

**IN THE MATTER OF THE 7TH QUADRENNIAL COMMISSION
ON JUDICIAL COMPENSATION AND BENEFITS**

**SUBMISSIONS OF THE ASSOCIATE JUDGES OF THE FEDERAL COURT
TO THE JUDICIAL COMPENSATION AND BENEFITS COMMISSION**

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PART I. INTRODUCTION

1. Associate Judges (formerly known as Prothonotaries) are a key part of ensuring the timely and effective dispensation of justice in the Federal Court. Associate Judges are judicial officers who hold office during good behaviour until age 75. They have the same immunity from liability as other judges of the Federal Court (“FC Judge”) and exercise many of the same powers and functions. It is common ground that the office of Associate Judge attracts the guarantee of judicial independence under the Constitution.

2. Over time, the office of Associate Judge has evolved significantly to become a *de facto* interlocutory and small-to-intermediate claims court “for the better Administration of the Laws of Canada.”¹ Associate Judges hear and decide complex cases and motions on a wide variety of matters, including *Charter* issues, commercial matters, specialized areas such as pharmaceutical regulation, intellectual property, Aboriginal law, maritime law, immigration, class actions, and judicial review. They routinely decide cases and issues between private entities and the Federal Crown and/or Ministers of the Crown, illustrating the strong need for judicial independence.

3. Since the 5th Quadrennial Commission (Rémillard Commission) Report in 2016, which was accepted by the Government, the salary of Associate Judges has been fixed at 80% of the salary of FC Judges. However, the duties of Associate Judges have evolved considerably since then. They now have full trial jurisdiction up to \$100,000. They are responsible for the bulk of the case management for Federal Court cases, a responsibility that has grown enormously since 2016. Their caseload has grown exponentially. Meanwhile, their income has been overtaken by many of their provincial counterparts. For these reasons, they seek an adjustment to have their salary fixed at **95%** of the salary of FC Judges.

4. Associate Judges were historically underpaid. The Government did not implement a process that complied with the *PEI Reference* until 2007. In May 2008, after their first ever independent review process, Special Advisor Adams issued a report² setting out comprehensive recommendations regarding their compensation and benefits. He

¹ *Constitution Act*, 1867, s.101, Joint Book of Documents (“JBD”) Tab 1.

² Report of Special Advisor on Associate Judges’ Compensation, dated May 30, 2008 (“Adams Report”), JBD Tab 15.

recommended, in particular, that the Associate Judges' salary be increased to 80% of that of a FC Judge. However, the global financial crisis intervened, and the Government declined to implement his recommendations at that time.

5. In June 2013, following a second independent review process, Special Advisor Cunningham issued a report³ consistent with the findings of Special Advisor Adams and made similar recommendations. He recommended, in particular, that the Associate Judges' salary be fixed at 80% of the salary of a FC Judge.

6. In response to the Cunningham Report, the Government undertook to make improvements to the Associate Judges' compensation and benefits, including an improved pension system and long-term disability and sick leave coverage. However, the Government fixed the Associate Judges' salary at 76% rather than 80% of a FC Judge as recommended by Special Advisor Cunningham, and signaled its intention to establish their salary and benefits under the *Judges Act*.

7. In 2016, the 5th Quadrennial Commission recommended, and the Government finally accepted, that Associate Judges' salary be fixed at 80% of the salary of a FC Judge.

8. In 2020, the 6th Quadrennial Commission recommended changes to the incidental expense allowance for Associate Judges, and the creation of a supernumerary program. The Associate Judges did not seek an increase to the percentage on which their salary was based at that time.

9. Now, however, the time has come to consider whether the 80% ratio remains appropriate. Over the years, the role of Associate Judge has evolved as the case load of the Federal Court increases in size and complexity. Associate Judges are on the frontlines of the Federal Court in several respects, including through case management, mediations, and small-to-intermediate trials, and their work increasingly resembles that of FC Judges. This has been recognized by the Federal Court of Appeal which has affirmed that Associate Judges, within their areas of authority, perform essentially the same task as FC Judges.

³ Report of Special Advisor on Associate Judges' Compensation, dated July 31, 2013 ("Cunningham Report"), JBD Tab 16.

10. The Associate Judges therefore respectfully request that their salary be set at 95% of the salary of a FC Judge, retroactive to April 1, 2024, and that s. 10.1 of the *Judges Act* be amended accordingly. In this request, the Associate Judges are supported by the Chief Justice of the Federal Court, and anticipate that he will make a submission to this effect.

11. These Submissions are organized as follows:

- Part II gives an overview of the Federal Court's jurisdiction and role within the Canadian justice system, the nature of the office, and the role performed by the Associate Judges;
- Part III provides an overview of the historical and current compensation of the Associate Judges;
- Part IV addresses the factors for consideration, and the findings and recommendations contained in the Adams and Cunningham Reports and the Report of the 5th Quadrennial Commission; and
- Part V details the Associate Judges' request for recommendations with respect to salary.

PART II. THE FEDERAL COURT: A BRIEF OVERVIEW

A. *Jurisdiction of the Federal Court*

12. The Federal Court of Canada (now the Federal Court) was established in 1971 to replace the Exchequer Court. Section 3 of the *Federal Courts Act*, RSC 1985, c.F-7 provides that the Federal Court is a court of law, equity and admiralty, and a superior court of record having both civil and criminal jurisdiction.

13. The Federal Court is Canada's national trial court which hears and decides legal disputes arising in the federal domain, including claims against the Government of Canada, civil suits in federally-regulated areas and challenges to the decisions of federal tribunals. The Federal Court is a bilingual court where proceedings may be taken in either or both of Canada's official languages. It is also a bi-juridical court applying both the common law and civil law. The Court sits regularly across Canada and its judgments have force and effect across the country.

14. Unlike the Superior Courts established by the provinces, the Federal Court does not

have inherent, general jurisdiction, although it does have full plenary powers to control its own processes. The jurisdiction of the Federal Court derives primarily from the *Federal Courts Act* and is conferred by over 100 other federal statutes. These give the Court authority to hear and decide cases in a number of broad categories, including national security, intellectual property, and maritime and admiralty disputes. The Federal Court has original, but not exclusive, jurisdiction over proceedings by and against the Crown, including Aboriginal law claims.

