JOINT SUBMISSIONS

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

to the

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

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I. OVERVIEW

1. Judicial independence is a fundamental principle of our democracy and legal tradition. As the Supreme Court of Canada has confirmed, financial security is a core characteristic of judicial independence.[1]

2. The Constitution of Canada requires the existence of an independent, effective, and objective body that is interposed between the judiciary and the other branches of the State, whose constitutional function is to depoliticize the process of determining changes in judicial compensation. For Canada's 1,195 federally appointed judges (referred to in these submissions as the "**Judiciary**"), the Judicial Compensation and Benefits Commission (the "**Commission**") is that body.[2]

3. The Commission "must make recommendations on judges' remuneration by reference to objective criteria, not political expediencies."[3] The Commission has generally considered the income levels of self-employed lawyers, as well as the compensation of the most senior deputy ministers, as two key comparators to determine the adequacy of judicial salaries and preserve Canada's continued ability to attract outstanding candidates to superior courts.

4. In its 2021 Report, the latest Commission found itself "at a crossroad" in terms of the quality of the data available to it, specifically regarding the income levels of self-employed lawyers. The chief concern was that the evidence available to past Commissions on the income levels of self-employed lawyers did not capture a growing subset of the population of that key comparator: lawyers practising through a professional legal corporation. The consequence of this gap in the available data was "inescapable": past commissions did not have "a full view of the income of those lawyers in private practice, especially those at the higher levels of professional income."[4] The Commission directed the Government and the Judiciary (the "**Parties**") to fill that gap before the next round.[5]

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1 *Reference Re Provincial Court Judges*, [1997] 3 SCR 3, para. 115 [*PEI Reference*], reproduced in the Joint Book of Documents ("**JBD**") prepared jointly with the Government [JBD at tab 4].

2 Attached as Appendix "A" is a historical review of the Commission's structure and work, and defines certain terms used elsewhere in this submission.

3 *PEI Reference*, para. 173 [JBD at tab 4].

4 Report of the Sixth Quadrennial Judicial Compensation and Benefits Commission, dated August 30, 2021 [Turcotte Report], para. 159 [JBD at tab 14].

5 Turcotte Report, p. 50, Recommendation 8 [JBD at tab 14].

5. This Commission is now equipped with a much-improved dataset. The portrait that emerged from the newly available data validates the Association and Council's long-held concern that the data on the income levels of self-employed lawyers presented to past Commissions significantly underestimated the earnings of lawyers in private practice.

6. Considering the imperative that Canada "attract outstanding candidates to the judiciary" - a factor that this Commission must consider under the *Judges Act*[6] - a correction is required to ensure that judicial salaries are set at a level reflective of the newly revealed actual income levels of lawyers in private practice.

7. Accordingly, acting upon the data available to this Commission for the first time, the Association and Council seek a recommendation that the base salary of puisne judges be correctively reset through an increase of $60,000, exclusive of IAI, to reduce the wide gap between judicial salaries and the income levels of self-employed lawyers. Given the historically corrective nature of this adjustment, the increase should be applied to judicial salaries as of April 1, 2024, the first year of this quadrennial cycle.

8. The requested increase will hopefully go some distance in mitigating the problematic situation evidenced by the "shortage of applicants" publicly acknowledged by the Minister of Justice.[7] It will also contribute to ensuring that the Canadian judiciary can attract outstanding candidates from all areas of practice.

II. BACKGROUND

9. The Turcotte Commission emphasized that 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.*"[8] The Commission observed, however, that the Quadrennial process was "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*."[9]

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6 *Judges Act*, RSC, 1985, c. J-1 [*Judges Act*] [JBD at tab 3].

7 Darren Major, "New justice minister appoints more than a dozen judges in effort to address vacancies", CBC, Aug 28, 2023 [Book of Exhibits and Documents of the Association and Council ("**BED**") at tab 68].

8 Turcotte Report, para. 30 [JBD at tab 14].

9 Turcotte Report, para. 299 [JBD at tab 14].

10. In the introduction to its analysis of the adequacy of judicial salaries, the Turcotte Commission highlighted five areas of concern:

    a. The Commission was left with "a lack of complete data as to the professional income level of lawyers in private practice," especially since it lacked data on the professional income earned by lawyers practising through a professional corporation;[10]

    b. The absence of concrete evidence to quantify the potential tax advantage of professional corporations;[11]

    c. The reducing number of lawyers in the CRA self-employed professional income data category, and the resulting reduction of the sample for this data;[12]

    d. The lack of movement of the DM-3 salary ranges while the average salary of the existing DM-3s had generally increased within those ranges;[13] and

    e. The absence of data regarding the source groups of applicants (as opposed to appointees) for judicial office.[14]

11. The Turcotte Commission noted that the next Quadrennial Commission had to be equipped with quality data,[15] and issued the following Recommendation regarding data collection:

> 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:
>
> 1. Data from the CRA as to levels of professional income reported through professional corporations on a gross and net professional income basis. Recognizing that this may require manual compilation, a statistically significant sample size within the current 17,871 such corporations should be undertaken in sufficient time to be of use to the Seventh Quadrennial Commission;
>
> 2. Where possible, the CRA to report on the extent to which professional corporations are used to retain professional income as opposed to pay out or dividend it to the professional, again on a statistically significant sample size;
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> 3. Where possible, the CRA to report on the use of individual pension plans within a lawyer professional corporation;
>
> 4. More detailed data on the differential in value between the pension entitlement in the DM-3 category and the judicial annuity;

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10 Turcotte Report, paras. 30-42 [JBD at tab 14].
11 Turcotte Report, paras. 43-46 [JBD at tab 14].
12 Turcotte Report, paras. 47-48 [JBD at tab 14].
13 Turcotte Report, paras. 49-52 [JBD at tab 14].
14 Turcotte Report, paras. 53-57 [JBD at tab 14].
15 Turcotte Report, para. 301 [JBD at tab 14].

> 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:
>
> (a) total judicial vacancies;
>
> (b) a breakdown of applicants (as opposed to appointees) into basic categories such as private sector partner, private sector non partner, public sector, public interest or non-profit sector, other like academic, corporate, etc.;
>
> (c) compensation levels of appointees immediately prior to their appointment; and
>
> (d) the source of applicants by province, geographic region and where applicable large urban centers;
>
> all during the current quadrennial period and provide data over a sufficient time span to identify material trends.[16]

12. The Turcotte Commission issued its report on August 31, 2021.

13. On December 29, 2021, the Minister of Justice issued the Government's response to the Turcotte Report, accepting all its recommendations, including by committing to act upon the Commission's recommendation regarding data collection.[17]

14. On November 23, 2022, representatives of the Association, the Council, the Associate Judges of the Federal Court, the Government of Canada, the Office of the Commissioner for Federal Judicial Affairs, and the Canada Revenue Agency ("**CRA**") met for the first time to initiate a process to implement Recommendation 8, with a view to improving the quality and reliability of the data available to this Commission.

15. In their efforts to implement Recommendation 8, the Parties gave particular attention to obtaining data on the levels of professional income of self-employed lawyers practicing through professional corporations. Beginning early in 2023, the Parties had multiple exchanges with CRA and Statistics Canada to explore how such data could be collected. The Parties also sought input from Stéphane Leblanc, a tax specialist at Ernst & Young, who made suggestions as to how CRA could identify and retrieve the relevant data.

16. These efforts culminated in the summer of 2024, when both CRA and Statistics Canada delivered data on the income levels of self-employed lawyers practicing through professional corporations.

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16 Turcotte Report, p. 50 [JBD at tab 14].
17 Government Response to the Turcotte Report [JBD at tab 14(a)].

III. THE COMMISSION'S MANDATE

17. The mandate of the Commission is set out in s. 26 of the *Judges Act*, which reads, in part, as follows:

Commission	**Commission d'examen de la rémunération des juges fédéraux**
26(1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally.	**26 (1)** Est établie la Commission d'examen de la rémunération des juges chargée d'examiner la question de savoir si les traitements et autres prestations prévues par la présente loi, ainsi que, de façon générale, les avantages pécuniaires consentis aux juges sont satisfaisants.
Factors to be considered	**Facteurs à prendre en considération**
(1.1) In conducting its inquiry, the Commission shall consider	**(1.1)** La Commission fait son examen en tenant compte des facteurs suivants :
(a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;	**a)** l'état de l'économie au Canada, y compris le coût de la vie ainsi que la situation économique et financière globale du gouvernement;
(b) the role of financial security of the judiciary in ensuring judicial independence;	**b)** le rôle de la sécurité financière des juges dans la préservation de l'indépendance judiciaire;
(c) the need to attract outstanding candidates to the judiciary; and	**c)** le besoin de recruter les meilleurs candidats pour la magistrature;
(d) any other objective criteria that the Commission considers relevant.	**d)** tout autre facteur objectif qu'elle considère pertinent.

18. The Commission's inquiry concerns the salary and benefits available to federally appointed judges. These judges sit on the superior courts and courts of appeal of the provinces and territories, the Federal Courts, the Court Martial Appeal Court of Canada, the Tax Court of Canada, and the Supreme Court of Canada.

19. Section 96 of the *Constitution Act, 1867* authorizes the Governor General to appoint the judges of the superior courts of each province and territory.[18] These are courts of inherent and general jurisdiction. They have jurisdiction over any matter that is not otherwise

[18] *Constitution Act*, *1867*, 30 & 31 Vict, 3.3, s. 96 [*Constitution Act, 1867*] [JBD at tab 1].

assigned to a different court or tribunal. The superior courts deal with a wide range of subject-matters, from constitutional, administrative, civil, family, and commercial disputes to criminal prosecutions and insolvency cases. In each province and territory, there is also a court of appeal to consider appeals from the decisions of the superior courts (and other first-instance courts and tribunals) of the province and territory.

20. Section 101 of the *Constitution Act, 1867* confers on the federal Parliament the power to establish "any additional Courts for the better administration of the Laws of Canada". The Exchequer Court of Canada, subsequently replaced by the Federal Court, was established under this provision. The jurisdiction of the Federal Court is set out in the *Federal Courts Act*. That Act also sets out the jurisdiction of the Federal Court of Appeal.

21. The Court Martial Appeal Court of Canada was created pursuant to the *National Defence Act* in 1959. Its main function is to hear appeals from courts martial, which are military trial courts. The judges of the Court Martial Appeal Court are cross appointed from the Federal Court of Appeal, the Federal Court, and the superior courts of the provinces and territories (including courts of appeal).

22. The Tax Court of Canada has exclusive original jurisdiction to hear and determine appeals and references to the Court on matters arising from federal legislation as set out in the *Tax Court of Canada Act*.

23. Section 101 of the *Constitution Act, 1867* also confers on the federal Parliament the power to establish a "General Court of Appeal for Canada". Pursuant to this power, the Supreme Court of Canada was created in 1875. The Supreme Court of Canada hears appeals from the decisions of the highest courts of final resort of the provinces and territories, as well as from the Federal Court of Appeal and the Court Martial Appeal Court of Canada.

24. The judges serving on the courts just listed are the federally appointed members of the Canadian judiciary whose salaries and benefits are the subject of this Commission's inquiry, to whom must be added the associate judges of the Federal Court and the Tax Court of Canada.[19]

[19] See s. 26.11 of the *Judges Act* [JBD at tab 3].

IV. ISSUES TO BE CONSIDERED

25. The Association and Council set out below the issues that they submit for this Commission's consideration. The recommendations sought by the Judiciary are provided at the end of the relevant discussion. The Association and Council begin with a word on process, as to which the Commission assumes an important role (**Section A**).

26. As substantive issues to be addressed by the Commission, the Association and Council raise the issues of judicial salaries (**Section B**), and the appropriateness of collecting information regarding the pre-appointment income of newly appointed judges (**Section C**).

27. The Association and Council have worked closely together in preparing these submissions on behalf of federally appointed judges. The recommendations sought from this Commission by the federal judiciary have been approved by the leadership of both the Association and Council.

A. Process

28. The Quadrennial Commission is the guardian of its own process. In 2008, the Block Commission noted that "concerns over the integrity of the [prior] Triennial Commission process were at the root of its demise."[20] It recognized that the new Commission needed to have the authority and duty to address process issues as they emerge.[21]

29. Like the Block Commission, the Levitt Commission (2012) rejected the Government's position that it did not have any jurisdiction to deal with process issues."[22] It also noted the "growing concern" that the Commission process was losing credibility with the judiciary, and warned that the Quadrennial process was "in grave danger of ending up where the Triennial process did."[23] The Rémillard Commission also "urg[ed] that great care be taken to preserve the integrity of the Quadrennial Commission process."[24]

30. Consistent with the foregoing, the Association and Council make a preliminary remark regarding one process issue: the treatment of past Commission reports.

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20 Report of the Third Quadrennial Judicial Compensation and Benefits Commission, dated May 30, 2008 [Block Report] at para. 30 [JBD at tab 11].

21 Block Report (2008) at para. 37 [JBD at tab 11].

22 Report of the Third Quadrennial Judicial Compensation and Benefits Commission, dated May 15, 2012 [Levitt Report] at para. 88 [JBD at tab 12].

23 Levitt Report (2012) at para. 92 [JBD at tab 12].

24 Turcotte Report (2021), para. 25 [JBD at tab 14]. See also Report of the Fifth Quadrennial Judicial Compensation and Benefits Commission, dated June 30, 2016 [Rémillard Report] at para. 243 [JBD at tab 13].

31. In *Bodner*, the Supreme Court held that judicial compensation 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.[25]

32. Past quadrennial Commissions have often considered and commented on this issue. The Block Commission (2008) took the view 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."[26]

33. The Levitt Commission agreed and stated that where consensus has emerged around a particular issue, the Commission should, in the absence of demonstrated change, take this consensus into account, which consensus should also be reflected in the Parties' submissions.[27] The Turcotte Commission described this principle as reflecting a "common sense approach", noting "[i]f 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 our recommendations." [28]

34. The foregoing demonstrates that the idea that each Quadrennial Commission should be guided by the work of previous Commissions is well accepted and fully consistent with the Supreme Court of Canada's decision in *Bodner*. Against this background, the Judiciary was concerned to learn that the Government of Canada intended yet again to seek to undermine the statutory annual salary adjustment provided for in the *Act*. This is an objective that the Government unsuccessfully pursued in the course of the Commission's previous three inquiries, with successive commissions warning that "the IAI adjustment was intended to

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25 *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 SCC 44 (CanLII), [2005] 2 SCR 286 [*Bodner]*, para. 15 [JBD at tab 6].

26 Block Report (2008), para. 201, reflected in Recommendation 14, p. 71 [JBD at tab 11].

27 Levitt Report (2012) at para. 111 [JBD at tab 12].

28 Turcotte Report (2021) at para 25 [JBD at tab 14].

be a key element in the legislative architecture governing judges' salaries and should not be lightly tampered with."[29]

35. The Association and Council will reply to the Government's proposal that this Commission impose a cap on the IAI in their reply submissions, once the Government has addressed the issue in its main submissions.

B. Judicial Salaries

36. In inquiring about the adequacy of judicial salaries, the Commission must consider the four criteria set out in s. 26(1.1)(a) to (d) of the *Judges Act*. Each of those criteria is addressed below.

1. Prevailing Economic Conditions in Canada

37. The first statutory criterion to be considered pursuant to s. 26(1.1)(a) of the *Judges Act* has two dimensions: "the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government".

38. The prevailing economic conditions in Canada and the overall economic and current financial position of the federal government allow for this Commission to issue a recommendation in favour of resetting judicial salaries to a level that reflects the new data discussed below.

39. The Department of Finance provided two letters to the Department of Justice, outlining the Government's most recent assessment of the state of the Canadian economy and the Government's current and future financial position.[30] Such assessments were largely drawn from the 2024 budget of the federal Government, released on April 16, 2024.

40. In its second letter dated November 29, 2024, the Department of Finance provided the following assessments:

    a. "Canada avoided the recession projected by many forecasters, with real GDP rising by 1.5 per cent in 2023—five times faster than projected in Budget 2023 (0.3 per cent) and picking up to 1.9 per cent on average in the first two quarters of 2024. This has been possible because of strong economic fundamentals, such as

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29 Rémillard Report (2016) at para. 38 [JBD at tab 13]. See also Levitt Report (2012) at para. 51 [JBD at tab 12].

30 Letter from Julie Turcotte, Assistant Deputy Minister, Economic and Fiscal Policy Branch, Department of Finance Canada, dated May 23, 2024 [JBD at tab 25].

strong population growth, a resilient labour market, as well as solid balance sheets for households."[31]

b. "The Canadian economy is expected to continue to outperform many of its peers. After posting the third-fastest growth among the G7 in 2023, the International Monetary Fund expects Canada's real GDP growth of 1.3 per cent in 2024 (second-fastest in the group) to pick up to 2.4 per cent in 2025, representing the fastest growth in the G7."[32]

c. "[T]he Government is forecasting a budgetary deficit of $40.0 billion in 2023-24 which will progressively improve to reach a deficit of $20.0 billion by 2028-29. […] Moving forward, as part of its responsible economic plan, the government will keep deficits below 1 per cent of GDP beginning in 2026-27 and future years."[33]

41. The Government recently issued its Fall Economic Statement, which projects a budgetary deficit of $61.9 billion. However, the Government reiterates that "[c]areful and responsible fiscal management has put Canada in an enviable fiscal position relative to our global peers."[34]

42. The economic expert for the Judiciary, Professor Doug Hyatt, notes that the Government's revised budget forecast now closely aligns with the forecast of the Policy and Economic Analysis Program (PEAP) at the Rotman School of Management, University of Toronto, a respected benchmark. According to Professor Hyatt, the Government's revised budget deficit "can be expected to have little impact on the key measures of economic activity – GDP growth and IAI growth."[35]

43. Moreover, Professor Doug Hyatt confirms these positive forecasted trends in economic conditions. For instance, he highlights that the PEAP projects an average growth in real GDP of 1.9% for the years 2024 to 2028, a slightly higher than the Government's projected growth of 1.7%.[36]

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31 Letter from Julie Turcotte, Assistant Deputy Minister, Economic and Fiscal Policy Branch, Department of Finance Canada, dated November 29, 2024, p. 1 [JBD at tab 26].
32 *Id.* p. 2 [JBD at tab 26].
33 *Id.* p. 2 [JBD at tab 26].
34 Department of Finance, 2024 Fall Economic Statement, p. 35 [BED at tab 86].
35 Professor Douglas E. Hyatt, A Report in the Matter of the Judicial Compensation and Benefits Commission, December 19, 2024, para. 6 [Hyatt Report] [BED at tab B].
36 Hyatt Report, para. 3 [BED at tab B].

44. Overall, Professor Hyatt concludes that while the previous Quadrennial Commission faced greater uncertainty as to the direction of the economy and fiscal position of the Government, due to the COVID-19 pandemic, it is now "evident that economic conditions have largely coalesced around traditional longer-term trends."[37]

45. In light of the relatively positive state of the Canadian economy, this Commission is in a position to recommend judicial salaries that it deems appropriate.[38]

2. The Role of Financial Security in Ensuring Judicial Independence

46. Under s. 26(1.1)(b), in conducting its inquiry, the Commission must consider the role of financial security of the Judiciary in ensuring judicial independence. As the Supreme Court outlined in *Valente*, judicial independence has three core characteristics: security of tenure, administrative independence, and financial security.[39] These guarantees have both an individual and an institutional dimension.[40]

a) The Individual and Institutional Dimensions of Financial Security

47. The individual dimension of judicial independence ensures that individual judges must be able to decide cases free from external interference or influence.[41] The individual dimension of financial security requires that judicial salaries be fixed by law and not subject to arbitrary interference in a manner that could affect judicial independence.[42]

48. The principle of individual judicial independence flows from the unique position of judges in society, which places judges in "a category or class of their own."[43] Commenting on the roles and responsibilities of judges for a unanimous court in *Therrien (Re)*, Justice Gonthier observed:

> Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels

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37 Hyatt Report, para. 7 [BED at tab B].

38 Report of the First Quadrennial Judicial Compensation and Benefits Commission, dated May 31, 2000 [Drouin Report], pp. 8-9 [JBD at tab 9].

39 *Valente v. The Queen*, [1985] 2 S.C.R. 673, pp. 698, 704 and 708 [*Valente*] [BED at tab 27]; *PEI Reference*, para. 115 [JBD at tab 4].

40 *Valente*, p. 687 [BED at tab 27]; *PEI Reference*, para. 118 [JBD at tab 4]; *The Queen v. Beauregard*, [1986] 2 S.C.R. 5621, p. 70 [*Beauregard*] [BED at tab 24].

41 *Beauregard*, p. 69 [BED at tab 24]; *Ell v. Alberta*, 2003 SCC 35, para. 21 [*Ell*] [BED at tab 8].

42 *Valente*, p. 704 [BED at tab 27]. See also *Beauregard*, p. 74 [BED at tab 24]; *R. v. Edwards*, 2024 SCC 15, para. 86 [*Edwards*] [BED at tab 20]; *Ell*, para. 28 [BED at tab 8].

43 Drouin Report (2000), p. 13 [JBD at tab 9]. See also *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 (CanLII), [2020] 2 SCR 506, para. 85 ("the distinctive nature of judicial office") [JBD at tab 7].

> of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies. Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.[44]

49. In their role as arbiter of disputes and guarantor of individual rights and freedoms, judges must be paid a salary sufficient to enable them to "function impartially and fearlessly in the advancement of the administration of justice."[45] Otherwise, judges risk being perceived as susceptible to economic manipulation, undermining public confidence in their ability to fairly decide cases.[46]

50. There is international consensus that financial security is a necessary feature of judicial independence. As Chief Justice Lamer noted in *Beauregard*, financial security has been "invariably" recognized as "a central component of the international concept of judicial independence."[47] Article 2.21 of the *Universal Declaration of the Independence of Justice* (the Montreal Declaration) provides that judicial salaries be "adequate, commensurate with the status, dignity and responsibility of their office, and be regularly adjusted to account fully for price increases."[48] The Supreme Court's jurisprudence on judicial independence expressly refers to this international understanding of the financial security requirement of judicial independence.[49]

51. The institutional dimension of financial security has three components:[50] First, judicial salaries can be maintained or changed only through recourse to an independent, effective

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44 *Therrien (Re)*, 2001 SCC 35 (CanLII), [2001] 2 SCR 3, para. 108 (references omitted) [*Therrien*] [BED at tab 25].

45 Drouin Report (2000), p. 13 [JBD at tab 9].

46 *PEI Reference*, para. 135 [JBD at tab 4].

47 *Beauregard*, p. 74 [BED at tab 24].

48 *Universal Declaration of the Independence of Justice* (adopted at the final plenary session of the First World Conference on the Independence of Justice held in Montréal in 1983), article 2.21a). [BED at tab 32] See, similarly, the Commonwealth Magistrates' and Judges Association's *Principles on the Funding and Resourcing of the Judiciary in the Commonwealth* (2020), which stipulates that "The remuneration of judges must remain at all times commensurate with their professional responsibilities, public duties and the dignity of their office." (p. 4) [BED at tab 33].

49 *Beauregard*, p. 75 [BED at tab 24]; *PEI Reference*, para. 194 (referring to a similarly worded provision of the *Draft Universal Declaration on the Independence of Justice*, United Nations Commission on Human Rights (1998)) [JBD at tab 4].

50 *Bodner*, para. 8 [JBD at tab 6]; *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13, paras. 56-61 [JBD at tab 5]; *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 (CanLII), [2020] 2 SCR 506, para. 31 [JBD at tab 7]; *Edwards*, para. 86 [BED at tab 20]; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39 (CanLII), [2016] 2 SCR 116, para. 34 [BED at tab 5].

and objective commission.[51] Second, no negotiations over remuneration are permitted between the judiciary and the government.[52] Third, judicial salaries cannot fall below a basic minimum level of remuneration required for the office of a judge.[53]

52. These components all flow from the constitutional imperative that the relationship between the judicial branch and the other branches of government be depoliticized, such that courts are both free, and perceived to be free, from political interference through economic manipulation.[54]

b) Financial Security is a Means to an End

53. It follows from the requirements of both individual and institutional financial security that judicial salaries must be set at an adequate level for the office of a judge. Furthermore, judicial salaries must be adjusted periodically to account for inflation to ensure that salaries remain at an adequate level. Judicial salaries must always "reflect the respect with which our courts are to be regarded"[55] and ensure that judges are able to fulfill their unique role in society.

54. It is important to emphasize that protecting the financial security of judges is not an end itself, but rather a means to ensure public confidence in the administration of justice.[56] As Chief Justice Lamer stressed in the *PEI Reference,* "the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public."[57]

55. Maintaining judicial salaries protects public confidence in the independence of the judiciary by ensuring that judges are not perceived to be susceptible to pressure through economic manipulation.[58] In other words, it "protects the integrity of the judicial office."[59]

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51 *PEI Reference*, para. 133 [JBD at tab 4].
52 *PEI Reference*, para. 134 [JBD at tab 4].
53 *PEI Reference*, para. 135 [JBD at tab 4].
54 *PEI Reference*, para. 131 [JBD at tab 4].
55 Block Report (2008), paras. 61-62 [JBD at tab 11].
56 *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39 (CanLII), [2016] 2 SCR 116, para. 32 [BED at tab 5]; *Ell*, para. 29 [BED at tab 8]; *PEI Reference*, para. 9 [JBD at tab 4].
57 *PEI Reference*, para. 193 (references ommitted) [JBD at tab 4], cited recently in *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39 (CanLII), [2016] 2 SCR 116, para. 89 [BED at tab 5].
58 *PEI Reference*, paras. 135 and 193 [JBD at tab 4].
59 *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39 (CanLII), [2016] 2 SCR 116, para. 34 [BED at tab 5].

56. Since financial security protects the constitutional role of the judiciary as an independent branch of government, it would be wrong in principle to consider the expenditure on judicial salaries as being simply one of many competing priorities on the public purse. As the Block Commission noted, judicial independence is not a mere government priority competing with other government priorities, but rather a constitutional imperative.[60] Were the Commission to consider judicial salaries on the same footing with other government priorities, it would be placed in a "highly politicized process."[61]

c) The Commission's Role in Protecting the Financial Security of Judges in Light of their Unique Role and Responsibilities in Canadian Society

57. Two important consequences flow from the requirements of judicial independence as it relates to judicial compensation.

