JOINT REPLY SUBMISSIONS

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

to the

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

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TABLE OF CONTENTS

I. OVERVIEW

1. These Joint Reply Submissions of the Canadian Superior Courts Judges Association ("**Association**") and the Canadian Judicial Council ("**Council**") ("**Reply Submissions**") address the main arguments made by the Government of Canada in their submissions dated December 20, 2024 ("**Government's Submissions**").

2. The Reply Submissions can be distilled into two key points. First, over 25 years and six past Commissions, a clear consensus has emerged on critical elements to arrive at recommendations on judicial compensation, including the IAI Adjustment and the use of filters when comparing judicial salaries to the income levels of self-employed lawyers. Despite such clear consensus, the Government attempts to re-litigate these settled points, while offering no valid reasons for departing from the conclusions of past Commissions.

3. As the Supreme Court explained in the *PEI Reference*, the Commission process must be objective, independent, and effective.[1] Allowing a party to disregard the work of past Commissions undermines certainty, strains resources, and risks politicizing the Commission process.

4. Second, although past Commissions have consistently highlighted the significant void in the data available to derive the private sector comparator because of the absence of any data relating to the income levels of lawyers practicing through professional law corporations, and despite the Parties' recent joint efforts to fill this void, the Government remarkably fails to factor into its analysis the newly available data on this critical issue.

5. By failing to engage meaningfully with evidence relating to higher-earning lawyers which was unavailable to past Commissions, the Government presents a distorted view of the actual income levels of self-employed lawyers – with cascading repercussions throughout its submissions. The Government neglects to recognize that the improved dataset confirms what the Association and Council have long maintained: self-employed lawyers, including those practicing through professional law corporations, earn significantly more than was assumed by past Commissions. This clear disparity underscores the importance of the recommendation sought by the Association and Council: 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 actual income levels of self-employed lawyers.

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[1] *Reference Re Provincial Court Judges*, [1997] 3 SCR 3, para. 169 [*PEI Reference*], reproduced in the Joint Book of Documents ("**JBD**") [JBD at tab 4].

II. THE GOVERNMENT'S ATTEMPT AT RE-LITIGATING ISSUES

6. Most of the issues raised in the Government's Submissions concerning judicial salaries and benefits have already been addressed by past Commissions. The implicit message to this Commission is that if this Commission's analytical approach or recommendations prove unfavorable to the Government, the same issues will simply be re-litigated at the next quadrennial cycle.

7. Such re-litigation is wasteful, unnecessary, and undermines the effectiveness of the Commission process. Absent a demonstrated change in circumstances, the Association and Council oppose the Government's attempt to re-litigate issues on which past Commissions have already reached consensus. This practice needlessly consumes the time and resources of all participants.

8. The Supreme Court of Canada identified the starting point for a judicial compensation commission as the date of the previous Commission's report.[2] While each Commission must make its own assessment in its own context, "this does not mean that each new Commission operates in a void, disregarding the work and recommendations of its predecessors."[3]

9. Echoing this principle, the Block Commission and the Levitt Commission recommended that:

> Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus should be taken into account by the Commission, and reflected in the submissions of the parties.[4]

10. In disregard of these principles, the Government's repeated attempts at re-litigation undermine not only the efficiency of the process but also risk straining the relationship

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2 *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. 14 [JBD at tab 6].

3 Turcotte Report (2021), para. 24 [JBD at tab 14].

4 Block Report (2008) Recommendation 14 [JBD at tab 11] and Levitt Report (2012) Recommendation 10 [JBD at tab 12].

between the judiciary and the Government. To that extent, they also run counter to Recommendation 11 of the Levitt Commission:

> The Government and the judiciary examine methods whereby the Commission process can be made less adversarial and more effective.[5]

11. Rather than heeding the consistent call of past Commissions to avoid re-litigating previously settled issues absent a demonstrated change in circumstances, the Government again attempts to re-litigate settled questions that past Commissions have consistently endorsed. These include:

    a. Reducing the existing statutory cap on the annual adjustments of judicial salaries based on the IAI;[6]

    b. Discarding the use of filters for the analysis of data on the income of self-employed lawyers in the private sector;[7]

    c. Eliminating the low-income cut-off when analyzing data on the income of self-employed lawyers;[8]

    d. Lowering the percentile considered when comparing judicial salaries with the income of self-employed lawyers;[9]

    e. Changing the methodology for calculating the value of the judicial annuity, in particular by including the value of the disability benefits;[10]

    f. Including CPP benefits as part the so-called "total compensation" of judges;[11] and

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5 Levitt Report (2012) Recommendation 11 [JBD at tab 12].

6 Government's Submissions, para. 3. The Turcotte Commission rejected the Government's suggestion to impose another cap on the IAI (Turcotte Report (2021), paras. 127-128) [JBD at tab 14].

7 Government's Submissions, para. 79. This is the same position presented before the Turcotte Commission. See Turcotte Report (2021), para. 157: "The Government's position is that there should be no filters as their application substantially reduces the target group of lawyers." [JBD at tab 14].

8 Government's Submissions, para. 89. The Government takes this position despite past Commissions systematically excluding lawyers' whose income fell below a certain threshold: Drouin Commission (2000) pp. 38-39 [JBD at tab 9]; McLennan Report (2004) at p. 43 [JBD at tab 10]; Rémillard Report (2016), paras. 62-65 [JBD at tab 13]; Turcotte Report (2021), paras. 162-164 [JBD at tab 14].

9 Government's Submissions, para. 92. Such attempts were rejected by the Levitt Report (2012), para. 38 [JBD at tab 12]; Rémillard Report (2016), para. 67 [JBD at tab 13]; Turcotte Report (2021), para. 171 [JBD at tab 14]. See also Drouin Report (2000), pp. 40-41 [JBD at tab 9] and McLennan Report (2004), p. 43 [JBD at tab 10], which both considered the 75th percentile of the income levels of self-employed lawyers.

10 Government's Submissions, para. 50. This submission was rejected by the Rémillard Report (2016), para. 73 [JBD at tab 13]; Turcotte Report (2021) paras. 183(c), 186-188 [JBD at tab 14].

11 Government's Submissions, para. 50. This submission was rejected by the Turcotte Report (2021), paras. 183(d), 186-188 [JBD at tab 14].

g. Considering the "compensation levels for senior professionals in the economy as a whole, when looking for public sector comparators."[12]

12. Past Commissions have declined to adopt many of these unprincipled proposed changes, as discussed in more detail below. It is thus inappropriate for the Government to advance these positions without engaging with the reasoning or the conclusions of past Commissions. In many instances, the Government's submissions read as though these prior contrary conclusions simply did not exist.

13. In the *PEI Reference*, the Supreme Court of Canada held that judicial compensation commissions must be independent, objective and effective.[13] By repeatedly ignoring the consensus of past Commissions and re-litigating settled issues, the Government undermines these principles, as well as a key objective of judicial compensation under the *Judges Act*, namely the attraction of outstanding candidates to the judiciary.

14. First, the effectiveness of the Commission process is compromised, as evidenced by the significant resources deployed by the parties and their experts to re-address issues long settled by past Commissions.

15. Second, re-litigating settled issues poses a more fundamental risk to the requirement that the Commission's deliberations be conducted by reference to "objective criteria, not political expediencies."[14] Objectivity is served when judicial compensation is assessed within a known, accepted, and predictable framework, in order to guard against arbitrariness and politicization.

16. Third, the Levitt Commission warned that the Government's habit of re-litigating settled issues risks undermining efforts to attract outstanding candidates to the bench by injecting an unacceptable level of uncertainty about future judicial remuneration. The Levitt Commission observed:

> [T]he 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

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12 Government's Submissions, para. 70. Similar arguments were rejected by the Block Report (2008), para. 103 [JBD at tab 11]; and the Levitt Report (2012), para. 31 [JBD at tab 12]. In addition, the Government unsuccessfully presented similar arguments to the Rémillard Commission (see Rémillard Report (2016) para. 46) [JBD at tab 13] and to the Turcotte Report (Submissions of the Government of Canada to the Turcotte Commission, para. 125, reproduced in the Book of Exhibits and Documents of the Association and Council ("**BED**") [BED at tab 46]).

13 *PEI Reference*, para. 169 [JBD at tab 4].

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

> 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.[15]

17. In sum, the Association and Council submit that this Commission should re-affirm and abide by the principle articulated by prior Commissions: "valid reasons [are] required – such as a change in current circumstances or additional new evidence – to depart from the conclusions of a previous Commission."[16] Allowing a party to disregard the work of past Commissions would open the door to moving the goal posts every four years, resulting in the very arbitrariness and politicization that the Commission process is meant to prevent.

III. THE GOVERNMENT'S PROPOSED CAP ON THE ANNUAL ADJUSTMENTS BASED ON THE IAI

A. The IAI Adjustment: a Key Element of the Architecture of the *Judges Act*

18. The Industrial Aggregate Index ("IAI") measures the number of working Canadians and their average weekly earnings, with some types of occupations excluded (e.g., farming, fishing, military). Judges' salaries are adjusted annually by the percentage change in IAI, subject to a 7% annual cap. This adjustment is referred to as the IAI Adjustment.[17]

19. The IAI Adjustment scheme was first introduced in the *Judges Act* in 1981. Section 25(2) of the *Judges Act* provides for an annual adjustment of the judicial salary by the IAI or 7%, whichever is less.

20. While the Government characterizes the IAI Adjustment as "generous,"[18] the adjustment simply ensures that judicial salaries are adjusted based on the general growth in the earnings of Canadians. It is difficult to see why applying this universal national measure of earnings to judicial salaries should be deemed "generous."[19]

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15 Levitt Report (2012), para. 30 [JBD at tab 12].
16 Rémillard Report (2016), para. 26 [JBD at tab 13].
17 Turcotte Report (2021), para. 107 [JBD at tab 14].
18 Government's Submissions, para. 29.
19 See also Hyatt Report dated January 24, 2025, para 2.2: "The Government identifies no economic principle, and I am aware of no economic principle, that would support a definition of real wage increases that mirror those experienced, on average, by all working Canadians, as 'generous'." [Supplemental Book of Exhibits and Documents of the Canadian Superior Courts Judges Association and Canadian Judicial Council ("**SBED**") at tab A].