15. The Court consists of a Chief Justice, 42 other Judges (including four supernumerary judges), and (currently) nine Associate Judges (including one supernumerary Associate Judge).

B. Qualifications for Appointment

16. The statutory qualifications for appointment as Associate Judge are set out in subsection 12(1) of the *Federal Courts Act*. Generally, Associate Judges must be barristers or advocates of a provincial or territorial bar in good standing and persons who are, in the opinion of the Governor in Council, necessary for the efficient performance of the work of the Court that, under the *Federal Courts Rules*, is to be performed by them. In practice, applicants must have at least 10 years' experience at the bar. These are essentially the same basic qualifications required of a superior court judge. However, in addition, a thorough knowledge of the *Federal Courts Rules* is a prerequisite. Importantly, the incumbent must possess both a depth of knowledge and experience to facilitate adjudication of complex matters, often between leading legal practitioners in Canada, as well as the ability to effectively streamline the hearing of matters brought by self-represented litigants with less experience before the courts as part of their role as frontline judicial officers. Associate Judges bring to the Court decades of litigation and courtroom experience in one or more of the core areas of the Court's jurisdiction, in addition to mastering its process and rules of procedures.

17. Depending on the location of the office, knowledge of English or French or both English and French is a further requirement. The incumbent must also be willing to travel within Canada as required by the Chief Justice.

18. The nature of the role and the duties of Associate Judges was agreed upon by the Government and the Associate Judges in an Agreed Statement of Facts filed before Special Advisor Cunningham, which was appended to his report.

C. Nature of the Office of Federal Court Associate Judge

19. There are currently nine Associate Judges in office – located in Toronto (3), Ottawa (3), Montréal (1), Edmonton (1), and Vancouver (1). Each Associate Judge is assigned to a specific location as part of his or her appointment. However, as noted above and given the Court’s pan-Canadian jurisdiction, Associate Judges travel and sit throughout Canada.

20. The Associate Judges are the frontline judicial officers of the Court in their respective regions. In most proceedings, they are the initial contact, and may be the only contact between litigants and the justice system.

21. The office of Associate Judge has evolved into a small and intermediate claims court, with greater monetary jurisdiction (now including claims up to \$100,000) than most provincial courts.

22. Associate Judges have similar “hallmarks” of office as FC Judges:

- They are sworn into office by the Chief Justice at special sittings of the Court.
- They hold office during good behaviour until age 75.
- They have the same immunity from liability.
- They are entitled to the protection of judicial independence, including the requirement to have their compensation determined by an independent judicial compensation review process, conducted on a periodic basis.
- Each Associate Judge is assigned a judicial assistant and has access to a pool of law clerks.⁴
- Lawyers and litigants address the Associate Judge as “Your Honour”.⁵

⁴ A law clerk, under the direction of the Judge or Associate Judge for whom the clerk works, researches points of law, prepares memoranda of law and generally assists the Judge or the Associate Judge in the work of the Court.

⁵ Notice to the Parties and the Profession dated September 3, 2009, [online](#). A special committee of the Federal Court was struck and made the recommendation to change the title to “Associate Judge”.

- Administrative and operational support for the Court's Judges and Associate Judges is provided by the Courts Administration Service (CAS) and the Registry.⁶
- Decisions of Associate Judges are final, subject only to appeal.⁷
- Discretionary decisions of Associate Judges are reviewable only on the basis of legal error or palpable and overriding factual error.⁸
- Associate Judges are subject to the Ethical Principles for Judges published by the Canadian Judicial Council.⁹
- Associate Judges are subject to the same disciplinary process, administered by the Canadian Judicial Council, as Judges.¹⁰

D. Role of the Office of Federal Court Associate Judge

23. Associate Judges are judicial officers appointed by the Governor in Council under the *Federal Courts Act*. Their functions are outlined at section 12 of the *Federal Courts Act* and set out in the *Federal Courts Rules*.

24. When the Federal Court was created in 1971, the then Masters of the Exchequer Court were renamed "Prothonotaries". In 1998, the rules of practice of the Federal Court were comprehensively revised for the first time since the creation of the Federal Court of Canada. The jurisdiction of the Associate Judge was significantly enhanced by virtue of amendments to the *Federal Court Act* and the *Federal Court Rules, 1998*.¹¹

25. Rules 50 and 51 of the *Federal Courts Rules* expanded the jurisdiction of the

⁶ The role of CAS is to provide administrative services to four courts of law: the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court of Canada and the Tax Court of Canada. These services permit individuals, companies, organizations and the Government of Canada to submit disputes and other matters to the courts, and enable the courts to hear and resolve the cases before them fairly, without delay and as efficiently as possible. The Registry is responsible for processing, recording and directing the flow of all documents filed by the parties to members of the Court, as well as recording all steps and events during the life of the case. The Registry also provides assistance in scheduling hearings and providing support during sittings.

⁷ Paragraph 72(2)(e) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) provides that in an application for leave and judicial review of a decision made under the IRPA, no appeal lies against an interlocutory judgment, rendered by either a FC Judge or Associate Judge.

⁸ *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, at para. 64, Associate Judges' Book of Documents ("AJ BOD"), Tab 1.

⁹ Canadian Judicial Council, *Ethical Principles for Judges* (2004), [online](#).

¹⁰ Sections 2 and 63(1) and (2) of the *Judges Act*, JBD Tab 3.

¹¹ Now the *Federal Courts Act* and the *Federal Courts Rules*.

Associate Judges by granting trial jurisdiction over monetary claims up to \$100,000.

26. Part 9 introduced case management¹², status reviews¹³, and dispute resolution services, specifically contemplating that Associate Judges would carry out these new duties.

