

**IN THE MATTER OF THE 7<sup>TH</sup> QUADRENNIAL COMMISSION  
ON JUDICIAL COMPENSATION AND BENEFITS**

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

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## **PART I. INTRODUCTION**

1. The focus of a judicial compensation commission is to identify the appropriate level of remuneration for the judicial office in question in light of the relevant factors including, most importantly, those factors set out in the commission's mandate.<sup>1</sup>

2. It is disappointing that the Government has once again failed to meaningfully engage with the relevant factors that apply to the appropriate level of remuneration for Associate Judges. Despite having advance notice that the Associate Judges intended to raise the issue of their compensation before this Commission, the Government's submissions on this point are conclusory and place the onus solely on the Associate Judges to establish that there has been a change in circumstances warranting an increase. The Government has not addressed any of these obvious and material changes, which are set out in the Associate Judge's main submissions and further highlighted here.

3. These submissions address the following points:

- a) First, the change in circumstances to the role and duties of Associate Judges since the Reports of the Rémillard Commission in 2016 and the Turcotte Commission in 2021 that support the requested adjustment to have their salary fixed at 95% of the salary of FC Judges;
- b) Second, the change in compensation for relevant comparator groups and history of the Government refusing to implement increases in compensation in light of these comparator groups; and
- c) Third, the proper interpretation to be applied to the data on comparator groups and professional legal corporations.

## **PART II. SUBMISSIONS**

4. The Government's starting premise in submitting that the current level of compensation is sufficient is that the "role or responsibilities of associate judges remain largely the same as they were before the Rémillard Commission."

5. This is incorrect.

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<sup>1</sup> *Bodner*, at paras. 14, 17, JBD Tab 6.

**A. Change in the role and responsibilities of Associate Judges**

6. First, in 2021, the trial jurisdiction of Associate Judges increased from monetary claims of up to \$50,000 to monetary claims of up to \$100,000. This doubling of monetary jurisdiction is a significant change. It greatly expands the nature of trials over which Associate Judges regularly preside, leading to longer trials, more reserved judgments, and an increased workload. This is a highly relevant factor for purposes of determining whether the current level of compensation is sufficient, or if an increase is warranted.

7. In addition to the formal change in monetary jurisdiction, the Federal Court at large has experienced drastic increases in volume in recent years. Since the time of the Rémillard Commission's Report in 2016, there has been a 97% increase in the total number of dispositions in the Federal Court and an 86% increase in the total number of active proceedings. These statistics are referenced at paragraph 61 of the Associate Judges' main submissions and in the submissions of the Chief Justice of the Federal Court.<sup>2</sup>

8. As the Chief Justice explains in his submissions, the average level of complexity of proceedings filed has also increased.<sup>3</sup> This has led to a significant increase in the number of cases that are subject to case management, a tool that the Federal Court has implemented to improve access to justice for litigants and for which Associate Judges take primary responsibility. In *Penney v. Canada (Minister of Public Safety) et al.*<sup>4</sup>, released after the Rémillard Commission's final report, the Federal Court explained that it was "now taking a much more flexible approach in assessing whether case management should be granted". As expected, this new approach has resulted in an increased workload for Associate Judges and represents a material evolution in their role and responsibilities at the Court.

9. Finally, in addition to the monetary jurisdiction, caseload, and average complexity of work, the standard of review that is applied to the decisions of Associate Judges was changed following the Rémillard Commission's report. In *Hospira Health Corporation v. Kennedy Institute of Rheumatology*<sup>5</sup>, the Federal Court of Appeal held that Associate Judges

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<sup>2</sup> See Chief Justice Submissions, p. 2.

<sup>3</sup> See Chief Justice Submissions, p. 2.

<sup>4</sup> Book of Documents of the Associate Judges, Tab 7.

<sup>5</sup> Book of Documents of the Associate Judges, Tab 1.

“are, for all intents and purposes, performing the same task as Federal Court judges.”<sup>6</sup> Accordingly, the Court of Appeal revised the standard of review applicable to discretionary orders of Associate Judges, concluding that going forward, they would only be reviewable when such decisions are incorrect in law or based on a palpable and overriding error in fact (i.e., the standard of review applicable to decisions of Federal Court Judges). The recognition that Associate Judges are performing the same task as Federal Court Judges within their areas of work is directly relevant to the level of compensation that is fair and reasonable.

