**IN THE MATTER OF THE *JUDGES ACT*, RSC 1985, c J-1, as amended**

**2024 JUDICIAL COMPENSATION AND BENEFITS COMMISSION**

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# REPLY OF THE GOVERNMENT OF CANADA

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## OVERVIEW

1. The judiciary's proposed increase in overall compensation is well beyond what is required to meet the objectives of the legislative criteria and to maintain the financial security of the superior court judiciary. An increase of $60,000 to the existing salary, when coupled with yearly increases in accordance with the Industrial Aggregate Index, would result in an unprecedently large raise that is unnecessary to uphold judicial independence or attract outstanding candidates. For context, and although not a determinative factor, the $60,000 bonus is roughly equal to the income of the median family after-tax in 2022.

2. The judiciary's analysis of judicial compensation is objectively problematic. It deviates from past commissions' methodology where it does not favour its comparator to the highest earners in private practice. Further, the judiciary's approach unjustifiably favors specific filters in order to promote the highest earners. This not only artificially inflates compensation in private practice, but also excludes all other traditional and non-traditional areas of practice that are relevant for attracting a diversity of outstanding candidates.

3. Based on the judiciary's main submissions, it is clear that there will continue to be disagreement between the participants regarding the data that informs compensation in private practice. The only way to resolve this disagreement is to obtain pre-appointment income data and recommend that the judiciary fully cooperates to provide this data in a timely and efficient manner.

4. As for the associate judges, their proposal to increase their salaries to 95% of a Federal Court judge's salary is untenable. The salary of the associate judges already account for 80% of a Federal Court judge, without considering the generous judicial annuity. This appropriately correspondents to their responsibilities in relation to that of their judicial counterparts. Proportionality of the duties and responsibilities between the judiciary and associate judges dictates that their salaries remain unchanged in the circumstances. Any recent change to their jurisdiction and or an increased workload does not change this let alone justify such an excessive increase.

## I. JUDICIAL COMPENSATION IS ADEQUATE

### 1) $60,000 Bonus is Unprecedented and Unjustified

5. The judiciary seeks an increase of $60,000 to their salary, retroactive to 2024. This represents 15% of judicial salaries in 2023 and does not account for the yearly increases to judicial salaries in accordance with the Industrial Aggregate Index ("IAI"). Not only does this increase have no legal basis, but it is insensitive to the current economic challenges of Canadians. The current judicial salary without the $60,000 bonus, which is greater than the 75$^{th}$ percentile of self-employed private sector lawyers in 2023 and almost the 87$^{th}$ percentile when total compensation is measured, is a reasonable and appropriate level of compensation that provides financial security and does not discourage outstanding individuals from seeking judicial office.