27. As noted earlier, the Associate Judges exercise many of the same powers and functions as a judge of the Federal Court. In particular:

- (a) they exercise full trial jurisdiction for monetary claims up to \$100,000;
- (b) they hear and decide motions on a wide range of matters, regardless of the relief sought or amount in issue, including final determinations such as motions to strike or dismiss proceedings;
- (c) in the context of the Court's admiralty jurisdiction, as well as in exercising jurisdiction over the enforcement of any of the Court's judgments, they make substantive determinations as to the ownership or beneficial interests of parties in vessels and other property that are often worth millions of dollars, direct the manner and amount of their judicial sale, rule on the substantive validity of claims made against the proceeds of sale that can equal or exceed the value of the property, and determine the claimants' respective priorities. In doing so, they apply the general laws of the provinces, as well as highly specialised admiralty and conflicts of interests laws.
- (d) they decide questions such as *Charter* issues and other general questions of law, and adjudicate complex commercial matters;
- (e) they play a critical role in actions commenced pursuant to section 6 of the *Patented Medicines (Notice of Compliance) Regulations*, which are statutorily required to be determined on the merits within 24 months of their commencement. In such proceedings, extensive case management and the timely determination of interlocutory motions are essential. In recognition of

¹² Case management involves the transfer of responsibility for management of the pace of litigation from the litigants to the judiciary. It entails a more active form of management and intervention by the court in the various phases of litigation, with a view to promoting the earlier resolution of cases, to eliminating unacceptable delays, and, ultimately, to reducing costs and enhancing the quality of justice.

¹³ Status reviews are hearings convened by the Federal Court when a specified amount of time has elapsed after certain steps in a proceeding without further action by the parties.

their important role in these proceedings, appeals from interlocutory decisions rendered by Associate Judges are made directly to the Federal Court of Appeal, with leave of that Court (as opposed to being made to a Judge of the Federal Court pursuant to Rule 51 as is normally the case)¹⁴;

- (f) they conduct references, pre-trial conferences, and case management of proceedings, including class actions, as designated by the Chief Justice;
- (g) they are trained mediators and conduct a significant number of dispute resolution conferences, which result in the resolution of many complex cases in all areas of the Court's jurisdiction; and
- (h) they routinely decide cases or issues as between private entities and the federal Crown, and/or Ministers of the Crown and other federal officials, including decisions made by quasi-judicial tribunals.

28. In the exercise of their trial jurisdiction, as well as the adjudication of interlocutory matters within their jurisdiction, Associate Judges have the same powers and functions as FC Judges. They routinely weigh and assess the credibility of evidence adduced by affidavit or through witnesses, rule on questions of evidence, and make factual and legal determinations.

29. The early intervention of an Associate Judge is crucial since the great majority of actions before the Court are resolved at the interlocutory stage without reaching trial. The nature and scope of the work of Associate Judges (then called Prothonotaries) was described by the Honourable Mr. Adams as follows:

Prothonotaries are integral to the proper functioning of the Federal Court and both their actual and perceived independence are vital to that Court's integrity. They deal with a broad range of exceedingly complex and sometimes arcane matters unique to the Federal Court's jurisdiction. A prothonotary requires considerable judgment and patience in dealing with such important matters. This is why a minimum of ten years experience as a lawyer has been required. The job's requirements are demanding in terms of volume and front-line pressure....

The responsibilities of the prothonotaries have expanded over the years and this likely will continue given the modern demands of case management and court sponsored alternative dispute resolution initiatives throughout Canada. Pre-trial motions, no matter the nature of the litigation, can be complex and fundamental to the direction of a matter regardless of the standard of review. A prothonotary requires a deep grasp of not only procedural issues

¹⁴ *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133, s. 6.11.

but also the substantive law governing the proceedings and the subtle strategies of counsel and their clients who regularly litigate in the Federal Court. A prothonotary must implement all this required knowledge in real time and in a manner that produces confidence in the administration of justice and the Federal Court of Canada.¹⁵

30. Since the Adams Report, the work of Associate Judges has become even more integral to the proper functioning of the court. Case management has expanded dramatically, both in volume and complexity, and most case management is conducted by Associate Judges. Interlocutory motions have become increasingly complex. With the increase in monetary jurisdiction, Associate Judges now hear many cases on the merits that would formerly have been heard by FC Judges.

31. The Associate Judges participate alongside FC Judges in judicial education programs organized by the National Judicial Institute, including the new judges program and judging in your first five years programs required by the Canadian Judicial Council.¹⁶ Associate Judges are also required to invest the equivalent of ten days per year of professional development required by the Canadian Judicial Council, in the same manner as Judges.¹⁷

32. The Associate Judges are members of committees of the Court, including the Executive Committee, Education Committee, Social Committee, Communications Committee, Technology Committee, and the Federal Courts Rules Committee.¹⁸ They are also members of the various bar liaison committees of the Court: Canadian Bar Association Liaison Committee; Indigenous Bar Association – Aboriginal Law Bar Liaison Committee; Maritime Law Bar Liaison Committee; Citizenship, Immigration and Refugee Law Bar Liaison Committee; Intellectual Property Law Bar Liaison Committee; and Class Action Bar Liaison Committee.

33. Some of the most senior counsel in Canada, with particular expertise in

¹⁵ Adams Report, JBD Tab 15, pp. 41-42.

¹⁶ The National Judicial Institute (NJI) is an independent, not-for-profit institution committed to building better justice through leadership in the education of judges in Canada and internationally.

¹⁷ Canadian Judicial Council Professional Development Policies and Guidelines (September 2018), [p. 5](#). While the Guidelines refer to “judges”, the Associate Judges are required by the Court to adhere to these standards as well.

¹⁸ Pursuant to s. 45.1(b) of the *Federal Courts Act*, the Federal Courts Rules Committee is composed of members of the judiciary, including one Associate Judge designated by the Chief Justice of the Federal Court.

constitutional and administrative law, intellectual property, Aboriginal law, and admiralty, routinely appear before Associate Judges.

34. The Associate Judges' jurisdiction has expanded substantially over the years. Because of this, and the choice exercised by counsel and unrepresented litigants, it is increasingly the Associate Judges who have the greatest day-to-day contact with litigants who come before the Federal Court.

