SUBMISSIONS

of the

CANADIAN SUPERIOR COURT JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

to the

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

further to the

RULING RESPECTING RECOMMENDATION 8(5)(C) OF THE REPORT OF THE SIXTH QUADRENNIAL JUDICIAL COMPENSATION AND BENEFITS COMMISSION

April 6, 2023

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A. BACKGROUND

1. The Judicial Compensation and Benefits Commission (the "**Commission**") delivered the Sixth Report and Recommendations of the Commission to the Minister of Justice of Canada on August 30, 2021 (the "**Report**").

2. The Report contains a detailed recommendation ("**Recommendation 8**") that the parties promptly begin preparatory work to collect various data points for use by the Seventh Quadrennial Commission. Recommendation 8 includes a recommendation that the Office of the Commissioner for Federal Judicial Affairs ("**FJA**") begin preparation now of statistical data for each province and territories as to compensation levels of appointees immediately prior to their appointment ("**Recommendation 8(5)(c)**").

3. The relevance and appropriateness of collecting of pre-appointment income data ("**PAI data**") is a highly contentious issue that has been debated extensively before two previous Commissions. Both the Block and Rémillard Commissions concluded that collecting PAI data was problematic, and that the data was not useful to determining the adequacy of judicial salaries. The issue was not raised or debated before this Commission.

4. Representatives of the Canadian Superior Court Judges Association (the "**Association**"), the Canadian Judicial Council (the "**Council**") (collectively, the "**Judiciary**"), the Associate Judges of the Federal Court, the Government of Canada, FJA, and the Canadian Revenue Agency ("**CRA**") met for the first time on November 23, 2022 to discuss Recommendation 8 and the way forward for the next Commission. The Judiciary conveyed that it had been surprised by the inclusion of Recommendation 8(5)(c) in the Report, given that the issue had not been raised by any party, and particularly in light of the long history surrounding this issue, the conclusions of the Block and Rémillard Commissions, and the established doctrine that valid reasons are required to depart from the conclusions of a previous Commission. The Judiciary understands that the Government of Canada was also surprised at the inclusion of Recommendation 8(5)(c). However, the Government indicated that it had committed, on December 29, 2021, to

implement the Commission's Report, and therefore took the position that the Judiciary should raise its objection with the Commission.

5. On February 13, 2023, the Association and Council wrote to the Commission to express its concerns and seek the Commission's guidance. On February 16, 2023, the Government of Canada wrote to the Commission indicating that it was prepared to act on the Commission's recommendations but would await the Commission's further direction regarding Recommendation 8(5)(c) before collecting any data.

6. On February 24, 2023, the Commission issued a Ruling Respecting Recommendation 8(5)(c) of the Report of the Sixth Quadrennial Judicial Compensation and Benefits Commission (the "**Ruling**"). The Commission directed that Counsel for the Judiciary file any written submissions in favour of the position that it wishes the Commission to take with respect to the implementation of Recommendation 8(5)(c) by April 10, 2023 and set a schedule for the submissions of the Government and any other hearing participant, and any responses or replies. The Commission directed that the submissions be delivered in a form that supports a determination in writing, and that if a party wishes an oral hearing, it should make that request, and the Commission will determine whether an oral hearing is necessary after receipt of all written submissions.

B. OVERVIEW OF THE JUDICIARY'S POSITION

7. The Judiciary thanks the Commission for the opportunity to make submissions on Recommendation 8(5)(c) and wishes to address at the outset the timing of this issue arising.

8. The Judiciary's surprise and concern with Recommendation 8(5)(c) were immediate upon the release of the Report. Careful consideration was given by the Association and Council at the time to immediately register the Judiciary's objection given that the collection of PAI Data had not been requested by any hearing participant nor had it been raised in any written or oral submissions made to the Commission. However, considering that the absence of any such request or debate was a matter of record and could not be disputed, the Judiciary deferred

raising this issue until its first post-Report meeting with the Government and the FJA, in the hope of coming to the Commission with a common position.

9. The Parties' first meeting to discuss the implementation of Recommendation 8 took place on November 23, 2022. The Judiciary raised its objection to the collection of PAI Data at that meeting. The Government took the matter under consideration and, in a subsequent communication, suggested that the Judiciary informally raise the question with the Commission. The Judiciary's letter followed shortly thereafter.