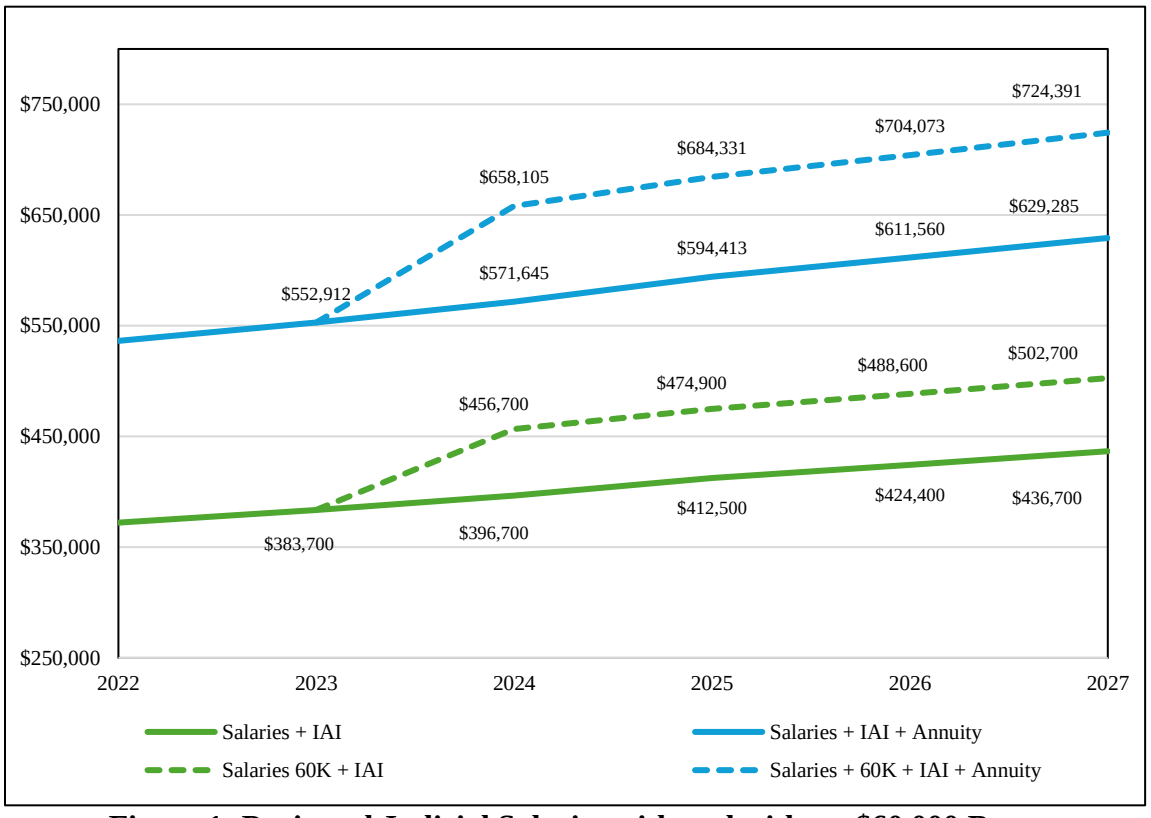


**Figure 1: Projected Judicial Salaries with and without $60,000 Bonus**

6. Figure 1 not only demonstrates the overall excessive nature of the increases that would result from adopting the judiciary's proposed $60,000 bonus, but also the importance of a ceiling on IAI increases. If the judiciary's proposed $60,000 bonus is

accepted, it would immediately increase the judicial salary as well as increase the financial effect of the yearly IAI indexing by thousands of dollars over the quadrennial period. The combination of the $60,000 bonus and the larger IAI indexing would result in an increase to the judicial salary of $119,000 over the quadrennial cycle. This level of growth in a single quadrennial period is unprecedented. When the judicial annuity is taken into consideration, the total compensation of judges would increase by approximately $170,000 by 2027. The inflationary effect of this $60,000 bonus on the IAI indexing would continue beyond the current cycle.

7. The proposed $60,000 bonus is not in line with the prevailing economic conditions. As explained in the Government's main submissions, geopolitical uncertainty continues to present significant challenges in today's economic landscape. This uncertainty has only increased since the filing of the submissions in light of current events. This commands fiscal restraint. A $60,000 increase to judicial salaries in addition to IAI indexing is incompatible with this need for fiscal prudence.

8. The proposed $60,000 bonus stands in contrast to the everyday struggles of Canadians. As explained in Eckler's Response Report, an increase of $60,000 for judicial salary, not accounting for the increased value due to the judicial annuity, equates to 98.7% of the 2022 median family after-tax income of Canadians which is $60,800.[1] And, as developed in the Government's main submissions, the high cost of living remains a problem for Canadians, especially groceries and housing.[2] The judiciary itself recognizes the severe inflationary pressures of the last four years.[3] To present the judiciary with a bonus roughly equal to the median family income while most Canadians struggle with the high cost of living would run counter to the Supreme Court of Canada's guidance in

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[1] Eckler, Response to Judiciary Submissions, Associate Judges Submissions and Book of Exhibits (January 2025), p 10 [**Eckler Response Report**], **Government Supplemental Book of Authorities, Tab 1.**

[2] Submissions of Government of Canada [**Main Government Submissions**] at para 21.

[3] Joint Submissions of the Judiciary Canadian Superior Courts Judges Association and the Canadian Judicial Council to the Judicial Compensation and Benefits Commission at para 122 [**Joint Submissions of the Judiciary**].