58. First, as noted by Chief Justice Lamer in the *PEI Reference,* the need to maintain the institutional independence of the judiciary means that judges "do not enjoy a basic right of other Canadians – the right to openly assert the need, and engage in negotiations, for improvements in compensation."[62] This restriction is one that "applies to no other person or class of persons in Canada"[63] and "places the judiciary at an *inherent disadvantage* compared to other persons paid from the public purse."[64]

59. Second, constitutional requirements constrain the potential for "utilizing flexible or creative approaches to compensation policy for the Judiciary."[65] As noted by the Drouin Commission, "many concepts and mechanisms that are basic and useful in the setting of compensation policy in the private and public sectors traditionally have not applied, and in some cases cannot apply, to the Judiciary."[66] For example, judges' compensation cannot be tied to performance or determined by commonly used incentives such as bonuses, stock options, or at-risk pay.[67] There is no concept of promotion or merit in the discharge of judicial duties and there is no marketplace by which to measure the performance or compensation of individual judges.[68]

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60 Block Report (2008), paras. 56-57 [JBD at tab 11].
61 Block Report (2008), para. 56 [JBD at tab 11].
62 Drouin Report (2000), p. 16 [JBD at tab 9].
63 Drouin Report (2000), p. 15 [JBD at tab 9].
64 *PEI Reference*, at para. 189. (emphasis added) [JBD at tab 4].
65 Drouin Report (2000), p. 17 [JBD at tab 9].
66 Drouin Report (2000), p. 17 [JBD at tab 9].
67 Drouin Report (2000), p. 18 [JBD at tab 9].
68 Drouin Report (2000), p. 18 [JBD at tab 9].

60. Consequently, this Commission plays the central and essential role in making up for the "inherent disadvantage" of the position in which judges find themselves after their appointment.

61. Chief Justice Lamer noted in the *PEI Reference* that the "mandatory involvement of an independent commission" offsets, to some extent, the constitutional prohibition on negotiation.[69] An independent commission process "provides a forum in which members of the judiciary can raise concerns about the level of their remuneration that might otherwise have been advanced at the bargaining table."[70]

62. Importantly, the *Judges Act* does not equate "adequacy" of judicial salaries and benefits with the bare minimum necessary to guarantee financial security. Rather, the Commission must inquire into the adequacy of salaries and benefits with the dual purpose of ensuring public confidence in the independence of the judiciary and attracting not just *adequate* but, as explicitly provided for in the *Judges Act*, "*outstanding"* candidates to the bench.

63. The Commission must also bear in mind that the judicial function is truly unique and imposes strict demands on the conduct of judges. Judges are asked to embody "the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built."[71] The public therefore demands "virtually irreproachable conduct from anyone performing a judicial function," which is "something far above what is demanded of their fellow citizens."[72] In *Therrien*, the Supreme Court cited Professor G. Gall's description of the extraordinary demands on judges:

> The dictates of tradition require the greatest restraint, the greatest propriety and the greatest decorum from the members of our judiciary. We expect our judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society which must fulfil this standard of public expectation and, at the same time, accept numerous constraints. At any rate, there is no question that a certain loss of freedom accompanies the acceptance of an appointment to the judiciary.[73]

64. As a result, there are several restrictions on judges' activities, "even activities that would not elicit adverse notice if carried out by other members of the community."[74] Notably,

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69 *PEI Reference*, at para. 189 [JBD at tab 4].
70 *PEI Reference*, para. 189 [JBD at tab 4].
71 *Therrien*, para. 109 [BED at tab 25].
72 *Therrien*, para. 111 [BED at tab 25].
73 *Therrien*, para. 111 (emphasis added) [BED at tab 25].
74 Canadian Judicial Council, Ethical Principles for Judges (2021), s. 2.A.5 [BED at tab 89].

judges must withdraw from all professional, commercial, and business activities upon appointment to the bench.[75] Judges are also statutorily prohibited from engaging in any other occupation or business beyond their judicial duties.[76] Whereas lawyers have the ability to pursue new opportunities to increase their remuneration, judges are bound by a rigid salary structure once they are appointed, without the ability to supplement their income through other commercial endeavours.

65. In addition, there are numerous restrictions on judges' conduct flowing from their ethical obligations that reflect the importance of maintaining institutional independence. Judges must refrain from conduct that could give rise to an appearance of political activity,[77] and they may only speak out about publicly controversial matters in limited circumstances and with a posture of restraint.[78]

66. The uniqueness of the judicial role in all of its manifestations, including the "loss of freedom" that accompanies the acceptance of that role,[79] must inform the Commission's inquiry.

3. The Need to Attract Outstanding Candidates to the Judiciary

67. Under s. 26(1.1)(c), when inquiring into the adequacy of judicial salaries, this Commission is required to consider the need to attract outstanding candidates to the judiciary.

68. This section is divided into four subsections, summarized as follows:

    a. The purpose of this criterion is to ensure that judicial salaries are competitive enough to avoid discouraging outstanding candidates from seeking judicial office. Assessing this criterion requires a comparison between judicial salaries and the incomes of self-employed lawyers in private practice (the "**private sector comparator**").

    b. The latest quadrennial period has been marked by a publicly acknowledged "shortage of applicants," as noted by the Minister of Justice, contributing to an unprecedented crisis of judicial vacancies. This crisis has had severe consequences for the administration of justice and further impedes Canada's ability to attract outstanding candidates to the bench.

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75 Canadian Judicial Council, Ethical Principles for Judges (2021), s. 3.A.4 [BED at tab 89].
76 *Judges Act*, s. 55 [JBD at tab 3].
77 Canadian Judicial Council, Ethical Principles for Judges (2021), s. 5.B.2 (p. 43) [BED at tab 89].
78 Canadian Judicial Council, Ethical Principles for Judges (2021), s. 5.B.6 (p. 44) [BED at tab 89].
79 *Therrien*, para. 111 [BED at tab 25].

c. Data from the Office of the Commissioner for Federal Judicial Affairs (**OCFJA**) illustrates the specific challenges associated with attracting outstanding candidates, particularly those from private practice.

d. We know that judicial salaries fall far short of the private sector comparator. New data on the previously unreported incomes of lawyers practicing through professional law corporations reveals that the income gap is significantly wider than previously recognized. In 2022, the salary of puisne judges was $372,200. By contrast, the private sector comparator (comprising both unincorporated and incorporated self-employed lawyers) stood at $774,408 – a staggering disparity of more than $400,000. Even when the judicial salary is grossed up to account for the judicial annuity, the disparity remains enormous: $297,992.

69. Resetting judicial salaries to reduce the gap with the income levels of self-employed lawyers is essential for maintaining Canada's ability to attract outstanding candidates to the bench.

a) Purpose and Importance of this Criterion

70. The need to attract "outstanding candidates to the judiciary" is at once the most important and the most challenging of the three statutory criteria. It is important because it is a *sine qua non* criterion to preserving the quality of Canada's federally appointed judiciary. This statutory criterion requires comparing the income of outstanding candidates to the judicial salary, compensation being a very important consideration for lawyers contemplating a judicial appointment.

71. The purpose of this statutory criterion is to ensure that judicial salaries are "competitive enough so as not to discourage the most outstanding candidates from seeking judicial office."[80] The objective is to "recruit to the bench lawyers of great ability and first class reputation"[81] ("*les meilleurs*"). Therefore, judicial salaries "must be set at a level such that

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80 Turcotte Report (2021), para. 174 [JBD at tab 14]. See also Hansard, December 18, 1980 at 5897 cited in the Turcotte Report, at para. 93 [JBD at tab 14], where the then Minister of Justice Jean Chrétien stated: "Some members tell me that I should seek the best minds available to become judges. I agree. However, the best people will not always accept these assignments because it involves many sacrifices.".

81 Drouin Report (2000), p. 35 [JBD at tab 9], citing *PEI Reference* para. 55 [JBD at tab 4] (where Lamer CJ recounts the decisions below, including *R. v. Campbell*, 1994 CanLII 5258 (AB KB), [1994] A.J. No. 866. The full relevant passage from the first instance decision reads as follows: "if the judges of a court are not protected as to their incomes in relation to living costs, the prospect of a judicial appointment will lose its attractiveness to lawyers of great ability and first-class reputation. There will be a greater likelihood that the persons who are available as prospective appointees will not include

those most qualified for judicial office, those who can be characterized as outstanding candidates, will not be deterred from seeking judicial office."[82]

72. Assessing "the need to attract outstanding candidates to the judiciary" is necessarily a comparative endeavour involving comparing judicial salaries and the salaries of prospective outstanding candidates. As noted by the Drouin Commission, this criterion:

> expressly engages recruitment issues that, in turn, give rise to consideration of those factors that encourage or discourage applications for appointment from outstanding candidates. *Income differentials are clearly such a factor*.[83]

73. While the objective is not for judicial compensation to necessarily "match" the compensation earned by the most financially successful private practitioners,[84] past Commissions have adopted a "rough equivalence" standard as a "useful tool" to evaluate the adequacy of judicial remuneration.[85]

74. The Levitt Commission has grappled with the practical application of the standard of "rough equivalence" in comparing judicial salaries with the public sector comparator. Faced with a delta of 7.3% between the salary of puisne judges and the public sector comparator, the Levitt Commission observed that such a delta "test[ed] the limits of rough equivalence."[86] As the Turcotte Commission found, this same yardstick is "equally applicable" when comparing the salary of puisne judges with the private sector comparator.[87] As demonstrated below, the most recent data on the income of self-employed lawyers reveals that the salary of puisne judges falls alarmingly short of meeting this "rough equivalence" standard.

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lawyers whose appointment would lend stature and distinction to the court. Those lawyers will prefer to remain in private practice." (para. 75) [BED at tab 18]).

82 Report of the Second Quadrennial Judicial Compensation and Benefits Commission, dated May 31, 2004 [McLennan Report], p. 15 (emphasis added) [JBD at tab 10]. In the United States, a systematic, empirical study of 1,800 nominees to federal district courts from 1964 to 2012 was conducted to determine whether higher salaries do, in fact, attract better prospective judges. The authors found that salary was "an important determinant" of the quality of candidates nominated and confirmed the "need for better remuneration for judges if federal courts are to attract the best and brightest candidates" (Habel, P., Bennett, D., Gleason, S. A., & Comparato, S. A. (2015). The Implications of Salary for the Quality of Nominations to the Federal District Courts, 1964–2012. *Justice System Journal*, *36*(4), 323-340, pp. 324-325) [BED at tab 29].

83 Drouin Report (2000), p. 35 [JBD at tab 9].

84 Drouin Report (2000), p. 43 [JBD at tab 9]; Turcotte Report, para. 102 [JBD at tab 14].

85 Levitt Report (2012), para. 48 [JBD at tab 12].

75. While outstanding candidates can be found in various sectors, judicial salaries must be set at a level that does not detract such outstanding candidates *in private practice* from an appointment to the bench. In other words, while not all outstanding candidates who should be attracted to the bench are lawyers in private practice, a significant proportion of the outstanding candidates are. The judicial salary should be set at a level that will attract lawyers from all practice areas in which outstanding candidates may be found. Therefore, applying s. 26(1.1)(c) of the *Judges Act* requires comparing judicial salaries and the incomes of lawyers from the private sector.

76. This proposition is uncontroversial. Past Commissions have recognized that judicial salaries must reflect a necessary and reasonable relationship with the remuneration of senior members of the bar, from whose ranks judges are traditionally appointed.

77. As early as 1983, the Lang Commission supported maintaining a proportionate relationship between the judicial salaries and the incomes of senior members of the bar "because it is the latter class of persons who, in the public interest, should be attracted to the bench."[88] As the Lang Commission explained:

> The level of salary and benefits should also be such that the most able members of the practising bar may be induced to accept appointment to the bench without being expected to accept a major reduction in their standard of living.
>
> […]
>
> It is the Commission's view that the salary of a superior court judge should bear a reasonably close relationship with that of an above average lawyer, because it is the above average lawyer who should be attracted to the bench.[89]

78. The Scott Commission (1996) similarly noted that a "significant aspect" of judicial compensation was the relationship "between judicial income and income at the private Bar from which candidates for judicial office are largely drawn."[90]

79. Successive Quadrennial Commissions have also taken note of the necessary relationship between judicial salaries and the income of lawyers in private practice. In 2000, the Drouin Commission explained that compensation differentials between judicial salaries and the

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88 Drouin Report (2000), p.33 [JBD at tab 9], referring to Lang Report, p. 2 [BED at tab 51].

89 Report and Recommendations of Commission on Judge's Salaries and Benefits, October 6, 1983 (Lang Report), p. 2-3 [BED at tab 51].

90 Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits, September 30, 1996 (Scott Report), at p. 14 [BED at tab 55].

incomes of lawyers in private practice were clearly relevant to the recruitment of judicial candidates:

> The criterion identified in subsection 26(1.1)(c) […] is directed expressly to the issue of recruitment of suitable candidates for the Bench. Traditionally, most judges in Canada are appointed from the ranks of private legal practitioners. Accordingly, those factors constituting incentives or disincentives to the seeking of judicial office by private legal practitioners are relevant to recruitment of judicial candidates. Compensation differentials are clearly one of the factors influencing the decision by practitioners to seek appointment to the Bench."[91]

80. The McLennan Commission (2004) similarly stated that the income of self-employed lawyers was "an important, and *perhaps the most important*, comparator for [its] work."[92] It reasoned:

> The rationale, of course, is that it is in the public interest that senior members of the Bar should be attracted to the bench, and senior members of the Bar are, as a general rule, among the highest earners in private practice. While not all the "outstanding" candidates contemplated by s. 26(1.1)(c) of the *Judges Act* will be senior lawyers in the higher earning brackets, many will, and they should not be discouraged from applying to the bench because of inadequate compensation.[93]

81. The Block Commission (2008) also observed that while remuneration is not the only motivation for candidates to seek a judicial appointment, "for judicial appointments to be attractive to the full range of candidates, *including senior members of the Bar, adequate compensation must remain an important consideration*."[94] It went on to state:

> 76. It is not sufficient to establish judicial compensation only in consideration of what remuneration would be acceptable to many in the legal profession. It is also necessary to take into account the level of remuneration required to ensure that the most senior members of the Bar will not be deterred from seeking judicial appointment. To do otherwise would be a disservice to Canadians who expect nothing less than

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91 Drouin Report (2000), p. 23 (emphasis added) [JBD at tab 9].
92 McLennan Report (2004), p. 41 (emphasis added) [JBD at tab 10].
93 McLennan Report (2004), p. 32 [JBD at tab 10].
94 Block Report (2008), para. 70 (emphasis added) [JBD at tab 11].

> excellence from our judicial system — excellence which must continue to be reflected in the calibre of judicial appointments made to our courts. [95]

82. Finally, before the Turcotte Commission, the Government itself recognized that s. 26(1.1)(c) of the *Judges Act* was "intended to address recruitment—what was necessary in order to 'attract' *senior members of the Bar* to judicial office."[96]

83. In sum, judicial salaries must be sufficiently competitive with those of senior lawyers in private practice to ensure that outstanding lawyers in private practice are not deterred from seeking judicial appointments. Yet, as explained in the next sections, judicial salaries do not meet the "rough equivalency" standard necessary to avoid deterring outstanding candidates in private practice from applying to the bench.

b) The Crisis of Judicial Vacancies

84. On May 1, 2023, the number of vacancies among federally appointed courts had reached nine percent (88 of 995 full-time positions), with some of those vacant judicial positions dating back as much as 18 months.[97] At the Ontario Superior Court of Justice, two-thirds of the vacancies had been open for at least four months, with some persisting for 18 months or longer.

85. On May 3, 2023, in light of the gravity of the situation, Chief Justice Wagner sent a letter to the Prime Minister to express his "deep concern with regard to the significant number of vacancies within Federal Judicial Affairs and the government's inability to fill these positions in a timely manner."[98] He warned that some courts routinely operate with vacancy rates of 10 to 15%, and that the situation was "untenable" – risking a "crisis for our justice system".[99]

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95 Block Report (2008), para. 76 (emphasis added) [JBD at tab 11].

96 Submissions of the Government of Canada to the Turcotte Commission, March 29, 2021, para. 44 (emphasis added) [BED at tab 46].

97 Cristin Schmitz, "Top judges decry Ottawa's appointment delays; application vetting defunct in B.C." (Law 360 Canada, May 9, 2023, Toronto) [BED at tab 66].

98 Letter cited in *Hameed v Canada (Prime Minister),* 2024 FC 242, para. 1 [*Hameed*] [notice of appeal and cross-appeal filed] [BED at tab 10].

99 Letter cited in *Hameed*, para. 1 [BED at tab 10].

86. Members of the Bar have also expressed concerns regarding the delay crisis plaguing courts across the country, which is made worse by judicial vacancies.[100] They have repeatedly urged the federal government to fill judicial vacancies in a timely manner.[101]

(1) The Shortage of Qualified Candidates

87. Multiple stakeholders – including two Ministers of Justice – have publicly recognized that this crisis of judicial vacancies was caused, at least in part, by a shortage of qualified applicants.

88. In 2023, Chief Justice Bauman of British Columbia sounded the alarm, stating that there were relatively "fewer willing applicants" to fill the B.C. Supreme Court's vacancies. He noted that the Minister of Justice, the Chief Justice of the B.C. Supreme Court and the B.C. Bar Association and Law Society were "all concerned, and are all reaching out to bring home that fact to the bar in British Columbia to encourage qualified applicants."[102] This concern about attracting outstanding applicants is all the more acute considering that the salaries of B.C. provincial court judges have increased by 28.4% during the last four years and are now comparable to that of judges of the B.C. Supreme Court, at $360,000.[103]

89. In May 2023, then Minister of Justice David Lametti acknowledged that part of the explanation for the inordinate delays in appointing judges was the shortage of qualified applicants, in some regions. He highlighted the persistent issues, despite his best efforts and those of members of the judiciary in actively reaching out to encourage applications from qualified lawyers.

> Asked why the persistent federal delays in appointing judges, Lametti told a scrum on Parliament Hill May 9 "we try to appoint judges at the necessary speed." […]

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100 See, e.g., The Advocates' Society, *A Call for Action on Delay in the Civil Justice System* (2023) [BED at tab 83].

101 See, e.g., See The Advocates' Society, Letter to The Honourable David Lametti, P.C., M.P., Minister of Justice and Attorney General of Canada, December 12, 2022 [BED at tab 90]; Federation of Ontario Law Associations, Letter to the Prime Minister, the Minister of Finance and the Minister of Justice, February 13, 2023; [BED at tab 91]; Canadian Bar Association, Letter to the Prime Minister, May 24, 2023 [BED at tab 92].

102 Cristin Schmitz, "Top judges decry Ottawa's appointment delays; application vetting defunct in B.C." (Law 360 Canada, May 9, 2023, Toronto) [BED at tab 66].

103 British Columbia Judicial Compensation Commission 2022 Report, April 28, 2023 [BED at tab 80]; The recommendations of the commission have been implemented since the B.C. Legislative Assembly did not reject the recommendations of the 2022 Commission within the statutory time limit [BED at tab 81(a)]; Louise Dickson, "B.C. provincial court judges to receive 28.4% pay increase over four years", December 29, 2023) [BED at tab 69].

> Lametti acknowledged the serious consequences that lengthy vacancies can have on court operations, and for the fair trial Charter rights of accused, who the Supreme Court of Canada has said must generally be tried within 30 months in superior court. […]
>
> The justice minister noted that "there are different blockages from time to time at different points in the system."
>
> **In some regions, for example, there may be too few applicants in the approved pool of judicial candidates to fit the requirements for the vacant posts, notwithstanding that Lametti and the judiciary of a number of courts have been reaching out to encourage applications from qualified lawyers.**
>
> "We are pushing to get people to apply in certain parts of the country more than others," Lametti said.[104]

90. Similarly, the newly appointed Minister of Justice acknowledged that one of the first briefings he received upon his appointment to that position concerned judicial vacancies and reported that the government was dealing with an issue of "shortage of applicants."[105] He reiterated the challenges in meeting the courts' needs, particularly in attracting candidates with expertise in areas like family law and insolvency, and emphasized his ongoing efforts to encourage lawyers to apply for judicial positions.[106]

91. In his statement prepared for this Commission, Chief Justice Morawetz of the Ontario Superior Court of Justice similarly notes the difficulty in attracting outstanding candidates from private practice to the bench, highlighting the challenging task of trying to convince outstanding lawyers to apply to fill judicial vacancies.[107]

92. In his most recent annual press conference, Chief Justice Wagner reported that Chief Justices from across the country faced similar difficulties in attracting outstanding candidates, especially in provinces with a high cost of living, like British Columbia and Ontario. Chief Justice Wagner noted that, together with inadequate support for those

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104 Cristin Schmitz, "Top judges decry Ottawa's appointment delays; application vetting defunct in B.C." (Law 360 Canada, May 9, 2023, Toronto) [BED at tab 66].

105 Darren Major, "New justice minister appoints more than a dozen judges in effort to address vacancies", CBC, Aug 28, 2023 [BED at tab 68].

106 House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 99, 1st Sess., 44th Parl., March 21, 2024, at p. 4 [BED at tab 50].

107 Statement of Chief Justice Morawetz, December 20, 2024, paras.14-23 [BED at tab A].

exercising judicial functions, judicial salaries contribute to the declining appeal of a judicial appointment.[108]

(2) The Effects of the Crisis

93. In his May 3, 2023, letter to the Prime Minister, the Chief Justice of Canada warned of the "appalling" impacts of the number of judicial vacancies on the administration of justice.[109] In a judgment issued in February 2024, the Federal Court described the current level of judicial vacancies in Canada as "untenable."[110] The Court accepted the evidence that, due to the number of judicial vacancies, "access to justice and the health of our democratic institutions are at risk".[111] The Court also found that the justice system was consequently at risk of being perceived as useless for civil matters, in turn fueling public cynicism and undermining trust in our democratic institutions. [112]

94. The consequences of judicial vacancies are particularly severe in criminal law, where, applying binding precedents, stays of proceedings have had to be pronounced "because of delays that are due, in part or in whole, to a shortage of judges."[113] Chief Justice Wagner cited the example of the Court of King's Bench of Alberta, which reported that over 22% of ongoing criminal cases were exceeding the 30-month trial deadline imposed by the Supreme Court in *Jordan*. Alarmingly, 91% of these cases involved serious and violent crimes.[114]

95. As the Supreme Court warned in *Jordan*, "the Canadian public expects their criminal justice system to bring accused persons to trial expeditiously."[115] Delays in criminal matters – including delays related to judicial vacancies – harm not only accused persons but also victims, their families, and the public interest in promptly bringing those charged with

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108 Peter Zimonjic."Ottawa making progress on judicial appointments but threats to rule of law remain, says chief justice", CBC News, June 3, 2024 [BED at tab 72]; CPAC, Chief Justice Wagner Provides Update on Work of Supreme Court (June 3, 2024) (link) [Chief Justice Wagner Press Conference (2024)] [BED at tab 71].

109 *Hameed*, para. 1, citing the letter from Wagner CJ [BED at tab 10].

110 *Hameed*, para. 15 [BED at tab 10].

111 *Hameed*, para. 50 [BED at tab 10].

112 *Hameed*, para. 50 [BED at tab 10].

113 *Hameed*, para. 45 [BED at tab 10]. See also, e.g., *R. v. Villanti*, 2018 ONSC 4259, paras. 37-38 [BED at tab 22]; *R. v. Bowen-Wright*, 2024 ONSC 293, para. 1 [BED at tab 17]; *R v Liu*, 2024 ONSC 2022, paras. 40, 44, 51-52 [BED at tab 16]; *R. v. Downey,* 2024 ONSC 2157, at paras. 41-46 [BED at tab 19].

113 *R v Liu*, 2024 ONSC 2022, para. 59 [BED at tab 16].

114 *Hameed*, para. 45 [BED at tab 10].

115 *R. v. Jordan,* 2016 SCC 27, para. 2 [*Jordan*] [BED at tab 21].

criminal offences to trial.[116] As one court put it, when delays exceed constitutional standards, "it is an embarrassment to the administration of justice that this serious 'priority' case, involving sexual abuse of a child, cannot be tried in accordance with the constitutional standard".[117]

96. Judicial vacancies also have severe consequences on the delays plaguing civil matters,[118] which are compounded as judges are forced to prioritize criminal cases.[119] For instance, in British Columbia, many scheduled hearings and trials have been postponed due to the lack of available judges:[120] 15.9% of trials and 16.3% of long chambers applications were "bumped" in 2023, the latter being the highest rate since 2019.[121]

97. This has not only caused significant stress and expenses for litigants, it also "risks undermining public confidence in the judicial process, poses serious risks to the administration of justice, and over time threatens the quality of the justice system."[122]

98. Family law cases are also suffering due to the shortage of judicial resources. Chief Justice Marie-Anne Paquette of the Superior Court of Québec highlighted the dramatic impact of judicial vacancies on families facing legal issues, sharing the example of a family going through a bitter separation who learned they would have to wait 19 months to be heard by the Superior Court.[123] The Ontario Superior Court of Justice also deplored the effects of a judicial position that had been left vacant in the Kitchener Unified Family Court for roughly two years, noting that it was "incomprehensible that the public, and particularly vulnerable children and families, should be so poorly assisted."[124]

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116 *Jordan*, para. 2 [BED at tab 21].

117 *R v Liu*, 2024 ONSC 2022, para. 59 [BED at tab 16].

118 *See e.g. Barbour v Ituna (Town)*, 2018 SKQB 50 at para. 4 [BED at tab 1]; *Sissons v Canadian Tire Corporation Limited*, 2023 BCSC 1134 at para. 9 [BED at tab 23]; *Burton v Docker*, 2023 ONSC 1182 at para. 18 [BED at tab 2]; *Lounds v Lounds; MacIsaac v Lounds*, 2024 ONSC 2010 at para. 6 [BED at tab 12].

119 *Hameed*, para. 45 [BED at tab 10].

120 Supreme Court of British Columbia, Annual Report (2023), pp. 6-7 [BED at tab 79].

121 Supreme Court of British Columbia, Annual Report (2023), p. 6 [BED at tab 79]. The Chief Justice of the Superior Court of Québec similarly noted that the number of cases bumped as a "direct" consequence of judicial vacancies (Louis-Samuel Perron, Entrevue avec la juge en chef de la Cour supérieure : « Tout tient avec du duct tape », La Presse, December 6, 2022) [BED at tab 65].

