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Martine Turcotte, Ad.E., Chairperson  
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c/o Ms Louise Meagher  
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**Recommendation 8(5)(c) of the Report of Sixth Quadrennial Commission, regarding the collection of pre-appointment income data**

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Dear Madam Chairperson,  
Dear Members of the Commission,

The Report of the Sixth Quadrennial Commission contains a detailed recommendation - Recommendation 8 - directing the Parties promptly to undertake preparatory work so that the Seventh Quadrennial Commission has before it adequate and appropriate additional data from which to work.

I am pleased to advise the Commission that in November 2022, representatives of the Canadian Superior Courts Judges Association (the "**Association**"), the Canadian Judicial Council (the "**Council**") (collectively the "**Judiciary**"), the Associate Judges of the Federal Court, the Government of Canada, the Canadian Revenue Agency (**CRA**), and the Office of the Commissioner for Federal Judicial Affairs (the **FJA Commissioner**) met to initiate a process to implement Recommendation 8, with a view to improving the quality and reliability of the data available to the Seventh Quadrennial Commission.

The one exception to the scope of the Parties' ongoing efforts to seek to implement Recommendation 8 of the Report concerns Recommendation 8(5)(c), requesting that the FJA Commissioner collect data regarding the compensation levels of appointees immediately prior to their appointment to the Bench ("**pre-appointment income data**" or "**PAI data**"). The Judiciary has reiterated to the Government and the FJA Commissioner its historical, and very firm objection to the collection of PAI data.

The purpose of this submission is to set out the reasons in support of the Judiciary's position and to seek guidance from the Commission regarding the way forward. For the reasons set out below, the

Association and Council submit that the question of whether pre-appointment income data should be collected is an issue on which the Parties have a right to be heard, and that it should therefore be deferred for appropriate consideration during the Commission's next inquiry. Alternatively, should the Commission prefer that the question be considered and determined prior to the next inquiry, the Judiciary respectfully requests that the Parties be afforded an opportunity to address the Commission on this antecedent question before the Parties move to implement Recommendation 8(5)(c).

The Judiciary's concerns with the collection of PAI data is based on both substantive and due process grounds and can only be properly understood if the issue is placed in its historical context.

### **Past Consideration of the Relevance of PAI Data and the Appropriateness of its Collection**

The collection of PAI data has long been a controversial issue between the Parties. When squarely raised before two previous Commissions, both found such data to be of little, if any relevance.

The Block Commission (2008) was the first to consider the question of pre-appointment income data. Without prior consultation with the Judiciary, the Government had obtained from CRA PAI data of lawyers appointed to the judiciary and made submissions to the Commission on the basis of this information.<sup>1</sup> 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.<sup>2</sup>

After carefully considering the relevance of pre-appointment income data to its statutory mandate, on the basis of full submissions by the Government and the Judiciary and with the benefit of the Government's PAI study itself, the Block Commission found such data not to be "particularly useful in helping to determine the adequacy of judicial salaries".<sup>3</sup> The pre-appointment income of those who accepted an appointment did not provide information as to "whether judicial salaries deter outstanding candidates who are in the higher income brackets of private practice from applying for judicial appointment."<sup>4</sup> The information provided merely confirmed the obvious point that "some appointees earn less prior to appointment and some earn more".<sup>5</sup>

The relevance of pre-appointment income data to the mandate of the Commission was raised again – and was yet again strongly debated – before the Rémillard Commission (2016), which reached the same conclusion as the Block Commission.

At a preliminary stage of the Rémillard Commission's inquiry, the Government brought a motion, asking the Commission to undertake a study of the pre-appointment income of sitting judges. The Association and Council raised concerns related to the untimely nature of the Government's proposal. They also reiterated the objections expressed before the Block Commission as to the

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<sup>1</sup> [Block Commission Report](#) (2008), paras. 84-88.

<sup>2</sup> *Id.* See also [Supplementary Reply Submission of the Association and Council](#), paras 4-7 and 18.

<sup>3</sup> [Block Commission Report](#) (2008), para. 90.

<sup>4</sup> [Block Commission Report](#) (2008), para. 90.