21. In view of the constant risk of the politicization of the setting of judicial compensation, annual salary adjustments based on the IAI have long been recognized as an essential tool to preserve judicial independence through financial security for the judiciary. Because it helps judicial salaries keep pace with general salary increases during the period between Commissions, the IAI Adjustment plays a significant role in ensuring that an appointment to the bench remains attractive to outstanding candidates.

22. The purpose of the IAI Adjustment is both to "prevent erosion of salaries from inflation,"[20] and to enhance the "independence of the judiciary by removing judicial compensation from the give-and-take of the political process."[21] Parliamentary debates confirm that the IAI Adjustment was intended to deal with the near constant confrontation that had existed in the past between the judiciary and the government on the subject of the adequacy of judicial salaries.[22]

23. As early as 1996, the Scott Commission characterized the IAI Adjustment as an integral part of the "social contract" that the Government and lawyers appointed to the bench can be considered to have entered into, whose importance "cannot be overstated."[23] This characterization of the IAI adjustment scheme has been consistently reaffirmed by subsequent Commissions, including the Turcotte Commission.[24] The Levitt Commission also echoed this view, calling the IAI a "key element in the architecture of the legislative scheme for fixing judicial remuneration," adding that it "should not lightly be tampered with."[25]

24. While the IAI Adjustment is indeed a key element in the architecture of the *Judges Act*, it serves a qualitatively distinct role from this Commission's mandate to inquire into the adequacy of judicial salaries and benefits. As noted by the Turcotte Commission, "indexation was <u>not</u> to be a substitute for the then triennial review process, but rather an annual automatic increase which would be taken into consideration when the regular review took place."[26] Therefore, it would be wrong in principle to consider the IAI Adjustment as

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20 Drouin Report (2000), p. 33 [JBD at tab 9].
21 Senate Debates (March 11, 1981) at p. 1993 as cited in Levitt Report, para. 45 [JBD at tab 12].
22 Levitt Report (2012), para. 44 [JBD at tab 12].
23 Scott Report (1996) at p. 14 [BED at tab 55].
24 Turcotte Report (2021), para. 126 [JBD at tab 14].
25 Levitt Report (2012), para. 46 [JBD at tab 12].
26 Turcotte Report (2021), para. 111 citing the House of Commons Standing Committee on Justice and Legal Affairs, February 19, 1981 (Issue 14), at 14:29 [JBD at tab 14].

fulfilling this Commission's constitutional responsibility to ensure that judicial salaries remain adequate, notably in light of the need to attract outstanding candidates to the bench.

B. The Government's Unprincipled Attempt – Yet Again – at Re-litigating the IAI Adjustment

25. Without acknowledging the past Commissions' strongly expressed views on the IAI adjustment scheme, the Government now proposes to cap the IAI Adjustment "to a total maximum of 14% of the judicial salary over the next four-year quadrennial cycle."[27] This proposal would significantly alter the existing statutory scheme in two critical ways:

    a. It would cut in half the current cumulative cap of 28% (7% over four years) to 14%; and

    b. It would impose that 14% limit on a four-year cycle, thus eliminating the year-over-year compounding that exists under the existing 7% annual cap.[28]

26. This is not the first attempt by the Government to modify the IAI Adjustment. During each one of the last three Commission cycles, the Government has made similar attempts, all of which were firmly rejected by the Commission.

27. Before the Levitt Commission (2012), the Government proposed limiting the IAI Adjustment to an annual 1.5% increase.[29] The Levitt Commission rejected this proposal based on:

> a) the legislative history of the IAI Adjustment, which 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; and
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> b) the marginal incremental cost to the public purse of maintaining the IAI Adjustment as opposed to capping it at 1.5%, based on figures supplied by the Government.[30]

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27 Government's Submissions, para. 31.

28 For instance, over the last four years, judicial salaries were adjusted by 6.6% (2021), 3.1% (2022), 3.1% (2023) and 3.4% (2024) based on the IAI, for a total of 16.2% (Eckler Report, p. 11). However, as the Eckler Report notes, when salaries as of April 1, 2024, are compared to April 1, 2020, salaries, the adjustment is 17.1% in total based on annual changes to the Industrial Aggregate (IA) (Eckler Report, p. 10, which refers to a $57,900 increase from the $338,800 salary of puisne judges in 2020, which is equivalent to a 17.1% increase). See Eckler Report, reproduced in the Government's Book of Documents ("**GBD**") [GBD at tab 4] Hence the Government's proposed cap would have triggered, if applied even to the past four years, years recognized as high inflation years in which the protection of the IAI was vital. If applied over the past four years, it would have only degraded salaries and increased the recruitment difficulties highlighted elsewhere in these submissions.

29 Levitt Report (2012), para. 19 [JBD at tab 12].

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

28. Before the Rémillard Commission (2016), the Government sought to replace the IAI by the Consumer Price Index (CPI).[31] The Rémillard Commission reiterated that the IAI Adjustment "should not be lightly tampered with."[32] It also found that it was appropriate to "adjust judges' salaries on the basis of the average salary increase of the public that judges serve."[33]

29. Finally, before the Turcotte Commission (2021), the Government sought to have not the second, but the *third* proverbial "kick at the can." Pointing to "*the current context* of high deficits, a contracted economy, and an ongoing pandemic with millions of Canadians unemployed," the Government requested that the Commission recommend a limit on IAI increases, capping it at a cumulative maximum of 10% from the 2020 base salary.[34]

30. Again, the Turcotte Commission unequivocally rejected the Government's proposal to impose a ceiling on the IAI Adjustment, noting that attempting to "fetter its effects" by imposing a ceiling, other than the annual 7% cap already provided for, would be "inconsistent with the policy behind indexation and its application over the last 40 years." [35]

31. In its response to the Turcotte Report, the Government acknowledged that the Turcotte Commission conducted "a thorough analysis of the evidence presented to it, the historical roots of IAI indexation, and its ongoing role in judicial compensation."[36] While stating that it disagreed with the implicit suggestion that the statutory framework governing IAI is "indelible", the Government stated that it respected the "deliberation and scrutiny the Commission brought to bear" regarding IAI indexation and accepted the recommendation that indexation continue to operate unchanged.[37]

32. Before this Commission, the "context" of the pandemic that served as the basis for the Government's request to revisit the IAI Adjustment scheme before the Turcotte Commission has receded.[38] Nevertheless, the Government is making yet another attempt – its <u>fourth</u> – to alter the IAI Adjustment.

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31 Rémillard Report (2016), paras. 33 and 36 [JBD at tab 13].
32 Rémillard Report (2016), para. 38 [JBD at tab 13].
33 Rémillard Report (2016), para. 40 [JBD at tab 13].
34 Turcotte Report (2021), para. 70, citing Submissions of the Government of Canada to the Turcotte Commission, para. 21 [BED at tab 46].
35 Turcotte Report (2021), paras. 125-127 [JBD at tab 14].
36 Government Response to the Turcotte Report (December 29, 2021) [JBD at tab(a)].
37 *Id.* [JBD at tab(a)].
38 Professor Douglas E. Hyatt, A Report in the Matter of the Judicial Compensation and Benefits Commission, December 19, 2024, para. 7 [BED at tab B].

33. This is contrary to the principle that once a consensus has emerged on an issue, absent a change in circumstances, this consensus should be recognized by subsequent Commissions.[39] Indeed, it is difficult to think of another aspect of the architecture of the *Judges Act* on which, despite the Government's insistence, a "clear[er] consensus" emerges from past Commission reports. The Association and Council strenuously object to any proposals that would undermine the existing statutory indexation of judicial salaries.

C. The Government's Failure to Justify its Proposed Cap on the IAI Adjustment

34. Before this Commission, the Government again challenges the IAI Adjustment but offers no evidence of changed circumstances, still less of legitimate grounds to modify this key element of the architecture of judicial remuneration under the *Judges Act*.

35. The Government attempts to justify its proposal by asserting that the Turcotte Commission rejected its position "without providing reasons" and without "addressing the benefits of an upper limit to IAI increases within a quadrennial period."[40] This is demonstrably false. The Turcotte Commission explicitly addressed the purpose of the IAI scheme, reviewed each party's arguments, and concluded that a cumulative cap would undermine the very function of the statutory indexing mechanism:

> [125] The intent behind the 1981 amendments was to provide automatic yearly adjustments to judicial salaries reflecting overall wage and salary increases in Canada, while giving the then Triennial and now Quadrennial Commissions the mandate to make recommendations for any further salary adjustments in light of prevailing conditions (with the section 26(1.1) criteria being added in the 1998 amendments to the *Judges Act*).
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> […]
>
> [127] Attempting to fetter its 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.[41]

36. The onus of establishing the need to depart from the conclusions of a previous Commission lies on the party seeking it.[42] The Government has not demonstrated a change in circumstances nor adduced evidence that would justify departing from the Turcotte

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39 Block Report (2008), para. 201 and Recommendation 14 [JBD at tab 11]; Levitt Report (2012), paras. 30, 111 and Recommendation 10 [JBD at tab 12].

40 Government's Submissions, para. 32.

41 Turcotte Report (2021), paras. 125-127 [JBD at tab 14]. The full analysis of the Turcotte Commission on the IAI Adjustment scheme can be found at paras. 107 to 128 of its report (not paragraphs 59 to 79 of the Turcotte Report, cited by the Government).

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

Commission's rejection of the proposed imposition of additional caps on the IAI Adjustment. Its attempt to re-litigate the issue and to modify the legislative scheme in place should thus be summarily dismissed.

37. Although the Government has not met the threshold for departing from the established consensus, the arguments it advances for altering the IAI Adjustment are wholly without merit.