10. The Judiciary also wishes to address at the outset the statement in paragraph 64 of the Judiciary's March 29, 2021 Submission, referenced in the Ruling, that a major cause of the drop in interest from lawyers in private practice is the income gap between what outstanding candidates earn in private practice and the judicial salary. With respect, this submission does not express a position on the advisability of collecting PAI data – that is, data regarding the pre-appointment income of those who have accepted an appointment. Rather, it reflects the Judiciary's long-held view that it is imperative to collect accurate data regarding the income of top private practice lawyers more broadly, as reflected in Recommendation 8(1). In no way did this submission signal a change in the Judiciary's consistent position that collecting PAI data specifically is a breach of privacy, is self-serving, and is of little relevance to understanding the situation of those who are **not** applying.

11. The Judiciary's position with respect to Recommendation 8(5)(c) is that implementation of the recommendation should be deferred at this time for the following reasons:

    a. Recommendation 8(5)(c) was issued without giving the parties an opportunity to be heard;
    b. Recommendation 8(5)(c) departs from the findings of previous Commissions contrary to the Commissions' established principles and the expectations of the parties;
    c. In accordance with the approach of previous Commissions, the parties should be given an opportunity to first consult and attempt to agree on the

subject-matter of Recommendation 8(5)(c). Absent agreement, if the Government wishes to raise the issue of PAI data before this Commission or a future Commission, then the Government should make a full and transparent proposal setting forth:

1. the type of data that will be collected;
2. how the consent of appointees will be obtained prior to collecting their PAI data;
3. how the data will be collected so as to both protect appointees' privacy and ensure the data can be reliably tested;
4. the use the Government intends to make of the data; and
5. the reasons advanced for seeking to depart from the conclusions of previous Commissions as regards the relevance and usefulness of PAI data;

the whole so as to give the Judiciary – and the Commission – a proper opportunity to review the proposal, potentially with the assistance of experts, as has been done before previous Commissions.

C. DETAILED SUBMISSIONS

I. Procedural Fairness in the Context of Compensation Commissions Requires Notice and an Opportunity To Be Heard on Recommendations

a. General Principles Regarding Procedural Fairness

12. Although the Commission is not strictly adversarial, it is bound by the duty of procedural fairness. The duty of fairness "extends to all administrative bodies acting under statutory authority".[1] It is triggered by **"**[t]he fact that a decision is administrative and affects the rights, privileges or interests of an individual".[2]

13. Even where an administrative body only issues "recommendations", it may be bound by the duty of fairness "where the recommendation process is an integral

[1] *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 SCR 249, para. 75 [Book of Documents of the Association and Council ("**BDAC**") tab 1].
[2] *Baker v. Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 81, para. 20 [*Baker*] [BDAC tab 2].

part of the decision-making process […]."[3] The duty of fairness has been held to apply to bodies making recommendations under statutory authority, including a judicial council and its committee of inquiry[4] and commissions of inquiry, even if their findings "cannot result in either penal or civil consequences for a witness".[5]

14. Applying the above principles, there is no doubt the Commission is bound by the duty of procedural fairness. The Commission acts under the statutory authority of s. 26 of the *Judges Act* and its work has a significant impact on the rights of the parties. Although its recommendations are not binding, its work must be given "meaningful effect" in the process of determining judicial remuneration.[6] As the Supreme Court has stated, "[t]he commission's recommendations must be given weight. They have to be considered by the judiciary and the government."[7] Indeed, the government can only reject or vary the Commission's recommendations where legitimate reasons are given, and its response is subject to judicial review.[8]

b. The Content of Procedural Fairness

15. While the content of the duty of fairness varies according to the circumstances, at its core, it ensures that administrative bodies provide "an opportunity for those affected by [their] decision to put forward their views and evidence fully and have them considered by the decision-maker."[9] Accordingly, even when the content of the duty is minimal, a decision-maker must provide notice to the affected party regarding its decision and receive and consider the affected party's submissions.[10]

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[3] Donald J.M. Brown and Hon. John M. Evans, *Judicial Review of Administrative Action in Canada* (2022, loose-leaf ed.) at § 7:55 [BDAC tab 8].
[4] *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, para. 81 [BDAC tab 3].
[5] *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, 1997 CanLII 323 (SCC), [1997] 3 SCR 440, para. 55 [BDAC tab 4].
[6] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, para. 175 [*PEI Reference*] [BDAC tab 5]
[7] *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, [2005] 2 S.C.R. 286, 2005 SCC 44, para. 23 [*Bodner*] [BDAC tab 6].
[8] *Bodner*, paras. 24, 28 [BDAC tab 6].
[9] *Baker*, para. 22 [BDAC tab 2].
[10] *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 SCR 504, para. 5 [BDAC tab 7].

