

**JUDICIAL COMPENSATION
AND BENEFITS COMMISSION**

SUBMISSIONS OF THE GOVERNMENT OF CANADA
further to the
**RULING RESPECTING RECOMMENDATION 8(5)(C) OF THE SIXTH
QUADRENNIAL JUDICIAL COMPENSATION AND BENEFITS
COMMISSION**

May 10, 2023

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1. This Commission plays a pivotal role in a constitutional process established by the Supreme Court of Canada and enshrined by Parliament in the *Judges Act*. The complete process is set out in the Court’s decision in *Bodner* and at section 26 of the *Act*. The Commission’s report is a critical “consultative”¹ step in this process that helps to inform the final response of the Government of Canada and the implementation of that response.² Once the Commission releases its report and the Government issues its response, the only means of challenging the Commission’s process, report or recommendations is by seeking judicial review of the Government’s response.

2. On August 30, 2021, pursuant to subsection 26(2) of the *Judges Act*, this Commission delivered its final report and recommendations.³ The recommendations addressed both substantive and evidentiary matters. Recommendation 8 called on the participants to collect data that the Commission deemed relevant in order to facilitate the work of the next Commission. The Commission urged all participants to work together to collect this “relevant data so that [the next Commission’s] 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.”⁴

3. The specific recommendation at issue, Recommendation 8(5)(c), calls on the Office of the Commissioner for Federal Judicial Affairs to prepare data regarding “compensation levels of appointees immediately prior to their appointment”.⁵ At no time between the

¹ *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. Québec (Attorney General)*; *Minc v. Québec (Attorney General)*, 2005 SCC 44, [*Bodner*], Book of Exhibits and Documents of the Canadian Superior Court Judges Association and the Canadian Judicial Council [Judiciary’s BOED], Tab 6, at [para 21](#).

² *Girouard v. Canada (Attorney General)*, 2020 FC 557, Book of Documents of the Government of Canada [Government’s BOD], Tab 1, at [paras 12 & 15](#). See also *Bodner*, Judiciary’s BOED, Tab 6, at [paras 14-44](#), where the complete process is described.

³ Report of the Sixth Quadrennial Judicial Compensation and Benefits Commission, dated August 30, 2021 [[Turcotte Commission Report](#)], Judiciary’s BOED, Tab 15.

⁴ *Ibid*, at [para 301](#).

⁵ *Ibid*, at [p. 50](#).

release of the Commission's report and the issuance of the Government's response did representatives for the Judiciary advise the Government of any concerns related to the Commission's inclusion of Recommendation 8(5)(c) in the report.

4. On December 29, 2021, the Minister of Justice released the Government of Canada's response to the Commission's report in accordance with subsection 26(7) of the *Judges Act*.⁶ The Government accepted all recommendations, including Recommendation 8(5)(c), and committed to their implementation. Regarding data collection pursuant to Recommendation 8, the Government specifically "committed to acting on the Commission's recommendation, in collaboration with the other participants in the Commission process, where appropriate."⁷

5. The participants to the Commission process did not seek judicial review of the Government's response.

6. Having accepted the Commission's recommendations in its subsection 26(7) response, the Government now considers itself bound to implement those recommendations. It would be inconsistent with the constitutional process described by the Supreme Court of Canada in *Bodner*⁸ – a process that includes a right of judicial review – were this Government to accept the Commission's recommendations only to later reopen and revise its decision. The Government's response stands. Absent a finding by a court that the commission process has not been effective, the Government has no authority to reconsider its decision to implement all of the Commission's recommendations.

7. Similarly, it would be inappropriate for the Commission to reconsider, revise or revoke a final recommendation included in a past report. The *Judges Act* does not give the

⁶ [Response of the Government of Canada to the Report of the 2021 Judicial Compensation and Benefits Commission](#), dated December 29, 2021, Government's BOD, Tab 2.

⁷ *Ibid.*

⁸ *Bodner*, Judiciary's BOED, Tab 6, at [paras 14-44](#).

Commission the authority for such action. Once the Government’s response is issued, the Commission’s report and recommendations cannot be subject to change.

8. Moreover, questions of whether “the commission process has been respected”⁹ or whether the Commission’s recommendations resulted “from a fair and objective hearing”¹⁰ are not within the purview of the Commission itself: the Commission cannot sit in review of its own process. Such questions should only be addressed in the Government’s response or in the context of an application seeking judicial review of that response.¹¹

Implementation of Recommendation 8(5)(c)

9. The Government welcomes the Commission’s guidance regarding the implementation of Recommendation 8(5)(c).

10. As stated in the Government’s December 29, 2021 response, the Government is committed to acting on the Commission’s data collection recommendations in collaboration with the other participants in the Commission process. The data requested are necessarily drawn from various entities fulfilling various distinct mandates, and there may be limits on what data are available or can be shared.

11. The Government’s response explicitly acknowledged that implementing Recommendation 8(5)(c) would require engagement with and collaborative efforts on the part of multiple participants. The Government has no independent access to appointees’ compensation levels immediately prior to their appointment; nor will it take steps to unilaterally gather this information. The Government is committed to working with other Commission participants and relevant entities to gather this information.

12. To this end, the Government proposes to implement Recommendation 8(5)(c) by way of voluntary, anonymous survey, which would be provided to individuals upon their

⁹ *Ibid*, at [para 31](#).

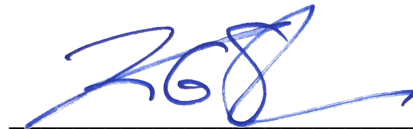
¹⁰ *Ibid*, at [para 17](#).

¹¹ Note that participants have sought judicial review of the Government Response both in cases where a Government rejected a commission recommendation and where a Government accepted commission recommendation: see *Bodner*, Judiciary’s BOED, Tab 6, at [para 154](#).

appointment to the bench. To succeed, this approach will require the full collaboration and cooperation of the judiciary. The survey would be administered by the Office of the Commissioner for Federal Judicial Affairs, an independent, arm's length body, that would collect and aggregate the data. The Commissioner would then provide the aggregated results of the survey to counsel for the Judiciary and the Government, at the same time. The participants would then be free to present arguments before the Commission regarding the import of the data.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, Ontario, this 10th day of May, 2023

A handwritten signature in blue ink, appearing to be 'KGS', written over a horizontal line.

Kirk G. Shannon
Christopher Rupar