122 Supreme Court of British Columbia, Annual Report 2023, p. 7 [BED at tab 79]. This is consonant with the Supreme Court's decision in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, paras. 37-39, which held that the rule of law is fostered by the continued existence and access to s. 96 courts [BED at tab 26].

123 Daniel Leblanc, La Cour supérieure dépend de « miracles » au quotidien pour gérer la pénurie de juges, Radio-Canada, May 10 2023 [BED at tab 67].

124 *Drew v. Kaker*, 2023 ONSC 4589, para. 5 [BED at tab 7].

99. Finally, judicial vacancies have a deleterious impact on judges themselves. In its 2023 Annual Report, the Supreme Court of British Columbia noted that "the ongoing issue of judicial vacancies increases the already heavy burden on the Court's existing judges who are assigned more work in order to make up the shortfall."[125] As Chief Justice Wagner wrote, and the Federal Court accepted, judges are faced with a chronic work overload and increased stress.[126] As a result, judges are "increasingly going on medical leave,"[127] further exacerbating the shortage of judges.

100. Judicial vacancies risk being exacerbated by the increasing number of judges who plan to retire before reaching the mandatory retirement age. Historically, the Drouin Commission noted that "few judges resign their position before they were eligible to retire, save for health or unusual personal reasons."[128] This is not the case anymore. A survey of federally appointed judges reveals that only 29% of the 416 judges surveyed expressed a commitment to serve until the mandatory retirement age. 35% of judges have decided *against* serving up to that date, and another 35% of judges remain uncertain.[129] This will increase the pressure to attract outstanding candidates to the judiciary.

101. Thus, judicial vacancies are not only *caused* by enduring challenges with attracting outstanding candidates to the bench, they also have a detrimental *effect* on the ability to attract these candidates. Chief Justice Wagner warned that the current situation regarding judicial vacancies "does not bode well for ensuring a healthy and thriving judiciary." He also noted that these conditions were unsustainable, given the need to attract outstanding candidates to the bench:

> If current issues persist, it could also become difficult to attract high-quality candidates for judge positions. This is already the case in British Columbia.[130]

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125 Supreme Court of British Columbia, Annual Report (2023), p. 7 [BED at tab 79].
126 *Hameed,* para. 51 [BED at tab 10].
127 *Id*., citing the May 2023 letter from Chief Justice Wagner [BED at tab 10].
128 Drouin Report (2000), p. 19 [JBD at tab 9].
129 Canadian Superior Courts Judges Association, 2023 CSCJA Member Research Report, November 2023, p. 30 [BED at tab 82].
130 Hameed, para. 51 citing the May 2023 letter from Chief Justice Wagner [BED at tab 10].

c) The OCFJA Data on Applicants and Appointees to the Bench

102. Recent trends illustrated by data from the OCFJA highlight the challenges of attracting outstanding applicants to serve on Canada's superior courts, especially those from private practice, which strikes at the core of the criterion provided by s. 26(1.1)(c) of the *Judges Act.* Key findings include:

1) Lawyers from private practice are underrepresented in the pool of applicants to the bench, with some provinces showing particularly low rates.

2) The proportion of "Highly Recommended" and "Recommended" candidates has dropped nationally over the latest quadrennial period.

3) While the vast majority of judges were historically appointed from private practice, the proportion has declined since 2007, with notable regional disparities.

(1) The Low Proportion of Applicants from Private Practice

103. For the first time, this Commission has the benefit of data regarding the employment background of applicants to the bench. This data supports the concern expressed by Chief Justices Wagner, Bauman, and Morawetz. It also confirms a long-standing concern articulated by the Association and Council before past Commissions: that of the worrying discrepancy in terms of interest in judicial appointments between lawyers in private practice and their counterparts in the public sector.

104. Between 2020 and 2024, the OCFJA data shows that only **48%** of applicants to the bench were lawyers from the private sector.[131] In some provinces, the situation is even more concerning. In Nova Scotia, from 2020 to 2024, only 20 applicants (representing 33% of applications) were lawyers from private practice.[132] In Saskatchewan, a mere 19 candidates from the private sector applied over the same period of four years (representing 35% of all applications,)[133] whereas 69% of all lawyers in the province work in the private sector.[134]

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131 Applications for Appointment, Statistics, provided by the Commissioner for Federal Judicial Affairs, April 1, 2020 to March 31, 2024 [JBD at tab 21]: Out of the 1,382 applications during the period of the last Commission, 117 were sole practitioners, 497 were in private practice and 50 were from the private sector (i.e., in-house counsel), for a total of 664.

132 20 out of 60 applicants. Applications for Appointment, Statistics, provided by the Commissioner for Federal Judicial Affairs, April 1, 2020 to March 31, 2024 [JBD at tab 21].

133 19 applicants (2 sole practitioners, 16 lawyers from private practice and 1 lawyer in the private sector) out of 54 applicants Applications for Appointment, Statistics, provided by the Commissioner for Federal Judicial Affairs, April 1, 2020 to March 31, 2024 [JBD at tab 21].

134 Law Society of Saskatchewan, 2023 Annual Report, page 22 (1,321 lawyers out of 1,917 total members: 1,121 in private practice and 200 in-house corporate counsel) [BED at tab 78].

(2) The Declining Proportion of Recommended and Highly Recommended Candidates

105. The McLennan Commission emphasized the importance of attracting not just qualified, but *outstanding* ("*les meilleurs*") candidates to the judiciary, consistent with the wording of the *Judges Act*:

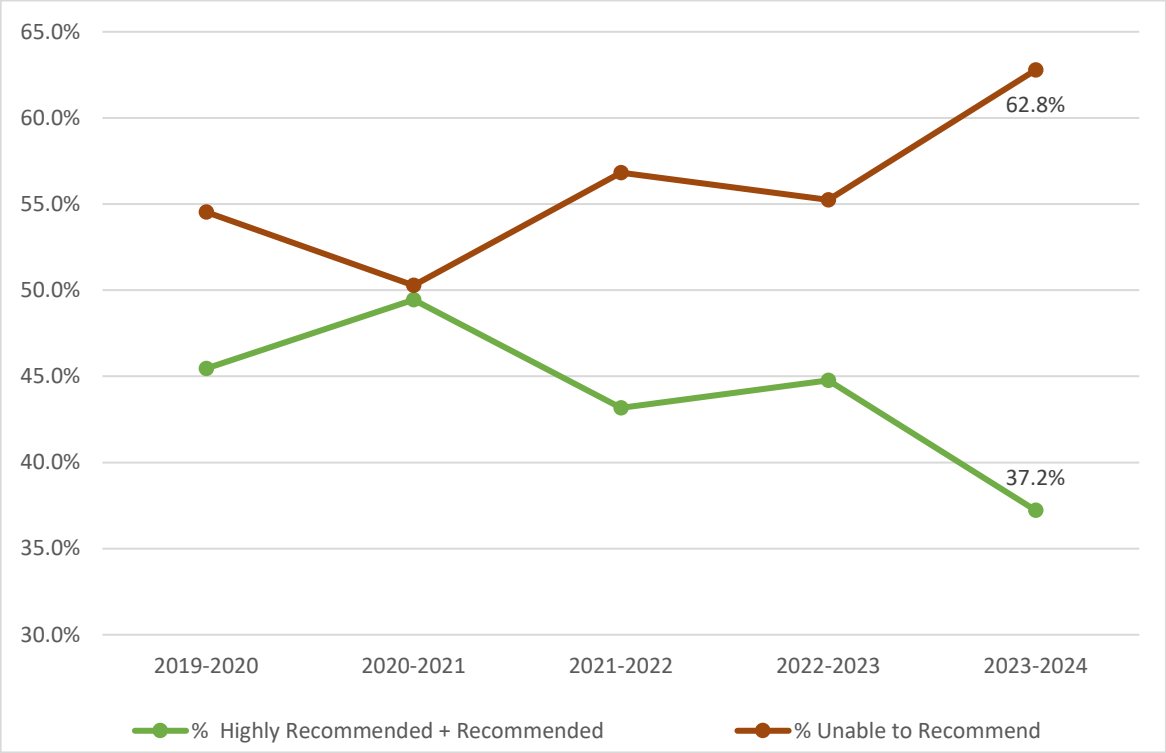
> We must also be mindful that, as shown in Table 6, the number of applicants who are recommended or highly recommended by the provincial and territorial Judicial Appointment Committees and the Federal Judicial Appointments Secretariat that inform the Minister of Justice, relative to the number of judicial vacancies, demonstrates that current levels of salary and benefits do attract qualified candidates. This consideration must be tempered by the fact that, while many potential candidates may be qualified or even highly qualified, what is important for the well-being of our judicial system and democracy, and what is mandated for us, is to ensure that salary and benefit levels are adequate to attract, or at least, not discourage, *outstanding* candidates, in other words, the best and the brightest, which must be only a subset of even those who may be highly recommended.[135]

106. According to data published by the Office of the Commissioner for Federal Judicial Affairs, out of all applicants assessed by judicial advisory committees, the proportion of highly recommended and recommended candidates has steadily declined, from 50% to 37.2%, between 2020 and 2024. This is illustrated in the graphical representation below.[136]

135 McLennan Report (2004), p. 20 (emphasis added) [JBD at tab 10].

136 Office of the Commissioner for Federal Judicial Affairs Canada, Demographic statistics on diversity in the judiciary (October 29, 2019 – October 28, 2024) [BED at tab 94].

Graph 1
Assessment of Candidates to Judicial Positions, October 2019 to October 2024



107. These national figures are another clear indication of the challenges of attracting outstanding candidates to the bench.

108. In addition, the national data masks even more concerning regional disparities. The Turcotte Commission noted that "the number of candidates who are recommended or highly recommended for each judicial appointment by the Judicial Advisory Committees varies significantly, depending on the province or territory."[137] For instance, in Nova Scotia, only four of the 40 candidates assessed during the period from April 2020 to March 2024 were "Highly Recommended" by the relevant Judicial Assessment Committee.[138]

109. Finally, while the McLennan Commission indicated that outstanding candidates "must be only a subset of even those who may be highly recommended", data from Federal Judicial Affairs shows that that is not the case. Nearly 30% of candidates who applied and were

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137 Turcotte Report (2021), para. 94 [JBD at tab 14].

138 There were three highly recommended applicants and one highly recommended candidate who was appointed to the bench. See Applications for Appointment, Statistics, provided by the Commissioner for Federal Judicial Affairs, April 1, 2020 to March 31, 2024 Tabs "Application and Appointments by Jurisdiction" and "Applied and Appointed in Period" [JBD at tab 21].

appointed during the period were *not* "Highly Recommended", with some provinces reporting even higher proportions.[139]

(3) The Proportion of Appointees from Private Practice

110. Historically, self-employed lawyers have been the primary source of judicial appointments. However, recent years have seen a significant decline in the proportion of appointments from private practice, with no indication of this trend reversing, as illustrated by the following table and graphical representation.

Table 1
Appointments to the Federal Bench Between 1990-2024
Proportion of Appointees from Private Practice in Canada[140]

Years	Proportion of Appointees from Private Practice
1990-1999	73%[141]
1997-2004	73%[142]
2004-2007	78%[143]
2007-2011	70%[144]
2011-2015	64%[145]
2015-2020	62%[146]
2020-2024	63%[147]

139 Applications for Appointment, Statistics, provided by the Commissioner for Federal Judicial Affairs, April 1, 2020 to March 31, 2024 Tab "Applied and Appointed in Period" [JBD at tab 21].

140 These figures include appointees from three categories: sole practitioners, lawyers from private practice (excluding sole practitioners) and lawyers from the private sector (in-house counsel).

141 Drouin Report (2000) at 37 [JBD at tab 9].

142 McLennan Report (2004) at p. 17 [JBD at tab 10].

143 Submissions of the Association and Council dated December 14, 2007 at para. 123 [BED at tab 38].

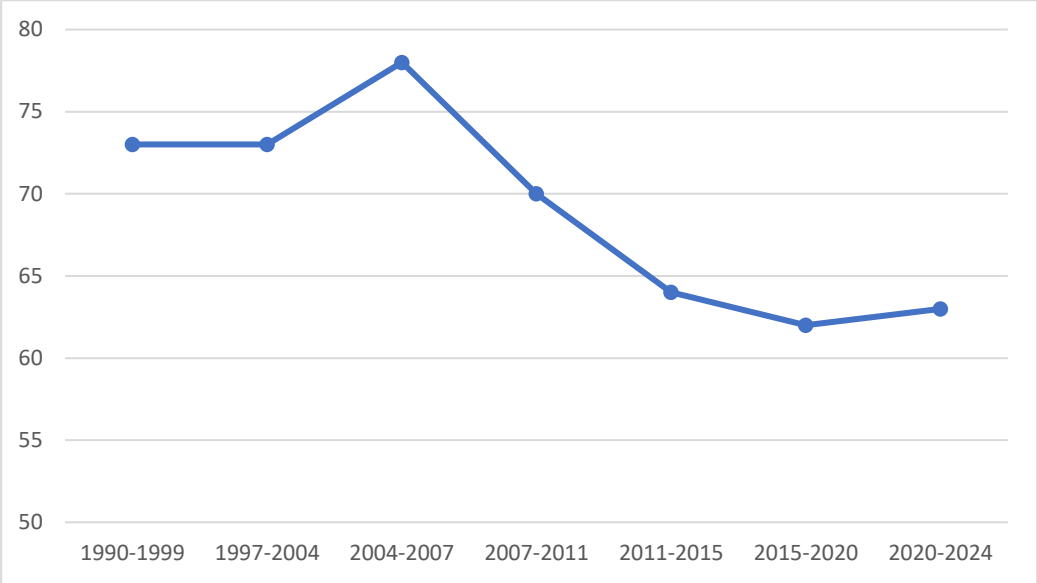
144 Submissions of the Association and Council dated December 20, 2011 at para. 143 [BED at tab 41].

145 Submissions of the Association and Council dated February 29, 2016 at 35, footnote 59 [BED at tab 43].

146 Submissions of the Association and Council dated March 29, 2021 at para. 63 [BED at tab 45].

147 This figure includes three individuals who are described as coming from the "private sector", which is distinct from "private practice" since the former denotes in-house counsel. There were 131 appointees from private practice for April 1, 2020 to March 31, 2024, 28 from "sole practice", and 3 the for private sector. The latter figure is not material. It was decided to include the "private-sector" lawyers in this category because the larger distinction is with appointments from the public sector [JBD at tab 22(d)].

Graph 2
Appointments to the Federal Bench Between 1990-2024
Proportion of Appointees from Private Practice in Canada



111. Importantly, there are significant regional variations regarding the proportion of lawyers from private practice appointed to the bench. For instance, in British Columbia, only 16 judges appointed during the last four years (representing 53.3% of appointees) were lawyers in private practice. Both the number and proportion of lawyers appointed from private practice in British Columbia have decreased during the four years covered by this Quadrennial Commission, when compared to the four preceding years, as illustrated in the table below.

Table 2
Appointments to the Federal Bench Between April 1, 2016 and March 31, 2024
Proportion of Appointees from Private Practice in British Columbia

Years	Total Number of Appointments	Appointees from Private Practice	% Appointees from Private Practice
April 2016 to March 2020[148]	40	23	58%
April 2020 to March 2024[149]	30	16	53%

112. All indications are that the decline in appointments from private practice reflects a drop in interest in judicial appointment among lawyers in private practice. This is consistent with the observation from Chief Justice Morawetz that judicial salaries, along with the increasing demands of judicial office, deter many outstanding candidates from applying for appointment to the bench, and that this issue is more pronounced among lawyers from private practice.[150]

113. This is a worrisome trend. The statement from Chief Justice Morawetz underscores the importance of a bench composed of judges with diverse experience, including a significant contingent of appointees from private practice. Chief Justice Morawetz attests to the benefits of having a significant proportion of judges with the specialized knowledge and practical experience gained in private practice to meet the demands of increasingly complex legal proceedings, which call for a growing level of judicial specialization.[151]

d) Private Sector Comparator: Judicial Salaries are Inadequate to Preserve Canada's Continued Ability to Attract Outstanding Candidates from Private Practice

114. One of the key comparators considered by previous Commissions is the income levels of self-employed lawyers. The following analysis is divided into three subsections:

    1) Traditional data on the income of *unincorporated* self-employed lawyers, applying relevant filters, indicates that the salary of puisne judges – even when grossed up to

148 Appointment Demographics provided by the Commissioner for Federal Judicial Affairs, with Summary, judicial appointments April 1, 2015 to October 23, 2020 (Tab 19 of the Joint Book of Documents, Volume II to the Turcotte Commission dated March 29, 2021) [BED at tab 48].
149 Appointment Demographics provided by the Commissioner for Federal Judicial Affairs, with Summary, judicial appointments April 1, 2020 to March 31, 2024 [JBD at tab 20].
150 Statement of Chief Justice Morawetz, December 20, 2024, paras. 21-22 [BED at tab A].
151 Statement of Chief Justice Morawetz, December 20, 2024, paras. 9-13 [BED at tab A].

account for the value of the judicial annuity – fall well short of the "rough equivalency" standard.

2) Previously unreported data on the income of *incorporated* self-employed lawyers reveals an even more pronounced gap between judicial salaries and the income of self-employed lawyers in private practice.

3) Integrating data from both unincorporated and incorporated self-employed lawyers shows a substantial disparity between the private-sector comparator and judicial salaries, and demonstrates the need for a key corrective adjustment in judicial salaries. Such a correction is critical to preserving Canada's ability to attract outstanding candidates from private practice to the judiciary.

(1) Self-Employed Lawyers' Income and the Appropriate Use of Filters

115. We move next to an analysis of unincorporated self-employed lawyers' incomes. It is important to bear in mind that this data omits the large number of lawyers who operate as corporations. We will be filling that data void below. However, even without considering the newly available data relating to incorporated self-employed lawyers, judicial salaries have fallen behind the income levels of even those lawyers who are not incorporated.

116. As in the past, the CRA was mandated by the Government and the Association and Council to assemble a dataset consisting of the 2019 to 2023 tax returns of individuals identified by the CRA as self-employed lawyers.

117. To obtain a better match with the population likely to yield "outstanding" candidates from private practice for judicial appointments, past Commissions have applied specific filters to the data.[152] For instance, the Rémillard Commission (2016) focused on self-employed lawyers (i) in the 44-56 age group (52.5 is the average age of appointment[153]), (ii) at the 75th percentile, (iii) with a low-income exclusion of $60,000. This was considered, for Canada as a whole and for the top 10 census metropolitan areas ("**CMAs**"),[154] where the majority of judges are appointed from.[155]

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152 McLennan Report (2004) at p. 43 [JBD at tab 10]; Rémillard Report (2016), paras. 57-67 [JBD at tab 13].

153 Tables derived from Appointment Demographics provided by the Commissioner for Federal Judicial Affairs, Table (f) [JBD at tab 22 (f)].

154 The top 10 CMAs are Toronto, Montréal, Vancouver, Calgary, Edmonton, Ottawa-Gatineau, Winnipeg, Québec, Hamilton, and Kitchener – Cambridge – Waterloo.

155 Tables derived from Appointment Demographics provided by the Commissioner for Federal Judicial Affairs, Table (b) [JBD at tab 22 (b)].

118. The Turcotte Commission (2021) also considered the 75th percentile of the CRA data but modified two filters. First, it increased the low-income exclusion from $60,000 to $80,000, to account for inflation. Second, rather than using the 44-56 age range as the relevant age filter, the Turcotte Commission elected to "age-weight" the CRA data depending on the weight of judicial appointments across different ages.[156]

119. Before this Commission, the Association and Council propose the following filters and findings for analyzing the CRA data on *unincorporated* self-employed lawyers:

    a. The low-income exclusion should be adjusted from $80,000 to $90,000 to reflect the substantial inflation that has occurred since the last Commission.

    b. Rather than "age-weigh" the CRA data, it is more appropriate to return to the 44-56 age group to maintain the focus on the true target pool for judicial appointments and avoid the demonstrable flaws of the age-weighted approach.

    c. The Commission should continue to apply the 75th percentile, which remains the appropriate parameter.

    d. While the Association and Council do not argue that a geographical filter must be applied to the CRA data, the higher income levels of self-employed lawyers in the ten largest CMAs should be factored into the Commission's analysis and inform its recommendations.

    e. For 2023, the judicial salary of puisne judges was $383,700. Applying the relevant filters, this judicial salary falls short by more than **$200,000** when compared to the net professional income of unincorporated self-employed lawyers for the same year, which stood at $589,445. Even when the judicial salary is grossed up by 28% to account for the value of the judicial annuity, the disparity is almost **$100,000** (or 20%) when compared to the income of unincorporated self-employed lawyers (again, excluding the even higher incomes of incorporated lawyers).

156 Turcotte Report (2021), paras. 162-169 [JBD at tab 14].

(a) The Low-Income Exclusion Should be Updated to $90,000

120. To compare the levels of judicial salaries with those of self-employed lawyers in private practice, past Commissions have appropriately excluded lawyers' whose income fell below a certain threshold. The Drouin Commission (2000) excluded lawyers whose income level was lower than $50,000 per annum and the McLennan Commission (2004) increased this threshold to $60,000. The McLennan Commission justified the increase of the low-income exclusion as follows:

> With respect to the appropriate level of exclusion mentioned above, our view is that it would be more appropriate to increase the level to $60,000. It is unlikely that any in the pool of qualified candidates will have an income level lower than $60,000. The salaries of articling students range from $40,000 to $66,000 in major urban centres and the salaries of first-year lawyers range from $60,000 to $90,000 in those same centres, and are often augmented by bonuses. Earnings for more senior associates are significantly higher. [157]

121. The Turcotte Commission adjusted the $60,000 per annum figure to $80,000. Citing the report of the expert retained by the Judiciary, it noted that the $60,000 figure from 2004 was equal, in 2019, to $79,200 using the CPI and to $87,000 using the growth in IAI. It then agreed that the low-income exclusion of $60,000 should be increased to $80,000.[158]

122. Given both the evolving market conditions for junior counsel and the severe inflationary pressures of the last four years, a further adjustment is now required.

123. According to the 2025 Legal Salary Guide by Robert Half Legal, the salary for a first-year associate at the 75th percentile, based on that firm's experience placing lawyers, was $120,250 nationally.[159] According to the same source, the salaries of first-year lawyers are even higher in Calgary, Edmonton, Vancouver, Ottawa, Toronto, and Montreal.[160] The 2024 Salary Guide from ZSA confirms that, at large firms in Toronto, first-year associates generally earn a base salary of $130,000 (before bonus).[161]

124. Based on the logic that the McLennan Commission adopted in 2004, it is most unlikely that self-employed lawyers in the pool of qualified candidates – who are required to have at least 10 years at the Bar - will have an income level lower than $90,000, if not $100,000.

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157 McLennan Report (2004) at p. 43 (emphasis added) [JBD at tab 10].
158 Turcotte Report (2021), paras. 163-164 [JBD at tab 14].
159 Robert Half Legal, Legal Salary Guide 2025 [BED at tab 85].
160 *Id.* [BED at tab 85].
161 ZSA , Private Practice Lawyer Salary Guide (June 2024) [BED at tab 84].

125. With regards to inflation, in their expert report, Uros Karadzic and Marvin Reyes from Ernst & Young confirm that, if the low-income exclusion had been increased to match inflation as measured by the percentage change in the Consumer Price Index since 2019, it would have been $90,574 in 2022 and $92,543 by 2023.[162] If the adjustment were calculated using the IAI, which represents the change in the earnings of employed Canadians, the low-income cut-off would also be over $90,000.[163]

(b) The Continued Appropriateness of the 44-56 Age Group

126. As mentioned above, past Commissions have for the most part considered the CRA data on the income of self-employed lawyers by focusing on the 44-56 age group.[164] Both the Drouin and McLennan Commissions reasoned that this approach recognizes that the majority of judges were within that group at the time of their appointment.[165]

127. Before the Rémillard Commission (2016), the Government argued that the 44-56 age filter should be abandoned. It suggested that since judicial appointments are made from all groups, the income of self-employed lawyers should be age-weighted based on the percentage of judges appointed from each group.

128. The Rémillard Commission, while acknowledging that 33% of appointments over the preceding 17 years had come from outside the 44-56 age group, nonetheless rejected the Government's submission that it should adopt an age-weighted approach. The Rémillard Commission instead found that "focusing on the age group from which the majority of judges is appointed is a useful starting point."[166]

129. Before the Turcotte Commission, the Government again raised this issue and argued that the data on the income of self-employed lawyers should be weighted across all ages.[167]

130. Unlike its predecessors, the Turcotte Commission accepted the Government's suggestion and adopted an age-weighted approach to the CRA data, on the stated consideration of the proportion of judicial appointments being made from outside the 44-56 age group:

> With the trend continuing and approaching 35% of appointments being made from outside the 44-56 age group, we believe that turning to an age-weighted approach would be more consistent with the recognition of

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162 Ernst & Young, Report on Private Sector Compensation (December 20, 2024), p. 14 [BED at tab D].
163 *Id.*, p. 15 [BED at tab D].
164 Turcotte Report (2021), para. 165 [JBD at tab 14].
165 Drouin Report (2000), p. 39 [JBD at tab 9]; McLennan Report (2004), p. 43 [JBD at tab 10].
166 Rémillard Report (2016), para. 52 [JBD at tab 13].
167 Turcotte Report (2021), para. 166 [JBD at tab 14].

> greater diversity in the applicant pool and the Government's commitment to ensuring that the judiciary reflects the society in which it operates.

131. With respect, in reaching this conclusion, the Turcotte Commission erred as a matter of process and as a matter of principle and logic. The Association and Council submit that, consistent with the prior findings of successive Commissions, the 44-56 age range should be retained as the relevant filter.

132. As a matter of process, the Turcotte Commission's conclusion departs from the principle according to which "valid reasons [are] required – *such as a change in current circumstances or additional new evidence* – to depart from the conclusions of a previous Commission."[168] The only possible reason for its departing from the conclusions of the previous Commissions and adopting the age-weighted approach was that there had been a very slight increase, of less than 2%, of appointments made from outside the 44-56 age group.

133. This obviously falls short of the required "change in current circumstances or additional new evidence" required to depart from the 44-56 age range, a filter used by the Commission as far back as 2000.