38. First, the Government contends that "uncertain fiscal conditions" and "the struggles of Canadians with recent high inflation and elevated costs of living" necessitate more "stable and predictable" judicial salary increases.[43] This argument undercuts the very purpose of the IAI Adjustment: if inflation is high, the IAI Adjustment (up to 7%) is the precise mechanism designed to ensure that judicial salaries are not eroded in real terms. There is no reason that the salaries of judges should increase at a lower rate than the average increase in the earnings of other Canadians and thus be eroded in real terms.[44] Imposing a lower cap on the IAI risks creating a *de facto* salary freeze. As such, the concerns raised by the Supreme Court in the *PEI Reference* concerning salary freezes could also be true of an IAI Adjustment that did not reflect the full measure of the increase in the earnings of other Canadians:

> Salary freezes for superior court judges raise questions of judicial independence as well, because salary freezes, when the cost of living is rising because of inflation, amount to *de facto* reductions in judicial salaries, and can therefore be used as means of political interference through economic manipulation.[45]

39. Second, the Government claims that "[t]he implementation of an indexation cap" ensures that the IAI Adjustment does not "inadvertently soar beyond what was envisioned at the time of the Commission's report."[46] However, the *Judges Act* already provides for 7% annual "indexation cap." In addition, IAI projections at the time of a Commission's report are just that – projections. If actual IAI figures exceed projections, that is because national earnings growth exceeded forecasts, not because the mechanism "soared" above its

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43 Government's Submissions, paras. 33-34

44 See also Hyatt Report dated January 24, 2025, para. 4: "salary adjustments that are not fully reflective of changes in the IAI, as would be the case if the cumulative increase in the IAI exceeds the arbitrary cap suggested by the Government, serves only to disadvantage the judiciary relative to all working Canadians" [SBED at tab A].

45 *PEI Reference*, para. 159 [JBD at tab 4].

46 Government's Submissions, para. 33.

intended operation. There is nothing "inadvertent" about the statutory structure. Parliament directly considered the need for a cap and established one at an appropriate level.

40. Finally, the Government's proposed cap on the IAI is an unprincipled and unjustified solution in search of a problem. The Government itself concedes that, based on its own projections, judges' salaries are "**not expected** to reach the [Government's proposed] ceiling in the next quadrennial period".[47] The current IAI projections for the quadrennial period starting April 1, 2024 would result in a cumulative increase of 13.8%, i.e. one that remains under the 14% cap proposed.[48] By the Government's own admission, its proposed ceiling would have "no impact" on the adjustment of judicial salaries.[49]

41. The Judiciary submits that it is simply not open to the Government to propose a fundamental change to a key element of the salary arrangements of the *Judges Act* when the evidence shows that the proposed measure addresses a stated hypothetical "problem" that, based on the Government's own evidence, will not arise in the relevant Commission cycle.

42. In sum, the Government urges this Commission to depart from the clear consensus that has emerged over the last 40 years with regards to the IAI Adjustment, without "valid reasons", despite conceding that its proposed cap would likely have no practical effect. Parliament has already turned its mind to the maximum annual IAI Adjustment under the *Judges Act*, and it set a 7% annual ceiling.

43. In light of the Levitt, Rémillard and Turcotte Commissions' consistent warnings against tampering with the IAI, and absent any credible justification, the Government's fourth attempt to alter the IAI Adjustment should be rejected as both unnecessary and inconsistent with the underlying policy of judicial salary indexation and its application over the last 40 years.[50]

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47 Government's Submissions, para. 35.
48 *Id.*, footnote 44.
49 *Id.*
50 Turcotte Report (2021) para. 127 [JBD at tab 14].

IV. REPLY TO THE ISSUES RAISED BY THE GOVERNMENT ON THE TWO TRADITIONAL COMPARATORS

A. Private Sector Comparator

44. The Government recognizes 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."[51] It further acknowledges that this statutory criterion "expressly mandates consideration of this relationship with the private practice."[52] Consequently, this Commission must ensure that judicial salaries are set at a level sufficient to avoid deterring outstanding candidates from private practice from applying to the bench.

45. The reality is that many outstanding self-employed lawyers operate through professional law corporations ("PLCs"). This Commission is now equipped with data enabling it to have knowledge of and consider the earnings of incorporated self-employed lawyers. However, as explained below, the Government fails to properly engage with this new data.

1. The Government's Failure to Account for the Newly Reported Data on Incorporated Self-Employed Lawyers

46. Past Commissions identified the absence of data on the income levels of self-employed lawyers practicing through PLCs as a critical gap in the CRA data, with the "inescapable" implication that such data was under-reporting the income of higher-earning private sector lawyers.[53] Despite the importance of this information to the Commission's mandate, and the Parties' significant efforts to obtain this data, the Government's analysis fails to account for the data on PLCs, devoting minimal analysis to it and repeatedly conflating unincorporated and incorporated lawyers. This approach leads to a distorted view that grossly undervalues the actual income levels of self-employed lawyers.

47. In its 60-page Submissions, the Government devotes only five paragraphs (paras. 105-109) to the new PLC data, reflecting a general failure to meaningfully engage with the PLC

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51 Government's Submissions, para. 61.
52 Government's Submissions, para. 62.
53 Turcotte Report (2021), para. 159 [JBD at tab 14]. See also Joint Submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council, dated December 20, 2024 ("**Judiciary's Submissions**"), para. 172.

data.[54] Its limited submissions on this new data can be broken down into three points, all of which contain significant errors.

48. First, at paragraphs 105 and 106, the Government suggests ignoring the income levels of incorporated partners by arguing that the new data is "heavily skewed by the highest earners."[55] It reaches this conclusion based on the gap between the mean and median incomes of incorporated partners.[56] The Government also notes that "the data does not include PLCs that are bankrupt or whose operations have ceased."[57]

49. However, as Ernst & Young emphasizes, a similar "skew" inevitably occurs in *all* large datasets of professional income, and is in fact even more pronounced in the CRA data on unincorporated lawyers.[58] Further, Ernst & Young confirms that the difference between the mean and the median is not material given that the appropriate filter is set precisely at the 75th percentile.[59]

50. Next, merely invoking the existence of high earners does not negate the data's validity – it simply confirms that many self-employed lawyers earn far above the median.

51. Additionally, data on bankrupt or inactive PLCs (assuming any such PLCs exist) would add no value when determining the actual earnings of self-employed lawyers.

52. Second, at paragraph 107, the Government presents a chart comparing judicial salaries with "the net income of individual partners."[60] Although labeled "PLC Individual Partnerships and Judicial Salaries," the Government's chart displays only income metrics for *unincorporated* partners. Despite its label, the Government's chart completely omits income

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54 This general lack of engagement is reflected in other sections of the Government's Submissions. For instance, the Government suggests that a self-employed lawyer can only fund a "similar benefit" to the judicial annuity through personal RRSP contributions, ignoring the distinct tax planning that a corporation can provide (Government's Submissions, paras. 51-52). Similarly, the Government notes that the CRA data does not provide information about lawyers "who operate as professional corporations," yet does not acknowledge that new data on PLCs is, in fact, now available (para. 80).

55 Government's Submissions, para. 105.

56 Government's Submissions, paras. 105-106.

57 Government's Submissions, para. 106.

58 Ernst & Young, Review of the Eckler Report, January 24, 2025, pp.6-7 [SBED at tab C].

59 *Id*. [SBED at tab C].

60 Government's Submissions, para. 107.

data on incorporated partners (provided in that very same Statistics Canada dataset). The Government's Figure 18 is reproduced below:

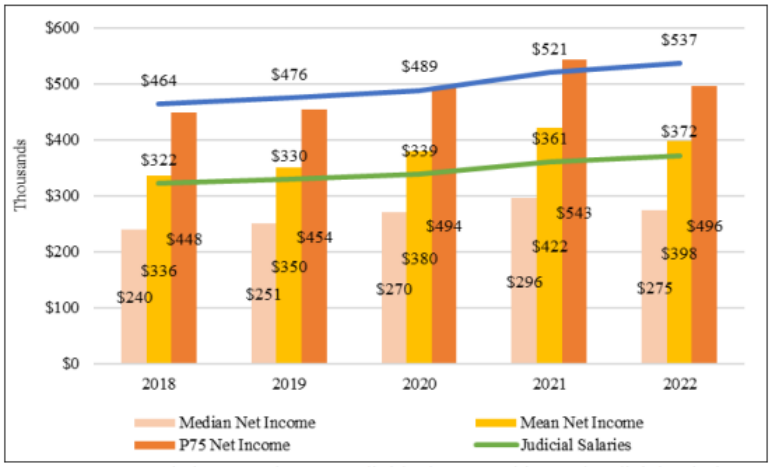

Figure 18: Statistics Canada PLC Individual Partnerships and Judicial Salaries (in Thousands)[146]

53. Characterizing unincorporated partners as "PLC" is misleading. The data in the Government's Figure 18 only shows the income of *unincorporated individual partners*, not corporate income. It is therefore utterly incorrect for the Government and its experts to present this data as "PLC data."

54. Parenthetically, this is not the sole issue with Figure 18. This figure presents data on the income levels of individual partners without the standard age or low-income filters.

55. In addition, and as further explained below (see paras. 111-122), the blue line in Figure 18 presents a distorted view of the grossed-up value of the salary of puisne judges.

56. Third, at paragraphs 108 and 109 of its submissions, the Government refers to a dataset provided by Statistics Canada titled "PLC Owners". It contends that this dataset provides information regarding the income and dividends received by "PLC owners."[61] Based on this premise, the Government and its experts suggest adding the average net income of PLC owners between the ages of 47-54 ($346,000) with the average dividends "received" by the same group.[62] The resulting figure is $456,442 for the year 2021. According to the Government, this represents "a more realistic comparator" for judicial salaries.[63]

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61 See also Eckler Report, p. 41 (which says that the "PLC Owners" spreadsheet provides income on the dividends *received* by the shareholders) [GBD at tab 4].

62 Eckler Report, p. 44 [GBD at tab 4].

63 Government's Submissions, para. 109; Eckler Report, p. 41 [GBD at tab 4].

57. This presentation is flawed for several reasons:

a. ***Misreading the "PLC Owners" dataset***. The Government's submissions are based on a fundamental misunderstanding of the data provided. As Ernst & Young explains in its report commenting on the Eckler Report, the Government and its experts incorrectly assume that the "PLC Owners" dataset shows the *personal* income and dividends received by a shareholder of the PLC.[64] In fact, this dataset tracks *corporate* net income, declared dividends and retained earnings of all corporations with NAICS code 541110 (Offices of lawyers), based on T2 corporate tax filings. It provides no reliable evidence on the total amount ultimately drawn from the corporation (as salary or dividends) by an individual lawyer.

b. ***Focus on net corporate income rather than gross***. Secondly, and perhaps most importantly, the data cited reflects only the net income of the PLC, not the gross income flowing into the corporation. This figure is thus of little relevance, as lawyers typically pay themselves a portion of the PLC's gross income as salary, thereby reducing the net income declared by the PLC on its T2.[65] The amount that a lawyer (and her accountant) decide to draw out of a PLC in a given year will largely be based on tax planning considerations rather than on the gross amount of income the lawyer received into her PLC that year. It is the gross income flowing into the PLC that reflects the value of the lawyer's work for that income, not the net amount flowing out of the PLC.

c. ***Treatment of dividends.*** A dividend is a proportion of the net income distributed to the shareholders. While dividends have a connection with the net earnings that are notionally retained by the PLC, it is not appropriate to use dividends as a proxy to estimate the annual income realized in a year by the corporation of the professional. A few other variables must be considered.[66] As explained by Ernst & Young,[67] adding the net income of the PLC to the dividends declared by the PLC

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64 The dataset is called PLC Owners simply because the data on PLCs is broken down depending on the age of PLCs.