PART III. HISTORY AND OVERVIEW OF COMPENSATION OF THE ASSOCIATE JUDGES

35. At page 54 of his report, Special Advisor Adams stated that the Associate Judges, "as a very small group of Federal Court judicial officers, have had difficulty attracting the federal government's attention to their concern over the years." Their remuneration history is reviewed extensively in the Adams Report at pp. 31-41.

36. Historically, subsection 12(4) of the *Federal Courts Act* provided that each Associate Judge would be paid a salary to be fixed by the Governor in Council. Subsection 12(5) further provided that, for the purposes of the *Public Service Superannuation Act*, an Associate Judge was deemed to be employed in the public service.

37. The first independent and comprehensive review of the Associate Judges' compensation was held in 2008, 11 years after *PEI Judges Reference*. Before then, there were, broadly speaking, three distinct periods in the history of how the Associate Judges' compensation was fixed. The Government consistently agreed in 1985, 1993, and 2001 that the Associate Judges' salary should be fixed by reference to the salaries paid to provincial Associate Judges and/or Provincial Court Judges.¹⁹

38. Following the issuance of the Cunningham Report, amendments were made to the *Judges Act* and the *Federal Courts Act*. Section 10.1 of the *Judges Act* set the Associate Judges' salary at 76% of that of a FC Judge.²⁰ However, Associate Judges were not entitled

¹⁹ The matter of the appropriate pensions, disability benefits, incidental allowances, and other benefits for the office were not considered by the Government during the *ad hoc* reviews in 1985, 1993 and 2001. The benefits remained tied to that government classification and the terms and conditions of employment of all other full-time Governor-in-Council appointments.

²⁰ Section 10.1 of the *Judges Act*, JBD Tab 3.

to certain benefits extended to judges under the *Judges Act*, including an allowance payable to a judge for reasonable incidental expenditures that the fit and proper execution of the office of judge may require (incidental allowance) and an option to elect supernumerary status instead of retirement after having serving 15 years in judicial office with a combined age and number of years in office is not less than 80, or having attained the age of 70 and continued in judicial office for at least 10 years (supernumerary status).

39. Further amendments to the *Judges Act* were made following the issuance of the 5th Commission's Report. The Government accepted the recommendations of the Commission that salaries for Associate Judges should be increased from 76% to 80% of that of a FC Judge, that Associate Judges should receive an incidental allowance of \$3,000 annually, and that Associate Judges should be paid 95% of the reasonable full indemnity costs incurred before the Quadrennial Commission.

40. Following the issuance of the 6th Commission's Report, reimbursement for reasonable incidental expenditures incurred by Associate Judges was increased to parity with FC Judges, from \$3,000 to \$7,500 annually. The *Judges Act* was also amended to provide for an option for Associate Judges to elect supernumerary status.

PART IV. FACTORS FOR CONSIDERATION

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

Commission

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.

Factors to be considered

(1.1) In conducting its inquiry, the Commission shall consider

(a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;

(b) the role of financial security of the judiciary in ensuring judicial independence;

(c) the need to attract outstanding candidates to the judiciary; and

(d) any other objective criteria that the Commission considers relevant.

42. The Supreme Court of Canada (“SCC”) affirmed in *Bodner* that “each commission must make its assessment in its own context”.²¹ The SCC held that the “starting point” for the work of each judicial compensation commission should be the date of the previous commission’s report.²² The previous report forms the background and context in which the present Commission performs its function. The whole concept of compensation being “adequate” means it must be related to objective criteria or compared with compensation received by other comparable groups. This section explores both the factors which should inform the recommendations and the comparisons which are submitted to be appropriate.

A. *The prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government*

43. To avoid duplication, the Associate Judges adopt the written submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council as they relate to this factor. In summary, the Associate Judges submit that no aspect of the prevailing economic conditions in Canada weighs against setting the remuneration of the nine Associate Judges at a level which is fair and reasonable taking into account the appropriate comparators.

B. *The role of financial security of the judiciary in ensuring judicial independence*

44. Judicial independence is a fundamental tenet of our constitutional and the rule of law. It flows “as a consequence of the separation of powers” of the three branches of government – the executive, the legislature, and the judiciary. It operates to insulate the courts from interference by parties to litigation and the public generally, as Lamer CJC set out at paragraph 130 of his reasons in *PEI Judges Reference*. Lamer CJC went on to quote from Professor Shetreet, who stated:²³

Independence of the judiciary implies not only that a judge should be free from executive or legislative encroachment and from political pressures and entanglements but also that he should be removed from financial or business entanglement likely to affect or rather to seem to affect him in the exercise of his judicial functions.

²¹ *Bodner*, paras. 14-15, JBD Tab 6.

²² *Bodner*, para. 14, JBD Tab 6.

²³ *PEI Judges Reference*, para. 130, JBD Tab 4.

45. The purpose of the constitutional guarantee of financial security as an aspect of judicial independence is not to benefit the judges who come within its scope. Rather, the benefit that judges derive is purely secondary. Judicial independence is important because it serves important societal goals. It is a means to secure these goals, which include maintaining public confidence in the impartiality of the judiciary, including the perception that justice will be done in individual cases.

46. The challenge identified by Lamer CJC in *PEI Judges Reference* is to ensure that judicial compensation is set in a manner that fulfills the so-called “structural requirement of the Canadian Constitution”, which is that the relationship between the judiciary and the other branches of government must be depoliticized. As Lamer CJC pointed out, the difficulty is that the setting of remuneration from the public purse is “inherently political” and, at the end of the day, the judicial compensation must be fixed by one of the political organs of the Constitution.²⁴ The solution identified by the SCC was to require recourse to an independent, objective and effective commission (“Judicial Compensation Commission”, or “JCC”), which would identify and consider objective criteria upon which to base recommendations about appropriate judicial compensation. As the SCC stated in *Bodner*: “The commission process is an ‘institutional sieve’ (*PEI Judges Reference*, at paras 170, 185 and 189) – a structural separation between the government and the judiciary.”²⁵

47. It is apparent from *PEI Judges Reference* and *Bodner* that the protection and preservation of judicial independence is the very *raison d’être* of the JCC. As such, it must be fundamental to the Commission’s considerations. This underscores the need for recommendations which should be understood to be independent and objective or, in other words, based on objective criteria rather than primarily political considerations.