16. The expectations of the parties also play a role in determining the content of the duty of fairness. Where a party "has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness".[11]

17. In *Bodner*, the Supreme Court emphasized that the commission's recommendations had to result from a fair hearing after considering the submissions of the parties:

> The commission must objectively consider the submissions of all parties and any relevant factors identified in the enabling statute and regulations. Its recommendations must result from a fair and objective hearing. Its report must explain and justify its position.[12]

18. In the context of compensation commissions, procedural fairness is not just a legal requirement; it goes to the legitimacy of the enterprise as "independent, objective and impartial."[13] As the Supreme Court stated in the *PEI Reference*, objectivity is best promoted by ensuring a commission is "fully informed before deliberating and making its recommendations."[14]

19. As noted in the Judiciary's letter dated February 13, 2023, from its inception more than 20 years ago, the Commission has always ensured the respect of the parties' right to be heard regarding issues that may form the subject of formal recommendations. Whenever this foundational principle has been perceived to be at risk, the parties have acted to safeguard it.

20. The baseline requirements of procedural fairness and the legitimate expectations of the parties thus required the Commission to provide the parties with notice and an opportunity to be heard *prior* to issuing Recommendation 8(5)(c).

21. The requirement to provide notice and an opportunity to be heard is all the more acute given that the subject-matter of Recommendation 8(5)(c) – the collection of PAI data – has already received extensive consideration by previous Commissions, as set out more fully below.

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[11] *Baker*, para. 26 [BDAC tab 2].
[12] *Bodner*, para. 17 [BDAC tab 6].
[13] *Bodner*, para. 16 [BDAC tab 6]; *PEI Reference*, para. 169 (emphasis added) [BDAC tab 5].
[14] *PEI Reference*, para. 173 [BDAC tab 5].

II. The Conclusions of Previous Commissions Should Not Be Departed From Without Valid Reason

a. General Principles Regarding the Conclusions of Previous Commissions

22. Recommendation 8(5)(c) also engages procedural fairness because of the repeated principle that Commissions will give "careful consideration to the reasoning of previous Commissions" and that valid reasons – such as a change in circumstances or additional evidence – are required to depart from the conclusions of a previous commission.

23. In *Bodner*, the Supreme Court established that commissions should take note of the work and recommendations of their predecessors:

> Each commission must make its assessment in its own context. However, this rule does not mean that each new compensation commission operates in a void, disregarding the work and recommendations of its predecessors. The reports of previous commissions and their outcomes form part of the background and context that a new compensation committee should consider.[15]

24. Past Commissions have considered this issue. The Block Commission (2008) first suggested that "[w]here consensus has emerged around a particular issue during a previous Commission inquiry […] in the absence of demonstrated change, […] such a consensus [should] be recognized by subsequent Commissions and arguably reflected in the approach taken to the question in the submissions of the parties."[16]

25. The Levitt Commission (2012) issued a Notice prior to its inquiry that it had determined that in the absence of "a change in facts or circumstances", the Commission "intend[ed] to regard" recommendations from the previous commission "as a settled matter of principle."[17]

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[15] *Bodner*, para. 15 [BDAC tab 6].
[16] Block report, para. 201, reflected in Recommendation 14, at page 71 [BDAC tab 9].
[17] Notice issued by the Judicial Compensation and Benefits Commission on December 8, 2011 [BDAC tab 10].

26. Of note, the Government submitted that this Notice was inconsistent with the Commission's mandate, the principles of natural justice and its right to be heard.[18] However, following submissions on the appropriateness of relying on recommendations of a prior commission, the Levitt Report decided that "in arriving at its recommendations, it is entitled to take into account recommendations made by a previous commission, in the absence of a demonstrated change, where consensus has emerged around a particular issue during a previous commission inquiry."[19] It issued a formal recommendation to the same effect.[20]

27. The Rémillard Commission adopted a similar approach:

> We approached matters decided by previous Commissions and Special Advisors in light of the evidence and arguments made before us. We adopted a common sense approach: careful consideration has been given to the reasoning of previous Commissions as well as to the evidence brought before us. **Valid reasons were required – such as a change in current circumstances or additional new evidence – to depart from the conclusions of a previous Commission.**[21]