134. Two additional reasons support the Judiciary's submissions that the age-weighted approach should be discarded in favour of a return to the traditional 44-56 age group filter.

135. First, since the Turcotte Commission, the most recent data provided by Federal Judicial Affairs shows that the proportion of appointments made outside the 44-56 age range has <u>decreased</u>, to 31.5%.[169] In other words, the proportion of appointees in the core 44-56 age range has <u>increased</u> during the last four years, reaching 68.5%, which alone supports a return to the historical focus on the incomes of lawyers within the 44-56 age range.

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168 Rémillard Report (2016), para. 26 [JBD at tab 13]; see also Turcotte Report (2021), para. 25 [JBD at tab 14].

169 Tables derived from Appointment Demographics provided by the Commissioner for Federal Judicial Affairs, Table (f) [JBD at tab 22 (f)].

Table 3
Appointments to the Federal Bench Between April 1, 2020 and March 31, 2024
By Age Range

Age Range	Number of Appointees	Proportion of Appointees
35-43	19	7.0%
44-56	185	68.5%
57+	66	24.6%
Appointments outside 44-56 age range	85	31.5%
Total	270	100%

136. The Rémillard Commission's conclusion that the age-weighted approach should be rejected when only "33% of appointments over the past 17 years have come from those either younger or older than the 44-56 year age group," is thus (once again) apposite.

137. Second, as Ernst & Young explain in their report, the age-weighted approach suffers from an embedded mathematical flaw. Specifically, it produces a slanted output that artificially *undervalues* estimated income. Age-weighting as put forth by the Government's expert before the Turcotte Commission overweighs the lower income that exists at both ends of the distribution (youngest and oldest candidates). This issue stems from the lack of sufficiently granular data to perform accurate weighting.

138. To produce accurate results, age-weighting would require income data for each and every age from 35 to 69, in order to properly align with the data provided on the numbers of appointees at each age. This would require 35 data points, one for each age (35 through 69). Only this method would allow the income for each age to be accurately weighted based on the actual number of appointees corresponding to that particular age.

139. However, the available income data here is grouped into broader age groups rather than by individual years. The age-weighted approach accepted by the Turcotte Commission relied on income data from seven age groups: 35-43, 44-47, 48-51, 52-55, 56-59, 60-63, and 64-69.[170]

[170] This data emanates from the dataset provided by CRA on the income of unincorporated lawyers in the top 10 CMAs, which also provides national figures for the same age groups. [JBD at tab 17].

140. The mismatch between the number of values and weights (35 years versus the more limited 7 groups) necessarily creates distortions. To take the first age group (35-43) as an example, there are nine distinct ages in that group (35, 36, …, 42, 43), and all ages composing that category are equally weighted relative to each other with the age-weighted approach. In practice, however, the number of nominations varies significantly across these ages. From 2011 to 2020 (as considered for the age-weighted approach before the Turcotte Commission), there were no nominations at age 35, only 2 nominations at age 37 but 26 nominations at age 43.[171] Despite this, the age-weighted approach gives the exact same weight to the income for lawyers aged 35 and those aged 43. To be correct, the weight given to the income of those aged 37 should be *13 times* less than the weight of the income of those aged 43 (26 appointees vs 2 appointees). The income of lawyers aged 35 should receive no weight at all since no judges were appointed at that age.

141. The same flaw can be observed with the last age group (64-69). For the selected time period, there were 16 nominations at age 64, only and 2 at age 68, and none at 69. This time, the income at older ages 68 and 69 is overweighted. The same phenomenon skews the results for age group from 60-63.

142. In sum, under an age-weighed approach, lower salaries at the outer ends of the distribution are given too much weight, which *lowers* the appropriate salary comparator.

(c) The Continued Appropriateness of the 75th Percentile

143. The Turcotte Commission rejected the Government's submission that the 75th percentile of income should be reconsidered and decided to continue using this percentile as the relevant filter, as previous Commissions had done.[172]

144. There is no "valid reason" to reconsider this filter. If anything, based on the expert report from Ernst & Young, one would be justified in focusing on the incomes of lawyers in private practice at a higher percentile than the 75th.[173] This was also the expert opinion given to the Turcotte Commission by the Judiciary's expert, Ms. Haydon.[174]

145. The Judiciary is not advocating for the application of a higher percentile. However, the Commission should bear in mind that adopting a higher percentile would be justified given

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171 Expert Report of Peter Gorham, Compensation Review of Federally Appointed Judges, March 26, 2021, Table 262, p. 78 [BED at tab 47].
172 Turcotte Report (2021), paras. 170-175 [JBD at tab 14].
173 Ernst & Young, Report on Private Sector Compensation (December 20, 2024), p. 16 [BED at tab D].
174 Turcotte Report (2021), para. 173 [JBD at tab 14].

the statutory criterion focusing on *outstanding* candidates and would inevitably yield a significantly higher private sector comparator. To put it in mathematical terms, applying the 75th percentile implies that a full quarter of self-employed lawyers are "outstanding" candidates for the judiciary. That is highly unlikely.

(d) The Relevance of the Top 10 CMAs

146. Past Commissions have primarily looked at the average national income of self-employed lawyers. However, they have recognized that it is also important to consider the income levels of lawyers practising in the top 10 CMAs.

147. As noted by the Drouin Commission (2000), it is essential for judicial salaries not to be set at a level that would produce a "chilling effect" on the recruitment of outstanding candidates in the largest metropolitan areas:

> [W]hile judicial salaries should not be set according to the most lucrative legal services market, they must be set at a level which will not have a chilling effect on recruitment by serving as a disincentive to outstanding candidates in the Largest Metropolitan Areas, including those urban centres in which lawyers in private practice realize the highest incomes. They must also be set at a level that does not result in unfairness to those current and future judges residing in larger urban areas. [175]

148. The Turcotte Commission also considered whether to use national income figures or those of the top 10 CMAs. It declined to rely on income figures for the top 10 CMAs, reasoning that "[a]n urban-only focus would not be consistent with a national judiciary."[176]

149. To be clear, the Association and Council do not contend that the private sector comparator should be modified so as to focus only on the income levels of self-employed lawyers in the top 10 CMAs. The Judiciary agrees with the statement of the Turcotte Commission that an "urban-only focus" would be inappropriate to determine the adequacy of judicial salaries.

150. Nevertheless, for the reasons outlined by the Drouin Commission cited above, the income of lawyers from the top 10 CMAs remains highly relevant to determine the adequacy of judicial salaries given the need to attract outstanding candidates to the judiciary – including outstanding candidates practising in the top 10 CMAs.

151. The higher income of private sector lawyers in the ten largest CMAs is a factor for broader consideration, for at least two reasons.

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175 Drouin Report (2000), p. 46 [JBD at tab 9].
176 Turcotte Report (2021), para. 179 (emphasis added) [JBD at tab 14].

152. First, the majority of judicial appointments are made from these centers. Two thirds (67.0%) of appointees between April 1, 2020 and May 31, 2024, practiced in one of the top 10 CMAs.[177] The need to consistently attract outstanding candidates for judicial appointments from these centers cannot be ignored.

153. Second, most provinces have adopted legislation imposing residency requirements on judges. Thus, judges appointed in many CMAs are obligated to reside in urban centers or in their vicinities. [178] Professor Hyatt points out in his report that the cost of living in urban centers is often significantly higher.[179] Judicial salaries must therefore be set at a level that does not deter outstanding candidates in the largest CMAs, where the cost of living is higher. Chief Justice Wagner emphasized this issue in his annual press conference, noting that it is particularly challenging to recruit outstanding candidates in areas where the high cost of living renders a judicial appointment less attractive.[180]

154. While some Commissions observed that the gap in the income of self-employed lawyers at the national level and in the top 10 CMAs could be addressed by considering regional allowances,[181] neither the Government nor the Judiciary is proposing such an approach. The key reason for rejecting this model was well articulated by the Drouin Commission:

> [C]reation of such a differential, or the adoption of other differentiating income mechanisms, could have the practical effect of creating many different classes of judges at the same level within the Judiciary, in fact or in perception. In our view, this would not be in the public interest or in the interests of the administration of justice cherished in this country.

155. However, this does not mean that the important disparities between judicial salaries and the income of lawyers in private practice in the top 10 CMAs can simply be overlooked. The "need to attract outstanding candidates to the judiciary" is a statutory requirement that applies nationally, including in the largest urban centers. Judicial salaries must be set at a level that ensures financial security for judges in both Vancouver and rural Canadian towns.

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177 Tables derived from Appointment Demographics provided by the Commissioner for Federal Judicial Affairs, Table (b) [JBD at tab 22 (b)].

178 See, e.g., *Courts of Justice Act*, CQLR c T-16, s 32 [BED at tab 58]; *Supreme Court Act*, RSBC 1996, c 443, s 2.1 (4)-(8) [BED at tab 62]; *Court of King's Bench Act*, RSA 2000, c C-31, s 6 [BED at tab 56]; *The King's Bench Act, SS 2023, c 28*, s 2-5 [BED at tab 63]; *Court of King's Bench Act*, CCSM c C280, s 9(2) [BED at tab 57]; *Judicature Act*, RSNB 1973, c J-2, s 12.01 [BED at tab 59]; *Judicature Act*, RSNS 1989, c 240, s 25(2)-(6) [BED at tab 61]; *Judicature Act*, RSNL 1990, c J-4, s 22(2)-(3) [BED at tab 60].

179 Hyatt Report, paras. 8-19 [BED at tab B].

180 Chief Justice Wagner Press Conference (2024) [BED at tab 71].

181 Rémillard Report (2016), para. 69 [JBD at tab 13]; Turcotte Report (2021), para. 181 [JBD at tab 14].

This is the only way Canada can continue to attract outstanding candidates to the superior court bench despite the disparity in the cost of living in different regions of our vast country.

(e) The Relevant Figures Regarding the Income Levels of Unincorporated Self-Employed Lawyers

156. As noted above, applying a low-income exclusion of $90,000 to the income levels of unincorporated self-employed lawyers in the 44-56 age group at the 75th percentile, the relevant figure for that sub-group within the private sector comparator for 2023 is $589,445 at the national level.

157. The relevant figure jumps to $648,800 when considering private sector lawyers' income in the ten largest CMAs, using the same filters. By comparison, the judicial salary in 2023 was $383,700, as shown in the tables below.

Table 4
Comparison of Salary of Puisne Judges with CRA Net Professional Income of Unincorporated Self-Employed Lawyers at 75th Percentile (Net Professional Income ≥ $90,000, Age Group – 44-56) Canada, 2019 to 2023

Year	Salary of Puisne Judges	75th Percentile Income (Canada)	Difference Between Judicial Salaries and Self-Employed Lawyers at 75th Percentile	% Difference Between Judicial Salaries and Self-Employed Lawyers at 75th Percentile
2019	$329,900	$513,305	-$183,405	- 55.6%
2020	$338,800	$579,035	-$240,235	- 70.9%
2021	$361,100	$613,130	-$252,030	- 69.8%
2022	$372,200	$569,330	-$197,130	- 53.0%
2023	$383,700	$589,445	-$205,745	- 53.6%
Average	**$357,140**	**$572,849**	**-$215,709**	**-60.4%**

Table 5
Comparison of Salary of Puisne Judges with CRA Net Professional Income of Unincorporated Self-Employed Lawyers at 75th Percentile (Net Professional Income ≥ $90,000, Age Group – 44-56)
Top 10 CMAs, 2019 to 2023

Year	Salary of Puisne Judges	75th Percentile Income (Top 10 CMAs)	Difference Between Judicial Salaries and Self-Employed Lawyers at 75th Percentile (Top 10 CMAs)	% Difference between Judicial Salaries and Self-Employed Lawyers at 75th Percentile (Top 10 CMAs)
2019	$329,900	$579,000	-$249,100	-75.5%
2020	$338,800	$652,880	-$314,080	-92.7%
2021	$361,100	$695,430	-$334,330	-92.6%
2022	$372,200	$651,475	-$279,275	-75.0%
2023	$383,700	$648,800	-$265,100	-69.1%
Average	**$357,140**	**$645,517**	**-$288,377**	**-80.7%**

158. As can be seen from the above tables, there is a dramatic discrepancy between the salary of puisne judges and the income of self-employed lawyers who did not incorporate. In 2023, this gap amounted to $205,745 across Canada, and to $265,100 in the top 10 CMAs.

159. Even when the judicial salary is grossed up by a percentage representing the value of the judicial annuity (28%), there remains a significant gap between the resulting grossed up amount and the income of unincorporated self-employed lawyers.

160. Carol Wong, a partner at Ernst & Young and a Fellow of the Canadian Institute of Actuaries with over 17 years of experience in the pension industry, has estimated the annual average value of the judicial annuity for the relevant period.

161. Ms. Wong applied the same methodology retained by the Turcotte Commission, which had valued the judicial annuity at 34.1% for its period. However, Ms. Wong updated two assumptions underlying that dated valuation. First, she adjusted the demographic assumptions based on the most recent 2022 report from the Office of the Chief Actuary of Canada on the pension plan for federally appointed judges. Second, she adjusted the discount rate from 5% (used by the last Commission) to 6%, reflecting a reasonable expected rate of return for a balanced portfolio given the prevailing economic conditions

during the reference period. Ms. Wong has concluded that the annual average value of the judicial annuity during the relevant period represents 28% of a puisne judge's salary.[182]

162. In 2023, the salary of puisne judges, grossed up to account for the value of the judicial annuity (28%), stood at $491,136. This grossed-up amount still falls nearly $100,000 short of the *unincorporated* self-employed private practice comparator for 2023 of $589,445 at the national level (and $648,800 for the ten largest CMAs).

163. The tables below compare the salary of puisne judges, grossed up by 28% to account for the value ascribed to the judicial annuity, to the incomes of *unincorporated* self-employed lawyers in private practice both across Canada and in the top 10 CMAs. In 2023, the gap amounts to **$98,309** (or 20%). In the top 10 CMAs, this number rises above $150,000 (or 32.1%).

Table 6
Comparison of Salary of Puisne Judges Plus Annuity with CRA Net Professional Income of Unincorporated Self-Employed Lawyers at 75th Percentile
(Net Professional Income ≥ $90,000, Age Group – 44-56)
Canada, 2019 to 2023

Year	Salary of Puisne Judges	Salary of Puisne Judges (with Annuity of 28%)	75th Percentile Income (Canada)	Difference Between Judicial Salaries with Annuity and Self-Employed Lawyers at 75th Percentile	% Difference Between Judicial Salaries with Annuity and Self-Employed Lawyers at 75th Percentile
2019	$329,900	$422,272	$513,305	-$91,033	-21,6%
2020	$338,800	$433,664	$579,035	-$145,371	-33,5%
2021	$361,100	$462,208	$613,130	-$150,922	-32,7%
2022	$372,200	$476,416	$569,330	-$92,914	-19,5%
2023	$383,700	$491,136	$589,445	-$98,309	-20,0%
Average	**$357,140**	**$457,139**	**$572,849**	**-$115,710**	**-25,5%**

[182] Ernst & Young, Report on the Value of the Judicial Annuity, December 20, 2024 [BED at tab C].

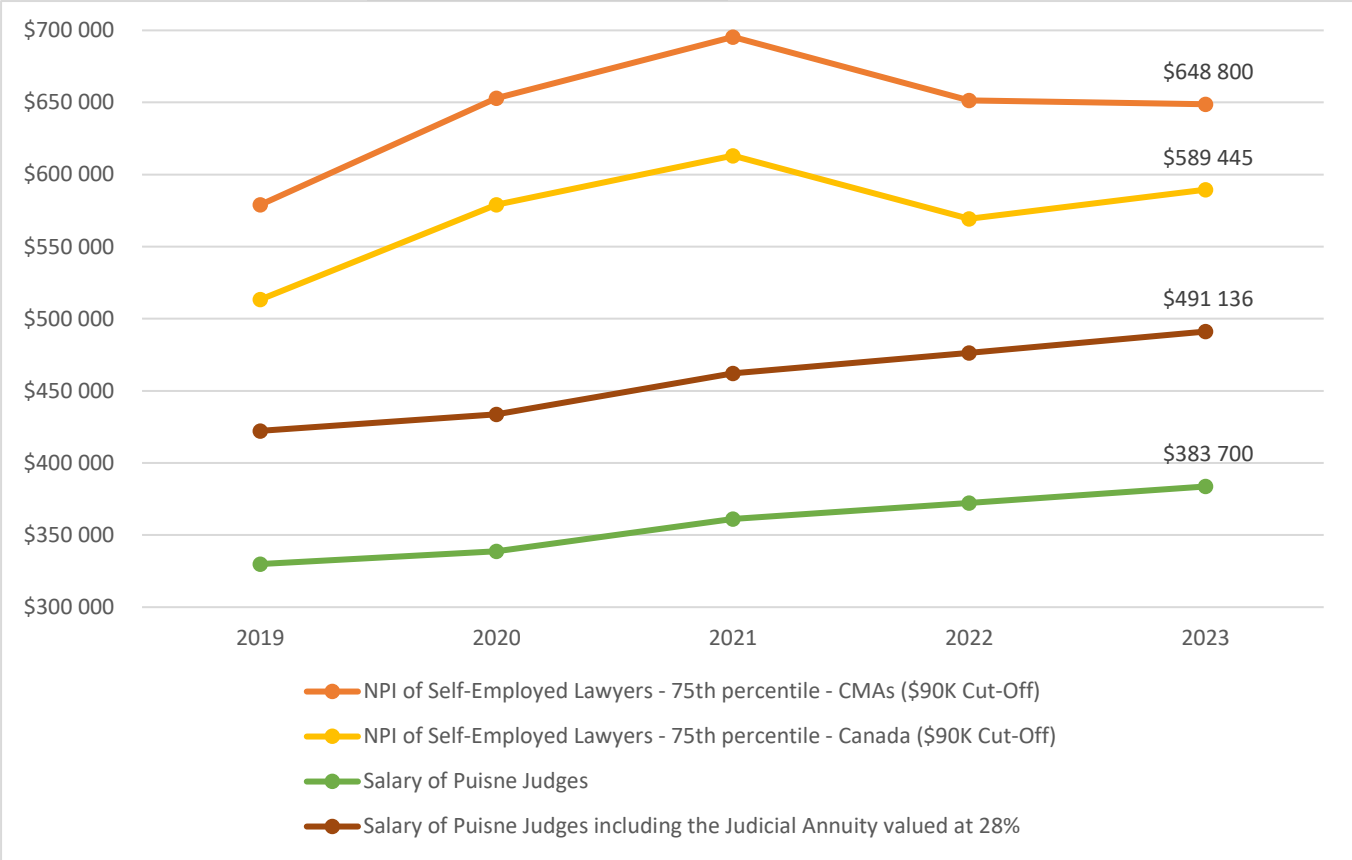
Table 7
Comparison of Salary of Puisne Judges Plus Annuity with CRA Net Professional Income of Self-Employed Lawyers at 75th Percentile
(Net Professional Income ≥ $90,000, Age Group – 44-56)
Top 10 CMAs, 2019 to 2023

Year	Salary of Puisne Judges	Salary of Puisne Judges (with Annuity of 28%)	75th Percentile Income (Top 10 CMAs)	Difference Between Judicial Salaries with Annuity and Self-Employed Lawyers at 75th Percentile (Top 10 CMAs)	% Difference Between Judicial Salaries with Annuity and Self-Employed Lawyers at 75th Percentile
2019	$329,900	$422,272	$579,000	-$156,728	-37,1%
2020	$338,800	$433,664	$652,880	-$219,216	-50,5%
2021	$361,100	$462,208	$695,430	-$233,222	-50,5%
2022	$372,200	$476,416	$651,475	-$175,059	-36,7%
2023	$383,700	$491,136	$648,800	-$157,664	-32,1%
Average	**$357,140**	**$457,139**	**$645,517**	**-$188,378**	**-41,4%**

164. The significant gap in compensation warrants this Commission's intervention, even more so considering that data on *incorporated* self-employed lawyers, who tend to be the higher earners, is not included in the above comparison.

165. The following graph compares the salary of puisne judges (already grossed up to account for the value of the annuity) between the years 2019 and 2023, with the net professional income of *unincorporated* self-employed lawyers across Canada and in the top 10 CMAs. The judicial compensation is clearly lagging.

Graph 3
Comparison of Salary of Puisne Judges Plus Annuity of Puisne Judges with CRA Net Professional Income ("NPI") of Self-Employed Lawyers at 75th Percentile (Net Professional Income ≥ $90,000, Age Group – 44-56)
Canada and Top 10 CMAs, 2019 to 2023

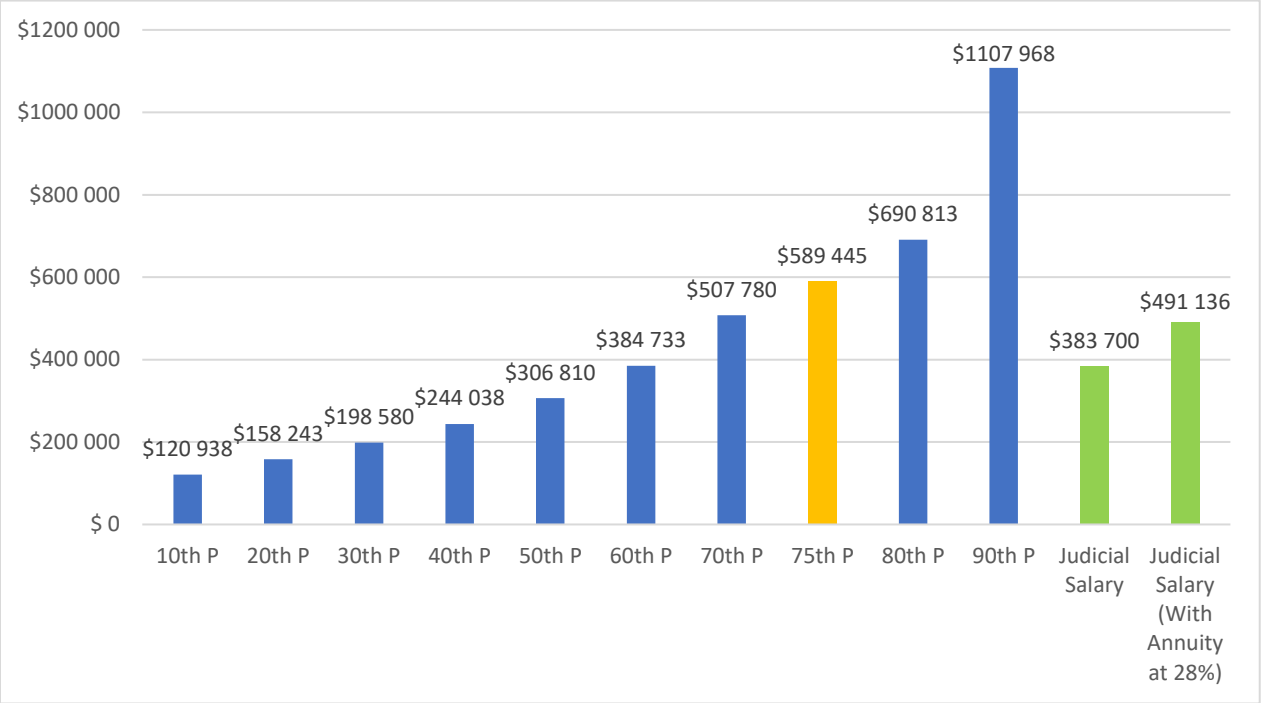


166. Another consideration is relevant for the Commission's inquiry. While the 75th percentile is a useful benchmark for comparison, it does not mean that lawyers at the higher percentages should be ignored for the purposes of the analysis. To put it simply, there will clearly be outstanding candidates in private practice who earn *more* than the 75th percentile, and they should not be unduly deterred from applying to the bench.

167. Yet, as illustrated by the chart below, outstanding candidates among lawyers in private practice with incomes at the 80th or the 90th percentile would likely be largely deterred from applying to the bench. In 2023, unincorporated self-employed lawyers at the 80th percentile

earned $690,813 across Canada. Those at the 90th percentile earned in excess of $1 million ($1,107,968).

Graph 4
Comparison of Salary of Puisne Judges Plus Annuity of Puisne Judges With CRA Net Professional Income of Self-Employed Lawyers at Each Decile and at the 75th Percentile ("P")[183]
(Net Professional Income ≥ $90,000, Age Group – 44-56)
Canada, 2023



168. While judicial salaries need not necessarily match the highest incomes in the legal profession, they must, to quote the Drouin Commission, be "sufficient to continue to attract outstanding candidates to the bench, including outstanding candidates from the most lucrative of legal services markets in Canada".[184]

169. In sum, given the need to attract outstanding candidates to the bench, including those in private practice, the substantial and persistent gap between the salaries of puisne judges

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183 Except for income of self-employed lawyers at the 75th percentile, the other figures were not provided directly by the CRA. However, this graph uses the same method that was used before the Rémillard Commission to arrive at the 75th percentile, which was not directly provided by the CRA. Specifically, the A method for arriving at the figure for the 75th percentile before the Rémillard Commission was to calculate the mean of the 15th and 16th tiles (75th and 80th percentiles, respectively) in a 20-tile table (see Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated March 29, 2016, at para. 107) [BED at tab 44]. The graph applies the same method to the most data provided by the CRA to arrive at other percentiles [JBD at tab 17]. For example, the average of the 16th and 17th tiles were used to arrive at the 80th percentile figure.

184 Drouin Report (2000), p. 43 [JBD at tab 9].

and the incomes of self-employed lawyers underscores the need for a significant adjustment in judicial salaries. The disparity becomes even more pronounced when considering the incomes of lawyers working through professional law corporations, the group to which we will now turn.