48. One aspect of this factor is that it invites particular comparison with other judicial officers who have similar jurisdiction. In *Bodner*, the SCC determined that a JCC would be misdirecting itself if it focused on a comparison with only one comparator to the exclusion or virtual exclusion of other relevant factors.²⁶ To be clear, for the purposes of this Commission,

²⁴ *PEI Judges Reference*, para. 146, JBD Tab 4.

²⁵ *Bodner*, para. 14, JBD Tab 6.

²⁶ *Bodner*, para. 72, JBD Tab 6.

the Associate Judges do not propose parity with FC Judges or any particular Associate Judge or Provincial Court Judge (“PC Judge”), but rather that the compensation paid to other judicial officers is a relevant consideration.

49. Consistent with the reasoning in the Adams Report and the Cunningham Report, consideration must be given to the fact that the nature and function of judicial work shows great similarities among the various levels of courts. While certain judges may have broader jurisdiction, the same qualities of judicial temperament, legal knowledge, and an abiding sense of fairness are required of all judicial officers. Judges at all levels of court must have the ability to make decisions that will greatly affect people’s lives, without bending to improper influence, the pressure of public demands and expectations, or a consideration of inadmissible material. The key factor is that judicial decision-making is common to all judges. Too great a salary differential between FC Judges and Associate Judges can only be perceived by the public and potential applicants for the judicial office as diminishing the value and importance of the Associate Judges’ work and decisions.²⁷

C. *The need to attract outstanding candidates to the judiciary*

50. In considering this criterion, the Commission should weigh the following points: the relevance of the independent compensation review process itself; the need to attract highly qualified candidates; and the competition for applicants from other courts.

51. First, the very existence of a periodic compensation review process contemplated by the SCC as being both (a) meaningful and effective and (b) grounded on good faith on the part of government, in and of itself attracts applicants to the bench.

52. It is not merely the level of compensation which attaches to the judicial office at the time of appointment that will attract qualified candidates; it is the legitimate expectation that compensation will be regularly, meaningfully, and effectively reviewed, and adjusted by government acting in good faith. Without this assurance, qualified applicants will not be attracted or, at best, a significantly reduced number of them will be attracted.

²⁷ Response of the Government of Canada to the Report of the 2011 Judicial Compensation and Benefits Commission, [online](#), JBD Tab 12a.

53. It follows that the 80% salary linkage with FC Judges should not be regarded as immutable. As circumstances and the office have evolved, the Commission should be prepared to examine this percentage afresh.

54. Second, it is not enough that the recommended level of remuneration attract qualified applicants, it must be at a level which attracts outstanding qualified applicants. The importance of judicial remuneration to the recruitment of highly qualified applicants in private practice was commented on in Ontario's Fourth (1999) Triennial Report of the Provincial Judges Remuneration Commission (the "Beck Report") on May 20, 1999²⁸ at page 46:

Another factor that we think is important is the attraction of the Provincial bench to a cross section of the best of the men and women practising at the criminal bar, or with some experience at the criminal bar. For many, appointment to the Provincial Division would see little, if any, increase in salary. For others, such an appointment would constitute a fall, in some cases a very sharp fall, in remuneration. What is absolutely essential is that the level of remuneration (including pension, which will be dealt with below), be set at such a level that it will be attractive, or at least not a disincentive, to the ablest men and women at the bar.

55. The Military Judges Compensation Committee made the same point in its most recent report dated January 31, 2024, noting that in legislating that the Committee was to inquire into the adequacy of remuneration, Parliament intended "to attract 'the best' candidates, not just well-qualified candidates. The 'best' means that the top candidates will not be diverted to higher-paying judicial positions elsewhere. With the current salary differential in place between military judges and all other federally appointed judges, the best candidates are likely to seek appointment to other parts of the federal judiciary."²⁹

56. Moreover, attracting outstanding candidates is not the end of the story. Remuneration should be at a level that encourages outstanding candidates, once appointed, to remain in the role so they can be as effective as possible. In recent years, the substantial salary differential between Associate Judges and FC Judges has resulted in several Associate Judges seeking appointment as FC Judges. Justices Lafrèniere, Furlanetto, Aylen, and Duchesne have all been appointed as FC Judges from their former position as

²⁸ Ontario's Fourth (1999) Triennial Report of the Provincial Judges Remuneration Commission ("Beck Report"), AJ BOD Tab 2.

²⁹ Report of the Military Judges Compensation Committee, January 31, 2024, p. 28, AJ BOD, Tab 3.

Prothonotaries/Associate Judges in recent years. For such a small group, this represents a significant level of attrition.

57. Third, in endeavouring to attract outstanding qualified applicants, the Federal Court must compete with other superior and provincial courts. It bears noting that the qualifications required to be appointed as an Associate Judge are essentially the same as those required for appointment as a FC Judge, any PC Judge or Superior Court Judge, or an Associate Judge in a Superior Court. A practical challenge for the Federal Court is attracting leading barristers who are familiar with Federal Court practice, preferably bilingual, and willing to travel for court business. Bearing in mind that remuneration must be adequate to continue to attract outstanding candidates to the office, any remuneration which is fixed at a level significantly lower than that of judicial officers who exercise directly comparable jurisdictions (such as provincial Associate Judges and PC Judges' civil jurisdiction) is bound to detract from the interest of qualified individuals in the position of Associate Judge. To the extent that such individuals may consider applying for appointment to the bench, it is reasonable to expect that they would apply to be appointed to positions that are higher paid.

58. It is the applicant, and only the applicant, who decides to which Court they will seek an appointment. Self-exclusion from potential for appointment as Associate Judge is a real risk if the terms of appointment are significantly less attractive.