28. In its more recent submissions to this latest Commission, the Government accepted that the Commission should follow this "common sense approach",[22] which the Judiciary supported.[23] This Commission itself also acceded to this approach:

> [W]e have tried to follow the common sense approach applied by the Rémillard Commission by giving careful consideration to the reasoning of previous Commissions as well as to the evidence before us. If valid reasons exist to change an approach, be it a change in circumstances, additional new evidence or developments to date, we took them into consideration in our deliberations before arriving at

[18] Response to Notice by the Government (December 12, 2011) [BDAC tab 11].
[19] Levitt Report, para. 111 [BDAC tab 12].
[20] Levitt Report, p. 40, Recommendation 10: "Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus should be taken into account by the Commission, and reflected in the submissions of the parties." [BDAC tab 12].
[21] Rémillard Report, para. 26 [BDAC tab 13].
[22] Submissions of the Government of Canada (March 29, 2021), para. 12 [BDAC tab 14]; Turcotte Report, para. 195 [BDAC tab 15].
[23] Turcotte Report, para. 194 [BDAC tab 15]; referring to Transcript of the May 10, 2021 Public Hearings of the Turcotte Commission at 13: 24-25, 14: 1-4.

> our recommendations. We believe that we have brought a fair and objective approach to any competing considerations.[24]

29. Thus, all participants in this process had a shared understanding that the Commission would only depart from the conclusions of a previous Commission for "valid reasons" such as a change in circumstances or new evidence. This shared understanding reflected the approach of the three previous Commissions, as well as the current Commission.

b. The Conclusions of Previous Commissions on PAI Data

30. The collection of PAI data is an issue on which the parties traditionally have had opposing views, and hence it has been the subject of extensive evidence and debate before two previous Commissions – Block and Rémillard – both of which concluded that this type of data was of minimal relevance.

i. The Block Commission (2008)

31. The Block Commission had the benefit of extensive evidence and submissions on the usefulness of PAI data before reaching its conclusion that the data was of little use in determining the adequacy of judicial salaries.[25]

32. Before the Block Commission, the Government actually submitted a PAI study, with data from the CRA about the pre-appointment income of judges between 1995 and 2007. The data collected by CRA, which, notably, could not be verified for privacy reasons, indicated that 62 % of appointees who had been self-employed lawyers received an increase in income upon their appointment.[26] The Judiciary had serious concerns about the reliability of this conclusion and the underlying data, but its expert was refused access to the raw data for privacy reasons.[27]

33. The Judiciary also objected to the PAI study on procedural bases, noting that "the Government ought to have disclosed to the judiciary that it would be seeking to

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[24] Turcotte Report, para. 25 [BDAC tab 15].
[25] Block Report, paras. 81-91 [BDAC tab 9].
[26] Block Report, para. 85 [BDAC tab 9]; *Report on the Pre-Appointment Earnings of Judges for the Department of Justice Canada* (2008) [BDAC tab 16].
[27] Supplementary Reply Submission of the Association and Council (February 12, 2008), paras. 19-39 [BDAC tab 17].

collect this data for use before the Commission, *so as to give the judiciary an opportunity to comment on the proposed data collection and the methodology applied by the CRA."*[28]

34. In addition, the Judiciary provided the Commission with an expert report from Navigant (encompassing 67 pages including appendixes) analyzing the data provided by the CRA. The Navigant Report concluded that it was "impossible to conclude" that the data was "valid or reliable" – in fact, there were "enough methodological problems in the PAI data as to render it unreliable".[29] The Navigant Report also concluded that, assuming the data was valid, its relevance was "very low" to determine an adequate level of judicial compensation to attract outstanding candidates.[30]

35. Considering both the PAI study and the critiques set out in the responsive expert opinion, the Judiciary filed a full brief on the sole question of PAI data,[31] raising several concerns regarding the appropriateness of the data, and its lack of relevance and reliability.[32] Regarding the relevance of the data, the Judiciary noted that the PAI study was not prospective in nature: it revealed "what individuals earned before appointment, not the future earning prospects that they would take into account in deciding whether to accept a judicial appointment."[33] The issue was debated at length during the oral hearings in front of the Block Commission.[34]