(2) Lawyers Practising Through a Professional Law Corporation

170. The private sector comparator is incomplete without integrating the income levels of lawyers who practice through a professional legal corporation (PLC). For the first time, this Commission is equipped with data providing a view of the incomes of lawyers within this group, which tend to be high-earning lawyers. The Association and Council build on this new data as follows:

a. Past Commissions have acknowledged that the CRA data on unincorporated self-employed lawyers excluded lawyers practicing through PLCs, resulting in a systematic undervaluation of the private sector comparator.

b. For the first time, both the CRA and Statistics Canada provided datasets related to the incomes of lawyers practicing through PLCs which include information on both corporate net income and partnership income of the PLC. In the professional opinion of Ernst & Young, (i) the more conservative Statistics Canada dataset is the more reliable source to assess the income of self-employed lawyers and (ii) the partnership income data is the only dataset that provides information on the income going *into* PLCs that are proper proxies for individual lawyers.

c. The same filters used to assess unincorporated self-employed lawyers should be applied to analyze the PLC data.

d. The data reveals, unsurprisingly, that incorporated self-employed lawyers earn substantially more than their unincorporated counterparts. It makes sense that the highest-earning lawyers would avail themselves of a structure that allows them to shelter their higher income from immediate taxation to the greatest extent possible. For 2022, the partnership income of incorporated self-employed lawyers at the 75th percentile was $830,000 across all ages and $1,020,900 for the 44-56 age range—far exceeding the judicial salary of $372,200, and even the grossed-up judicial salary of $476,416. These findings underscore the need for a substantial adjustment to judicial salaries to finally reflect the true private-sector comparator.

(a) The Missing Piece of the Puzzle: the Previously Uncaptured Incomes of Lawyers Practicing through Professional Corporations

171. Before past Commissions, the Association and Council consistently argued that the *real* gap between the judicial salaries and the income of self-employed lawyers was undoubtedly much larger than was revealed by the CRA data on (unincorporated) self-employed lawyers. This is because the CRA data simply did not capture high-income earners who have structured their practices as professional law corporations.

172. This flaw was acknowledged by previous Commissions:

    a. The Drouin Commission (2000) noted that lawyers who have established personal corporations and were not captured by the data on self-employed lawyers were "probably those with the higher incomes"[185]

    b. The McLennan Commission (2004) observed that the private sector comparator was probably conservative since "lawyers who have established personal corporations and are no longer reporting professional incomes are probably those with the higher incomes"[186]

    c. The Rémillard Commission (2016) noted that the CRA data regarding the income of self-employed lawyers poses "certain problems" because it "does not capture self-employed lawyers who structure their practices as professional corporations."[187]

    d. Finally, the Turcotte Commission (2021) noted with concern that "[t]he professional income earned through these professional corporations is not reflected in the available CRA data."[188] It emphasized that the implication of the CRA data under-reporting the income of higher-earning private sector lawyers was "inescapable" and that it did not have "a full view of the income of those lawyers in private practice, *especially those at the higher levels of professional income*."[189]

173. Since the issuance of the Turcotte Report, the Parties have sought to implement its recommendation regarding data collection and, specifically, to obtain data regarding the income levels of self-employed lawyers practising through a professional law corporation.

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185 Drouin Report (2000), p. 42 [JBD at tab 9].
186 McLennan Report (2004), p. 42 [JBD at tab 10].
187 Rémillard Report (2016), para. 58(a) [JBD at tab 13].
188 Turcotte Report (2021), para. 34 [JBD at tab 14].
189 Turcotte Report (2021), para. 159 [JBD at tab 14].

174. The new evidence now obtained confirms what the Association and Council had long suspected and argued: the CRA data on (unincorporated) self-employed lawyers dramatically underestimates the income levels of lawyers to be considered as part of the private sector comparator. It follows that past Commissions have unfortunately issued recommendations based on a truncated view of the incomes of lawyers in private practice. A correction is warranted now that this data is available to account for that heretofore missing piece of the puzzle. This Commission is the first to be in a position to issue a recommendation that ensures that judicial salaries are set at a level consistent with the *actual,* corrected private sector comparator.

(b) The Available Data Sources

175. The Government and the Judiciary jointly mandated both the CRA and Statistics Canada to assemble datasets to derive information on the income levels of those lawyers practising through a professional law corporation (PLC).

176. While the CRA data on *unincorporated* self-employed lawyers includes information up to 2023, both Statistics Canada and the CRA were only able to provide data on corporations up to 2022. Nevertheless, the data is highly illuminating.

177. CRA provided data regarding the net income of all corporations with NAICS code 541110 (Offices of lawyers), based on T2s (corporate tax returns). A NAICS code (North American Industry Classification System code) is a standardized classification used to categorize businesses based on the primary economic activity they engage in. The CRA data on PLCs also provides information for a *subset* of these corporations that receive income from a partnership.

178. Statistics Canada was also tasked with analyzing firm and individual income tax data, specifically focusing on PLCs under NAICS code 541110 (Offices of lawyers). Statistics Canada manually compiled and merged data from T1s (individual tax returns), T2s (corporate tax returns), and T5013s (reporting income from partnerships). Statistics Canada also provided information on both (1) the *net* income of all corporations with NAICS code 541110 (Offices of Lawyers), based on their T2s and (2) the partnership income share of incorporated and unincorporated partners, based on tax form T5013.

179. The request was primarily concerned with PLCs, the income that comes into PLCs, and the income that is paid out of PLCs to the lawyer. In terms of Recommendation 8(1), for PLCs where the lawyer is a partner in a law partnership, the Parties specified that the relevant

measure of income is the partnership income going *into* the PLC, not what the lawyer receives as salary or dividends (which latter amounts are largely governed by tax and personal considerations rather than the actual gross earnings of the lawyer).

180. After analysing the various data points available, Ernst & Young determined that the proper proxy for determining the income of incorporated self-employed lawyers was to use data on *partners* rather than the net income of all corporations with NAICS code 541110 (Offices of Lawyers), based on their T2s. More specifically, Ernst & Young chose to focus on the partner income share, as declared by the partnership. In the professional opinion of Ernst & Young, that data point is the most reliable figure because it properly reflects the income flowing from a partnership and into a PLC, and therefore most accurately captures the compensation of self-employed lawyers practicing through a professional corporation.[190]

181. Conversely, data derived from the datasets comprising all corporations with NAICS code 541110, based on their T2s, does not provide a suitable proxy to estimate the income of self-employed lawyers. Ernst & Young comes to this conclusion for two reasons. Firstly, using datasets that include indiscriminate data on *all* corporations with a specific NAICS code makes it impossible to isolate incorporated individual self-employed lawyers, who represent only a subset of all corporations included in the NAICS code. The data on all legal corporations contains other entities that are not a proxy for individual lawyers, such as law firms operating as corporations with multiple shareholders.[191]

182. Secondly, the data points derived from the datasets comprising all corporations with NAICS code 541110, based on their T2s, do not allow one to properly calculate the total income of incorporated self-employed lawyers, as they only provide the *net* income of the corporation. Critically, these data points do not provide the *gross* income coming into the corporation from the partnership,[192] which is the information that should be considered to estimate the income of a single incorporated partner. This is why the Parties specified that the relevant measure of income is the partnership income going *into* the PLC, not what comes *out* as salary or dividends.[193]

183. If one considers the example of a single incorporated lawyer, the *net* income of the PLC is not representative of the actual compensation of that lawyer, as lawyers will typically pay

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190 Ernst & Young, Report on Private Sector Compensation (December 20, 2024), p. 12 [BED at tab D].
191 *Id.*, p. 33 [BED at tab D].
192 *Id.*, p. 33 [BED at tab D].
193 Appendix A to the Letter of Agreement between Statistics Canada and the Department of Justice (June 19, 2024), Detailed Work Description, [BED at tab 93].

themselves a portion of the income as salary, thereby reducing the net income declared by the PLC on its T2. Further, if one considers the example of a NAICS code 541110 corporation that consists in law firm with multiple shareholders, the *total net* income of the entire firm does not provide insight into the compensation of individual lawyers.

184. In sum, the legal corporation datasets (T2) do not provide the right information required to accurately capture the compensation of incorporated self-employed lawyers. By contrast, the partnership (T5013) dataset provided by Statistics Canada includes each partners' share of the net partnership income, and thus presents the best tool to estimate the income of incorporated self-employed lawyers.

(c) The Applicable Filters

185. For the reasons outlined above (at paras. 119 to 144), the following filters discussed above should be applied to the newly-available data, namely:

a. The low-income exclusion, adjusted from $80,000 to $90,000 to reflect inflation over the past four years;

b. The focus of the analysis should be the 44-56 age group, from which a majority of judges are appointed;

c. The 75th percentile remains the relevant parameter.

186. Applying the age filter poses a challenge in the context of PLCs since neither the CRA data on PLCs nor the relevant Statistics Canada datasets are filtered by age.[194] To address this gap in the data, Ernst & Young calculated appropriate age and income ratios based on the CRA data on *unincorporated* self-employed lawyers (for which age data exists), and applied these same ratios to the Statistics Canada data to arrive at an estimated value of the income of incorporated partners in the 44-56 age group.[195]

(d) The Relevant Figures Regarding the Income Levels of Incorporated Self-Employed Lawyers

187. The Association and Council have sought the assistance of Ernst & Young to analyse and seek to reconcile the data on PLCs provided by CRA and Statistics Canada. For the

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194 Statistics Canada did provide some data on PLCs filtered by age. However, this is not the case for data on PLCs that receive partnership income – which, as explained, is the relevant data set in the submission of the Association and Council.

195 Ernst & Young, Report on Private Sector Compensation (December 20, 2024), pp. 24-25 [BED at tab D].

reasons set out in their report, Ernst & Young advises that, in their professional opinion, the Statistics Canada data on PLCs is more reliable than the equivalent data obtained from the CRA. The main reason for this opinion is that there are inconsistencies in the CRA dataset.[196] It is important to note that the Statistics Canada dataset regarding PLCs is actually more conservative than the figures yielded by the CRA dataset. As such, the income levels of PLCs receiving partnership income would have been higher had Ernst & Young used the CRA data.[197]

188. Applying a low-income exclusion of $90,000 to the income levels of PLCs reporting partnership data at the 75th percentile, as provided by Statistics Canada, the relevant PLC comparator for 2022 is $830,000. When this figure is adjusted to focus on the 44-56 age range, the figure rises to $1,020,900.[198] Again, by comparison, the judicial salary in 2022 was $372,200. When grossed up by 28% to account for the value of the judicial annuity, the relevant figure is $476,416.

Table 8
Comparison of Salary of Puisne Judges with Statistics Canada Net Partnership Income of Incorporated Lawyers Receiving Partnership Income
(Partnership Income ≥ $90,000, All Ages)
Canada, 2019 to 2022

Year	Salary of Puisne Judges	Salary of Puisne Judges (with Annuity of 28%)	75th Percentile Income (PLCs – All Ages)	Difference Between Grossed up Judicial Salaries and PLCs at 75th Percentile	% Difference Between Grossed up Judicial Salaries and PLCs at 75th Percentile
2019	$329,900	$422,272	$723,000	-$300,728	-71,2%
2020	$338,800	$433,664	$803,000	-$369,336	-85,2%
2021	$361,100	$462,208	$891,000	-$428,792	-92,8%
2022	$372,200	$476,416	$830,000	-$353,584	-74,2%
Average	**$350,500**	**$448,640**	**$811 750**	**-$363,110**	**-80,9%**

196 Ernst & Young, Report on Private Sector Compensation (December 20, 2024), pp. 31-32 [BED at tab D].
197 *Id.*, p. 31 [BED at tab D].
198 *Id.*, p. 25 [BED at tab D].

Table 9
Comparison of Salary of Puisne Judges with Statistics Canada Net Partnership Income of Incorporated Lawyers Receiving Partnership Income (Partnership Income ≥ $90,000, 44-56 Age Range Estimation) Canada, 2019 to 2022

Year	Salary of Puisne Judges	Salary of Puisne Judges (with Annuity of 28%)	75th Percentile Income (PLCs – Age 44-56)	Difference Between Grossed up Judicial Salaries and PLCs (Age 44-56) at 75th Percentile	% Difference Between Grossed up Judicial Salaries and PLCs (Age 44-56) at 75th Percentile
2019	$329,900	$422,272	$882,060	-459,788 $	-108,9%
2020	$338,800	$433,664	$1,003,750	-570,086 $	-131,5%
2021	$361,100	$462,208	$1,095,930	-633,722 $	-137,1%
2022	$372,200	$476,416	$1,020,900	-544,484 $	-114,3%
Average	**$350,500**	**$448,640**	**$1,000,660**	**-552,020 $**	**-122,9%**

189. As shown in the tables above, and as previous Commissions had suspected, partners practising through professional law corporations are among the highest earners in the legal profession. In 2022, the gap between judicial salaries (even grossed up to account for the judicial annuity) and the income levels of partners practising through a PLC reached **$353,584** (or 74.2% of grossed up judicial salaries). Accounting for the 44-56 age range, the gap increases to **$544,484**.

190. In a nutshell, the newly available data on the incomes of partners practising through PLCs represents a sea change for the use of the private sector comparator. It reveals that, as suspected, past Commissions were unfortunately provided with data that systematically and significantly undervalued the income of self-employed lawyers in private practice. An material correction is thus required.

(3) Conclusion: The Gap Between the Private Sector Comparator and the Judicial Salary

191. In 2021, the Association and Council submitted to the Commission that "the real gap between the incomes earned by self-employed lawyers and the judicial salary is significantly greater than that reflected in the CRA data."[199] The newly-available evidence on the income of lawyers practising through law corporations not only confirms that this submission was accurate, but demonstrates that the *real* gap is, in reality, wider than previously thought.

192. The Association and Council asked Ernst & Young to integrate the data received on the income levels of *unincorporated* self-employed lawyers from the CRA ($569,330 in 2022) with the data received by Statistics Canada on the income levels of *incorporated* lawyers ($1,020,900 in 2022), applying the relevant filters. Ernst & Young combined both figures based on the relative proportion of unincorporated self-employed lawyers and incorporated lawyers.

193. The results are shown in the table below. In 2022, the accurate private sector comparator was **$774,408**, more than **$400,000** above the judicial salary. The private sector comparator also exceeds by almost **$300,000** the grossed-up amount to account for the value of the judicial annuity.

199 Submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated March 29, 2021, para. 145 [BED at tab 45].

Table 10
Comparison of Salary of Puisne Judges with
Weighted Income of Incorporated and Unincorporated Self-Employed Lawyers
(Income ≥ $90,000, 44-56 Age Range Estimation)
Canada, 2019 to 2022

Year	Salary of Puisne Judges	Salary of Puisne Judges (with Annuity of 28%)	75th Percentile Income Incorporated and Unincorporated Lawyers	Difference Between Grossed up Judicial Salaries and Incorporated and Unincorporated Lawyers at 75th Percentile	% Difference Between Grossed up Judicial Salaries Incorporated and Unincorporated Lawyers at 75th Percentile
2019	$329,900	$422,272	$656,976	-$234,704	-55,6%
2020	$338,800	$433,664	$753,538	-$319,874	-73,8%
2021	$361,100	$462,208	$815,874	-$353,666	-76,5%
2022	$372,200	$476,416	$774,408	-$297,992	-62,5%
Average	**$350,500**	**$448,640**	**$750,177**	**-$301,537**	**-67,2%**

194. This persistent, dramatic gap is a serious obstacle to ensuring that outstanding members of the Bar remain interested in considering a judicial appointment. Importantly, it is an obstacle that strikes at the heart of the criterion set out in the *Judges Act* regarding the need to attract outstanding candidates to the judiciary.

195. Past Commissions have never had the benefit of the required evidence to attest to the magnitude of the gap between the income earned by *unincorporated* and *incorporated* self-employed lawyers and the judicial salary. It has now become clear that an immediate special adjustment is required to ensure that judicial salaries begin to reflect the new actual data on the private sector comparator.

4. Other Objective Criteria that the Commission Considers Relevant

196. Pursuant to section 26(1.1)(d) of the *Judges Act*, the Commission may consider "any other objective criteria" that it considers relevant. The rationale for this residual provision is that to "allow the commission the capacity to do its work […] it must be able to consider other criteria, but in an objective manner."[200]

197. The Association and Council examine two supplementary factors under this rubric: (a) the compensation levels of the most senior deputy-ministers, otherwise designated in past Commission reports as the "public sector comparator"; and (b) the evolving roles and responsibilities of Canadian judges.

a) The Public Sector Comparator: The Compensation of the Most Senior Deputy Ministers

198. In this section, the Association and Council make the following submissions regarding the compensation levels of the most senior deputy-ministers – the second key comparator examined by past Commissions:

1) The compensation levels of the most senior deputy-ministers have been a relevant factor for Triennial and Quadrennial Commissions. This comparator seeks to maintain a relationship between judges' salaries and the remuneration of senior federal public servants whose attributes most closely parallel those of superior court judges.

2) While past Commissions have focused on the midpoint of the DM-3 salary range plus one half of available at-risk pay (the so-called "DM-3 Block Comparator"), recent developments require that the public sector comparator also include consideration of (a) the compensation of DM-4s and (b) the actual total average compensation of DM-3s.

3) In 2023, the DM-3 Block Comparator and the salary of puisne judges were roughly equivalent. However, this is not the case for (a) the midpoint of the DM-4 salary range plus one half of available at-risk pay, which exceeds the salary of puisne judges by $62,035 and (b) the total average DM-3 compensation, which was $57,854 above the salary of puisne judges.

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200 Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No 37, 1st Sess, 36th Parl, October 22, 1998, p. 37:21 [BED at tab 35].

(1) Origin and Lineage

199. Because the most senior deputy ministers are not a significant source of recruitment for the judiciary, as noted by the Drouin Commission, the public sector comparator is only properly considered under the residual fourth criterion set out in s. 26(1.1)(d) – "any other objective criteria that the Commission considers relevant".[201]

200. In 1975, Parliament amended the *Judges Act* to make the salary level of puisne judges roughly equivalent with the midpoint salary of the most senior level of deputy ministers, at that time deputy ministers at the highest level, which was level 3 (hence, "DM-3s").[202] That language is no longer found in the statute.

201. Nonetheless, in the intervening years, the Triennial Commissions still considered judicial salaries in relation to the compensation of the most senior level of deputy-ministers (DM-3s), as did the first Quadrennial Commission, the Drouin Commission.

202. The Drouin Commission (2000) explained its rationale for the continued relevance of the DM-3 comparator: "the important aspect of the DM-3 comparator, for the purposes of our inquiry, is the maintenance of a relationship between judges' salaries and the remuneration of those senior federal public servants whose skills, experience and levels of responsibilities most closely parallel those of the Judiciary."[203] The Commission concluded that the relationship between judicial salaries and the remuneration of DM-3s should be maintained as a reflection of "what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges."[204] The Block and Levitt Commissions endorsed this characterization of the public sector comparator.[205]

203. The long-standing comparison that is made between the salary of puisne judges and the compensation of the most senior deputy ministers is not based on the hypothesis that lawyers who might consider applying to the bench might also consider the upper echelons of the executive branch. Nor is the comparison based on some purported resemblance between the functions of the most senior deputy ministers and those of superior court

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201 Drouin Report (2000), pp. 9 and 23 [JBD at tab 9]. See also Submissions of the Government to the Turcotte Commission, March 29, 2021, para. 51 [BED at tab 46].

202 Turcotte Report (2021), para. 129 [JBD at tab 14].

203 Drouin Report (2000), p. 31 (emphasis added) [JBD at tab 9].

204 Drouin Report (2000), p. 32 [JBD at tab 9], Scott Report (1996), at p. 13 [BED at tab 55]; Report and Recommendations of the 1989 Commission on Judges' Salaries and Benefits, March 5, 1990 (Courtois Report), at p. 10 [BED at tab 53].

205 Block Report (2008), para. 103 [JBD at tab 11]; Levitt Report (2012), paras. 26-27 [JBD at tab 12].

judges. Rather, the expressed reason for the historic relationship between judicial salaries and the salaries of the most senior deputy-ministers, has to do with a similarity in attributes.

(2) The DM-3 Block Comparator and the Average Compensation of the Most Senior Deputy Ministers

204. The Block Commission rightly considered that performance pay, otherwise known as "at risk pay", is an integral component of the cash compensation of deputy ministers, particularly given that this is not available to the judiciary. It decided to define the public sector comparator as the midpoint of the DM-3 salary range plus one half of available at-risk pay. This midpoint is the half-way point of a theoretical range, not the average or median figure of the actual salary paid. This has since been referred to as the Block Comparator.[206]

205. The Rémillard Commission noted that the public sector comparator should not be used in a "formulaic benchmarking" fashion.[207] The DM-3 comparator is only a "reference point against which to test whether judges' salaries have been advancing appropriately in relation to other public sector salaries."[208]

206. The Association and Council submitted before the Block Commission that the total *average* compensation of DM-3s (average salary plus total average performance pay) was the more relevant figure for comparison purposes. The Block Commission agreed that "[a]verage salary and performance pay may be used to demonstrate that judges' salaries do retain a relationship to actual compensation of DM-3s". Nonetheless, the Block Commission declined to adopt the total average compensation as the formal yardstick at that time because it believed that, due to the small number of DM-3s, any figure based on an actual average could fluctuate too much from year to year to assist the Commission in establishing any long-term comparison between the compensation of DM-3s and judges. The Rémillard and the Turcotte Commissions followed this approach.[209]

207. Based on the latest data received on the incomes of DM-3s, in 2024, the Block Comparator stood at $397,148.50.

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206 Turcotte Report (2021), para. 130 [JBD at tab 14]; Block Report (2008), paras. 108, 111 [JBD at tab 11].

207 Rémillard Report (2016), para. 47 [JBD at tab 13].

208 *Id.* [JBD at tab 13].

209 Rémillard Report (2016), para. 50 [JBD at tab 13]; Turcotte Report (2021), paras. 146-147 [JBD at tab 14].

208. For the reasons set out below, the Association and Council submit that the public sector comparator must *also* include consideration of both (a) the compensation of DM-4s and (b) the actual total average compensation of DM-3s.

(a) The Income Levels of DM-4s

209. When examining the public sector comparator, past Commissions have focused solely on the compensation of DM-3s. However, DM-3s are no longer the most senior deputy ministers. Following a recommendation of the Advisory Committee on Senior Level Retention and Compensation (the Strong Committee), dated December 2000, DM-4s are the most senior deputy ministers. Given that the public sector comparator was designed to consider the compensation of the most senior level of deputy minister, and considering that the DM-4s – both in number and in proportion to DM-3s – have recently increased, it is appropriate that the compensation of DM-4s should be considered by this Commission.

210. In 2000, the Strong Committee recommended in its report the creation of a DM-4 level. The Committee stated that its recommendation for the creation of a DM-4 level "ensures greater equity between the most senior deputy ministers and the CEOs of some of the larger Crowns and sends an important message in terms of the government's willingness to attract and retain qualified and experienced staff."[210] The echoes of this Commission's role are unmistakable.

211. Before the McLennan Commission (2004), the Association and Council were prepared to accept that the Commission compare judicial salaries with the midpoint of the remuneration (including at-risk pay) of DM-3s. The Judiciary stated that it was adopting this position because the DM-4 category was newly introduced, was composed of only two individuals at the time, and remained in a state of flux. In fact, the Association and Council "expressly reserve[d] their right to rely on the DM-4 compensation level as the relevant comparator on appearances before future Quadrennial Commissions."[211]

212. Before the Block Commission (2008), the Association and Council emphasized that there was "no indication that the DM-4 category will be phased out, and there is no reason to ignore it in the comparison between judicial compensation and the compensation of the

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210 Advisory Committee on Senior Level Retention and Compensation, Third Report: Dec 2000 at 41 [BED at tab 76].

211 Submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated December 15, 2003, at para. 67 [BED at tab 36].

most senior deputy ministers."[212] However, the Block Commission decided not to alter the DM-3 comparator at that time. It reasoned that "[s]ince only two deputy ministers are paid at the DM-4 level, and this level appears to be reserved for exceptional circumstances and positions of particularly large scope, we see no justification at this time to use it as a comparator in determining the adequacy of judicial salaries."[213] There has been no fresh consideration of that issue since that time.

213. The exclusion of DM-4s from the analysis should now be reconsidered for four reasons.

214. First, the public sector comparator calls for comparison of judicial salaries with the compensation of the most senior deputy ministers. That group must *necessarily* include DM-4s.

215. Second, the rationale for comparing judicial salaries with the salaries of DM-3s applies with greater force to DM-4s. As indicated, the purpose of the public sector comparator is to determine "what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges." DM-4s clearly exhibit such attributes.

216. Third, while the Association and Council reservedly accepted the DM-3s as the appropriate public sector comparator when the DM-4 category was still new and evolving in 2004, this is no longer valid. The DM-4 category has now been in existence for over 20 years. There is no principled reason to ignore it when comparing judicial salaries with the compensation of the most senior deputy ministers.

217. Finally, and most importantly, the rationale underlying the conclusion of the Block Commission is no longer valid, as the proportion of DM-4s relative to DM-3s has increased since its report. This represents a material change in circumstances justifying a departure from the conclusion of the Block Commission.

218. In 2006-2007, only two deputy ministers were paid at the DM-4 level, compared to 10 at the DM-3 level. This means DM-4s accounted for just 16% of the combined number of DM-3s and DM-4s.[214] However, the table below illustrates that between 2018 and 2024, the

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212 Submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated December 14, 2007, para. 99 [BED at tab 38].

213 Block Report (2008), para. 105 [JBD at tab 11].

214 Reply Submissions of the Government of Canada, dated January 29, 2008, page 21, footnote 26 [BED at tab 39].

number of DM-4s has increased and now represents a more meaningful proportion of the combined number of individuals from levels DM-3 and DM-4.[215]

Table 11
Number and Proportion of Individuals at the DM-3 and DM-4 Levels
2018-2023

Year	Number of Individuals from Level DM-3	Number of Individuals from Level DM-4	Total Number of Individuals from Levels DM-3 and DM-4	Proportion of Individuals from Level DM-4 in Relation to the Total Number
2018-2019	14	4	18	22.2 %
2019-2020	11	3	14	21.4%
2020-2021	11	6	17	35.2%
2021-2022	12	6	18	33.3%
2022-2023	14	4	18	22.2 %
2023-2024	13	4	17	23.5%

219. As such, a comparison between DM-4 compensation and the salary of puisne judges is now justified.

220. The following table presents the Block Comparator in relation to DM-4s (i.e., the midpoint of the DM-4 salary range plus one half of available at-risk pay). It shows that, between 2018 and 2022, judicial salaries have consistently fallen between 12 and 17.5% below the DM-4 comparator.[216]

[215] Privy Council Office, Deputy Minister Average Salary, Mid-point and Counts [JBD at tab 33].

[216] Again, this far exceeds the already considerable 7.3% gap between the DM-3 comparator and the salary of puisne judges which the Levitt Commission acknowledged "tests the limits of rough equivalence" Levitt Report (2012) at para. 52 [JBD at tab 12].