**B. Change in the compensation of relevant comparators**

10. Previous Commissions have found that in addition to Federal Court judges, regard should be had to other judicial comparators who perform similar work to Associate Judges, have similar qualifications, or are otherwise similar in other respects. This comparative exercise is useful in light of the Government’s history of resisting implementation of a fair level of compensation for Associate Judges.

11. Associate Judges have been historically underpaid. Despite the release of the *PEI Judges Reference* in 1997, the Government did not establish an independent review of Associate Judges’ compensation until 2007. Special Advisor Adams issued a report following this review setting out comprehensive recommendations regarding the compensation and benefits for Associate Judges. However, the Government declined to implement Special Advisor Adams’ recommendations with respect to an increase in the salary of Associate Judges, citing economic concerns.

12. A second independent review process was held in 2013 by Special Advisor Cunningham. Like his predecessor, Special Advisor Cunningham determined that the compensation for Associate Judges should be increased. He concluded that an appropriate comparator was Provincial Masters (not any remaining Ontario traditional Masters) and the judges of the Federal Court. He determined that 80% of the salaries of Federal Court judges would be appropriate. The Government again declined to fully implement the recommended salary increase, capping the increase at 76% due to concerns that the salary paid to

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<sup>6</sup> *Hospira Health Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, at para. 63 (Book of Documents of the Associate Judges, Tab 1).

Associate Judges should not exceed the salary paid to Military Judges.

13. However, since the Rémillard Commission, the salaries of judges performing similar work to Associate Judges have increased. As set out at paragraph 71 of the Associate Judges' main submissions (and reproduced here for ease of reference), the salaries for Associate Judges in the Federal Court, Alberta, British Columbia, and Ontario are currently as follows:

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

14. This gap in compensation is a relevant factor before this Commission and there is no reasonable justification for this gap. Two independent Special Advisors have already determined that Associate Judges of other provinces are a relevant comparator and the provinces listed above are the only jurisdictions in Canada that maintain a distinct role akin to that of Associate Judges of the Federal Court. This gap in compensation is also not justified due to a greater level of responsibility of other judges. To the contrary, Associate Judges of the Federal Court have broader jurisdiction and responsibilities, as set out at paragraph 89 of the Associate Judges' main submissions.

15. The gap in compensation poses a serious issue for the Court's ability to attract outstanding candidates. While the Government submits that there is no evidence of difficulty attracting outstanding candidates to the position of Associate Judge (without providing any

evidence of their own), the Chief Justice’s submissions note that only a “very small number” of outstanding candidates have applied for appointment to the Court in the recruitment processes that have occurred over the last decade.<sup>7</sup> Chief Justice Crampton attributes this unsatisfactory level of interest at least in part to the current gap in compensation that exists between Associate Judges and Federal Court Judges.<sup>8</sup> It is particularly disappointing that the Government has ignored this data in its submissions, given that Chief Justice Crampton made remarks before the Turcotte Commission addressing this very issue.<sup>9</sup>

16. Finally, following the Rémillard and Turcotte Commissions, the compensation paid to Military Judges is no longer a bar to fairly compensating Associate Judges. As set out above, the Government has previously voiced concerns that increasing the salaries of Associate Judges would be inappropriate due to the salaries for Military Judges being lower than their counterparts in non-military courts. However, in July 2024, the Government accepted the recommendations of the Military Judges Compensation Committee that the salary of Military Judges be increased to gain parity with Federal Court Judges. As the Associate Judges do not propose parity with Federal Court Judges, this should no longer be an impediment to full and fair compensation.