65 Ernst & Young Report on Private Sector Compensation, 20 December 2024, p. 33 [BED at tab D].

66 To calculate the total earnings of an incorporated lawyer in a given year, one would need to sum: (i) salary drawn from the PLC; (ii) dividends received from the PLC (grossed up, and from the current year earnings only); and (iii) the increment to retained earnings for that year only. We emphasize that the PLC data provided does not include any metrics on salary paid by the corporation (or any other expense), thus making this calculation impossible based on the PLC(T2) dataset.

67 Ernst & Young, Review of the Eckler Report, January 24, 2025, pp.5-6 [SBED at tab C].

is completely irrelevant to the true task of assessing the total income of the professional.

d. ***Unfiltered data.*** The Government presents the *average* "income," without applying the long-recognized low-income exclusion. This is contrary to the approach of past Commissions, which focused on the specific 75th percentile and applied a low-income exclusion to properly compare the data on the income of self-employed lawyers who are likely candidates for appointment to the bench.[68]

58. Finally, beyond the Government's misuse of the PLC data, it fails to integrate information on both unincorporated and incorporated self-employed lawyers into a single, coherent comparator. Contrary to the Government's submissions, data on PLCs is not "a new comparator for federally appointed judges." Rather, it *complements* the existing data on unincorporated self-employed lawyers, filling the gap acknowledged by past Commissions in the CRA data on self-employed lawyers. It is thus essential to combine the data for both incorporated and unincorporated lawyers in order to compare judicial salaries with the *actual* income levels of all self-employed lawyers.

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59. As the Association and Council explained in their main submissions, Ernst & Young determined that the most relevant information that can be obtained about incorporated lawyers from the data provided by Statistics Canada is the income of incorporated partners.[69]

60. In 2022, at the standard 75th percentile, both the Government and its experts recognize that the initial figure is $815,000 (unfiltered by age and without the low-income cutoff).[70] Applying the relevant filters, the partnership income of incorporated self-employed lawyers at the 75th

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68 See, e.g., Turcotte Report (2021), para. 182 [JBD at tab 14].

69 Judiciary's Submissions, paras. 180-183. We note that data concerning unincorporated partners is (and always was) already included in the CRA data on self-employed lawyers.

70 Government's Submissions, para. 106(b); Eckler Report, p. 40 [GBD at tab 4]. However, it is important to note that the Eckler Report relied on an inaccurate dataset, such that the count of PLCs reported in its report is inaccurate. Eckler used on the first version of the dataset provided by Statistics Canada on the income of incorporated and unincorporated partners, ignoring the additional, revised dataset subsequently provided by Statistics Canada. Since the inaccurate dataset was filed in the Joint Book of Documents (Tab 19, file "partners_cma_2018_2022"), the Association and Council refer to the updated spreadsheet "partners_cma_2018_2022_NEW" [SBED at tab 6].

percentile for the same year was $830,000 across all ages and an estimated $1,020,900 for the 44-56 age range.[71]

61. When integrating the data to include both unincorporated and incorporated self-employed lawyers, the private sector comparator stands at $774,408 for 2022– a staggering disparity of more than $400,000 over the $372,200 salary of puisne judges for the same year.[72]

62. These figures, largely ignored by the Government, leave no doubt that a corrective increase is required to reduce the gap between the salary of puisne judges and the actual income levels of self-employed lawyers as a whole.

2. Appropriate Use of Filters

63. The issue of which filters to apply to the data on self-employed lawyers has been addressed by past Commissions.[73] The Association and Council address each of the filters in turn below. However, preliminary comments are necessary because the Government now suggests abandoning the use of filters altogether – a complete rupture with the practice established by past Commissions.

a) The Need for Filters to Compare Judicial Salaries with the Income of Outstanding Candidates

64. The Government suggests that "[b]efore previous Commissions, the judiciary has advocated for the application of filters related to age, location, and low-income exclusions which result in a significant reduction in the size of the data set of self-employed lawyers."[74] It claims that it would be "statistically and logically inaccurate to base the Commission's analysis and recommendations on the net income of so few self-employed lawyers."[75] The Government's experts now recommend, without providing any justification, that "the All-Canada data cut be used instead of looking at the specific salary exclusion cuts or the age range cuts."[76]

65. These statements are incorrect and substantively unfounded. They are incorrect because it is not simply the judiciary that has "advocated" for filters: past Commissions themselves

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71 Judiciary's Submissions, para. 188.
72 Judiciary's Submissions, para. 193.
73 See, e.g., Turcotte Commission (2021), paras. 154-182 [JBD at tab 14].
74 Government's Submissions, para. 78.
75 Government's Submissions, para. 79.
76 Eckler Report, p. 5 [GBD at tab 4].

have accepted and applied them consistently, going right back to the first quadrennial inquiry by the Drouin Commission, in 2000.[77]

66. Further, the critiques are substantively unfounded because filters ensure that the private sector comparator aligns with the pool of outstanding potential judicial candidates.

67. As Ernst & Young observes, filters are critical to identify the target population of prospective candidates.[78] In their professional opinion, reliance on unfiltered data from all self-employed lawyers, including those not remotely positioned for a judicial role, provides little insight into whether judicial compensation is adequate to attract outstanding candidates.[79]

68. Parliament's objective extends beyond attracting well-qualified candidates; it aims to attract "the best" candidates (in French, "*les meilleurs*"). [80] Filtering for age and income is essential to isolate those lawyers who realistically fall in the category of outstanding candidates.

69. Additionally, Ernst & Young stresses that the use of filters is essential given that consistency in methodology is paramount in any compensation analysis.[81] Past Commissions have systematically applied filters, and the Government provides no rationale to depart from this approach. Indeed, the Government raised the same arguments before the Turcotte Commission,[82] which rejected the Government's submissions and applied a low-income exclusion of $80,000 to age-weighted figures at the 75th percentile.[83]

70. In any case, the Government overstates the impact of filters on the dataset for two reasons. On the one hand, much of the reported decline in the number of unincorporated self-employed lawyers in the CRA data is likely due to the increasing number of incorporated self-employed lawyers.[84] This was the view expressed by the Turcotte Commission, which noted, "we can reasonably conclude that the drop in the number of reporting professionals

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77 Drouin Report (2000), pp. 39-40 [JBD at tab 9]; Rémillard Report (2016), paras. 59-67 [JBD at tab 13]; Turcotte Report (2021), para. 182 [JBD at tab 14].

78 Ernst & Young, Review of the Eckler Report, January 24, 2025, p. 7 [SBED at tab C].

79 *Id.* [SBED at tab C].

80 On this point, see also Report of the Military Judges Compensation Committee 2024, pp. 17, 28, [SBED at tab 5].

81 Ernst & Young, Review of the Eckler Report, January 24, 2025, p. 8 [SBED at tab C].

82 Submissions of the Government of Canada to the Turcotte Commission, para. 86 [BED at tab 46]: "It would be statistically and logically inaccurate to base the Commission's analysis and recommendations on the net income of so few self-employed lawyers." See also Turcotte Report (2021) para. 157 [JBD at tab 14].

83 Turcotte Report (2021) para. 182 [JBD at tab 14].

84 Government's Submissions, para. 100 (while there may be concerns about the reliability of the 19,739 figure presented by Figure 17, the trend toward the increasing number of lawyers operating as an incorporated entity is clear).

in the CRA data is likely to be linked to the corresponding increase in the use of professional corporations."[85]

71. On the other hand, contrary to the Government's suggestion,[86] the Association and Council do *not* seek to limit the analysis solely to the incomes of self-employed lawyers in Census Metropolitan Areas ("CMAs"). Rather, the income of self-employed lawyers in top CMAs is simply one factor among many that have been recognized as relevant to the Commission's inquiry,[87] particularly given that nearly two-thirds of new judicial appointments come from these regions.[88] Ignoring data on the income of self-employed lawyers in the top 10 CMAs would obscure a significant income gap and exacerbate the current problems with judicial recruitment from private practice in some of these regions.

72. Despite the consensus from past Commissions on the application of filters, the Government and its experts persist in presenting unfiltered comparisons, many of which are thus of limited utility to the Commission.[89] The Commission should consider those comparisons with caution.

b) Age Exclusion

73. The Government proposes age-weighing private sector incomes based on the relative number of judges appointed at each age range, rather than focusing on the income of self-employed lawyers between the ages of 44 and 56.[90] As detailed in the main submissions of the Association and Council, there are "valid reasons" to return to the 44-56 age group,

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85 Turcotte Report (2021), para. 160(c) [JBD at tab 14].

86 Government's Submissions, para. 97.

87 Drouin Report (2000), p. 46 [JBD at tab 9].

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

89 For instance, the Government asserts that judicial salaries "have been consistently higher than the salaries of 75% of self-employed lawyers aged 35-69 since 2010," but uses data (i) without low-income cutoff, (ii) unfiltered by age, and (iii) excluding incorporated self-employed lawyers (Government's Submissions, para. 72; see also para. 93). The Government's experts also compare the income of "self-employed lawyers" and judicial salaries, (i) without low-income cutoff, (ii) unfiltered by age, (iii) excluding incorporated self-employed lawyers, and (iv) from mismatched years. (Eckler Report, pp. 4 and 18 (first row) as well as p. 25 (which presents data filtered by age but without low-income cutoff)) [GBD at tab 4].

90 Government's Submissions, paras. 83-86.

namely, to maintain the focus on the true target pool for judicial appointments and to avoid the demonstrable flaws of the age-weighted approach.[91]

74. To support the age-weighted approach, the Government observes that the application of the 44-56 age range excludes 64% of the lawyers in the CRA data.[92] This is a red herring. The objective is to capture the age range of the majority of judicial appointees, not the majority of lawyers. As Ernst & Young notes, the proportion of lawyers outside the 44-56 age range is irrelevant because the goal is to identify a comparator best representing the candidates that Canada seeks to attract to the judiciary.[93] For instance, it would be inappropriate to take into consideration the income level of a 35 year old, who is likely not yet part of the pool of outstanding candidates the judiciary seeks to attract.