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[28] Block Report, para. 88 (emphasis added) [BDAC tab 9].
[29] Report on the Canada Revenue Agency's pre-appointment income data (February 12, 2008), paras. 28-29 [BDAC tab 18]. The Navigant report highlighted that the CRA had used an inappropriate time period to calculate the pre-appointment income**,** that the pre-appointment income of some judges was suspiciously low and that the variance of PAI was very large**.**
[30] *Id*., para. 24.
[31] Supplementary Reply Submission of the Association and Council [BDAC tab 17].
[32] See the February 13 2023, letter: "The Association and Council took great exception to the Government's PAI study. They explained that (i) they were not properly informed of the Government's intention to conduct this study, (ii) they were not consulted on the methodology to be used, (iii) the data collected by the Government, while aggregated, concerned sitting judges who had not provided their consent, and, (iv) in any event, the data was not relevant to the Commission's mandate."
[33] Block Report, para. 88 [BDAC tab 9].
[34] Transcript of the March 3, 2008 Public Hearings of the Block Commission, pages 62-74 (Submissions from the Judiciary), pages 118-126 (Submissions from the Government on the "due process" issue), pages 126-132 (submissions from the Government relying on the PAI study), pages 166-170 (Counsel for the Government addressing the methodological issues raised by the Judiciary's expert report), pages 181-187 (reply from the Judiciary on the PAI study) [BDAC tab 19].

36. With the benefit of actual data, expert reports, and full submissions on the PAI issue, the Block Commission concluded:

> We are […] not in a position to judge whether the information obtained is accurate. In any case, the information provided to us only served to confirm that some appointees earn less prior to appointment and some earn more.
>
> We do not believe that a snapshot of appointees' salaries prior to appointment is particularly useful in helping to determine the adequacy of judicial salaries. Such a study does not tell us whether judicial salaries deter outstanding candidates who are in the higher income brackets of private practice from applying for judicial appointment.[35]
>
> [Emphasis added.]

37. Moreover, the Block Report strongly urged that should the Government seek to adduce such information in the future, prior consultation occur so as to collect information that "both parties agree is reliable and useful".[36]

ii. The Rémillard Commission (2016)

38. None of the parties raised the issue of PAI data or sought recommendations on the subject in front of the Levitt Commission (2012). However, the relevance of PAI data to the Commission's mandate was raised again by the Government before the Rémillard Commission, which reached the same conclusion as the Block Commission.

39. This time, the Government brought a motion at a preliminary stage asking the Commission to undertake a study on the PAI of sitting judges, along with 14 pages of submissions and multiple appendixes setting out the purported relevance and probative value of the data, along with a proposed process to obtain such data.[37]

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[35] Block Report, paras 89-90 [BDAC tab 9].
[36] Block Report, para. 91: "Should similar information be sought in the future, we urge the Government and the Association and Council to consult on the design and execution of such studies to ensure that future commissions are provided with information that both parties agree is reliable and useful." [BDAC tab 9].
[37] Submissions of the Government of Canada on the Proposal for a Pre-Appointment Income Study (January 19, 2016) [BDAC tab 20].

40. The Judiciary was given the opportunity to file a 13-page response on this sole question, and raised several concerns, including that (i) the information sought was not relevant, since it would not say anything about lawyers who have not applied, yet would be outstanding candidates, (ii) the proposed PAI study was self-serving, and (iii) the proposed study would generate incomplete data.[38] The Judiciary noted that should the Commission undertake a PAI study, the Judiciary would need to have an expert "review, analyze and possibly file an expert report on this subject" and be given the opportunity to make submissions to the Commission "on the data generated and the expert evidence filed".[39]

41. The Rémillard Commission dismissed the Government's motion on the grounds that the question was premature and that the benefits of the study had not been established considering the absence of "a fully developed set of submissions and a record".[40]

42. In its main submissions to the Rémillard Commission, the Government renewed its request for a PAI study. The Judiciary filed expert evidence concluding that the PAI study would not produce reliable or needed data to assist the Commission with its mandate.[41] The issue was again fully debated during the oral hearings. [42]

43. With the benefit of expert evidence and full submissions on the subject of PAI data, the Rémillard Commission reached conclusions on both the substantive and procedural issues raised by the parties. It concluded once again that (i) simply collecting information about compensation levels of appointees prior to their appointment was not useful; and (ii) prior to any formal recommendation being issued with respect to future studies, the parties should consult and agree on the approach:

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[38] Response of the Association and the Council to the proposal by the Government for a Pre-Appointment Income Study (January 29, 2016) [BDAC tab 21].
[39] *Id*., para. 16.
[40] Ruling Respecting Preliminary Issues: Pre-Appointment Income Study and Representational Costs of Prothonotaries (18 February 2016) [BDAC tab 22].
[41] Association and Council's Reply Submission (March 29, 2016), Appendix B, at page 5 (page 40 of the complete submissions) [BDAC tab 23].
[42] Transcript from the public hearings of the Rémillard Commission, April 28, 2016, pp. 119-121; pp. 169-173 [BDAC tab 24].