*PEI Reference* and risks damaging the reputation of the judiciary and the administration of justice.[4]

**2) Unjustified Departure from Previous Commissions**

9. As set out in the Government's main submissions at paragraph 12, although not binding, the approach of previous Commissions should guide the participants unless there are "valid reasons" to depart from them.[5] In their submissions, the judiciary forcefully reiterates this principle, suggesting that the Government has inappropriately raised issues previously decided.[6] It is the judiciary, however, that advocates departures from previous findings in several notable areas.

a. The DM-03 Block Comparator has been consistently considered and determined an appropriate consideration with respect to judicial compensation.[7] The judiciary, however, suggests that such a measure is no longer appropriate, and instead propose a Block Comparator tied to DM-04 pay, without explaining how such a comparator overcomes concerns about the DM-03 comparator. The only rationale for departing from previous commissions appears to be that it results in a comparison to higher level of pay.

b. As acknowledged by the judiciary, the Turcotte Commission accepted that an age-weighted approach to CRA data was appropriate as "consistent with the recognition of greater diversity in the applicant pool and the Government's commitment to ensure that the judiciary reflects the society

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[4] *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3, at para 196, **Joint Book of Documents, Tab 4**.

[5] Turcotte Commission Report, p 4, para 25, **Joint Book of Documents, Tab 14.** See also *Bodner v. Alberta*, 2005 SCC 44, at paras 14–15, **Joint Book of Documents, Tab 6.**

[6] Joint Submissions of the Judiciary at paras 31-35.

[7] The Turcotte Commission again reiterated the reluctance to change the fundamentals of a comparator which has been used for so many years and along with IAI indexing kept judicial salaries "in pace with salaries in both the public and industry sectors." (Turcotte Report, p 22, at para 147, **Joint Book of Documents, Tab 14**).

in which it operates."[8] In its report, the Turcotte Commission undertook a detailed consideration of the appropriateness of age-weighting the data, and the judiciary has not shown "valid reasons" to depart from it. Moreover, to say that to do so "necessarily creates distortions" ignores the distortion created by other filters, such as filtering out the lower income data.

c. The judiciary also rejects the Turcotte Commission's explicit recommendation that the Office of the Commissioner for Federal Judicial Affairs collect data with respect to the compensation levels of appointees prior to their appointment.

10. The judiciary's proposal fails to follow a principled, "common sense" approach to the previous commissions' reports, but instead seeks to depart from the approach of previous commissions simply because it does not align with its current proposal.

**3) Incomplete and Inaccurate Portrait of the Data**

11. The recommendations of the judiciary are based on a skewed analysis of the data.[9] It selects specific datasets, specific peers in a dataset, or uses aspirational peers for the sole intent of establishing the highest salary exclusion datasets as the proper peer comparator. The result is a comparator that is only representative of the highest earners in the largest metropolitan centers in the country. Not only does such a comparison fail to represent the actual communities from which judicial appointments are made — notably those practicing criminal and family law that the judiciary claims are most in need of assistance[10] —, it also supports the false narrative that monetary success determines who is an outstanding candidate for judicial office. This narrative has not been accepted by past commissions and should not be accepted now.

12. The judiciary's proposed exclusion of salaries less than $90,000 has a significant impact on the dataset. As explained in the Eckler Response Report, the idea of excluding

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[8] Turcotte Report, p 26, at para 169, **Joint Book of Documents, Tab 14**.
[9] Eckler Response Report at p 3, **Government Supplemental Book of Authorities, Tab 1.**
[10] Joint Submissions of the Judiciary at paras 94, 98.

lower salaries is not a common practice in compensation consulting. Excluding the lowest salaries in the dataset results in the highest salary outliers having a larger impact on the dataset overall, skewing the statistics higher. Such skewing clearly occurs here, as excluding salaries less than $90,000 from the data in the 44-56 or 47-54 age groups in 2019-2023 results in 25.0% to 33.2% higher salaries than those with no exclusions.[11] If the Commission insists on such a cut-off, the only way to remedy the skewing would be to exclude incomes at the top of the dataset, as there are outliers on the higher end as well.[12]

13. The judiciary's overreliance on the professional law corporations ("PLC") data also contributes to this problem, as this data is heavily skewed by the highest earners. The Government discusses the difficulties associated with this data at length in its main submissions.[13]

14. The judiciary's decision to cast aside age weighting to determine *puisne* judges' compensation — *i.e.*, the methodology advocated for and applied by the Turcotte Commission — is confounding. Age weighting ensures that the most relevant and representative market data is examined and used to compare to the compensation. It also protects data integrity and facilitates consistent benchmarking that can be used in future comparisons.[14] There is no compelling reason to deviate from this effective industry practice.