75. The Government's experts also claim that "age is not a common parameter used in market benchmarking exercises in Canada."[94] However, as Ernst & Young confirms, in certain circumstances, age (as a reasonable proxy for experience) can be crucial in compensation analyses.[95]

76. Curiously, while the Government calls for age weighting,[96] it then proceeds to compare the salary of puisne judges to the CRA data on unincorporated lawyers without any age-weighting (or any other age filter).[97] This contradiction shows that the Government's advocacy in favour of an age-weighted approach appears to be a segue to its true objective, which is to seek to shift the Commission's focus to the data for any and all self-employed lawyers, without regard for age, income or region.

77. This is unacceptable and imposes an undue and needless burden on all participants in the Commission's inquiry, who are put to the task of re-arguing points that have long been accepted. It is also in patent contradiction with the conclusions of the Block and Levitt Commissions, which recommended that where consensus has emerged around a particular

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91 Judiciary's Submissions, paras. 126-142. In addition, the Turcotte Commission's adoption of the age-weighted approach departed from the consistent conclusions of previous Commissions for reasons that fell short of the "change in current circumstances or additional new evidence" required to depart from the 44-56 age range.

92 Government's Submissions, para. 82.

93 Ernst & Young, Review of the Eckler Report, January 24, 2025, p. 8 [SBED at tab C].

94 Eckler Report, p. 24 [GBD at tab 4].

95 Ernst & Young, Review of the Eckler Report, January 24, 2025, p. 8 [SBED at tab C].

96 Government's Submissions, paras. 83-86.

97 Government's Submissions, para. 93, Figures 15 and 16.

issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus should "be reflected in the submissions of the parties."[98]

c) Income Exclusion

78. The Government opposes any low-income exclusion, claiming it is "not an acceptable practice in compensation benchmarking."[99] Its experts similarly assert that "excluding salary levels is not a common or recommended practice in market benchmarking exercises."[100]

79. However, the Government neglects to mention that it already made these same arguments before previous Commissions,[101] all of which rejected them and endorsed the low-income exclusion.[102] The Association and Council now propose adjusting the $80,000 cut-off applied by the Turcotte Commission to $90,000 simply to account for inflation, which past Commissions have recognized as a valid basis for adjustment.[103]

80. The Government provides no "valid reason," such as a change in circumstances, to discard this filter. Despite the clear pronouncements of past Commissions, the Government merely states, audaciously, that "[t]here is no objective basis for applying any salary exclusions to the data."[104] In other words, the Government implies that all past Commissions got it wrong and lacked any "objective basis" for their conclusion. This is not acceptable.

81. Moreover, Ernst & Young confirms that this type of filter is standard in compensation benchmarking to target the group of relevant candidates.[105] In fact, Ernst & Young considers the $90,000 exclusion to be conservative given the objective of attracting outstanding candidates to the judiciary.[106] To paraphrase the McLennan Commission, "[i]t is unlikely

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98 Block Report (2008) Recommendation 14 [JBD at tab 11]; and Levitt Report (2012) Recommendation 10 [JBD at tab 12].

99 Government's Submissions, para. 87.

100 Eckler Report, p. 17 [GBD at tab 4].

101 Submissions of the Government of Canada to the Block Commission, para. 61 ("incomes of lawyers earning less than $60,000 should not be excluded from the analysis") [SBED at tab 1]; Submissions of the Government of Canada to the Levitt Commission, para. 74 ("there is no objective basis for excluding all lawyers with incomes of less than $60,000 from the data analyzed.") [SBED at tab 2]; Submissions of the Government of Canada to the Rémillard Commission, para. 73 ("There is no objective basis for applying any salary exclusions to the data") [SBED at tab 3]; Submissions of the Government of Canada to the Turcotte Commission (2021), para. 71 ("There is no objective basis for applying any salary exclusions to the data") [BED at tab 46].

102 Drouin Commission (2000), pp. 38-39 [JBD at tab 9]; McLennan Report (2004), p. 43 [JBD at tab 10]; Rémillard Report (2016), paras. 62-65 [JBD at tab 13]; Turcotte Report (2021), paras. 162-164 [JBD at tab 14].

103 Judiciary's Submissions, paras. 120-125.

104 Government's Submissions, para. 89.

105 Ernst & Young, Review of the Eckler Report, January 24, 2025, p. 8 [SBED at tab C].

106 *Id.* [SBED at tab C].

that any in the pool of qualified candidates will have an income level lower than [$90,000].”[107] This amount is significantly below the 75th percentile salary of *first-year* lawyers across Canada, which is $120,250.[108]

82. The Government further contends that excluding low incomes somehow conflicts with valuing “a diversity of experiences” among appointees to the bench:

> Excluding salaries — whether under $60,000, $80,000, $90,000 or any number — does not reflect the realities of a modern judicial appointment process that values a judiciary with a diversity of experiences. <u>While a majority of appointees continue to come from private practice, many are appointed on the basis of their legal experiences in positions that may not historically be associated with a higher renumeration</u>.[109]

83. This argument is puzzling. As the Government itself acknowledged,[110] the objective of the *private sector* comparator is to ensure senior lawyers in <u>private practice</u> are not deterred from applying.[111] There is no reason, therefore, to consider lawyers from non-private practice backgrounds when addressing the <u>private sector comparator</u>.

d) <u>Percentile</u>

84. The Government acknowledges that past Commissions, including the Turcotte Commission, have examined the 75th percentile of the income levels of self-employed lawyers.[112] However, the Government submits, without identifying a single reason in support of its argument, that a 50th percentile “remains” its preferred benchmark.[113]

85. In reality, the Government has shifted its position over time. Before the last three Commissions, the Government argued that the <u>65th percentile</u> was the appropriate standard,[114] rather than the 50th percentile for which it now advocates.

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107 McLennan Report (2004) at p. 43: “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.” [JBD at tab 10].

108 Robert Half Legal, Legal Salary Guide 2025 [BED at tab 85].

109 Government’s Submissions, para. 90.

110 Government’s Submissions, paras. 61-62.

111 Block Report (2008), para. 76 [JBD at tab 11]; Judiciary’s Submissions, paras. 75-81.

112 Government’s Submissions, para. 91.

113 Government’s Submissions, para. 92.

114 Levitt Report (2012), para. 38 [JBD at tab 12]; Rémillard Report (2016), para. 66 [JBD at tab 13]; Turcotte Report (2021), para. 171 [JBD at tab 14].

86. More ironic still is the fact that the 75th percentile (that has long been applied by successive Commissions) is the percentile that the Government itself submitted was the appropriate percentile in its submissions to the Drouin Commission.[115]

87. Notwithstanding the Commission's acceptance of this Government proposal 25 years ago, the Government has since that time repeatedly attempted to re-litigate this issue, to no avail.[116] Most recently, the Turcotte Commissions reaffirmed the 75th percentile filter, emphasizing that "salaries must be competitive enough so as not to discourage the most outstanding candidates from seeking judicial office."[117]

88. The Government's own experts do not support the position it advances on the 50th percentile. They write that "[t]o recruit and retain exceptional individuals, we would consider a market lead positioning and target the 65th or 75th percentile."[118]

89. As Ernst & Young notes, the 75th percentile tends to be the "minimum target where the objective is to focus on outstanding candidates." Indeed, according to them, a higher percentile would be justified.[119]

90. Simply put, the median lawyer is not representative of an "outstanding" candidate. Parliament's mandate to this Commission is to ensure that judicial salaries are set at a level that ensures that Canada remains able to attract outstanding ("*les meilleurs*") candidates.[120] Adopting the 50th percentile – the mere midpoint of *all* self-employed lawyers – would be fundamentally at odds with that objective.

91. It is worth noting that the data presentations of the Government and its experts shift inconsistently between medians, averages and the 75th percentile. For instance, the Government argues that "on average, as illustrated in Figure 6, private sector income levels start to decrease in a lawyer's early to mid-50s."[121] However, after referring to the "average,"

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115 Drouin Report (2000) at p. 40 [JBD at tab 9].
116 See, e.g., Levitt Report (2012), para. 38 [JBD at tab 12]; Rémillard Report (2016), para. 67 [JBD at tab 13]; Turcotte Report (2021), para. 171 [JBD at tab 14].
117 Turcotte Report (2021), para. 174 [JBD at tab 14]. See also Rémillard Report (2016), para. 67 [JBD at tab 13].
118 Eckler Report, p. 8 [GBD at tab 4].
119 Ernst & Young, Review of the Eckler Report, January 24, 2025, p. 7 [SBED at tab C].
120 *Judges Act*, s. 26(1.1)(c) [JBD at tab 3].
121 Government's Submissions, para. 56.

the Government then goes on to compare judicial salaries with the significantly lower median income.[122]

92. Ernst & Young explains that mixing and matching medians, averages, and percentiles violates a fundamental principle of compensation benchmarking, namely, consistency.[123] Again, the comparisons of the Government and its experts cannot be relied upon and must be approached with extreme caution.

3. Income of Other Lawyers in Top Legal Roles

93. The Government's own experts show that, at the 75th percentile for 2024, top legal executives earn $682,143.[124] By comparison, the salary of puisne judges for the same year thus lagged the incomes of these top legal executives by $285,443.[125] The figure – which is presented without age or income filters – is even higher in top CMAs.[126]

4. The Decline in Appointees from Private Practice and Diversity Among Legal Professionals

94. The Government recognizes that there is an "increase in appointees from other sectors compared to the previous quadrennial cycle" but argues that it is not indicative of an inability to attract outstanding candidates from private practice.[127] It goes on to note that "since 2016, there has been an increase in ferally [*sic*] appointed judges that self-identify as Indigenous, racialized individuals, a member of an ethnic or cultural group, a person with disability, or a member of the 2SLGBTQI+ community."[128] The thrust of the Government's submissions seems to be that the decline in appointees from private practice can be attributed to the Government's objective that the judiciary "reflects the diversity of Canadian society."[129]

95. However, increased diversity on the bench and attracting private practice lawyers are not mutually exclusive objectives. Contrary to the Government's implication, there is no evidence before the Commission that the private bar lacks outstanding lawyers who identify

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122 Government's Submissions, para. 56, Figure 6. See also Figure 14, on p. 37. Similarly, while the Eckler Report tends to refer to the 75th percentile for various comparators, it occasionally switches to "average" income data. A reader accustomed to references to the 75th percentile may not notice such subtle shifts in metrics.