59. Fourth, the level of remuneration should not act as a major disincentive for outstanding candidates from the private sector to apply for appointment. The Associate Judges are located in the largest urban centres in Canada, where private sector incomes are the highest. The Associate Judges share the concern of the Superior Court Judges' Association and the Canadian Judicial Council that the proliferation of professional corporations among leading practitioners has partially masked the extent to which lawyers' incomes now greatly surpass those of the judiciary – and particularly those members of the judiciary who are paid less than s.96 judges. Too wide a gap between the incomes of practitioners in leading law firms, and those of Associate Judges who are often drawn from their ranks, may serve to dissuade some desirable candidates from applying.

D. Any other objective criteria that the Commission considers relevant

1. The evolution in the role of Associate Judge

60. As Special Advisor Adams anticipated in 2008, the role and responsibilities of Associate Judges have expanded over the years as the Federal Court continues to evolve in response to increasing pressures.

61. First, according to the Courts Administration Service's Annual Reports, the number of proceedings heard at the Federal Court has skyrocketed in recent years. Since 2016, when the salary of Associate Judges was increased to 80% of the salary of FC Judges, the total number of dispositions in the Federal Court has increased from 7,547 (in 2016-2017) to 14,873 (in 2022-2023), an increase of 97%.³⁰ There has been a similarly significant increase in the number of total active proceedings in the Federal Court, which increased from 5,772 in 2016-2017 to 10,787 in 2022-2023, an increase of over 86%.³¹ From the beginning of January to the end of September 2024 alone, 20,006 proceedings were commenced in the Federal Court.³² This consistent growth in volume of cases, which is itself significant, does not account for the increase in complexity of many proceedings which often involve more issues, parties, and/or documents to review.

62. The increase in overall number and complexity of cases has had particular effects on the evolution of the role of Associate Judge. When case management was first introduced in the Federal Court, its availability was limited and unavailable in cases where the proceedings were at an early stage and there was neither confusion nor a need to narrow the issues.³³ In *Penney v. Canada (Minister of Public Safety) et al.*, Associate Judge Lafrenière (as he then was) noted that this has changed:

Although special management is neither routine nor automatically granted on request, this Court is now taking a much more flexible approach in assessing whether case management should be granted. Case management orders will automatically be issued when it appears necessary from the nature of the proceedings, such as class actions, proceedings brought pursuant to the *Patented Medicines (Notice of Compliance)*

³⁰ Courts Administration Service, Annual Report 2020-21, [p. 17](#), AJ BOD Tab 4; Courts Administration Service, Annual Report 2022-2023, [p. 25](#), AJ BOD Tab 5.

³¹ Courts Administration Service, Annual Report 2020-21, [p. 17](#), AJ BOD Tab 4; Courts Administration Service, Annual Report 2022-2023, [p. 25](#), AJ BOD Tab 5.

³² Federal Court, "Statistics (September 30, 2024)", [online](#), AJ BOD Tab 6.

³³ See *Penney v. The Minister of Public Safety Canada and Attorney General of Canada*, 2016 FC 877, at para. 4, AJ BOD Tab 7, citing *Canada (Attorney General) and Janice Cochrane v. Canada (Information Commissioner)*, 2001 CanLII 22120 (F.C.).

Regulations and cases involving First Nations band governance). Special management can also be requested informally by letter when it is anticipated that the timelines set out in the *Rules* cannot reasonably be met by the parties, or when the Court's intervention will be required to issue directions, resolve procedural issues or deal with interlocutory motions.³⁴

[Emphasis added]

63. The more flexible approach to case management, combined with the increase in overall caseload, has resulted in far greater numbers of litigants seeking case management. At present, each Associate Judge is assigned to case manage around 100-200 matters. Most of these matters require regular attention from the Associate Judges assigned to them to properly manage and hear any motions arising from them.

64. While the number of case management orders has increased as this option becomes more accessible to litigants, Associate Judges have not received a corresponding increase in administrative support. When the Commission process began for Associate Judges, there was reliable support of two Registry Officers available for every Associate Judge. Today, Associate Judges have a higher load of case management files with often *less* support than in the past, particularly outside of Toronto.

65. In addition to the general increase in the number of cases at the Federal Court, an increasing number of cases involve self-represented litigants. In 2019, 14% of the proceedings that were filed were by self-represented litigants. In 2023, this number increased to 17% of filings. By October 2024, self-represented litigants made up approximately 25% of filings. As the frontline judicial officers of the Federal Court, Associate Judges take on much of the responsibility of ensuring that self-represented litigants take the proper procedural steps in a matter. Presiding over matters in which the parties are unrepresented can also often require Associate Judges to conduct their own research of procedural and substantive issues on a myriad of legal issues.

66. A further evolution in the role of Associate Judge is the more restrictive standard of review that is applied to decisions rendered by them. Like FC Judges, decisions of Associate Judges are final and subject only to appeal. However, while previously, decisions of Associate Judges deciding questions that were "vital" to the final issue in a case could be reviewed *de novo* by a FC Judge, the Federal Court of Appeal has revisited this standard.

³⁴ *Penney*, at para. 5, AJ BOD Tab 7.

Today, discretionary orders made by Associate Judges are only reviewable when such decisions are incorrect in law or based on a palpable and overriding error in fact (i.e., the same standard of review that is applied to decisions made by FC Judges).

67. In *Hospira Health Corporation v. Kennedy Institute of Rheumatology*, Nadon J.A. explained the rationale behind this change in law:

It is also worthy of note that the role of prothonotaries of the Federal Court has continued to evolve since *Aqua-Gem* was decided in 1993. In particular, their role, as the respondents submit, includes the task of hearing and determining the merits of actions where the monetary value at issue is less than \$50 000. Needless to say, prothonotaries are no longer, if they ever were, viewed by the legal community as inferior or second class judicial officers. Other than in regard to the type of matters assigned to them by Parliament, they are, for all intents and purposes, performing the same task as Federal Court judges.

These circumstances “fundamentally shift the parameters of the debate” regarding the standard applicable to discretionary orders of prothonotaries. In my respectful opinion, the supervisory role of judges over prothonotaries enunciated in rule 51 no longer requires that discretionary orders of prothonotaries be subject to *de novo* hearings. That approach, as made clear by Low J. in *Zeitoun*, is one that has been overtaken by the evolution and rationalization of standards of review and by the presumption of fitness that both judges and masters are capable of carrying out the mandates which the legislator has assigned to them. In other words, discretionary orders of prothonotaries should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts.