Table 12
Comparison of Judicial Salary and Block Comparator DM-4 Compensation, 2018-2024

Date	DM-4 Salary Range	DM-4 Mid-Point Salary[217]	Block Comparator - DM-4[218]	Judicial Salary	Difference Between Block Comparator and Judicial Salary Compensation	% Difference Between Block Comparator and Judicial Salary Compensation
2018	$299,900 - $352,800	$326,350	$389,988.25	$321,600	$68,388.25	-17,5%
2019	$306,600 - $360,600	$333,600	$398,652.00	$329,900	$68,752.00	-17,2%
2020	$311,200 - $366,100	$338,650	$404,686.75	$338,800	$65,886.75	-16,3%
2021	$315,900 - $371,600	$343,750	$410,781.25	$361,100	$49,781.25	-12,1%
2022	$331,100 - $389,500	$360,300	$430,558.50	$372,200	$58,358.50	-13,6%
2023	$342,800 - $403,200	$373,000	$445,735.00	$383,700	$62,035.00	-16,2%
2024	$350,500 - $412,300	$381,400	$455,773.00	$396,700	$59,073.00	-13,0%

(b) The Total Average Compensation of DM-3s

221. While the Association and Council do not propose that the Block Comparator be abandoned, the total actual average compensation of DM-3s remains an important factor for this Commission to consider in determining whether the relationship between judicial salaries and the actual remuneration of DM-3s is maintained.

222. In 2021, the Association and Council highlighted two noticeable trends: first, "a disparity between the Block Comparator and the actual average DM-3 compensation figures, which disparity has persisted through the past three quadrennial cycles; and second, an increasing delta between the total average compensation of DM-3s and the judicial salary."[219] These trends have persisted during the latest quadrennial period.

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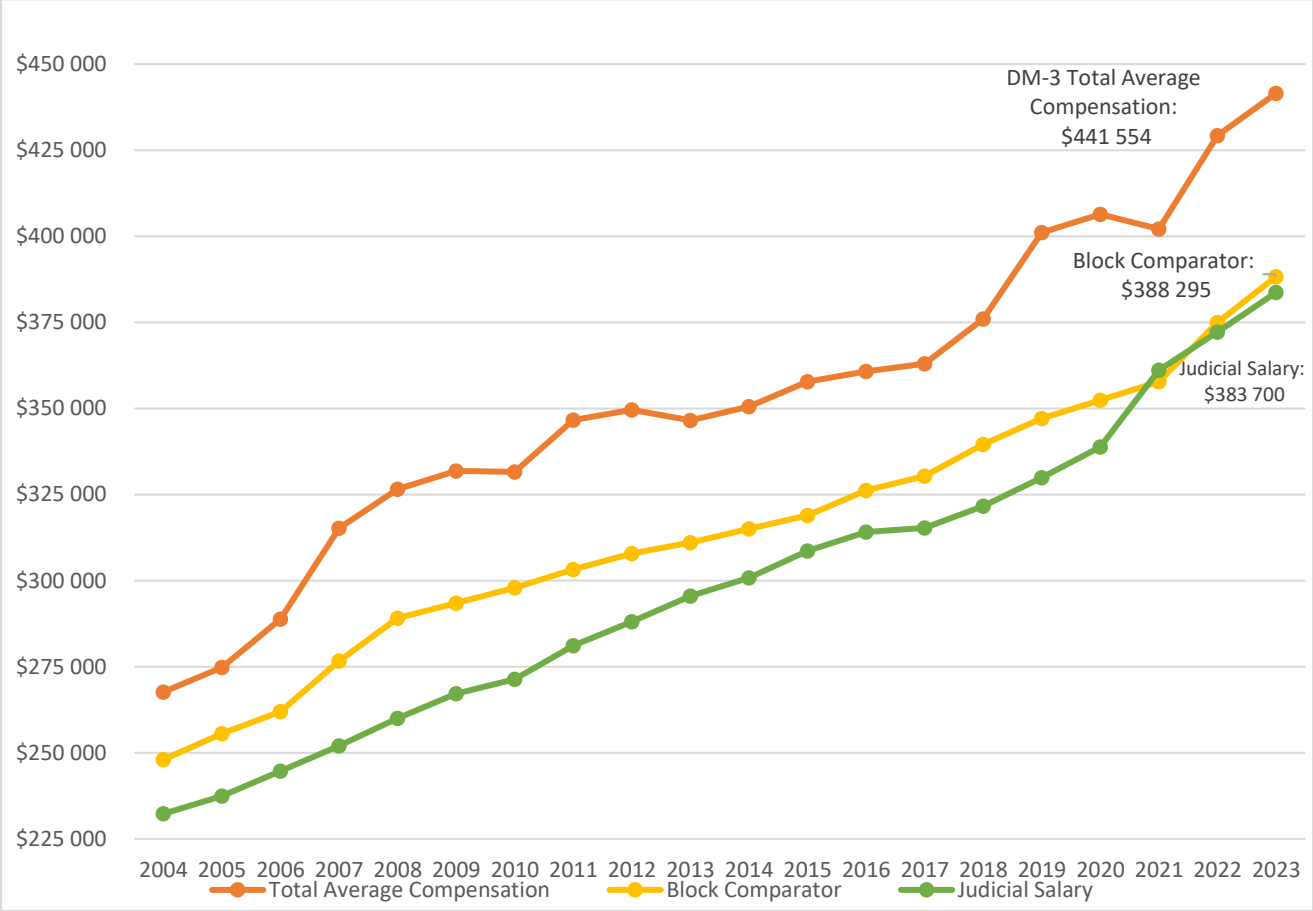
217 Privy Council Office, Deputy Minister Average Salary, Mid-point and Counts [JBD at tab 33].

218 Based on half of a maximum at-risk pay, which is 39% of the base salary for DM-4s (Privy Council Office, GIC Salary Ranges and Performance Pay) [JBD at tab 27].

219 Submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated March 29, 2021, para. 104 [BED at tab 45].

223. The following graphical representation illustrates the first trend: the continuing disparity between the Block Comparator and the total average compensation of DM-3s.[220]

Graph 5
Comparison of Block Comparator and DM-3 Total Average Compensation, 2004-2023[221]



224. As the table below shows, the Block Comparator has been between 9% and 13.5% lower than the total actual average compensation of DM-3s on a yearly basis since the year 2018. The gap between the Block Comparator and the DM-3s' total average compensation has grown to 12.1% ($53,259) in 2023.

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220 This table spans the years 2004 to 2022 since no information is available on the Total Average Compensation of DM-3s for the years 2023 and 2024.

221 Sources are the following: Submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated March 29, 2021, p. 36 [BED at tab 45]; Turcotte Report (2021), para. 140 [JBD at tab 14]; Privy Council Office, Deputy Minister Distribution of At-Risk Pay [JBD at tab 29].

Table 13
Comparison of Block Comparator and DM-3 Total Average Compensation, 2018-2023

Date	Block Comparator	Total Average Compensation	Difference Between Block Comparator and Total Average Compensation	% Difference Between Block Comparator and Total Average Compensation
2018	$339,598	$376,021	- $36,424	-9,7%
2019	$347,112	$401,109	- $53,997	-13,5%
2020	$352,413	$406,363	- $53,951	-13,3%
2021	$357,772	$402,083	- $44,312	-11,0%
2022	$375,014	$429,236	- $54,223	-12,6%
2023	$388,295	$441,554	- $53,259	-12.1%
2024	$397,149	N/A	N/A	N/A

225. The table below illustrates the second trend, namely, the persisting delta between the total average compensation of DM-3s and the judicial salary. More specifically, it shows that since the year 2018, the judicial salary of puisne judges has been between 10% and 18.8% lower than the total average compensation of DM-3s on a yearly basis.

Table 14
Comparison of Judicial Salary and Total Average DM-3 Compensation, 2018-2023

Date	Total Average Compensation	Judicial Salary	Difference Between Total Average Compensation of DM-3s and Judicial Salaries	%Difference Between Total Average Compensation of DM-3s and Judicial Salaries
2018	$376,021	$321,600	-$54,421	-14,5%
2019	$401,109	$329,900	-$71,209	-17,8%
2020	$406,363	$338,800	-$67,563	-16,6%
2021	$402,083	$361,100	-$40,983	-10,2%
2022	$429,236	$372,200	-$57,036	-13,3%
2023	$441,554	$383,700	-$57,854	-13.1%
2024	N/A	$396,700	N/A	N/A

226. In 2023, the salary of puisne judges was 13.1% (or $57,854) lower than the DM-3 total average compensation. This delta also raises a serious question as to whether "judges' salaries do retain a relationship to the actual compensation of DM-3s".[222]

227. One reason for the problem is clear – although there is a band of potential performance pay, the actual performance pay has been pushed into the upper echelons of that band. In essence, the lower half of the performance pay band is simply not used to the extent one would assume when using a midpoint.[223] As such, judicial salaries are being tested against a wholly artificial notion because the government has chosen not to impose the midpoint upon their DM-3s, choosing to compensate them into the upper end of the band. Judges should receive that same consideration.

(3) Conclusion: There Exists a Gap Between the Compensation of the Most Senior Deputy Ministers and the Salary of Puisne Judges

228. As of April 1, 2023:

a. The salary of a puisne judge was $383,700;

b. The DM-3 Block Comparator was $388,295;

c. The actual total average compensation of DM-3s was $441,554;

d. The DM-4 Block Comparator was $445,773.[224]

229. While in 2023 the DM-3 Block Comparator and the salary of puisne judges were roughly equivalent, the same cannot be said if consideration is also given to:

a. The gap between the Block Comparator for DM-4s and the salary of a puisne judge: $62,035, a -16,2% difference; or to

b. The gap between the total average DM-3 compensation and the salary of a puisne judge: $57,854, a -13.1% difference.

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222 Block Report (2008) at para. 106 [JBD at tab 11].

223 For the years 2022-2023 and 2023-2024, no DM-3 received less than 15% as actual performance pay. See Privy Council Office, Deputy Minister Distribution of At-Risk Pay [JBD at tab 29].

224 To preserve confidentiality, the Government has not provided information concerning the average compensation of DM-4s.

b) Evolution of the Role and Responsibilities of Canadian Judges

230. Already in 2000, the Drouin Commission noted that the role and responsibilities of judges "has undergone significant change over the years":

> There are increasing, and ever-shifting, demands placed upon the Judiciary. As a result of the introduction of the Charter, the growth in litigation in Canada, the complexity of the matters which actually proceed before the courts, and intensified public scrutiny of judicial decisions, the process and requirements of "judging" have become more onerous at both the trial and appellate levels. There is no reason to conclude that this will change during the planning period relevant to our report.[225]

231. This statement remains true today. Chief Justice Morawetz has observed "a significant rise in the complexity of cases that come before Canada's superior courts" over recent years.[226]

232. Civil litigation continues to grow increasingly complex, often with multiple expert witnesses. In the class action realm, the Judiciary must contend with the "modern realities of increasingly complex litigation involving parties and subject matters that transcend provincial borders."[227] Such cases require that judges be "adept at managing multi-party litigation and steering complex procedural dynamics."[228] Commercial disputes require mastery of technical information. In many provinces, there are specialist judges who take carriage of restructuring and insolvency proceedings; such judicial specialization is "essential to meet the challenges of complex restructuring and insolvency proceedings, often called the 'hothouse of real-time litigation'".[229]

233. In public law, the traditional role of judges as arbiters settling disputes and adjudicating the rights of the parties has evolved considerably.[230] The introduction of the *Charter* effected a "revolutionary transformation of the Canadian polity";[231] judges seized of Charter litigation

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225 Drouin Report (2000), p. 17 [JBD at tab 9]. See also McLennan Report (2004), p. 5: "If anything, those factors are even more relevant in 2004, given the involvement of the courts in such diverse and controversial matters as same-sex marriage, First Nation land claims and constitutional challenges to legislation. One vivid example serves to signify the issue – the child pornography decision in *R. v. Sharp*, where the trial judge was widely (but totally improperly) vilified in some quarters for concluding that the relevant sections of the Criminal Code violated the provisions of the Canadian Charter of Rights and Freedoms." [JBD at tab 10]

226 Statement of Chief Justice Morawetz, December 20, 2024, para.8 [BED at tab A].

227 *Endean v. British Columbia*, 2016 SCC 42, para. 48 [BED at tab 9].

228 Statement of Chief Justice Morawetz, December 20, 2024, para.10(d) [BED at tab A].

229 *Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41, paras. 69-70 [BED at tab 14]. See also Statement of Chief Justice Morawetz, December 20, 2024, para.10(a) [BED at tab A].

230 *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, at para. 108 [BED at tab 25].

231 *Canada (Attorney General) v. Power*, 2024 SCC 26, para. 94 citing L. E. Weinrib, "Canada's *Charter of Rights*: Paradigm Lost?" (2002), 6 *Rev. Const. Stud.* 119, at p. 120 [BED at tab 4].

are now often called upon to review voluminous social science evidence.[232] To cite another example, cases involving Aboriginal claims are often "long and expensive, not only in economic but in human terms,"[233] and require learning new legal traditions and reconciling them within the Canadian legal structure.[234]

234. In 2021, the Ethical Principles for Judges were updated and expanded for the first time in twenty years to take account the evolving role and responsibilities of judges and provide guidance in areas such as case management and settlement conferences, social media, interacting with self-represented litigants, professional development, the post-judicial role, and "to reflect the fact that judges are expected to be alert to the history, experience and circumstances of Canada's Indigenous peoples, and to the diversity of cultures and communities that make up this country."[235]

235. Access to justice being the greatest challenge to the rule of law in Canada today,[236] Canadian judges no longer serve the Canadian public merely in their traditional role as adjudicators. They are now at the forefront of the "culture shift" identified by the Supreme Court in *Hryniak*.[237] Judges are now required to "actively manage the legal process in line with the principle of proportionality."[238] In many provinces, the rules of procedure confer on judges a role as "protectors of the judicial process and the various Parties' rights."[239] Professor Piché (as she then was) summed it up when she observed that Canadian judges are often called upon to play the "extraordinary" roles of "law-maker, interpreter, manager, (often) psychologist, administrator, and mediator".[240]

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232 See, e.g., the description of the evidentiary record in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 15: "The evidentiary record consists of over 25,000 pages of evidence in 88 volumes. The affidavit evidence was accompanied by a large volume of studies, reports, newspaper articles, legislation, Hansard and many other documents. Some of the affiants were cross-examined." [BED at tab 3].

233 *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, para. 186 [BED at tab 6].

234 See also Statement of Chief Justice Morawetz, December 20, 2024, para.10(c) [BED at tab A].

235 Canadian Judicial Council, *The Canadian Judicial Council publishes new Ethical Principles for Judges* (June 9, 2021) [BED at tab 64].

236 *Hryniak v. Mauldin*, 2014 SCC 7 , para. 1. [*Hryniak*] [BED at tab 11].

237 *Hryniak*, para. 2 [BED at tab 11].

238 *Hryniak*, para. 32 [BED at tab 11].

239 *MediaQMI inc. v. Kamel*, 2021 SCC 23, para. 97, citing J. Plamondon, "Les principes directeurs et le nouveau *Code de procédure civile* (art. 17 à 24 C.p.c.)", in S. Guillemard, ed., *Le Code de procédure civile: quelles nouveautés?* (2016), 27, at pp. 38-39 (Wagner C.J. and Kasirer J., dissenting, but not on this point) [BED at tab 13].

240 C. Piché, « Un juge extraordinaire », dans S. Guillemard, ed., Le Code de procédure civile : quelles nouveautés? (Cowansville: Éd. Yvon Blais, 2016) p. 226 (our translation) [BED at tab 30].

236. The access to justice crisis has also led to an increasing number of self-represented litigants in our courts. This is especially the case in family law cases, which account for nearly one-third of all civil court cases in Canada, and where the majority of litigants represent themselves.[241] Judges must not only act as arbiter of disputes, but also guide self-represented litigants through the procedural and evidentiary complexities of our justice system.[242]

237. In addition to the increasing complexity of judicial work, the workload of superior court judges has also risen in recent years,[243] especially during the peak of judicial vacancies noted above. This increasing workload is further exacerbated by insufficient resources, which place additional strain on judges.[244] While increasing judicial salaries may not address issues related to insufficient resources, this does not mean that the increased workload and complexity of work can simply be ignored when determining an appropriate judicial salary. On the contrary, this Commission should account for these factors to ensure that judges are adequately rewarded for their diligence and adaptability in navigating the evolving demands of their roles. Failing to account for such evolving demands could discourage potential meritorious candidates from applying to the bench.

238. Beyond the courtroom, a changing media landscape and increased polarization have created greater exposure for judges to attacks on their judicial independence. In his most recent annual press conference, Chief Justice Wagner observed that "today we are seeing attacks on our judges and our institutions, something we used to only see in other countries." He noted that "[i]t is troubling when the judge is more scrutinized than the judgment itself", including critiques targeting judges' personal identities and how they were appointed.[245] Judges have become public figures subject to disparaging and uncivil

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241 L.C. Burns, Canadian Centre for Justice and Community Safety Statistics, Profile of family law cases in Canada, 2019/2020 [BED at tab 77]; Rachel Birnbaum, Nicholas Bala, & Lorne Bertrand, "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants" (2013) 91:1 Can Bar Rev 67 at 71 [BED at tab 28]; Cassandra Richards, "Creating a System for All Parents: Rethinking Procedural and Evidentiary Rules in Proceedings with Self-Represented Litigants" (2022) 45:1 Dal LJ 227 [BED at tab 31].

242 See Canadian Judicial Council. *Statement of Principles on Self-represented Litigants and Accused Persons*, September 2006, p. 7. [BED at tab 88] This *Statement of Principles* was endorsed by the Supreme Court in *Pintea v. Johns*, 2017 SCC 23 (CanLII), [2017] 1 SCR 470, at para. 4 [BED at tab 15].

243 Statement of Chief Justice Morawetz, December 20, 2024, paras. 18 and 21 [BED at tab A].

244 Chief Justice Wagner Press Conference (2024) [BED at tab 71].

245 Remarks by the Right Honourable Richard Wagner, P.C. Chief Justice of Canada, June 3, 2024[BED at tab 70].

critiques. However, unlike other public figures, their ethical duty of reserve requires them to refrain from making public comments in their own defense.

239. In sum, the demands on judges have grown significantly, requiring them to adapt to new responsibilities and heightened public scrutiny. Ensuring that judicial compensation reflects these new challenges is crucial to maintaining the integrity and effectiveness of the judiciary in Canada.

5. Salary Recommendation Sought by the Association and Council

240. Having regard to the private and public sector comparators, in particular the income levels of self-employed lawyers, an upward adjustment to the judicial salary of puisne judges is required to ensure that Canada is able to continue to attract outstanding candidates to the bench, including from the private sector.

241. In April 2022, the salary of puisne judges was $372,200. When grossed up to account for the judicial annuity, valued at 28%, it stood at $476,416. By comparison, the relevant figure for the private practice comparator was $774,408, more than **$400,000** above the judicial salary in 2022. Even the grossed-up judicial salary thus fell short of the private sector comparator by **$297,992** (see table 10).

242. The Association and Council submit that an increase of **$60,000** from the 2024 judicial salary of puisne judges ($396,700) is the minimum necessary to:

a. begin to address the historical inadequacy of the data which informed the salary recommendations of past Commissions, due to the unavailability of income data for self-employed lawyers practicing through professional corporations; and

b. place the salary of puisne judges on a more solid and sustainable economic footing for the future, and thus ensure that Canada remains able to attract outstanding candidates, including outstanding self-employed lawyers in private practice.

243. Support for this adjustment can be found on several principled bases:

a. The adjustment represents only approximately 15% of the gap between the judicial salary and the private sector comparator, which stood at more than **$400,000** in 2022;

b. The adjustment represents 20% of the **$297,992** gap (in 2022), identified above, between the grossed-up judicial salary and the private sector comparator;

c. The proposed $60,000 adjustment is also supported by reference to the following touchstones (using figures for the year 2023):

1. The **$57,854** gap between the judicial salary and the total average compensation of DM-3s (See Table 14);

2. The **$62,035** gap between the judicial salary and the DM-4 Block Comparator (see Table 12);

3. The **$205,745** gap between the judicial salary and the appropriately filtered unincorporated self-employed lawyer income (see Table 4), **$98,309** when considering the grossed-up value (see Table 6); and

4. The **$265,100** gap between the judicial salary and the appropriately filtered unincorporated self-employed lawyer income in the top 10 CMAs (see Table 5), **$157,664** when considering the grossed-up value (see Table 7).

244. Given the corrective nature of this adjustment, the Association and Council submit that the increase should be applied to judicial salaries as of April 1, 2024, the first year of this quadrennial cycle, exclusive of IAI.

245. While the challenge of attracting outstanding candidates from private practice will remain, especially in certain parts of the country, the requested increase will go some distance in mitigating the "shortage of applicants" publicly acknowledged by the Minister of Justice.[246].

[246] Darren Major, "New justice minister appoints more than a dozen judges in effort to address vacancies", CBC, Aug 28, 2023 [BED at tab 68].

246. The Association and Council submit that the criteria set out in s. 26(1.1) of the *Judges Act* justify that this Commission make the following salary recommendation:

Recommendation: That the salary of puisne judges be increased by $60,000 as of April 1, 2024, exclusive of statutory indexing based on the IAI, and that the other judicial salaries payable to the Judiciary under the *Judges Act* be adjusted proportionately.

C. Collection of Pre-Appointment Income Data

247. As a second issue to be considered, the Judiciary raises the question of the appropriateness of collecting pre-appointment income data ("**PAI data**") from newly appointed judges.

248. Recommendation 8 of the Turcotte Commission included a recommendation that the Office of the Commissioner for Federal Judicial Affairs begin preparation of statistical data for each province and territories as to the compensation levels of appointees immediately prior to their appointment ("**Recommendation 8(5)(c)**").

249. The question of collecting pre-appointment income data from appointees to the bench never arose during the Turcotte Commission inquiry. None of the Parties raised it, nor sought a recommendation that PAI data should be collected.

250. Recommendation 8(5)(c) was thus issued without giving the Parties an opportunity to be heard, contrary to the Commission's established practice and the legitimate expectations of the Parties. This is all the more problematic given that the recommendation departed from the considered findings of two previous Commissions.

1. Past Consideration of the Relevance of PAI Data and the Appropriateness of its Collection

251. The appropriateness of collecting PAI data and its relevance to the mandate of the Commission is a highly contentious issue that had been debated extensively in the past. Both the Block and Rémillard Commissions concluded that collecting PAI data was problematic, and that the data was of minimal relevance in determining the adequacy of judicial salaries.

252. The Block Commission (2008) was the first to consider the question. Without prior consultation with the Judiciary, the Government had obtained from CRA PAI data of lawyers that had been appointed to the judiciary and made submissions to the Commission on the

basis of this information.[247] 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 to the collection of that information, and, (iv) in any event, the data was not relevant to the Commission's mandate.[248]

253. After carefully considering the relevance of pre-appointment income data to its statutory mandate, with full submissions by the Government and the Judiciary, and with the benefit of the Government's PAI study itself, 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.[249]

254. 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.

255. With the benefit of expert evidence and full submissions on the subject of PAI data, the Rémillard Commission concluded 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 an approach:

> 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

247 Block Report (2008), paras. 84-88 [JBD at tab 11].

248 *Id*. See also Supplementary Reply Submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated February 12, 2008, paras. 4-7 and 18 [BED at tab 40].

249 Block Report (2008), paras. 89-90 (emphasis added) [JBD at tab 11].

> 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. [250]

256. 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.

2. Impact of the Requirements of Procedural Fairness on Recommendation 8(5)(c)

257. It is against this background that the Judiciary took note of recommendation 8(5)(c) on the collection of pre-appointment income data, an issue that never arose during the inquiry of the Turcotte Commission.

258. On February 13, 2023, the Association and Council wrote to the Commission to express the Judiciary's concerns with the inclusion of recommendation 8(5)(c) in the Turcotte Report and to seek the Commission's guidance. In response, the Commission directed that the Parties file written submissions on this issue.

259. The Judiciary reiterated its objection to Recommendation 8(5)(c) on the basis of (i) the conclusions of the Block and Rémillard Commissions, (ii) the established doctrine and practice that future Commissions should not depart from the conclusions of a previous Commission absent valid reasons and (iii) the fact that the Government had not sought to reopen the issue of PAI data before the Commission. The Judiciary thus submitted 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, the Judiciary submitted that if the Government wished to raise the issue of PAI data, the Government should make a full and transparent proposal to give the Judiciary and the Commission a proper opportunity to review the proposal.[251]

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250 Rémillard Report (2016), paras. 229-232 (emphasis added) [JBD at tab 13].

251 Submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council dated April 6, 2023, para. 47 [BED at tab 49].

260. For its part, the government submitted that once the 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 undertook not to take steps to unilaterally gather PAI data but asserted that it was committed to working with the Commission participants and other relevant entities to gather this information.

261. On June 6, 2023, the Executive Director of the Commission sent a letter to the Parties advising that the Turcotte Commission had decided to decline the invitation to enter into a reconsideration or deferral of Recommendation 8(5)(c), for the following reasons:

> 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.

3. Substantive and Due Process Concerns Regarding the Collection of PAI Data

262. The Association and Council now raise the issue of the collection of PAI Data and ask the Commission to reconsider Recommendation 8(5)(c) in light of the substantive and due process issues just summarized.

263. With regards to substance, the Judiciary remains firmly opposed to the collection of PAI data from appointees to the federal bench, essentially for the reasons advanced before the Block and Rémillard Commissions, including that (i) such information is not relevant, since it would not say anything about lawyers who have not applied, yet could be outstanding candidates, (ii) the collection of PAI information would generate incomplete data and (iii) this information is potentially self-serving and therefore inherently suspect.

264. With regards to due process, the Judiciary is also concerned by the precedent established by Recommendation 8(5)(c). In addition to the recommendation having been issued without notice, thus depriving the Parties of an opportunity to make their positions known to the Commission on this question, the Turcotte Commission did not provide any reasons or context in support of Recommendation 8(5)(c). To this day, the Judiciary is left in the dark as to the reasons why the Commission decided to depart from the conclusions of previous

Commissions on this question. Indeed, the Judiciary does not even know whether the Turcotte Commission was aware that it was departing from the conclusions of previous Commissions, and that it was doing so in respect of a highly controversial issue.

