commission suggests that the use of a professional corporation is tax advantageous to lawyers in private practice earning an income of \$200,000-\$300,000 or more, although there are within the reported CRA data self-employed lawyers earning in excess of both \$200,000 and \$300,000 per annum.²⁰
- [37] We were advised that the CRA faces limitations on the data that it is able to extract from professional corporation tax filing information because a) there is a two-step process to determine whether a professional corporation belongs to a lawyer; b) questions then arise from the data based on the number of employees of the corporation as to which employee is the lawyer who constituted the corporation; and c) it is difficult to know whether the figures were before or after expenses.

¹⁸ Judiciary Submission, table 6 and paras 137-138.

¹⁹ McLennan Report at 42-43.

²⁰ Report of Stéphane Leblanc and André Pickler, Judiciary Submission, Exhibit B, at 2; letter from Christopher Rupar dated May 14, 2020 [sic].

- [38] The CRA advises that this is a labour-intensive task and could not confirm that it would be possible for it to do so.
- [39] In short, the CRA is not able to confirm that any data it could provide to the Commission on professional corporations would be accurate and complete. The Government and the Judiciary concluded that it would not be possible for them to obtain more information on professional corporations in time for this Commission to meet its statutory deadlines.²¹
- [40] As a result, this Commission is left with a lack of complete data as to the professional income level of lawyers in private practice.
- [41] The implication, however, of the CRA data under-reporting the income of higher-earning private sector lawyers is inescapable.
- [42] As the Government observed, “if this trend continues, the CRA data may become less and less reflective of practicing lawyers’ incomes.”²²

2. Tax Advantages of Professional Corporations

- [43] In the expert evidence before the Commission there is theoretical, but not concrete, reference to the benefits of tax deferral and potential tax savings in the future where the lawyer does not spend all of the professional income earned through the professional corporation in that taxation year.²³
- [44] This benefit, which may be material depending on income level, is difficult to quantify, given that the lifestyle requirements, and spending habits, of a given professional would be highly subjective and likely vary widely.
- [45] Accordingly, there is no hard evidence upon which to quantify this potential advantage.
- [46] We were advised that there is also the opportunity to create an individual pension plan within a professional corporation.²⁴ We have no evidence as to the degree to which this is actually utilized, let alone to compare it in any effective way with the judicial annuity.

3. Sample Size Within the CRA Self-employed Professional Income Data

- [47] Given the reducing number of lawyers in the self-employed professional income category in the CRA data, when applying filters to that data, the sample size becomes increasingly smaller.²⁵

²¹ Letter from Christopher Rugar dated May 14, 2020 [sic].

²² Government Submission, para 61.

²³ Report of Stéphane Leblanc and André Pickler, Judiciary Submission, Exhibit B.

²⁴ Second Report of Stéphane Leblanc and André Pickler, Judiciary Reply, Exhibit B.

²⁵ See for example the chart at para 87 of the Government Submission where, for the 2019 taxation year and applying certain filters, the target group of all self-employed lawyers in the CRA data set is reduced to only 19%, or 2,990 of the original 15,510. Using different filters, the target group is reduced to 6%, see letter dated May 26, 2021 from Kirk G. Shannon.

[48] This, in conjunction with the under-reporting of private practice lawyer income in the CRA data due to the increasing use of professional corporations, is a further area of concern to this Commission.

4. Lack of Movement of DM-3 Salary Brackets

[49] The Block Comparator, established in the Block Report and applied by subsequent Commissions, is defined as the midpoint of the DM-3 salary range, plus one half of available at-risk pay.²⁶

[50] Historically, the salary ranges have increased on a relatively consistent basis until more recently when, since 2017, the salary range has remained unchanged while the average salary of the existing DM-3s has generally increased within those ranges.²⁷

[51] We were advised that the salary ranges in the information provided to us with respect to the DM-3 category reflect retroactive increases approved on May 18, 2018 for each of April 1, 2014, 2015, 2016 and 2017.²⁸

[52] Given these retroactive increases and no evidence as to the explanation for the lack of movement of the DM-3 salary ranges, the Commission requested and received information from the Government as to what the DM-3 salary ranges would be if they were to reflect the most recent increases for the rest of the Public Service of Canada.²⁹

5. Evidence with Respect to Source Groups of Applicants for Judicial Office

[53] In considering the need to attract outstanding candidates to the judiciary, the Commission had before it studies from other jurisdictions, some anecdotal evidence and statistical evidence of a decreasing proportion of judicial appointments from private practice. We had little evidence before us about the lawyers in the applicant pools.

[54] The Judiciary attribute the downward trend in the percentage of appointments from private practice to the judicial salary as an obstacle to attracting lawyers in private practice to the Bench.³⁰

[55] The Government suggests that there is no evidence of a reduction in high quality candidates for the Bench, including those from private practice, as the number of private law firm partners (as opposed to non-partners) appointed to the Bench has generally increased over the years.³¹

[56] The Commission inquired of the Judiciary and the Government whether statistics existed that would detail the prior employment of applicants (as opposed to appointees) and whether they

²⁶ Block Report, paras 108, 111.

²⁷ Judiciary Submission, see table following para 105.

²⁸ Letter dated May 26, 2021 from Kirk G. Shannon.

²⁹ Letter dated May 26, 2021 from Kirk G. Shannon.

³⁰ Judiciary Submission, para 152.

³¹ Government Reply, para 53.

come from the public or private sectors or other sectors such as academic, corporate or non-profit organizations. The Commission was informed that such data is not available.

[57] Additionally, the system maintained by the Office of the Commissioner for Federal Judicial Affairs (“FJA”) does not track the source of candidates by regions within a province other than in Ontario and Quebec where there are multiple Judicial Advisory Committees. We have been told that to create more data would require a manual review of the actual applications.³²

6. Conclusion

[58] In our view, the next Quadrennial Commission will require more robust data in these areas, both from the CRA and the FJA, in order to address the criteria under section 26(1.1) of the *Judges Act*. This will be addressed further in our Recommendations in Chapter 5.

Deficiencies in data

[159] The deficiencies in data referred to earlier in this Report make it clear that we do not have a full view of the income of those lawyers in private practice, especially those at the higher levels of professional income.

CHAPTER 6 – CONCLUSION

...

[301] The next Quadrennial Commission must be equipped with the most up to date relevant data so that its deliberations can be based on a record that enables it to determine whether trends and risks expressed in the submissions to us can be fully evaluated with current evidence beginning in 2024.

[302] We urge the parties to this Quadrennial Commission to begin that process immediately.

...

³² Letters dated May 11, 2021 and May 14, 2020 [sic] from Christopher Rupar and May 26, 2021 from Kirk G. Shannon.