15. Finally, the judiciary undervalues the judicial annuity, *i.e.*, one of the most valuable retirement plans in Canada.[15] It does so by eschewing the value of the disability benefit (estimated to be worth an additional 5.6%) in its calculation of the judicial annuity.[16] It also relied on a notably higher discount rate of 6% per annum — rather than the 3.6% discount rate provided in the Chief Actuary Report — on the assumption that significant investment

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[11] Eckler Response Report, p 8, **Government Supplemental Book of Authorities, Tab 1.**
[12] Eckler Response Report, p 7, **Government Supplemental Book of Authorities, Tab 1.**
[13] Government's Submissions at paras 100–109.
[14] Eckler Response Report, p 6, **Government Supplemental Book of Authorities, Tab 6.**
[15] Eckler Response Report, p 4, **Government Supplemental Book of Authorities, Tab 1.**
[16] Eckler Response Report, pp 4–5, **Government Supplemental Book of Authorities, Tab 1.**

risk would have to be assumed by the individual in order for them to obtain an annualized return of 6%. As explained by Eckler, this assumption is unreasonable, because one of the primary advantages of the judicial annuity is that it is essentially risk free, as the Government is responsible for bearing all investment and longevity risk associated with its payment.[17] This exemplifies again how the judiciary filters and skews the data to downplay its current total compensation.

**4) Pre-Appointment Income Data is Crucial**

16. The submission that this Commission should reject the Turcotte Commission's Recommendation 8(5)(c), which asked that the Office of the Commission for Federal Judicial Affairs begin preparation of statistical data concerning compensation levels prior to appointment, amounts to requesting this Commission to sit in appeal of a recommendation that was accepted and was not judicially reviewed. The Turcotte Commission has already declined to reconsider the recommendation or defer its implementation.[18] The judiciary's repeated statement of its position on this issue simply reflects its differing view as to the appropriate evidence.

17. In declining to reconsider Recommendation 8(5)(c), the Turcotte Commission urged the parties to consult and work together to achieve what they could with respect to the recommendation.[19] Moving forward on this data point requires collaboration from all parties, which has not been forthcoming. The only way to move forward is to insist that the judiciary cooperate fully so that pre-appointment data can be made available to future commissions in a timely and efficient manner.

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[17] Eckler Response Report, pp 4-5, **Government Supplemental Book of Authorities, Tab 1.**

[18] Quadrennial Commission Letter to Parties, Recommendations 8(5)(c), dated June 6, 2023, **Joint Book of Documents, Tab 14 (c).**

[19] Quadrennial Commission Letter to Parties, Recommendations 8(5)(c), dated June 6, 2023, p 4, **Joint Book of Documents, Tab 14 (c).**

**5) State of Judicial Appointments is Not in Crisis**

18. Contrary to the judiciary's claim, there is no "crisis" of judicial vacancies nor a shortage of qualified candidates.[20] Quite the opposite, the objective evidence suggests that there remains substantial interest in judicial appointments, that the majority of appointees continue to be drawn from private practice, and that the new appointments process set in place by the Government — which prioritizes diversity of experiences and personal merit — is resulting in excellent appointments.

A) No "Crisis of Judicial Vacancies"

19. The information cited by the judiciary to support the existence of a "crisis of judicial vacancies" is outdated. It does not reflect the current state of judicial appointments. As evidenced by the most up-to-date statistics, judicial appointments are being made steadily and expeditiously.

20. The evidence before the Commission presents a positive picture on the state of judicial appointments. In the last ten years, the Government has appointed more than 815 judges, including over 200 appointments since the Chief Justice of Canada's letter cited by the judiciary. In the last seven years, the Government has also funded the creation of 116 new judicial positions. The creation of new positions results in an increase in the number of judicial vacancies, but these positions have for the most part been filled. There are currently only 38 vacancies in *all* of the superior courts of every province and territory, including the federally established courts. The Chief Justice himself has recognized that judicial vacancies had reduced and that the situation has improved.[21]

21. Isolated statements in the media are not definitive proof of difficulty in appointing candidates. These past statements by the Minister of Justice do not reflect the objective evidence on the state of judicial appointments and cannot be separated from their evidentiary context. For example, one of the statements cited by the judiciary was

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[20] Joint Submissions of the Judiciary at paras 84–113.