265. 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."[252] 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."[253]

266. 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.

267. Safeguarding the Parties' right to be afforded procedural fairness is another ground that justifies reconsideration of Recommendation 8(5)(c).

Recommendation: That the Office of Commissioner for Federal Judicial Affairs cease collecting data regarding the pre-appointment income of newly appointed judges.

V. COSTS

268. Under s. 26.3(2) of the *Judges Act*, the judiciary is entitled to reimbursement of two-thirds of the costs arising from its participation in the Commission's inquiry. The Block Commission recommended that this remain unchanged while the Levitt, Rémillard and Turcotte Commissions did not make any recommendation concerning this question. The Association and Council do not at this stage seek to change this provision of the *Act*.

252 *Bodner*, para. 16 [JBD at tab 6]; *PEI Reference*, para. 169 [JBD at tab 4].
253 *PEI Reference*, para. 173 [JBD at tab 4].

VI. SUMMARY OF RECOMMENDATIONS SOUGHT

269. The following is a summary of the recommendations sought by the Judiciary:

Recommendation: That the salary of puisne judges be increased by $60,000 as of April 1, 2024, exclusive of statutory indexing based on the IAI, and that the other judicial salaries payable to the Judiciary under the *Judges Act* be adjusted proportionately.

Recommendation: That the Office of Commissioner for Federal Judicial Affairs cease collecting data regarding the pre-appointment income of newly appointed judges.

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

Montréal, December 20, 2024

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Jean-Michel Boudreau
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APPENDIX A:
PRESENTATION OF THE PARTIES AND SUMMARY OF THE HISTORY OF THE TRIENNIAL AND QUADRENNIAL COMMISSION PROCESSES

I. THE ASSOCIATION AND COUNCIL

1. The Association is successor to the Canadian Judges Conference, which was founded in 1979 and incorporated in 1986. Its objects include:

    a. the advancement and maintenance of the judiciary as a separate and independent branch of government;

    b. liaising with the Council to improve the administration of justice and to complement its functions through conferences and various educational programs;

    c. taking such actions and making such representations as may be appropriate in order to assure that the salaries and other benefits guaranteed by s. 100 of the *Constitution Act, 1867*,[254] and provided by the *Judges Act,*[255] are maintained at levels and in a manner which is fair and reasonable, and which reflect the importance of a competent and dedicated judiciary;

    d. seeking to achieve a better public understanding of the role of the judiciary in the administration of justice;

    e. monitoring and, where appropriate, seeking to enhance the level of support services made available to the judiciary in cooperation with the Council; and

    f. addressing the needs and concerns of supernumerary and retired judges.

2. The Association represents approximately 1,400 judges, sitting and retired, who serve on the superior courts and courts of appeal of each province and territory, as well as on the Federal Court of Canada, the Federal Court of Appeal and the Tax Court of Canada.

3. In furtherance of the Association's objects that relate to judicial salaries and other benefits, a Compensation Committee was established to study and make recommendations to the Association's Executive Committee and Board of Directors in respect of issues regarding judicial compensation.

4. The Council was established by Parliament in 1971. It consists of the Chief Justice of Canada and the Chief Justices and Associate Chief Justices of the provincial and territorial

254 *Constitution Act, 1867* [JBD at tab 1].
255 *Judges Act* [JBD at tab 3].

superior courts, the Federal Court of Appeal, the Federal Court, the Tax Court of Canada and the Court Martial Appeal Court of Canada.

5. The objects of the Council are to promote and improve efficiency, uniformity and quality of judicial service in superior courts.[256]

6. The Association and Council, on behalf of the Judiciary, have made written and oral joint submissions to each of the five Triennial Commissions (1982-1996) and to the six past Judicial Compensation and Benefits Commissions (the "**Drouin Commission**", the "**McLennan Commission**", the "**Block Commission**", the "**Levitt Commission**", the "**Rémillard Commission**", and the "**Turcotte Commission**"). The Drouin Commission issued its report (the "**Drouin Report**") on May 31, 2000. The McLennan Commission issued its report (the "**McLennan Report**") on May 31, 2004. The Block Commission issued its report (the "**Block Report**") on May 30, 2008. The Levitt Commission issued its report (the "**Levitt Report**") on May 15, 2012. The Rémillard Commission issued its report (the "**Rémillard Report**") on June 30, 2016. The Turcotte Commission issued its report (the "**Turcotte Report**") on August 30, 2021.

II. SUMMARY OF PAST TRIENNIAL AND QUADRENNIAL COMMISSION

7. Prior to 1981, advisory committees reviewed judges' compensation and made recommendations to the Government.[257] As noted by the Drouin Commission, this process was unsatisfactory because the advisory committee recommendations "generally were unimplemented or ignored", and "the process merely amounted to petitioning the government to fulfill its constitutional obligations."[258]

A. The Triennial Commission Process

8. In 1982, the Triennial Commission process was established. Under s. 19.3 of the *Judges Act* as it read at the time, the Triennial Commission was required to inquire into the adequacy of judicial compensation and to make recommendations to the Minister of Justice. The objective of the Triennial Commission process was to depoliticize the determination of judicial salaries and benefits in order to preserve judicial independence.

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256 The objects of the Council are set out in s. 60 of the *Judges Act* [JBD at tab 3].

257 Two advisory committees were chaired by Irwin Dorfman, Q.C. (report issued on November 22, 1978) and Jean de Grandpré (report issued on December 21, 1981) respectively.

258 Drouin Report (2000) at 2 [JBD at tab 9].

9. There was no obligation on the part of the Government under the Tribunal Commission process to respond or act upon the recommendations made by Triennial Commissions.

10. This proved to be a fundamental shortcoming, and no one disputes that the Triennial Commission process was a failure. The salary recommendations of the five Triennial Commissions were generally ignored, left unimplemented and often became the subject of a politicized debate.[259]

11. It is relevant to cite what the Scott Commission observed, in 1996, in the twilight of the Triennial Commission process:

> The purpose of the Commission was to ensure that, through the creation of a body which would be independent both of the judiciary and Government, Parliament would be presented with an objective and fair set of recommendations dictated by the public interest, having the effect of maintaining the independence of the judiciary while at the same time attracting those pre-eminently suited for judicial office. The theory was that, by way of such recommendations, emanating from regularly convened independent commissions, the process would be de-politicized and judicial independence would be thus maintained.
>
> While the idea was sound, the underlying assumptions appear to have been naïve. The result has been a failure in practice to meet the desired objectives. Since the first Triennial, there have been four Commissions (Lang (1983), Guthrie (1986), Courtois (1989) and Crawford (1992)). In spite of extensive inquiries and exhaustive research in each case, recommendations as to the establishment of judicial salaries and other benefits have fallen almost totally upon deaf ears. The reasons for this state of affairs have been largely political.[260]

12. David Scott, Chair of the 1995 Commission on Judges' Salaries and Benefits, testified before the Standing Senate Committee on Legal and Constitutional Affairs, that "the triennial commission system not only did not work well, but […] it did not work at all." It became a "mechanism that allowed the government of the day to do nothing about judges, because doing something about the judges is a very unpopular thing."[261]

13. The regrettable state of affairs of this important process was commented upon by former Chief Justice Lamer in 1994, in an address to the Council of the Canadian Bar Association,

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259 The reports of the Triennial Commissions were as follows: Lang Report (1983), Guthrie Report (1987), Courtois Report (1990), Crawford Report (1993), and Scott Report (1996) [BED at tabs 51 to 55].

260 Scott Report (1996) at 7 [BED at tab 55].

261 Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No 32, 1st Sess, 36th Parl, September 30, 1998 [Senate Committee September 30, 1998], p. 35:5 [BED at tab 34].

when he said that the Triennial Commission "looks good on paper, but it has one problem. It doesn't work. Why? Because the Executive and Parliament have never given it a fair chance."[262]

B. The PEI Reference

14. Judicial independence is a fundamental principle of our democracy and legal tradition. This principle, whose historical origins can be traced back to the *Act of Settlement, 1701*,[263] is incorporated in the Constitution of Canada through the preamble and the judicature sections of the *Constitution Act, 1867* and s. 11(d) of the *Canadian Charter of Rights and Freedoms*.[264]

15. Judicial independence and judicial compensation as a means to ensure financial security are inextricably bound to each other. In *Valente v The Queen*,[265] *Reference Re Provincial Court Judges* ("**PEI Reference**"),[266] and *Bodner v Alberta* ("**Bodner**"),[267] among others, the Supreme Court of Canada confirmed that financial security, both in its individual and institutional dimensions, is, with security of tenure and administrative independence, one of the three core characteristics of judicial independence.[268]

16. It is important to keep in mind that financial security through adequate judicial compensation ultimately benefits the public, as emphasized by Chief Justice Lamer in the *PEI Reference*:

> I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public.[269]

17. In 1997, the Supreme Court of Canada in the *PEI Reference* explained that the Constitution requires the existence of a body such as a commission that is interposed between the

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262 The Honourable Chief Justice Lamer, "Remarks by the Rt. Honourable Antonio Lamer, P.C., Chief Justice of Canada, to the Council of the Canadian Bar Association Annual Meeting" (20 August 1994) at 10 [unpublished] [BED at tab 87].

263 *Act of Settlement, 1701*, (U.K.), 12-13. Will. III, c. 2.

264 For ease of reference, these provisions of the Constitution of Canada are reproduced in the JBD at tabs 1 and 2.

265 *Valente v The Queen*, [1985] 2 SCR 673 [*Valente*] [BED at tab 27].

266 *Reference Re Provincial Court Judges*, [1997] 3 SCR 3 [*PEI Reference*] [JBD at tab 4].

267 *Bodner v Alberta*, 2005 SCC 44 [JBD at tab 6].

268 *Valente*, at p. 704 [BED at tab 27]; *PEI Reference* at paras. 115-122 [JBD at tab 4]; *Bodner*, at paras. 7-8 [JBD at tab 6]; *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 (CanLII), [2020] 2 SCR 506, at para. 31 [JBD at tab 7]; *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21 (CanLII), [2020] 2 SCR 556, at para. 29 [JBD at tab 8].

269 *PEI Reference*, at para. 193 [JBD at tab 4].

judiciary and the other branches of the State. The constitutional function of this body is to depoliticize the process of determining changes to or freezes in judicial compensation.

18. This objective is achieved by entrusting that body with the specific task, at regular intervals, of issuing a report on the salaries and benefits of judges to the executive and the legislature. The Court said that the body must be independent, objective, and effective in order to be constitutional.[270] Any changes to judicial salaries without prior recourse to this body would be unconstitutional.[271]

19. The existence of this body also ensures that the judiciary does not find itself in a position of having to negotiate its salary directly with the government, something that is fundamentally at odds with judicial independence.[272]

20. A necessary component of the effectiveness of this body is the timely implementation of its recommendations, or a prompt response from the government in question providing legitimate reasons for a refusal to implement.[273]

C. The Quadrennial Commission Process and the First Quadrennial Commission

21. Acting upon the constitutional imperative enunciated by the Supreme Court of Canada in the *PEI Reference*, Parliament amended the *Judges Act* in 1998 and established the Quadrennial Commission.

22. The first Quadrennial Commission was chaired by Mr. Richard Drouin, QC, in 1999. The other members were Ms. Eleanore Cronk (later of the Court of Appeal for Ontario) and Mr. Fred Gorbet. The Drouin Report was issued on May 31, 2000. It was an impressive, well-reasoned report by any standard. The Drouin Commission took note that the Triennial Commissions had failed despite the goal of depoliticizing the process.[274]

23. The Government's response to the Drouin Report marked an improvement as compared to previous Government responses to Triennial Commission reports. The Government accepted all but two of the Drouin Commission's recommendations,[275] and amendments to

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270 *PEI Reference*, at paras. 169-175 [JBD at tab 4]; see also *Bodner*, supra at para. 16 [JBD at tab 6].
271 *PEI Reference*, at para. 147 [JBD at tab 4].
272 *PEI Reference*, at para. 186 [JBD at tab 4].
273 *PEI Reference*, at paras. 179-180 [JBD at tab 4].
274 Drouin Report (2000) at 2 [JBD at tab 9].
275 The two exceptions were eligibility for supernumerary status and reimbursement of costs of the judiciary before the Quadrennial Commission.

the *Judges Act* implementing the Government's Response were adopted expeditiously, in June 2001.

D. The McLennan Commission

24. The second Quadrennial Commission, the McLennan Commission, was established in September 2003. It was chaired by Roderick McLennan, Q.C., and its two members were Gretta Chambers, C.C. and Earl Cherniak, Q.C. The Commission issued its report on May 31, 2004.

25. The principal issue of contention between the judiciary and the Government before the McLennan Commission was the determination of the amount of judicial salary. When the McLennan Commission began its inquiry, the salary of a puisne judge was $216,600.

1. Salary Recommendations

26. The Association and Council submitted to the Commission, based on the level of remuneration of traditional comparators, as applied in the Drouin Report, that the salary of a puisne judge should be increased to $253,880 as of April 1, 2004, plus annual salary increments of $3,000 in 2005, 2006 and 2007, in addition to indexation according to the Industrial Aggregate Index ("**IAI**") provided in the *Judges Act*. For its part, the Government proposed an increase to $226,300 as of April 1, 2004, inclusive of IAI for 2004, plus annual salary increments of $2,000 in 2005, 2006 and 2007, in addition to IAI for 2005, 2006 and 2007. As the McLennan Commission observed, the Government's proposal represented an increase of 7.25% over those years, in addition to IAI in 2005, 2006 and 2007.[276]

27. The McLennan Commission recommended an increase for the salary of puisne judges to $240,000 as of April 1, 2004, inclusive of IAI in that year, plus IAI effective April 1 in each of the next three years, as already provided for in the *Judges Act*. The Commission did not recommend annual salary increments, as proposed by the Government and supported by the Association and Council, in addition to IAI.

28. The Commission's recommendation represented a one-time 10.8% increase for the four-year period commencing April 1, 2004, in addition to IAI in the years 2005, 2006 and 2007, as compared to the 7.25% increase proposed by the Government.

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[276] McLennan Report (2004) at 23 [JBD at tab 10].

2. The Government's Response to the McLennan Report

29. The Government's response to, and delayed partial implementation of, the McLennan Report was a source of grave concern for the judiciary. The Association and Council observed that politicization was creeping into the process yet again, and was undermining the nascent and still fragile Quadrennial Commission process, much as the Triennial Commission process was undermined and ultimately came to fail.

30. On November 20, 2004, the Minister of Justice issued the Government's response (the "**First Response**") to the McLennan Report, as required by s. 26(7) of the *Judges Act*.[277] The First Response accepted all but one[278] of the recommendations of the McLennan Commission.

31. With respect to judicial salary, the Minister stated in the First Response that the McLennan Commission had "engaged in a careful balancing of all the [statutory] factors"[279] and provided "thorough and thoughtful"[280] explanations for its conclusions. The Minister noted that the salary increase recommended by the McLennan Commission "appears reasonable".[281]

32. On May 20, 2005, the Government introduced Bill C-51 to implement its acceptance of the McLennan Commission's recommendations, notably its salary recommendation. The Bill passed first reading and was supposed to be referred to committee after second reading. However, the Bill died on the order paper when Parliament was dissolved on November 29, 2005.

3. The Newly Elected Government's Second Response to the McLennan Report

33. A new Government was elected on January 23, 2006. Shortly after the new Government came to power, the then Minister of Justice purported to issue a second response to the

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277 Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (November 20, 2004) [JBD at tab 10(a)].

278 The Government refused to accept the McLennan Commission's recommendation that the judiciary be reimbursed for 100% of its disbursements and 66% of its legal fees. Instead, the Government's First Response proposed that the reimbursement be a total of 66% for all costs.

279 Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (November 20, 2004) at 3 [JBD at tab 10(a)].

280 Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (November 20, 2004) at 2 [JBD at tab 10(a)].

281 Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (November 20, 2004) at 4 [JBD at tab 10(a)].

McLennan Report on May 29, 2006 (the "**Second Response**").[282] On May 31, 2006, the Government tabled Bill C-17 in the House of Commons, which would implement the recommendations of the McLennan Report only to the extent that they were accepted in the Second Response.

34. The Second Response contradicted the First Response. The Government no longer accepted the salary recommendation set out in the McLennan Report. In its Second Response, the Government proposed an increase to judicial salaries of 7.25% as of April 1, 2004.[283] There was no mention of the fact that this increase was the exact percentage increase that the Government had proposed in its submission to the McLennan Commission in 2003-2004. In effect, the Government's Second Response unilaterally imposed what the Government had proposed in the first place, as if the Commission process had been of no consequence.

35. The Second Response stated that the McLennan Commission's recommendations must be analyzed in light of the mandate and priorities upon which the Government had recently been elected.[284] A summary list of the new Government's budget priorities and measures of "fiscal responsibility" was given in the Second Response.[285] It further stated that Canadians expect that expenditures from the public purse should be reasonable and generally proportional to these economic pressures and priorities, and that the McLennan Commission's salary recommendation did not pay heed to this reality.[286]

36. Significantly, the Government did not attempt to argue that the economic conditions in Canada were not as strong as when the First Response had been made. In fact, the Second Response was delivered at a time when economic conditions in Canada were very strong, with a real economic growth of 2.8% for 2006[287] and the Government having a budgetary

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282 Second response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (May 29, 2006) [BED at tab 10(b)].

283 Second response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (May 29, 2006) at 2 [BED at tab 10(b)].

284 Second response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (May 29, 2006) at 4, 6 [BED at tab 10(b)].

285 Second response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (May 29, 2006) at 6 [BED at tab 10(b)].

286 Second response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission (May 29, 2006) at 7 [BED at tab 10(b)].

287 Statistics Canada, Catalogue #13-016-X, Economic accounts key indicators, Canada, at 22. The indicator is the real gross domestic product (GDP) [BED at tab 74].

surplus of $4.7 billion[288] in the first quarter of 2006 and of $13.2 billion for the fiscal year 2005-2006.[289]

37. On June 2, 2006, counsel for the Association wrote to the Minister of Justice to protest the issuance of the Second Response and to invite the Government to reconsider the position adopted in the Second Response. The Association also expressed the hope that Bill C-17 would be amended in the committee stage.

38. The Association's letter also made the point that the so-called reasons put forward in the Second Response were not "legitimate reasons" for departing from the Commission's salary recommendation, as required by the relevant constitutional jurisprudence.[290]

39. On July 31, 2006, the Minister of Justice responded by simply stating that the Government had regard for the principles set out in the *PEI Reference* and *Bodner* in developing its Second Response. The Minister omitted to respond to the Association's point that the Second Response was statutorily and constitutionally invalid as a question of process, and constitutionally invalid as a question of substance.

40. The Second Response was implemented through Bill C-17,[291] which received Royal Assent on December 14, 2006. Puisne judges' salary was fixed retroactively at $232,300 as of April 1, 2004, rather than at $240,000 had the McLennan Commission's recommendation and the First Response been implemented. At the beginning of the following Quadrennial Commission cycle, the salary for puisne judges, statutorily adjusted by the IAI, was $252,000 as of April 1, 2007, rather than $262,240 had the McLennan Commission's recommendation and the First Response been implemented.

4. The Inconsistency of the Second Response with Applicable Constitutional Principles

41. The *Judges Act* does not contemplate multiple government responses. The Association and Council are firmly of the view that multiple responses undermine the cardinal constitutional requirement of effectiveness and are inconsistent with the Supreme Court's

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288 Department of Finance Canada, "The Fiscal Monitor", January to March 2006. The budgetary surplus was $1.7 billion in January 2006 and $4.1 billion in February 2006. In March 2006, there was a budgetary deficit of $1.1 billion [BED at tab 73].

289 Department of Finance Canada, "Fiscal Reference Tables", October 2011 [BED at tab 75].

290 The Supreme Court in the *PEI Reference*, at para. 183 spoke of the need for the government to provide a "legitimate reason" for refusing to accept commission recommendations [JBD at tab 4]. The Supreme Court had occasion to elaborate on that requirement in *Bodner*, at paras. 23-27 [JBD at tab 6].

291 *An Act to amend the Judges Act and certain other Acts in relation to courts*, S.C. 2006, c. 11.

rationale for requiring of government that it formally respond, with diligence, to a Commission report. While the First Response was issued under, in accordance with, and within the time-limit set out in the *Judges Act*, the Second Response has no status whatsoever under the *Judges Act*[292] or the constitutional process expounded in the *PEI Reference*.

42. The Second Response, by a newly elected government, also served to politicize the Quadrennial Commission process since such a response was sought to be justified on the basis of the new Government's priorities. The Association and Council submit that the Second Response was, in essence, the expression of a newly elected Government's disagreement, for political reasons, with a previous government's formal response to the McLennan Report.[293]

43. The Association and Council also considered that the delay of 2½ years between the issuance of the McLennan Report and the implementation of the flawed Second Response undermined the effectiveness of the process. In addition, this inordinate delay deprived members of the judiciary of the time value of the salary increase that the Government finally accepted and the actual time lost for those judges who would have been able to elect supernumerary status earlier had the Government implemented that recommendation more promptly.

44. The Association and Council submitted these concerns to the Block Commission, which agreed that they were well-placed. The Block Report stated in this regard:

> 42. Without commenting on the substance of the second Government response, we wish to express our concern with the issuance of more than one response in principle. As the Association and the Council note, such a practice is not provided for under the current process. Not only does the issuance of a second response not conform to the current process, it also has significant Constitutional implications.
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> 43. Apart from concerns about whether a second response may have the effect, real or perceived, of threatening the apolitical nature of the Commission process, it also has the very real effect of introducing an

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292 Section 26(7) of the *Judges Act* provides: "The Minister of Justice shall respond to a report of the Commission within six months after receiving it." The statute makes no allowance for a further report. The Block Commission expressed serious concern about the issuance of more than one response, see Block Report (2008) at paras. 42-45 [JBD at tab 11].

293 The Block Commission correctly observed that judicial independence cannot be seen as just another government priority, and that there was no statutory justification for increases in judicial compensation to be measured against the "expenditure priority that the Government has accorded to attracting and retaining professionals of similarly high qualities and capacity within the federal public sector", Block Report (2008) at para. 58 [JBD at tab 11].

additional step and therefore additional delay in a process that imposes strict timelines on all parties involved. In this case, the second response was issued 18 months after the first response, and 18 months after the expiry of the legislative deadline for responding to a Commission report under the *Judges Act*. Although the Government tabled draft legislation almost immediately after issuing the second response, this still resulted in an additional four-month delay which could have been avoided had the new Government moved to re-introduce legislation reflecting the first response upon being elected.

44. The Commission acknowledges the potential challenges of advancing a legislative agenda faced by a minority government. This does increase the possibility that legislation tabled to enact the Government responses to Commission recommendations could die on the order table, as occurred in November 2005. Should this occur again in the future, we submit that the integrity of the Commission process is only maintained if the newly elected Government proceeds with the process of implementation, even where the election has resulted in a change of Government. Any deviation from the process as currently outlined raises questions about whether a Commission's recommendations have had a meaningful effect on the legislative outcome and risks undermining the integrity of the Commission process.

45. While the Commission's effectiveness is most important in the context of the preservation of judicial independence, on a related note, the perceived effectiveness of the Commission is likely to influence the ability of the parties to convince nominees to accept appointment to future Commissions. Advisory committees, Triennial Commissions and Quadrennial Commissions have been populated by individuals who considered it an honour to serve the public interest in this capacity; the current Commission is no exception. However, continuing to attract suitable members for future Commissions will depend to a large extent on the ability to assure them that they will be participating in a process that is independent, objective and effective.[294]

E. The Block Commission

45. The third Quadrennial Commission, the Block Commission, was established in October 2007. It was chaired by Sheila Block, and its two members were Paul Tellier, C.C., Q.C. and Wayne McCutcheon. The Commission issued its report on May 30, 2008.

46. Apart from process issues related to the serious concerns expressed by the judiciary with the Government's lack of solicitude for the Quadrennial Commission process, discussed above, the principal issue before the Block Commission was the determination of the judicial

[294] Block Report (2008) at paras. 42-45 [JBD at tab 11]. See also the evidence of Mr. E. Cherniak, QC to the House of Commons Standing Committee on Justice and Human Rights (Meeting No. 24, October 24, 2006), 39th Parliament, 1st Session [BED at tab 37].

salary for the puisne judges. The Commission also made a number of other substantive recommendations.

1. Salary and Other Substantive Recommendations

47. When the Block Commission began its inquiry, the salary of a puisne judge was $252,000. The Association and Council proposed a salary increase of 3.5% as of April 1, 2008, and 2% for 2009, 2010, and 2011, in addition to IAI. Under this proposal, the salary of puisne judges at the end of the Block Commission's mandate, *i.e.* as of April 1, 2011, would have been $302,800. The actual salary of puisne judges as at April 1, 2011, was $281,100.

48. The Government proposed a salary increase of 4.9% as of April 1, 2008, inclusive of IAI, which was 3.2% on that date, for a proposed net increase of 1.7%. For the subsequent years, it proposed nothing except to leave IAI in place. IAI was 2.8% on April 1, 2009, 1.6% on April 1, 2010, and 3.6% on April 1, 2011. Under the Government's proposal, the salary of puisne judges would thus have been $286,000 as of April 1, 2011.

49. The Government's proposed increase as of April 1, 2008, of 4.9% inclusive of IAI, necessarily meant that the Government was of the view that some kind of increase was appropriate, even though it was not of the same order of magnitude as that proposed by the Association and Council.

50. The Block Commission first rejected the Government's attempt to use the pre-appointment income data of judges as support for the argument that current judicial salaries are not a disincentive to attracting significant numbers of judges who enjoyed high pre-appointment incomes. The judiciary had objected to the collection and use of this data because of concerns for individual privacy, the unreliability of the data and its lack of relevance.

51. The Block Commission also reviewed the various comparators proposed by the Parties, ultimately deciding that DM-3s and lawyers in private practice were the appropriate comparator groups to arrive at recommendations on judicial salaries. The Block Commission rejected the Government's position that the most relevant comparator group was all of the strata among the most senior federal public servants, namely EX 1-5, DM 1-4, and Senior LA (lawyer cadre).