123 Ernst & Young, Review of the Eckler Report, January 24, 2025, p. 10 [SBED at tab C]

124 Eckler Report, p. 47 [GBD at tab 4].

125 *Id.* [GBD at tab 4].

126 Eckler Report, pp. 46-47 [GBD at tab 4].

127 Government's Submissions, para. 64.

128 Government's Submissions, para. 66.

129 Government's Submissions, para. 67.

as Indigenous, racialized individuals, members of an ethnic or cultural group, persons with disability, or members the 2SLGBTQI+ community. Achieving diversity in judicial appointments should not be used as a justification for limiting appropriate increases in judicial salaries.

96. Finally, it is necessary to address the Canadian Bar Association's apparent suggestion that there is "no direct evidence" of the gap between private sector and judicial compensation deterring outstanding candidates.[130] Chief Justice Morawetz in his statement to this Commission has attested to the difficulty in convincing outstanding lawyers from private practice to seek judicial appointments, citing the heavy workload and "the perceived lack of commensurate pay for that work" as reasons for their reluctance.[131] Similarly, as reported by the CBC, the Chief Justice of Canada, Chief Justice Wagner, observed in June 2024 that "in British Columbia and Ontario — where the cost of living is higher — it has been difficult to attract candidates […] because salaries and working conditions make the job unattractive."[132]

97. Coupled with the Government's acknowledgement of the decline in appointees from private practice[133] and past Commissions' focus on self-employed lawyers' income, it is logical to conclude that if too significant a gap exists and persists, highly qualified candidates will be deterred because the financial sacrifice will be too great.

98. Lastly, the Commission will appreciate that the inherently confidential nature of recruitment efforts directed at possible candidates for judicial office is an obvious obstacle to the tendering of detailed "direct evidence" on this subject.[134] The message conveyed in this regard by Chief Justice Wagner, Chief Justice Morawetz and, before the Turcotte Commission, by Chief Justice Popescul,[135] is nevertheless clear: there is a real problem in convincing successful private practitioners to seek a judicial appointment, and compensation is part of the problem.

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130 Canadian Bar Association submissions, pp. 5-6.
131 Statement from Chief Justice Morawetz, para. 18 [BED at tab A].
132 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].
133 Government's Submissions, para. 64.
134 Statement from Chief Justice Morawetz, para. 17 [BED at tab A].
135 Judicial Compensation and Benefits Commission Hearings, Transcript of the May 10, 2021 hearing, pp. 42-52 [SBED at tab 4].

B. Public Sector Comparator

1. Adequacy of the Most Senior Deputy Ministers Comparator

99. The Government seeks to undermine the public sector comparator by referring to: 1) the small size of the DM-3 group; 2) differences in tenure between the respective positions; and 3) differences in considerations concerning DM-3 compensation.[136] Each of these issues was unsuccessfully raised by the Government before past Commissions.[137]

100. The disparity between the number of the most senior deputy ministers and the number of federally appointed judges has always existed. It is also irrelevant to the rationale behind the use of the most senior deputy ministers as a comparator, which seeks to reflect "what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges."[138] The Levitt Commission rejected the idea that the small number of DM-3s made them an inappropriate comparator group.[139]

101. As for the security of tenure accorded to judges, this argument misses the mark. It is incongruous that the Government should submit that security of tenure, a core constitutional principle that goes to the very heart of judicial independence in a liberal democracy, defeats the application of this key comparator to determine judicial salaries. The Block Commission explicitly rejected this hollow argument.[140]

102. Finally, the Government states that the individualized nature of the compensation for deputy ministers and the availability of performance pay are two reasons militating against the comparison with senior deputy ministers.[141] However, compensation is individualized for almost every comparator group being proposed by the Government, thus demonstrating that this argument is inapposite. Moreover, past Commissions have consistently held that performance pay must be factored in the analysis.[142] Performance pay is undoubtedly an important part of the deputy ministers' total compensation package.

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136 Government's Submissions, para. 120.

137 Submissions of the Government of Canada to the Levitt Commission, paras. 114-121 [SBED at tab 2]; Submissions of the Government of Canada to the Rémillard Commission, para. 116 [SBED at tab 3]; Submissions of the Government of Canadato the Turcotte Commission, para. 113 [BED at tab 46]; Turcotte Report (2021), para. 136 [JBD at tab 14].

138 Block Report (2008), para. 103 [JBD at tab 11].

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

140 Block Report (2008), para. 108 [JBD at tab 11].

141 Government's Submissions, para. 126.

142 See, e.g. Levitt Report, which firmly rejected the Government's submission that it would be appropriate to compare the salary of a judge with the salary of a deputy minister to the exclusion of the latter's

103. The Government itself acknowledges that the current salary of puisne judges is $59,073 below the mid-point salary and one-half of maximum performance pay of the most senior deputy ministers (DM-4s).[143] Rather than recognizing that this comparison supports an increase in judicial salaries, the Government dismisses the disparity on the grounds that the DM-4 level is "reserved for exceptional circumstances and positions of particularly large scope."[144] As detailed in the main submissions of the Association and Council, there are "valid reasons" to reconsider the exclusion of DM-4s from the analysis, given that the public sector comparator is meant to compare judicial salaries with the compensation of the most senior deputy ministers.[145]

104. Furthermore, the report of the Government's own experts underscores the importance for this Commission to now keep an eye on the actual total compensation of the most senior deputy ministers. The data available to this Commission shows that the average base salary of DM-3s was constantly $15,000 to $20,000 over the mid-point salary considered in the Block Comparator.[146] Similarly, while the Block Comparator presently includes only half of the maximum at-risk pay (i.e., 16.5%[147]), in practice the actual average at-risk pay of DM-3s between 2018 and 2023 ranged between 22.6% to 26.3%.[148] Hence, the Block Comparator lags behind the actual compensation of DM-3s to a significant degree.

2. Inadequacy of Expanding Beyond the Most Senior Deputy Ministers Comparator

105. Rather than focusing on the two traditional comparators, the Government now proposes to compare judicial salaries with a wide array of public servants and various other comparators, including law practitioners in the federal government,[149] Government Agency

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performance pay, finding that this position was "inconsistent with the approach adopted by past Commissions, with customary compensation practice, and with common sense." (para. 25) [JBD at tab 12]. See also Block Report (2008), paras. 108-109 [JBD at tab 11].

143 Government's Submissions, para. 129.

144 Government's Submissions, para. 129, citing Block Report (2008), para. 105 [JBD at tab 11].

145 Judiciary's Submissions, paras. 214-219.

146 Eckler Report, p. 28 [GBD at tab 4].

147 Half of the maximum amount that a deputy minister can earn based upon performance, which is 33% of base salary.

148 Eckler Report, p. 27 [GBD at tab 4].

149 Government's Submissions, para. 112.

appointees,[150] senior law positions in provincial governments,[151] as well as law professors and law school deans.[152]

106. This is not the Government's first attempt to expand the public sector comparator group beyond the most senior deputy ministers:

a. Before the Block Commission, the Government submitted that "the most relevant comparator group is that of the most senior federal public servants (EX 1-5; DM 1-4; Senior LA [lawyer cadre])"[153] The Block Commission rejected this submission, stating that the group proposed by the Government "would be a significant departure from the DM-3 comparator used by previous commissions."[154]

b. Before the Levitt Commission, the Government urged consideration of "all persons paid from the public purse or, if that submission was not accepted, all deputy ministers."[155] The Levitt Commission rejected that approach,[156] concluding that the Government had "failed to discharge that onus in regards to its argument that the DM-3 comparator be displaced by a broader comparator group."[157]

c. Before the Rémillard Commission, the Government again argued that focusing on the DM-3 comparator was unwarranted and contended that "trends in public sector compensation generally" should be used instead.[158] The Rémillard Commission did not accept that submission.[159]

d. Before the Turcotte Commission, the Government submitted that the Commission should consider the "compensation for senior civil servants other than the DM-3 group."[160] Once more, the Turcotte Commission did not adopt that approach.[161]

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150 Government's Submissions, para. 113. Once again, the comparisons are selective and misleading. For instance, the Government does not take into account the at-risk pay of Government Agency appointees (Eckler Report, p. 32), nor do its experts when comparing salaries (p. 33 of the Eckler Report) [GBD at tab 4]. The Government also fails to mention the income of other high-earners, such as Crown corporation CEOs [JBD at tab 27].
151 Government's Submissions, para. 114.
152 Government's Submissions, para. 115.
153 Block Report (2008), para. 79 [JBD at tab 11].
154 Block Report (2008), para. 103 [JBD at tab 11].
155 Levitt Report (2012), para. 24 [JBD at tab 12].
156 Levitt Report (2012), para. 27 [JBD at tab 12].
157 Levitt Report (2012), para. 31 [JBD at tab 12].
158 Rémillard Report (2016), para. 46 [JBD at tab 13].
159 Rémillard Report (2016), para. 52 [JBD at tab 13].
160 Submissions of the Government of Canada to the Turcotte Commission, para. 125 [BED at tab 46].
161 Turcotte Report (2021), paras. 105 and 149 [JBD at tab 14].

107. Notwithstanding a clear consensus from past Commissions rejecting its arguments, the Government persists in re-litigating the same position, without even acknowledging that four consecutive Commissions have declined to adopt it. Most importantly, nor does the Government attempt to identify any "valid reason" to justify departing from the conclusions of past Commissions.

108. In any event, there is no principled reason to consider any of the disparate comparators proposed by Government. As Ernst & Young explains, one of the foundational principles of compensation research is a degree of consistency over time in the use of comparators. This is necessary to maintain confidence in the analytical process of benchmarking.[162] Comparing the salary of puisne judges with the income levels of untested, disparate groups undermines this principle.

109. In addition, while government lawyers, law professors and law school deans form one part of the pool of candidates that may be appointed to the judiciary, as their salaries have traditionally been lower than those of judges, there is no concern that the judicial salary would be an obstacle to attracting outstanding candidates from these sectors. Their compensation is, therefore, not relevant to the factor set out at s. 26(1.1)(c) of the *Judges Act*.