### **C. The Government’s Misuse of Data on Professional Legal Corporations**

17. The Government appears to rely on data collected by the CRA and Statistics Canada on the *net* income of Professional legal corporations (“PLCs”) to portray incomes of lawyers in private practice who practice through PLCs. The Government claims that the income of PLC owners is near or below the level of judges (when the judicial annuity is taken into account) and not significantly above the level of Associate Judges.<sup>10</sup>

18. For reasons that are unclear, the Government (through their consultant Eckler Ltd.) used average *net* incomes of PLCs, then added the average dividends paid to owners (adjusting for the fact that more PLCs reported net income than reported paying dividends)

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<sup>7</sup> Chief Justice Submissions, p. 5.

<sup>8</sup> Chief Justice Submissions, p. 6.

<sup>9</sup> These submissions are appended to the Chief Justice’s Submissions at Appendix 2 (Chief Justice Submissions, p. 19).

<sup>10</sup> Government Submissions, paras. 104-109.

to derive an average income for PLC owners aged 47-54 of \$456,442 in 2021.<sup>11</sup> This is the number cited by the Government in its submissions.<sup>12</sup>

19. This understates the real income of lawyers practicing through PLCs. Net income of the PLC is not meaningful, because it excludes (among other things), salary paid to the owner. PLC owners frequently pay themselves a salary during their working years, for a variety of reasons, including meeting their expenses and enabling them to build up their RRSPs. This is an expense to the PLC that lowers its net income. Also, PLCs provide greater tax benefit over time when earnings are retained and invested rather than paid out as dividends.

20. For example, consider a lawyer who earned \$600,000 as a partner in a law firm through their PLC in 2021, and elected to pay themselves \$300,000 in salary. Assuming that the PLC had no other significant expenses, its *net* income would be approximately \$300,000. This lawyer does not pay themselves dividends from the PLC, because they want to take full advantage of the tax benefit of allowing retained earnings to be invested and grow within the PLC. On the Government's approach, this lawyer would be recorded as having an income of \$300,000, below the salary of an Associate Judge, rather than their true income of \$600,000 which is substantially higher than the income (including benefits) of an Associate Judge.

21. The Association and Council's expert consultant, Ernst & Young, has confirmed that the most reliable data set is the Statistics Canada data on partners in law firms who practice through PLCs, and the parties have agreed that for these lawyers, the relevant measure of income is the income going *into* the PLC, not the net income of the PLC. This makes sense. A lawyer may well be a partner in a law firm before setting up a PLC. From the law firm's point of view, there is no difference between paying them their share of the partnership income as a human partner or as an incorporated partner. In either case, the lawyer's share of the partnership income will be recorded in a T5013 tax slip issued by the partnership. In the case of a lawyer practicing through a PLC, what they do from that point on is entirely up

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<sup>11</sup> These numbers are drawn from a Statistics Canada table entitled *plc\_owners\_Canada\_90k\_2018\_2021*, tiles 2 and 3, JBD Tab 19, and reproduced at Eckler Report, p.41. Tab 2 of the Statistics Canada table states explicitly that the data are for "average net incomes" of PLCs.

<sup>12</sup> Government Submissions, para. 109; see Eckler Report, p. 41.



to them. They can pay themselves salary, or dividends, or retain earnings, in whatever mix they choose according to their circumstances.

22. The only data on PLCs that can be directly compared to self-employed unincorporated lawyers is the data on partnership income earned by lawyers practicing through a PLC, as reflected in the T5013 slips issued by the partnership. For PLCs in other contexts, there are too many variables such as number of shareholders, number and type of employees of the PLC, other expenses of the PLC, and allocation strategies by owners as between salary, dividends, and retained earnings, to be able to make meaningful comparisons to unincorporated lawyers. The data on partners in law partnerships who practice through a PLC shows average income (i.e., partnership income going into the PLC) that is far in excess of the total income of judges, let alone Associate Judges of the Federal Court who earn only 80% of the income of a puisne judge of the superior courts. This is particularly true in the largest census metropolitan areas (“CMAs”), where the Associate Judges are based.

23. The Associate Judges also submit that the data relied upon by the Government on a substantial drop in income for lawyers in private practice after age 55 should be approached with caution. Some in this age range (55-69) may elect to transition to “counsel” arrangements in which they do not practice full time, which may lower the average. For this reason, it would be unwise to rely upon the purported drop in income of lawyers in private practice after age 55 as a comparison point to judicial remuneration.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

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