[Emphasis added]

68. The recognition by the Federal Court of Appeal that Associate Judges are “for all intents and purposes, performing the same task as Federal Court judges” justifies an increase in their remuneration.

69. Finally, due to the finality of their decisions and increase in complexity, Associate Judges face greater than ever demands to publish their reasons. While this is undoubtedly a benefit to the legal system, it adds to the responsibility of the office of Associate Judge. Special Advisor Adams found that this was a relevant factor to compensation in the first Independent Review, in which he noted that Associate Judges “do not regularly write the substantial reasons customarily issued by those [FC] judges”.³⁵ This significant change provides further reason to bridge the gap between the salaries of Associate Judges and FC Judges.

³⁵ Adams Report, p. 42, JBD Tab 15.

2. Relevant comparators

70. As described below, Associate Judges of the Federal Court have fallen behind their counterparts in Alberta, British Columbia, and Manitoba, which are the other provinces that maintain a distinct role akin to that of an Associate Judge.

71. From April 1, 2024 to March 31, 2025, salaries for Associate Judges in the Federal Court, Alberta, British Columbia, Manitoba, and Ontario were as follows:

Province	2024-2025 Salary
Alberta	\$348,102
British Columbia	\$360,000
Manitoba	\$327,000 (April 1, 2023 to March 31, 2024 – the salary beginning April 1, 2024 was adjusted equal to the annual percentage change in the average weekly earnings for Manitoba on April 1, 2024)
Federal Court/Ontario ³⁶	\$317,300

72. As detailed below, it is important that the salary of Associate Judges be adjusted to take into account material change in their comparators' compensation. The greater the gap in compensation between Associate Judges and other judicial officers, the greater the likelihood highly qualified applicants will refrain from applying when there is a vacancy.

³⁶ The annual salary for Associate Judges in Ontario is linked to the salaries for Associate Judges of the Federal Court. The report of the Second and Third Commission for Associate Judges' compensation in Ontario, released by Commissioner Kaplan on October 30, 2017 (AJ Tab 8), recommended that any increase that Federal Court Associate Judges obtained as a result of their next commission process be applied to Ontario Associate Judges.

PART V. RECOMMENDATIONS SOUGHT BY THE ASSOCIATE JUDGES

A. Salary

73. The Commission's mandate is to recommend an adequate level of remuneration for the office of Associate Judge in light of all relevant criteria. The concept of what is adequate is based on all of the relevant factors and ultimately is that which is commensurate with the status and responsibility of the office.

74. The Commission's task is shared by JCCs in all Canadian jurisdictions and was identified in the *PEI Judges' Reference* – to safeguard judicial independence by acting as an “institutional sieve” between government and the judiciary, in recognition of the imperative that no negotiations can take place between them over compensation. In fulfilling this important role, the Commission must be able to rely on the assistance of the judiciary and Government to bring forward relevant information and analysis in a fair and responsible manner, to ensure that the public's interest in maintaining and safeguarding judicial independence is achieved. A JCC is neither interest arbitration nor adjudication of an adversarial dispute.

75. The Associate Judges submit that their salary should continue to be fixed or expressed as a percentage of that of a FC Judge. The issue to be determined is what should be the appropriate percentage.

76. The Associate Judges submit that, aside from the FC Judges in proportion to whose remuneration their salary is to be set, the most relevant comparators are Associate Judges of the Superior Court in British Columbia, Alberta, and Manitoba. Common sense dictates that regard should be had primarily to judicial comparators who do similar work, have similar qualifications or are otherwise similar in other respects.

77. To understand the relevance and/or weight to be given to these comparators, it is necessary to review briefly how the Associate Judges' remuneration was initially fixed and adjusted over the years.

1. Historical approach of the Government

78. The Associate Judges' salary was fixed in 1985 and in 1993 by reference to the salary of an Ontario Traditional Master. For administrative reasons, the resulting salary was

translated by the Government to the top of the GIC-6 scale, and the Associate Judges' salary was pegged to that level. That GIC "classification" also determined the level of benefits (insurance, health, etc.) provided to Associate Judges.

79. In 1998, the Associate Chief Justice of the Federal Court requested that the compensation paid to Associate Judges be reviewed following amendments to the *Federal Courts Rules*. As a result of this request and of the submissions of the Federal Court, urging that the remuneration of Associate Judges be set as a percentage of that of federally-appointed judges, approximately equal to the average of the remuneration of a PC Judge in Alberta, British Columbia, and Ontario, the Privy Council Office submitted a written proposal on May 7, 2001 to settle the issue of the Associate Judges' salary, offering to fix the salary of Associate Judges at 69% of the salary of a FC Judge, based on the average salary of all provincial and territorial Masters.

80. The Government evidently concluded at the time that the role and responsibilities of Associate Judges were comparable to those of Masters and PC Judges and that they were more onerous or added a greater value to the Canadian public than the role and responsibilities of GCQ-6 appointees, and that a substantial differential was appropriate.

2. The Adams Review

81. Six years passed before the first independent review of the adequacy of the Associate Judges' compensation was conducted by Special Advisor Adams in 2008.

82. Special Advisor Adams found that the Associate Judges' salaries had, since at least 2004, fallen well below the appropriate level and recommended significant salary adjustments, retroactive to April 2004. He considered both Masters and PC Judges in his analysis, then translated the suggested salary into percentage terms, arriving at a recommendation that Associate Judges' salaries be fixed at 80% of an FC Judge's salary. In his Response to the Adams Report, the Minister of Justice rejected all but one of the recommendations relating to vacation entitlement, citing as the overarching concern, the intervening extraordinary deterioration of the economy.

3. The Cunningham Review

83. A second independent review of the adequacy of the Associate Judges' compensation was conducted by Special Advisor Cunningham in 2013.