52. The Block Commission concluded that the appropriate comparator among senior deputy ministers, namely DM-3s and DM-4s, was the midpoint of the DM-3 salary range plus one-

half of the maximum performance pay[295] for which DM-3s are eligible. As for lawyers in private practice, the Block Commission noted that there was no certainty that the Government would continue to be successful in attracting outstanding judicial candidates from the senior Bar in Canada if the income spread between lawyers in private practice and judges were to increase markedly.

53. Using the comparator of the midpoint of the DM-3 salary range[296] plus one-half of eligible performance pay, the Block Commission noted that the resulting figure for DM-3s was $276,632 for the 2007-2008 fiscal year. The salary of puisne judges was $252,000 in that year, or 91% of the DM-3 comparator.[297]

54. To achieve "rough equivalence" with the DM-3 salary range midpoint plus one-half eligible performance pay, the Block Commission recommended an increase of 4.9%, inclusive of IAI, for a salary of $264,300 effective April 1, 2008, and an increase of 2% for each of 2009, 2010, and 2011, in addition to IAI.

55. If the Block Commission's recommendation had been implemented, the salary for puisne judges in the 2011-2012 fiscal year would have been $302,800, a figure roughly equivalent to the figure of $303,249.50, which was the midpoint of the DM-3 salary range plus one-half of eligible performance pay for 2011-2012. The actual salary of puisne judges for 2011-2012 was $281,100. For comparison purposes, the overall *average* DM-3 compensation for the 2010-2011 fiscal year was $331,557.

56. In addition to its salary recommendation, the Block Commission made recommendations regarding the retirement annuity of senior judges of the territorial courts, representational allowances, and an appellate differential.

2. Observations and Recommendations as to Process

57. The Block Commission made a number of important observations relating to process, an overriding one being that Quadrennial Commissions should serve as the guardian of the Quadrennial Commission process. The Block Commission expressed the view that

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295 "Performance pay" and "at-risk pay" are often used as synonyms to refer to the variable part of the compensation paid to DMs, including bonuses.

296 "Midpoint" should not be confused with median. The midpoint figure is simply the halfway point of the theoretical salary range, whereas the median figure would be the actual salary of the person falling in the middle of the range of persons arranged from lowest to highest. The average salary is a different concept from both the midpoint and the median in that it reflects the relative weight of the range of salaries given that it takes into account the combination of the salary figures and the number of people earning them.

297 Block Report (2008) at para. 119 [JBD at tab 11].

process-related issues should be the subject neither of direct discussions between the Government and the judiciary, which are inadvisable, nor of litigation before the courts, if at all possible, the latter being an option that must be "carefully weighed".[298] The Block Commission added:

> 37. The parties nevertheless require access to a forum where concerns related to process can legitimately be raised. It is our view that Quadrennial Commissions, by virtue of their independence and objectivity, are well-placed to serve as that forum and to offer constructive comments on process issues as they arise. While the structure and mandate of the Commission are outlined in statute, any question of process that affects the independence, objectivity or effectiveness of the Commission is properly within its mandate. It is entirely appropriate and arguably imperative that the Commission serve as guardian of the Quadrennial Commission process and actively safeguard these Constitutional requirements.

58. The Block Commission also made an important observation regarding the need to respect, and reflect in the future submissions of the Parties, the consensus that has emerged around particular issues during a previous Commission inquiry.[299] The Block Commission gave as an example of such an issue the relevance of DM-3 as a comparator.

3. The Government's Response to the Block Report

59. Under the *Judges Act*, the Minister of Justice was required to respond to the Block Report by November 30, 2008, six months after receiving it.[300]

60. On February 11, 2009, well beyond the strict statutory deadline, the Minister of Justice issued a response declining to implement any of the recommendations made by the Block Commission. Importantly, the Minister's response did not reject any of the Commission's recommendations. Rather, the Minister invoked the economic crisis that began in late 2008 as the reason for the Government's decision.

61. The Association issued a press release on February 11, 2009, stating that federally appointed judges recognized that the Canadian economy was facing unprecedented challenges calling for various temporary measures. However, it emphasized that the applicable constitutional principles would require that the Block Commission's recommendations be reconsidered once the economic situation improved. The Association

298 Block Report (2008) at paras. 33 ff [JBD at tab 11].
299 Block Report (2008) at paras. 21 and 201 [JBD at tab 11].
300 *Judges Act*, s. 26(7) [JBD at tab 3].

also expressed its deep concern about the Minister of Justice's failure to respect the statutory deadline for issuing his response to the Block Report.

F. The Levitt Commission

62. The fourth Quadrennial Commission, the Levitt Commission, was established in December 2011. It was chaired by Brian Levitt, and its two members were Paul Tellier, C.C., Q.C., and Mark Siegel. The Commission issued its report on May 15, 2011.

63. The principal issue before the Levitt Commission was the determination of the judicial salary for puisne judges. Integral to the Commission's consideration of this issue, however, was the Government's unexpected request that the Commission recommend that the annual adjustments to judicial salaries based on the IAI be capped at 1.5%. The Levitt Commission also articulated a number of concerns with the future of the Commission process itself.

1. Salary and Other Substantive Recommendations

64. The salary of a puisne judge was $281,100 when the Levitt Commission began its inquiry. The Association and Council proposed that the Levitt Commission adopt, prospectively commencing in the first year of the quadrennial period, the Block Commission's recommendations. This would have resulted in a 4.9% increase as of April 1, 2012 inclusive of IAI, and increases of 2% for each of 2013, 2014 and 2015, in addition to IAI.

65. The Government proposed that judicial salaries be maintained at their current level, and that salary adjustments based on the IAI be limited to an annual increase of 1.5% for the quadrennial period. The Government admitted that it expected that this proposal would result in a *reduction* in individual judicial salaries in real terms.[301]

66. The Levitt Commission rejected the Government's proposed cap on IAI. The Levitt Commission found that the legislative history of IAI "clearly indicates that it was intended to be a key element of the architecture of the process for determining judicial remuneration without affecting judicial independence and, as such, not to be lightly tampered with."[302] The Levitt Commission further found that the cost of retaining the existing statutory indexation as opposed to imposing a 1.5% cap would have only a marginal incremental cost to the public purse.

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301 Submission of the Government of Canada to the Levitt Commission, December 23, 2011, footnote 10 [BED at tab 42].

302 Levitt Report (2012) at para. 51 [JBD at tab 12].

67. The Levitt Commission then considered the Parties' arguments on the appropriate comparator groups and concluded that a "rough equivalence" with the DM-3 salary range midpoint plus one-half eligible performance pay was a "useful tool in arriving at a judgment as to the adequacy of judicial remuneration, because this concept reflects the judgmental (rather than mathematical) and multi-faceted nature of the enquiry."[303]

68. The Levitt Commission rejected the Government's argument that it should depart from the practices of previous Quadrennial Commissions and consider all persons paid from the public purse, or at least consider the average salary of deputy ministers without variable pay, as the relevant measure of the public sector comparator. Aside from questioning the merits of the Government's argument, the Levitt Commission found that adopting a comparator group that was consistent with comparator groups used by previous Quadrennial Commissions furthered the goals of the *Judges Act*:

> 30. The Government took exception to the Commission's position with respect to recommendation 14 of the Block Commission as applied to the selection of the public sector comparator group. Recommendation 14 stated that:
>
> > [w]here consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus be taken into account by the Commission and reflected in the submissions of the parties.
>
> While the Commission reached its conclusion based on its own work, it also concluded that the Government's position in this regard is counterproductive to the attainment of one of the objectives for judicial compensation mandated by the Judges Act, namely the attraction of outstanding candidates to the judiciary. The more certainty about the conditions of employment that can be provided to a candidate contemplating a mid-life career change to the judiciary, the lower will be the barriers to attracting the most successful candidates. By introducing an unnecessary degree of uncertainty about future remuneration, the Government's position that the comparator group is to be re-litigated anew every four years sacrifices efficacy on the altar of process.
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> 31. It is the Commission's position that, while the appropriate public sector comparator group is a proper subject for submissions to a Quadrennial Commission, the onus of establishing the need for change lies with the party seeking it. The Commission believes that this approach strikes an appropriate balance between certainty, on the one hand, and flexibility to respond to changing circumstances, on the other. In this instance, the Government has failed to discharge that onus in regards to its argument that the DM-3 comparator be displaced by a broader comparator group, or no comparator at all.

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303 Levitt Report (2012) at para. 48 [JBD at tab 12].

69. Using the comparator of the midpoint of the DM-3 salary range plus one-half of eligible performance pay, the Levitt Commission noted that the resulting figure for DM-3s was $303,249.50 for the 2011-2012 fiscal year. The salary of puisne judges was $281,100 in that year, or 7.3% less than the DM-3 comparator.

70. The Levitt Commission noted that while the 7.3% gap between the DM-3 comparator and the salary of puisne judges "tests the limits of rough equivalence", the salary of puisne judges did not require any further adjustments as long as IAI was maintained in its current form for the quadrennial period.

71. In addition to its salary recommendation, the Levitt Commission recommended, as had the Block Commission, that puisne judges sitting on provincial and federal appellate courts receive a salary differential of 3% above puisne judges and made further recommendations concerning supernumerary status, representational allowances and annuities for certain categories of the judiciary.

2. Observations and Recommendations as to Process

72. Along with making recommendations on substantive matters, the Levitt Commission addressed a number of procedural issues that it believed "go to the very heart of the effectiveness of the mechanisms contemplated by the Supreme Court of Canada" in *Bodner* and the *PEI Reference*.[304]

73. The Levitt Commission rejected the Government's position that it did not have any jurisdiction to deal with process issues, finding that each Quadrennial Commission has an important role to play in overseeing the evolution of the process and "actively safeguarding the constitutional requirements."[305]

74. The Levitt Commission made four recommendations that it hoped would help strengthen the process. First, the Levitt Commission recommended that the Government, when drafting its response, take into account not just the perspective of reasonable, informed members of the public but the judiciary as well. The Levitt Commission was concerned that any response that ignored the judiciary's perspective would only further exacerbate the existing credibility issues:

> The Commission does not believe that the constitutional objectives of this process can be met if the Government does not feel a need to be

304 Levitt Report (2012) at para. 85 [JBD at tab 12].
305 Levitt Report (2012) at para. 88 [JBD at tab 12].

> concerned that a reasonable, informed judge be satisfied that throughout the process the Government participated in good faith and in a respectful and non-adversarial manner that reflects the public interest nature of the proceedings. The judiciary constitutes a stakeholder in this process with a weighty interest. This process can be successful only if both the Government and the judiciary, acting reasonably, believe it is effective. Additionally, in omitting any focus on the judiciary, the Government's submission betrays what the Commission believes is at the root of the judiciary's growing dissatisfaction with the process.[306]

75. Second, the Levitt Commission emphasized the importance of the Government's response complying with the Supreme Court of Canada's decision in *Bodner*, and warned that failure to do so could lead to litigation.

76. Third, the Levitt Commission recommended that when consensus has emerged around a particular issue during a previous Commission inquiry, that, in the absence of demonstrated change, the Commission should take this consensus into account and it should be reflected in the Parties' submissions. The Levitt Commission found that this position was entirely consistent with the Supreme Court of Canada's decision in *Bodner*. The Levitt Commission rejected the Government's position that a Commission could only adopt a previous Commission's recommendations if it reviewed the transcript of evidence before that Commission.

77. Finally, the Levitt Commission commented on what it saw as the "troubling" adversarial nature of the Quadrennial Commission process. The Levitt Commission accordingly recommended that the Government and the judiciary examine methods whereby the Commission process can be made less adversarial and more effective.

78. The Levitt Commission concluded its report by reiterating its concern about the future of the Quadrennial process:

> In closing, the Commission wishes to reiterate its concern for the current health and future of the Quadrennial process. The Commission believes that a robust and timely response by the Government to this Report is essential to maintain the confidence of the judiciary in the process. The Commission also believes that a joint "lessons learned" exercise based on the four Commission processes which have taken place over the past twelve years would be both timely and legal. The Commission hopes and expects that such an exercise would result in both the Government and the judiciary "recommitting" to the Quadrennial process, and believes it likely that the exercise would result in a more efficient process and a

306 Levitt Report (2012) at para. 99 [JBD at tab 12].

> greater satisfaction of all stakeholders with the outcome of future Quadrennial Commission processes.[307]

3. The Government's Response to the Levitt Report

79. On October 12, 2012, the Minister of Justice issued the Government's response to the Levitt Report.

80. The Government accepted the Levitt Commission's recommendations that judicial salaries should continue to be automatically indexed every April 1 based on IAI, that all retirement benefits currently enjoyed by chief and associate chief justices should be extended to the three senior northern judges, and that the senior family law judge in Ontario should receive the same representational allowance as all Ontario senior regional judges.

81. The Government rejected the Commission's recommendation that judges of appellate courts receive a salary differential.

82. The Government did not respond in detail to the Levitt Commission's process recommendations. The Government reiterated its position that each Quadrennial Commission must consider the Parties' arguments anew and not simply adopt the recommendations of previous Commissions. With respect to the recommendation calling for respect of the consensus around particular issues that may have emerged during a previous Commission inquiry, – which quite plainly meant to refer to a consensus arising out of the report(s) of previous Quadrennial Commission(s) –, the Government's response contained the surprising observation that no consensus could arise on any issue unless the *main parties* were in agreement, an observation that is ill-founded as a matter of simple logic.

83. The Government's response stated that it would amend the *Judges Act* to improve the timeliness of the Commission process by reducing the time for the Government's response from six months to four months and establishing an express obligation on the Government to introduce implementing legislation in a timely manner. Finally, the Government stated that it was "open to exploring with the judiciary approaches that would make the process less adversarial and thereby improve its overall effectiveness."

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307 Levitt Report (2012) at para. 121 [JBD at tab 12].

4. Amendments to the *Judges Act*

84. The Government made the above-mentioned amendments to the *Judges Act* through the omnibus *Jobs and Growth Act, 2012*. The amendments to the *Judges Act* changed the Quadrennial Commission's start date from September 1 to October 1, reduced the Minister of Justice's time to respond to the Quadrennial Commission's report from six (6) months to four (4) months, and specified that the Minister had to introduce a bill to implement the response "within a reasonable period."

85. In 2014, through the *Economic Action Plan 2014 Act, No. 2*, the Government amended the *Judges Act* and the *Federal Courts Act* to include Federal Court prothonotaries within the scope of the Quadrennial Commission's statutory mandate.

G. The Rémillard Commission

86. The fifth Quadrennial Commission, the Rémillard Commission, was established in December 2015. It was chaired by Gil Rémillard, and its two members were Margaret Bloodworth and Peter Griffin. The Commission issued its report on June 30, 2016.

87. The principal issue before the Rémillard Commission was the determination of the judicial salary for puisne judges. As part of its inquiry, the Rémillard Commission had to consider whether to recommend, as proposed by the Government, that the indexation of judicial salaries be based on the CPI rather than the IAI.

1. Salary and Other Substantive Recommendations

88. The salary of a puisne judge was $308,600 when the Rémillard Commission began its inquiry. The Association and Council proposed that the Rémillard Commission recommend an 2% increase on April 1, 2016 and April 1, 2017, and a 1.5% increase on April 1, 2018 and April 1, 2019, in addition to the annual IAI adjustment.

89. The Government proposed that judicial salaries be maintained at their current level. They also submitted that annual salary adjustments should be based on the CPI rather than the IAI, as set out in the *Judges Act*.

90. The Rémillard Commission rejected the Government's proposed replacement of the IAI adjustment with the CPI. The Rémillard Commission reaffirmed the Levitt Commission's warning that "the IAI adjustment as intended to be a key element in the legislative

architecture governing judges' salaries and should not be lightly tampered with."[308] The Rémillard Commission recognized that the IAI adjustment reflected a choice to "adjust salaries in accordance with the measure that reflects changes in the average income of Canadians, not in accordance with the index that measures only changes in the cost of living, as is done for retirement annuities."[309]

91. The Rémillard Commission also rejected the Government's attempt to focus on broader trends in public sector compensation rather than the DM-3 comparator. The Rémillard Commission recognized that "the DM-3 comparator remains worthwhile for its long-term use, consistency, and objectivity."[310]

92. Using the comparator of the midpoint of the DM-3 salary range plus one-half of eligible performance pay, the Rémillard Commission noted that the 7.3% gap between the DM-3 comparator and judges' salaries had reduced significantly to about 2% in 2015, with the gap projected to close completely during the Rémillard Commission's term. The Rémillard Commission noted that these figures suggested that "indexation in accordance with the IAI is serving its intended function."[311]

93. The Rémillard Commission also concluded that the gap between the average private sector lawyer's income and judge's salary, including the value of the judicial annuity, appears to be closing. It recommended that effective April 16, 2016, the judicial salary should be set at $314,100.

2. Observations and Recommendations as to Process

94. Along with making recommendations on substantive matters, the Rémillard Commission recommended that the Government consider alternatives to avoid future election periods jeopardizing the nine-month completion date for the Commission's report, set out at s. 26(2) of the *Judges Act*. The intervention of the general election in 2015 had delayed the commencement of the Commission's inquiry. In making its recommendation, the Rémillard Commission reaffirmed that "the Quadrennial Commission process is constitutionally and statutorily mandated, and must be complied with."[312]

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308 Rémillard Report (2016) at para. 38 [JBD at tab 13]. See also Levitt Report (2012) at para. 51 [JBD at tab 12].
309 Rémillard Report (2016) at para. 42 [JBD at tab 13].
310 Rémillard Report (2016) at para. 52 [JBD at tab 13].
311 Rémillard Report (2016) at para. 56 [JBD at tab 13].
312 Rémillard Report (2016) at para. 208 [JBD at tab 13].

95. While the Rémillard Commission did not make any further recommendations as to process, it did endorse the Levitt Commission's comments on the need for the Parties to "pursue as collaborative and cooperative a process – and reaction to the recommendations – as possible."[313] The Rémillard Commission concluded as follows :

> We join past Commissions in urging that great care be taken to preserve the integrity of the Quadrennial Commission process. A robust and timely response by the Government to the Quadrennial Commission process is an essential component of maintaining that integrity and ensuring the judiciary's continued confidence in the process.[314]

3. The Government's Response to the Rémillard Report

96. On October 31, 2016, the Minister of Justice issued the Government's response to the Rémillard Report.

97. The Government accepted the Rémillard Commission's compensation-related recommendations. In particular, "in light of the Commission's careful analysis of the arguments and evidence on the issue", the Government accepted the recommendation that judges' salaries should continue to be adjusted annually on the basis of increases in the IAI.

98. The Government also took up the Rémillard Commission's recommendation to explore means of ensuring that the statutory time periods set out in the *Judges Act* are complied with. The Government's response stated that it would amend the *Judges Act* to set June 1, 2020 as the date for the commencement of the next Commission's inquiry, with subsequent commissions to commence on June 1 every four years thereafter. The Government was of the view that fixed start dates for the Commission process were the best way to ensure compliance with statutory time periods.

4. Amendments to the *Judges Act*

99. The Government implemented the recommendations made in the Rémillard Commission's report through the omnibus *Budget Implementation Act, 2017, No. 1*. Notably, the amendments to the *Judges Act* changed the Quadrennial Commission's start date from October 1 to June 1.

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313 Rémillard Report (2016) at para. 218 [JBD at tab 13] citing Levitt Report (2012) at paras. 112-117 [JBD at tab 12].

314 Rémillard Report (2016) at para. 243 [JBD at tab 13].

5. Inquiry on Proposed Amendment to the *Judges Act*

100. On May 31, 2019, the Minister of Justice requested, pursuant to s. 26(4) of the *Judges Act*, that the Rémillard Commission conduct an inquiry and report on the effect on the adequacy of federal judicial compensation and benefits of a proposed amendment to the *Judges Act* that would stop the accrual of pensionable service for any judge whose removal from office has been recommended by the Council. The Association made submissions in support of the proposed amendments.

101. The Rémillard Commission concluded that the proposed amendment would not impact the adequacy of the salaries and other amounts payable under the *Judges Act* or the adequacy of judges' benefits generally. Moreover, it found the proposed amendment would have no impact on the ability to recruit outstanding candidates for the judiciary. Instead, it concluded that the proposed amendment would be a reasonable measure to contribute to continued public confidence in the judicial system. The Commission expressed reservations about the Minister's proposal to apply the changes on the day they come into force to judges who are already the subject of a recommendation for removal.

102. On February 27, 2020, the Government accepted the Rémillard Commission's recommendations, stating its intent to implement the proposed amendments to the *Judges Act*, but only so as to apply to judges whose removal is recommended on or after the day it comes into effect.

H. The Turcotte Commission

103. The sixth Quadrennial Commission, the Turcotte Commission, was established in May 2020. It was chaired by Martine Turcotte, and its two other members were Margaret Bloodworth and Peter Griffin. Upon the request of the Parties, the Commission agreed to defer the commencement date of the Commission's inquiry from June 1, 2020 to December 1, 2020 in light of the uncertainty created by the COVID-19 pandemic. The Commission issued its report on August 30, 2021.

104. The principal issue before the Turcotte Commission was the determination of the judicial salary for puisne judges. The Turcotte Commission also considered whether to recommend, as urged by the Government, that the indexation of judicial salaries based on the IAI be capped at a maximum of 10% over the quadrennial period.

1. Salary and Other Substantive Recommendations

105. The salary of a puisne judge was $361,100 when the Turcotte Commission began its inquiry. The Association and Council proposed that the Turcotte Commission recommend an 2.3% increase in each of the final two years of the quadrennial period, April 1, 2022 and April 1, 2023, in addition to the annual IAI adjustment.

106. The Government proposed that judicial salaries be maintained at their current level, and that annual IAI adjustments be capped at a maximum four-year cumulative increase of 10%.

107. The Turcotte Commission rejected the Government's proposed imposition of a ceiling on the IAI adjustment. Following a review of the legislative history of the IAI and the observations of past Commissions on the subject, the Turcotte Commission observed that: "[a]ttempting to fetter [the IAI's] effects by imposing ceilings or floors, other than the annual 7% cap already provided for, is inconsistent with the policy behind indexation and its application over the last 40 years."[315]

108. The Turcotte Commission then considered the Parties' arguments on the appropriate comparator groups. It rejected the Judiciary's invitation to use the total average compensation of DM-3s rather than the midpoint of the salary range plus one-half of eligible performance pay (the Block Comparator). The Turcotte Commission concluded that there was no basis for further adjustment of judicial salaries based on this comparator.[316]

109. The Turcotte Commission then considered the compensation level of private sector self-employed lawyers. The Turcotte Commission first noted that since the available data on the income levels of self-employed lawyers did not capture the income of lawyers practising through a professional law corporation, it is "inescapable" that the data provided to the Commission under-reports the income of higher-earning private sector lawyers.[317]

110. Nevertheless, the Turcotte Commission analyzed the existing CRA data on the income levels of self-employed lawyers. The Turcotte Commission filtered such data by (i) focusing on the 75th percentile, (ii) applying a low-income exclusion of $80,000 (increasing it from $60,000), and (iii) adopting an "age-weighted" based on the relative number of judges appointed at each age during the relevant period.[318] Applying these filters, the Turcotte Commission concluded that the gap between judicial compensation and the relevant private

315 Turcotte Report (2021), para. 127 [JBD at tab 14].
316 Turcotte Report (2021), para. 149 [JBD at tab 14]
317 Turcotte Report (2021), para. 41 [JBD at tab 14].
318 Turcotte Report (2021), para. 182 [JBD at tab 14].

sector comparator fell "within the 7.3% differential identified by the Levitt Commission as testing the limits of rough equivalence."[319]

111. The Turcotte Commission recommended that effective April 1, 2021, judges' salaries should be set at the prevailing levels ($361,100 for puisne judges).

112. In addition to its salary recommendation, the Turcotte Commission made further recommendations concerning the incidental allowance, the representational allowances and medical assistance for judges in receipt of a northern allowance.

2. Observations and Recommendations as to Process

113. The Turcotte Commission opined that the process was 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*."[320]

114. The Turcotte Commission expressed strong reservations about the adequacy of the data available to the Commission and emphasized specifically, giving particular emphasis to the absence of data regarding the professional income of lawyers practising through a professional law corporation.[321]

115. The Turcotte Commission issued a recommendation, Recommendation 8, calling on the Parties to engage in "preparatory work" to ensure the Seventh Quadrennial Commission would have adequate and appropriate data from which to work.[322]

3. The Government's Response to the Turcotte Report and Amendments to the *Judges Act*

116. On December 29, 2021, the Minister of Justice issued the Government's response to the Turcotte Report.

117. The Government accepted all of the Turcotte Commission's recommendations. In particular, the Government noted in regard to the annual IAI adjustments that the Turcotte Commission had engaged "in a thorough analysis of the evidence presented to it, the historical roots of IAI indexation, and its ongoing role in judicial compensation."

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319 Turcotte Report (2021), para. 182 [JBD at tab 14].
320 Turcotte Report (2021), para. 299 [JBD at tab 14].
321 Turcotte Report (2021), paras. 30-58 [JBD at tab 14].
322 Turcotte Report (2021), p. 50 (Recommendation 8) [JBD at tab 14].

118. The Government implemented the recommendations made in the Turcotte Commission's August 2021 report through the omnibus *Budget Implementation Act, 2022, No. 1*.

4. Implementation of Recommendation 8 and the Collection of Pre-Appointment Income

119. The Turcotte Commission's Recommendation 8 regarding data collection included a recommendation that the Office of the Commissioner for Federal Judicial Affairs begin preparation of statistical data for each province and territories relating to the compensation levels of appointees immediately prior to their appointment ("Recommendation 8(5)(c)").

120. The question of collecting pre-appointment income data from appointees to the bench never arose during the inquiry overseen by the Turcotte Commission. None of the Parties raised it, nor sought a recommendation that pre-appointment income data should be collected.

121. Consequently, following the Government's response to the Turcotte Report, the Association and Council wrote to the Commission to express its concerns and seek the Commission's guidance. The Commission directed that the Parties file written submissions on this issue.

122. Following submissions by both the Judiciary and the Government, the Commission declined the Judiciary's request that the question be reconsidered or that the implementation of Recommendation 8(5)(c) be deferred, instead directing the Parties to "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 ."[323]

[323] Quadrennial Commisson Letter to parties – Recommendations 8(5)(c), dated June 6, 2023 [JBD at tab 14 (c)].