<sup>5</sup> [Block Commission Report](#) (2008), para. 89.

relevance and reliability of the targeted information, as well as the privacy rights of sitting judges, and submitted that the information was potentially self-serving and therefore inherently suspect.<sup>6</sup>

The Rémillard Commission refused to order or request the proposed study. Not only was the issue found to be premature, but the benefits of the study had not been established considering the absence of “a fully developed set of submissions and a record”.<sup>7</sup>

The Government later renewed the request for a pre-appointment income study to be conducted during the subsequent quadrennial period. The Association and Council continued to oppose the request, and adduced expert evidence concluding that such a study would be neither reliable nor useful to the Commission.<sup>8</sup>

In its final Report, the Rémillard Commission emphasized that the information sought was of little utility when assessing whether judicial compensation deters outstanding candidates from applying for judicial appointment.<sup>9</sup> Instead, it agreed with the Block Commission that it would be helpful to survey individuals at the higher end of the earning scale who could be objectively identified as potential outstanding candidates for judicial appointment.<sup>10</sup> Even then, the Rémillard Commission expressly declined to make a formal recommendation given “the need for consultation and agreement on such an approach”.<sup>11</sup>

Thus, with the benefit of fully developed submissions reflecting the Parties’ strongly held, and diametrically divergent views, two previous Commissions rejected the relevance and usefulness of pre-appointment income data.

### **The Judiciary’s Right to be Heard in Respect of Recommendation 8(5)(c)**

The question of collecting pre-appointment income data from appointees to the Bench never arose during the inquiry overseen by the present Commission. None of the Parties raised it, nor sought a recommendation that PAI data should be collected, whether it be to inform the findings of this Commission or for use in future inquiries of the Commission.

It is against this background that the Judiciary took note of recommendation 8(5)(c).

Not having had the opportunity to present their position to the Commission on this controversial issue, the Association and Council were surprised by the issuance of this recommendation. From its inception more than 20 years ago, the Commission has always ensured respect of the Parties’ right to be heard regarding issues potentially the subject of formal recommendations. This was with good reason, considering that such right inheres to due process and natural justice. The Judiciary remains firmly opposed to the collection of PAI data from appointees to the federal Bench, essentially for

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<sup>6</sup> [Response of the Association and the Council to the proposal by the Government for a Pre-Appointment Income Study](#), para. 15.

<sup>7</sup> [Ruling Respecting Preliminary Issues: Pre-Appointment Income Study and Representational Costs of Prothonotaries](#) (18 February 2016).

<sup>8</sup> [Association and Council’s Reply Submission](#), paras 97-98.

<sup>9</sup> [Rémillard Commission Report](#) (2016), paras 228-229.

<sup>10</sup> [Rémillard Commission Report](#) (2016), para. 230.

<sup>11</sup> [Rémillard Commission Report](#) (2016), para. 232.

the reasons advanced before the Block and Rémillard Commissions, and therefore objects to the implementation of recommendation 8(5)(c).

Upon being advised of the Judiciary's objection to the implementation of this specific recommendation unless and until the Judiciary is given an opportunity to address the Commission on the question, the Government has suggested that the issue be raised with the Commission.

Accordingly, the Association and Council hereby respectfully request that the Parties be afforded an opportunity to address the Commission on the question of whether pre-appointment income data should be collected from appointees to the federal Bench, and this, before the Parties move to implement Recommendation 8(5)(c). The Association and Council's strong preference is that this question, if it is to be revisited notwithstanding that it has been the subject of considered pronouncements by two past Commissions, should be deferred to the next inquiry so as to spare the Parties the costs and disruption of tackling it yet again at this juncture.

Should the Commission, even cognizant of the background canvassed in this letter, still prefer that the question be considered and determined prior to the Commission's next inquiry, then the Judiciary respectfully requests that an agreed schedule for briefs and argument be established to afford the Parties the opportunity to address the Commission on this question, and suggests that any work on the implementation of Recommendation 8(5)(c) be held in abeyance pending the outcome of the Commission's deliberations on this question.

Sincerely,



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PB/rc

Cc Christopher Rupar and Kirk G. Shannon, Department of Justice, Government of Canada  
Andrew Lokan, Counsel for the Associate Judges of the Federal Court  
Marc A. Giroux and Philippe Lacasse, Office of the Commissioner for Federal Judicial Affairs  
Justices Ward Branch and Dominique Lafleur, Canadian Superior Courts Judges Association  
Chief Justice Robert G. Richards, Canadian Judicial Council  
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