84. Special Advisor Cunningham rejected the Government's position that the senior federal tribunal community was an appropriate comparator group and concluded that "a more appropriate comparator ought to be Provincial Masters (not any remaining Ontario traditional Masters)" and that "the best comparator may well be the judges of the Federal Court".³⁷ After a careful determination of the responsibilities of Associate Judges and their status, he determined that "at 80% they would be in acceptable range of the salaries of Provincial and Territorial Masters in relation to Federal Court judges' salaries."

85. In its Response to the Cunningham Report, the Government declined to fully implement the salary recommendation because it would result in the Associate Judges being paid more than Military Judges whose salary at the time was 76% of that of a FC Judge.

4. The 5th Commission

86. Associate Judges participated in the 5th Commission in 2016.

87. The Commission agreed with Special Advisor Cunningham that "Federal Court judges represent the best relative comparator to the position and work of prothonotaries."³⁸ Taking into account the unique role of Associate Judges, which limited the qualified pool of applicants to "more urban-centred practitioners with Federal Court experience",³⁹ Commissioner Rémillard concluded that the need to attract outstanding candidates warranted an increase in salary to 80% of that of a FC Judge.

B. The Associate Judges' Submissions on Salary

1. Provincial Associate Judges and PC Judges

88. Following the 80% linkage of the Associate Judges' salary, the salaries of Associate Judges in BC, Alberta, and Manitoba have increased. The disparity between the salaries of Associate Judges in the Federal Court and in other provinces, if continued, will make it

³⁷ Cunningham Report, p. 22, JBD Tab 16.

³⁸ Report of the 5th Quadrennial Commission, para. 142, JBD Tab 13.

³⁹ Report of the 5th Quadrennial Commission, para. 143, JBD Tab 13.

increasingly difficult to attract the best candidates for the office. Many of the best lawyer candidates for judicial appointment would opt instead for positions on the superior or provincial courts.

89. The gap in compensation is not justified upon any reasonable analysis. Two independent Special Advisors have already determined that Provincial and Territorial Associate Judges and Judges are the most relevant comparators in terms of their judicial role. With respect to provincial Associate Judges in Alberta, British Columbia, and Manitoba, the jurisdiction and responsibilities of federal Associate Judges is in fact broader. Applications Judges in Alberta (the closest equivalent for Associate Judges) do not have jurisdiction to conduct trials or to determine disputed or contentious questions of fact unless the parties agree to dispose of the question on affidavit evidence alone.⁴⁰ Associate Judges in British Columbia and Manitoba similarly do not conduct trials. Despite this more limited jurisdiction, Associate Judges in these jurisdictions receive higher remuneration.

90. It should also be noted that Associate Judges of the Federal Court are assigned to reside, and primarily sit, only in the four largest urban centres in Canada: Vancouver, Toronto, Ottawa and Montreal. These cities are also among the most expensive places to live. These are also the major labour markets for legal talent in Canada – salaries for lawyers in private practice in these centres are among the highest in Canada.

91. Arguably, because the candidates the Federal Court would seek to attract for the office of Associate Judge either already reside in those major centers or would relocate there, the salary must take into account both the cost of living in these cities and the competing opportunities those outstanding candidates would otherwise find.

2. Relationship to FC Judges' salary

92. JCCs throughout the country have generally accepted the utility of comparisons with the compensation of other judicial officers, and an analysis of the common elements of the judicial function that make the profession unique.

⁴⁰ *Court of King's Bench Act*, R.S.A. 2000, c. C-31, s. 9(3).

93. The concept of reasonableness compels an analysis of the extent to which the nature of the work and responsibilities of a judge or judicial officer may exceed those of another judge or judicial officer.

94. The Associate Judges' primary reference is to the salary of FC Judges, who were paid \$396,700 per year effective April 1, 2024.⁴¹ Effective April 1, 2024, Associate Judges were paid \$317,300 per year, at a level of 80% of the federal salary.

95. The substantial disparity between the salaries of Associate Judges and FC Judges leads to a perception of second-class status for the office of federal Associate Judge and will contribute to the increasing difficulty in attracting the best candidates to this office.

3. Military Judges

96. In its Response to the Cunningham Report, the Government declined to fully implement the salary recommendation of 80% because it would result in the Associate Judges being paid more than Military Judges whose salary at the time was 76% of that of a FC Judge. The Government made similar arguments before the 5th Commission and suggested that it would be inappropriate for Associate Judges to receive greater compensation than Military Judges.⁴²

97. The nature, role and functions of the military justice system and its military judges is described in detail by the Court Martial Appeal Court in *Leblanc v. R.*, 2011 CMAC 2.⁴³ The military judges are for all intents and purposes the federal version of a PC Judge exercising criminal jurisdiction, with the additional jurisdiction to deal with serious offences, such as murder, manslaughter and kidnapping, committed abroad by military personnel. Like the role of Associate Judge, Military Judges serve a niche role in the administration of justice and there is an even more distinct pool of qualified candidates (military or JAG lawyers) due to their affiliation with the Armed Forces.

⁴¹ Judicial salary levels for all federally appointed judges are prescribed in Part I of the *Judges Act*. Salaries are adjusted annually on the basis of the lesser of the percentage change in Statistics Canada's Industrial Aggregate Index (IAI) or 7%. The judges' salary will be adjusted automatically effective April 1, 2025.

⁴² Report of the 5th Quadrennial Commission, at para. 129, JBD Tab 13.

⁴³ *Leblanc v. R.*, [2011 CMAC 2](#), AJ BOD Tab 9.

98. The Government's previous concern that increasing the salaries of Associate Judges would be inappropriate due to the compensation of Military Judges is no longer relevant. In its January 31, 2024 report, the Military Judges Compensation Committee recommended that the salary of Military Judges be increased to gain parity with FC Judges. On July 31, 2024, the Government accepted all recommendations of the Committee, including with respect to remuneration. There is therefore no longer any concern that increasing the salary of Associate Judges to a higher percentage of the salary of FC Judges will result in Associate Judges out-earning Military Judges.

Recommendation on Salary:

That Associate Judges be paid a salary in the range of 95%⁴⁴ of the salary of a Federal Court Judge, retroactive to April 1, 2024.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

December 20, 2024



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⁴⁴ \$376,865 based on the FC Judge's salary effective April 1, 2024.