C. The Government's Inadequate Comparisons with Judicial Salaries

110. Two additional flaws undermine the Government's approach to comparing judicial salaries. First, its valuation of the judicial annuity is artificially inflated by the improper inclusion of disability and CPP benefits and by employing an unjustified discount rate. Second, the Government uses inconsistent or outdated comparator data, making its temporal comparisons unreliable.

[162] Ernst & Young, Review of the Eckler Report, January 24, 2025, p. 9 [SBED at tab C]

1. Judicial Annuity Valuation

111. The experts retained by the Government take the view that the value of the judicial annuity is 44.1%, a figure composed of the value of the retirement benefit calculated at 38.5% and the disability benefit calculated at 5.6%.[163] By contrast, Ernst & Young, the Association and Council's actuarial expert, conclude that the annual average value of the judicial annuity represents 28% of a puisne judge's salary.

112. There are two key points of disagreements between the experts: (a) whether to include the disability and CPP benefits in the annuity valuation and (b) what is the appropriate discount rate.

113. Before turning to these points of divergence, it is important to note that while it is appropriate for the Commission to consider the value of the judicial annuity, it would be inaccurate to simply gross up judicial salaries and compare that figure against the incomes of self-employed lawyers. That is so because the actual value of the judicial annuity to any particular judge is unknown. Judges may never reach an age or level that entitles them to the full annuity. Further, while the Drouin Commission considered the value of the judicial annuity in assessing the adequacy of judicial salaries, it recognized that "in both economic and human terms […] the value of future pension entitlements does not assist in the payment of bills due in the present."[164]

a) Inclusion of the Disability and CPP Benefits

114. The Government's experts arrive at an inflated and unprecedented value of 44.1% by including the disability benefit in the annuity valuation. This methodology has never been adopted by any previous Commission and was expressly rejected by the Rémillard and Turcotte Commissions.[165] Ernst & Young similarly concludes that the disability benefit should be treated separately and should therefore not be included in the valuation of the judicial annuity.[166]

115. The very nature of the disability benefit also militates against its inclusion in the value of the judicial annuity. Contrary to the annuity, it applies only if a judge becomes permanently

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163 Eckler Report, p. 30 [GBD at tab 4]; Government's Submissions, para. 50.
164 Drouin Report (2000), p. 42 [JBD at tab 9].
165 Rémillard Report (2016), para. 73 [JBD at tab 13]; Turcotte Report (2021), paras. 187-188 [JBD at tab 14].
166 Ernst & Young, "Value of the Judicial Annuity – Review of the Eckler Report," January 21, 2025, at pp. 3-4 [SBED at tab B].

disabled.[167] It is therefore speculative and not an integral component of the compensation of most judges.

116. The Government also states that the 44.1% valuation includes Canada Pension Plan (CPP) contributions.[168] However, the Turcotte Commission previously rejected the Government's "total compensation" approach. Then, as now, the Government argued that the Commission should look at the "total compensation" of puisne judges, including the disability benefit, CPP benefits, supernumerary status, and other benefits such as life insurance, health and dental coverage and the like.[169] The Turcotte Commission rejected that submission:

> [186] Previous Commissions have looked at the combination of judicial salary and judicial annuity, but have not engaged in a comparative total compensation exercise including other benefits.
>
> [187] Given the lack of available data from which to assess the total compensation of those applicants in pools from which judges are drawn, it is difficult to go through a meaningful exercise in any comparison of total compensation.
>
> [188] As a result, the Commission declines to include such a comparison in our deliberations.[170]

117. Here again, it is truly remarkable that the Government would suggest, once again, that this Commission should consider the so-called "total compensation" of puisne judges, including CPP and disability benefits, without being transparent about the fact that this question was raised, considered, and rejected by the Turcotte Commission. Nor does the Government attempt to present any "valid reasons" to depart from that prior conclusion. For the same reasons as those of past Commissions, the value of the judicial annuity should exclude any consideration of the disability and CPP benefits.

b) Discount Rate

118. Setting aside the value of the disability benefit, the Government's experts arrive at a "net retirement benefit" of 38.5%.

119. Eckler provides only a cursory explanation to support its valuation:

> The value of the judicial annuity benefit is summarized in the table below. [...] The values in the table below are based on the assumptions disclosed in the 13th Actuarial Report on the Pension Plan for Federally Appointed

167 *Judges Act*, s. 42(1.1)(b) [JBD at tab 3].
168 Government's Submissions, para. 50.
169 Turcotte Report (2021), para. 183 [JBD at tab 14].
170 Turcotte Report (2021), paras. 186-188 [JBD at tab 14].

> Judges as at March 31, 2022 and the data as at March 31, 2024 as provided by Department of Justice Canada.[171]

120. As Ernst & Young outlines in their second report, the Government's experts have employed a different approach to calculate the annuity than that accepted by past Commissions.[172] Specifically, the Government's valuation reflects "the costs of pension obligations to the government". This is "a very different purpose than determining the value of the judicial annuity to an individual, as a component of that judge's compensation package,"[173] calculated by Ernst & Young and used by past Commissions.[174]

121. This distinction leads to a flawed proposed discount rate. While the Eckler analysis uses the government's borrowing rate of 3.6%,[175] Ernst & Young applied a rate aligned with the typical returns of a balanced investment portfolio that might be available to a judge.[176] Hence, Ernst & Young's methodology leads to a more accurate reflection of the annuity's value from the perspective of an individual (prospective) judge and is in line with the conclusions of past Commissions. Ernst & Young concludes:

> Eckler's position that the estimated value of the judicial annuity should *increase* (38.5%) relative to the value adopted by the prior Commission (34.1%), is inconsistent with the prevailing market conditions. To the contrary, one would expect that given the current higher interest rate environment, the value of the judicial annuity should *decrease* from the 34.1% value determined at the prior Commission.[177]

122. While Ernst & Young identified and justified the assumptions underlying their valuation of the judicial annuity,[178] the Government's expert neglected to mention and failed to explain why it has departed so drastically from previous valuation methods used by past Commissions. The attempt to do so should be rejected.

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171 Eckler Report, p. 12 [GBD at tab 4].
172 Ernst & Young, "Value of the Judicial Annuity – Review of the Eckler Report," January 21, 2025, p. 5 [SBED at tab B]
173 *Id.*, p. 4 [SBED at tab B].
174 *Id.*, p. 5 [SBED at tab B].
175 *Id.*, p. 5 [SBED at tab B].
176 *Id.*, pp. 5-6 [SBED at tab B].
177 Ernst & Young, Report on the Value of the Judicial Annuity, December 20, 2024, pp. 4-7 [JBD, at tab B].
178 Judiciary's Submissions, para. 161.

2. Inaccurate Temporal Comparisons

123. The flaws in the Government's submissions extend beyond "what" is compared in terms of the grossed-up salary of puisne judges, as well as the relevant private sector and public sector comparators. They also relate to "when" this comparison is made.

124. The Government frequently compares the most recent salary of puisne judges (2024) against earlier, and consequently lower, comparators, thus skewing their comparisons.[179]

125. The Eckler report exhibits similar inconsistencies that are just as inaccurate. It presents seven disparate "comparators" measured against the 2024 salary of a puisne judge, yet many of these "comparators" rely on outdated data:

    a. Unincorporated Self-Employed Lawyers (2023)[180]

    b. DM-3 Total Average Compensation (2022)[181]

    c. DM-3 Block Comparator (2023)[182]

    d. Government Agency Appointees (2024)

    e. Unincorporated Lawyers Receiving Partnership Income (2021/2022)[183]

    f. Law Professors and Law School Deans (2023)[184]

    g. Top Legal Roles in Corporations (2024)[185]

126. In some instances, the Eckler report also purports to present comparator data from a certain year but actually references data from a different year.[186] The compensation and actuarial experts at Ernst & Young confirm that one of the core principles in compensation analysis

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179 See, e.g., Government's Submissions, paras. 74 and 92, which compare the so-called "2024 total judicial compensation" with the income of self-employed lawyers in 2023." See also para. 109, comparing judicial compensation in 2024 with the income of PLCs in 2021.

180 See also Eckler Report, pp. 19-20 [GBD at tab 4].

181 See also Eckler Report, p. 31 [GBD at tab 4].

182 *Id.* [GBD at tab 4].

183 At page 4, Eckler says that the data is from 2023 but the data from Statistics Canada that feeds this "comparator" is dated 2021 and 2022 (see p. 40 of the Report) [GBD at tab 4].

184 Eckler Report, p. 45 [GBD at tab 4].

185 Eckler Report, p. 46 [GBD at tab 4].

186 Eckler Report, [GBD at tab 4] See, for instance, data on unincorporated partners (presented as 2023 data when it is from 2022) at p. 4 of the Report; and the DM-3 total average compensation at p. 32 of the report (presented as 2023-2024 data, when it is actually 2022-2023 data). See also the table at p. 35, which is supposed to present data for 2018 to 2022 but actually only presents data up to 2021. Finally, at p. 41, Eckler "adjusts" judicial compensation to 2020, for a total compensation of "$570,511." This figure is unexplained in the report and inexplicable. In 2020, the salary of puisne judges was $338,800. Even when it is grossed up to account for Eckler's valuation of the judicial annuity, the result is much lower than $570,511.

is ensuring that data being compared is aligned by time period.[187] Mixing data from 2021, 2022, 2023, and 2024 results in a muddled dataset that make the analysis even more confusing and less reliable.

V. REPLY TO OTHER ISSUES RAISED BY THE GOVERNMENT

A. Economic Conditions and the Government's Attempt to Single Out the Judiciary

127. The Government states that the current economic situation in Canada militates against increasing judicial salaries. To support its position, the Government argues that "there remains uncertainty due to the current geopolitical landscape,"[188] and points to the effects of inflation, high interest rates and elevated costs of living, as well as geopolitical volatility caused by international events, notably Russia's invasion of Ukraine.[189] The Government suggests that because of this "economic uncertainty," judicial salaries should not be increased and should in fact be frozen if they reach the Government's proposed reduced cap on the IAI.