> 229. The pre-appointment income of those accepting an appointment does not tell us much about why other attractive candidates do not put their names forward and whether this is connected to a significant compensation reduction were they to accept a judicial appointment.
>
> 230. We agree with the Block Commission that a targeted survey of individuals who are at the higher end of the earning scale, and who could be objectively identified as outstanding potential candidates for judicial appointments, should be the focus of such a study. Linking that information with an analysis of whether the number of high-earning appointees is increasing or decreasing over time would be useful.
>
> 231. The Government and the Association and Council should consult on the design and execution of those types of studies to ensure that future Commissions receive useful information derived in a manner agreed upon by the parties.
>
> 232. Given the need for consultation and agreement on such an approach, we will not make a formal recommendation at this time.[43]
>
> [Emphasis added.]

III. Impact of the Conclusions of Previous Commissions and the Requirements of Procedural Fairness on Recommendation 8(5)(c)

44. The Judiciary's surprise and objection to Recommendation 8(5)(c), as well its approach of first engaging with the Government at the November 23, 2022 meeting before returning to this Commission, are not only genuine but well-founded, given: (i) the conclusions of the Block and Rémillard Commissions, (ii) the established doctrine and practice that future Commissions will not depart from the conclusions of a previous Commission absent valid reasons and (iii) that the Government did not seek to reopen the issue of PAI data before this Commission.

45. Without notice that the Commission was considering making a recommendation on PAI data, the Judiciary was not afforded the opportunity to provide the Commission with the full context and history surrounding this issue[44] and the

[43] Rémillard Report [BDAC tab 13].

[44] The only submissions made on this point are found in the Appendix to the Joint Submission of the CSCJA and CJC (March 29, 2021), which summarizes the history of the Triennial and Quadrennial Commission

Commission was not "fully informed before deliberating and making its recommendations".[45] In addition, the Commission did not provide any reasons or context for Recommendation 8(5)(c), and so the Judiciary is left in the dark as to the reasons – valid or not – the Commission may have relied upon for departing from the conclusions of previous Commissions. The Judiciary does not even know whether the Commission was aware that it was departing form the conclusions of previous Commissions, and that it was doing so in respect of a highly controversial issue.

46. Moreover, without any prior proposal or consultation with respect to the type of study to be conducted (as urged by both the Block and Rémillard Commissions), the Judiciary is unable to assess and adduce evidence regarding the reliability and usefulness of any such study and to make submissions to assist the Commission in determining whether and how such a study should be conducted.

47. For all the above reasons, the Judiciary respectfully submits that implementation of Recommendation 8(5)(c) should 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. Absent agreement, if the Government wishes to raise the issue of PAI data before this Commission or a future Commission, the Government should make a full and transparent proposal setting forth:

    1. the type of data that will be collected;
    2. how the consent of appointees will be obtained prior to collecting their PAI data;
    3. how the data will be collected so as to both protect appointees' privacy and ensure the data can be reliably tested;
    4. the use the Government intends to make of the data; and

processes and refers to the conclusions of the Block Commission on the lack of usefulness of PAI data and the Judiciary's concerns for "individual privacy, the unreliability of the data and its lack of relevance" (p. 83) [BDAC tab 25].

[45] *PEI Reference*, para. 173 [BDAC tab 5].

5. the reasons advanced for seeking to depart from the conclusions of previous Commissions as regards the relevance and usefulness of PAI data;

the whole so as to give the Judiciary – and the Commission – a proper opportunity to review the proposal, potentially with the assistance of experts, as has been done before previous Commissions.

D ORDER SOUGHT

48. The Association and the Council respectfully request that this Commission defer Recommendation 8(5)(c) in accordance with paragraph [47], above.

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

Montreal, April 6, 2023

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