128. The Government's submissions are unfounded as a matter of law and as a matter of fact. As a matter of law, the Government quotes the following sentence from the *PEI Reference* to support its submission: "[n]othing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times."[190]

129. However, as the Government itself notes, the Supreme Court was commenting that constitutional protections did not shield the judiciary from deficit reduction policies of general application.[191] In the absence of such measures, the Court explicitly warned of the risk of political interference through economic manipulation when judges are treated differently from other persons paid from the public purse.[192]

130. Here, the Government has not put forward any evidence that it is pursuing a policy of deficit reduction in general or that it has put in place measures to freeze salaries or reduce statutory or other entitlements accrued by any other person paid out of the public purse as

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187 Ernst & Young, Review of the Eckler Report, January 24, 2025, p. 10 [SBED at tab C]
188 Government's Submissions, para. 4.
189 Government's Submissions, para. 22.
190 Government's Submissions, para. 17.
191 *PEI Reference*, para. 196 [JBD at tab 4].
192 *PEI Reference*, para. 158 [JBD at tab 4].

part of its response to current economic conditions. Accordingly, the Government's proposal represents an unconstitutional singling out of the judiciary.

131. In line with this principle, the Turcotte Commission concluded that "the burden is on the government to give compelling evidence that other competing fiscal obligations justify infringing upon a constitutional imperative."[193] Because the Government "presented no evidence of deficit reduction policies of general application," the Turcotte Commission concluded that the first criterion under section 26(1.1) of the *Judges Act* did not inhibit it from making otherwise necessary recommendations to ensure the adequacy of judicial compensation.[194]

132. This conclusion is equally applicable today. As Professor Hyatt observes in his second report, neither the 2024 Budget nor the Fall Economic Statement reveals a general policy of austerity. On the contrary, in the Fall Economic Statement, the Government emphasizes "general policies of continued spending and economic growth initiatives."[195]

133. As a matter of fact, the evidence adduced by the Government does not support the view that the current economic situation militates against an increase in judicial salaries (or justifies a potential freeze in real terms). The Government itself recognizes that:

    a. Canada's economic outlook appears "moderately promising"[196]

    b. The Canadian economy has "managed to outperform expectations in 2023";[197]

    c. Private sector economists expect "continued moderate growth over the next few quarters";[198]

    d. Inflationary pressures are "dissipating";[199]

    e. The unemployment rate is anticipated to decrease to 6.3% in 2025 and to gradually decline to 5.7% by 2028.[200]

134. Furthermore, the concept of "economic uncertainty" is always a reality, and it strains credulity to suggest there could be a period entirely free from uncertainty. Indeed, past

193 Turcotte Report (2021), para. 77 [JBD at tab 14].
194 Turcotte Report (2021), para. 79(c) [JBD at tab 14].
195 Hyatt Report (2025), para. 11 [SBED at tab A].
196 Government's Submissions, para. 4.
197 Government's Submissions, para. 20.
198 Government's Submissions, para. 21.
199 Government's Submissions, para. 21.
200 Government's Submissions, para. 25.

Government submissions likewise sought to invoke geopolitical conditions as creating "economic uncertainty" to argue that caution was necessary. For example:

a. In 2011, the Government warned that there was "uncertainty" over the economic outlook and pointed to the "sovereign debt and banking crisis in Europe";[201]

b. In 2015, in the opening lines of its main submissions, the Government cautioned "Canada continues to face uncertain economic times,"[202] referring to the prevailing crude oil price at the time;[203]

c. In 2021, the Government stressed the challenging economic conditions related to the COVID-19 pandemic.[204]

135. The Government's repetitive references to "economic uncertainty" undermine the credibility of their submissions before this Commission.

136. More recently, in 2022 and 2023, the Government took the same position before the Military Judges Compensation Committee. The Committee was chaired by the Honourable Clément Gascon, C.C., Ad. E. and its two members were the Honourable Thomas A. Cromwell, C.C., and Mr. James E. Lockyer, O.N.B., C.D., K.C.[205]

137. There, the Government again argued that in light of "uncertainty in the economy," no increase in military judges' salaries was warranted.[206] The Committee rejected this submission, noting that the Turcotte Commission had concluded that the "state of the economy" in 2021 should not be considered a restrictive factor in the determination of the remuneration of federally appointed judges.[207] The Committee went on to state:

> The same would be true of the evidence presented to the MJCC in 2023. If anything, the economy has been slowly recovering since the pandemic, which was at its height in 2021 for the JCBC Turcotte Committee. Thus, for the MJCC in 2023, the first factor should not inhibit or restrain the MJCC from making recommendations we would otherwise consider necessary to ensure the adequacy of military judicial compensation. Finally, the salary increase requested by the military judges, which is parity with other federally appointed judges, cannot be credibly or

201 Government Submissions to the Levitt Commission, para. 10. See also paras. 40 and 42. [SBED at tab 2].
202 Government Submissions to the Rémillard Commission, para. 3 [SBED at tab 3].
203 *Id.*, para. 24 [SBED at tab 3].
204 Government Submissions to the Turcotte Commission (2021), para. 16. [BED at tab 46].
205 Report of the Military Judges Compensation Committee 2024, p. 9 [SBED at tab 5].
206 Report of the Military Judges Compensation Committee 2024, p. 20. The timing of the Government's submissions is mentioned at p. 10 [SBED at tab 5].
207 Report of the Military Judges Compensation Committee 2024, p. 22 [SBED at tab 5].

> reasonably said to compromise in any realistic manner Canadian public finances.[208]

138. In short, while the current economic conditions are a relevant factor, consideration of that factor cannot be at the expense of Canada's ability to continue to attract outstanding candidates to the bench, and it cannot entail an unconstitutional singling out of the judiciary to treat them differently than other persons paid out of the public purse.

B. The Government's Impoverished Account of the Commission's Role in Ensuring Financial Security

139. The Government states: "there can be no suggestion that the 2024 judicial salary [has] fallen below an acceptable minimum such that judicial independence has been compromised"[209] It also claims:

> There are no reasons to believe that there is a risk of interference with judicial independence as a result of judicial salaries. The current judicial salary as of April 1, 2024, of $396,700 is well above the minimum level at which a need to protect the judiciary from political interference through economic manipulation would be relevant.[210]

140. The Government is thus advocating for a bare "minimum" model to preserve judicial independence and its financial security dimension. This is an incorrect and truncated view of the relevant constitutional and statutory position.

141. Both the Constitution and the *Judges Act* require not that judicial salaries be only set at the "bare minimum" to preserve judicial independence, but rather that they be "adequate." Chief Justice Lamer wrote in the *PEI Reference* that the Constitution "requires that Parliament provide salaries that are adequate."[211] Similarly, the *Judges Act* provides that this Commission must inquire into the "adequacy" of judicial salaries in light of the statutory criteria.[212] This includes considering the need to attract outstanding candidates to the judiciary – a factor that the Government recognizes was intended to preserve Canada's ability to "attract" senior members of the Bar to judicial office.[213]

142. The 2024 Military Judges Compensation Committee recently rejected the Government's similar submission advocating for the "bare minimum" approach to preserving judicial

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208 Report of the Military Judges Compensation Committee 2024, p. 23 [SBED at tab 5].
209 Government's Submissions, para. 5.
210 Government's Submissions, para. 36.
211 *PEI Reference*, para. 87 [JBD at tab 4].
212 *Judges Act*, s. 26(1) and (1.1) [JBD at tab 3].
213 Government's Submissions, para. 61.

independence in light of the identical statutory text.[214] The Committee concluded that for judicial salaries to be "adequate," it is insufficient that they merely represent the bare minimum.

143. The Committee came to that conclusion based on the shared meaning of the French and English versions of the statutory text of both the *Judges Act* and the *National Defence Act*, which required that salaries be set at a "satisfactory" level.

144. The Committee thus rejected the same "bare minimum" model as that advocated by the Government before this Commission, concluding that it was inconsistent with the statutory mandate of the Committee and the importance of examining the statutory criteria "in their totality, and not in isolation from each other." Its conclusion provides a complete answer to the same arguments raised by the Government before this Commission:

> The Government asserts at para. 81 of its factum that: [translation] "The current salary … is far above the minimum level required to protect the military judiciary from political interference through economic manipulation." However, this Committee believes that the three criteria statutorily mandated by Parliament must be considered in their totality, and not in isolation from each other, or from the overall mandate of the Committee. The Government appears to be advocating for a "bare minimum" interpretation of s. 165.34 of the *NDA* [equivalent to s. 26 of the *Judges Act*]. For the reasons noted above, we have come to the conclusion that application of proper principles of statutory interpretation lead to the conclusion that Parliament in creating s. 165.34 of the *NDA* was not tasking the Committee with a bare minimum model, but rather with determining what satisfactory remuneration would be.[215]

C. Supernumerary Status as an Incentive

145. As it did before the Commissions in 2016 and 2021, the Government once again points to the option to elect supernumerary status as being of significant value to prospective judicial candidates.[216]

146. The Government provides the Commission with an incomplete assessment of this benefit. Supernumerary status, while undeniably a benefit to individual judges, is also beneficial to the Government. Thus, it is a mutual benefit. As noted by the Supreme Court of Canada,

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214 Report of the Military Judges Compensation Committee 2024, p. 25. The Government had similarly argued that military judges' salaries were "far above the minimum level required to protect the military judiciary from political interference through economic manipulation." [SBED at tab 5].

215 Report of the Military Judges Compensation Committee 2024, pp. 25-26 [SBED at tab 5].

216 Government's Submissions, paras. 53-56. See also Submissions of the Government of Canada to the Turcotte Commission, paras. 95-98 [BED at tab 46]; Submissions of the Government of Canada to the Rémillard Commission, paras. 89-93. [SBED at tab 3].

supernumerary status enables "the government to benefit from the expertise of experienced judges while paying only the difference between a full salary and the pension that would in any event have been paid to a judge who had elected to retire."[217]

147. In sum, while the availability of supernumerary status may be a benefit, it is not one to which a dollar value can be assigned. Accordingly, this benefit must properly be considered in a holistic analysis of judicial compensation and benefits.

VI. CONCLUSIONS

148. The continued stellar quality of the Canadian judiciary is dependent on Canada's ability to continue attracting outstanding candidates to the bench.

149. The Association and Council reiterate the arguments set out in the Judiciary's Submissions filed on December 20, 2024. The Government's request for a cap on the IAI of 14% over four years must be rejected. Instead, in light of the newly available data on incorporated lawyers, the Association and Council request 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.

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

Montréal, January 24, 2025

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[217] *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, para. 63 [JBD at tab 5].