[21] Transcript of Remarks by the Right Honourable Richard Wagner, P.C., Chief Justice of Canada Annual News Conference with the Chief Justice of Canada, p 2, **Government Supplemental Book of Authorities, Tab 2.**

accompanied by information suggesting that the difficulty associated with the number of applicants in the approved pool of candidates was related to the processing of applications. These issues have since been addressed. The Government has extended the terms of Judicial Advisory Committee members and the assessment validity period of judicial applications from two to three years. These changes improved the Judicial Advisory Committees' capacity to review the high number of applications and, in turn, ensured an ongoing source of recommended candidates eligible for appointment.[22]

B) No "Shortage of Qualified Candidates"

22. The evidence does not bear out the judiciary's claim that there is a shortage of applications for judicial appointment or a significant reduction in qualified candidates. On the contrary, the data supports that the number of applications and highly recommended candidates largely reflect the same pace of recent years.

23. As illustrated in Figure 2, the number of applications received from interested candidates has remained consistent since October 2017. With 379 new applications received last year alone — the majority from private practice, as explained below — it appears that the position remains as coveted as ever.

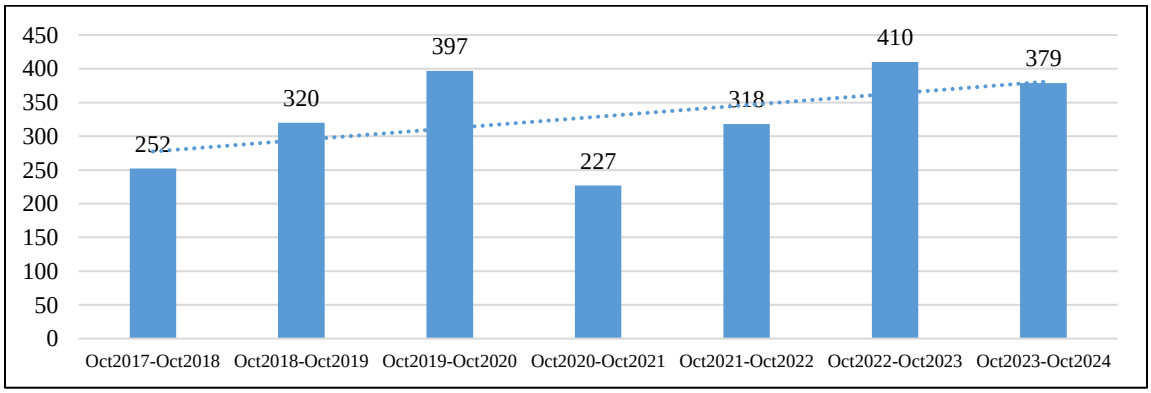


**Figure 2: Number of Applications (2017 to 2024)[23]**

[22] Government of Canada, *New measures announced to make federal judicial appointments process more efficient* (Ottawa: Department of Justice, 5 September 2023), **Government Supplemental Book of Authorities, Tab 3.**

[23] The data is available in Office of the Commissioner for Federal Judicial Affairs Canada, *Demographic Statistics on Diversity in the Judiciary* (Ottawa: Federal Judicial

24. The available data also does not support that there is a drop in recommended or highly recommended candidates; if anything is to be taken from the data, it is that there has been an increase in the assessment of candidacies. In fact, Judicial Advisory Committees have identified *more* recommended or highly recommended applications in the last year than they have in each of the last five years, as shown in Figure 3.

| Year | Total Assessed | Highly Recommended | Recommended | Unable to Recommend |
|---|---|---|---|---|
| Oct2018-Oct2019 | 182 | 41 | 45 | 96 |
| Oct2019-Oct2020 | 374 | 76 | 94 | 204 |
| Oct2020-Oct2021 | 359 | 85 | 93 | 181 |
| Oct2021-Oct2022 | 227 | 45 | 53 | 129 |
| Oct2022-Oct2023 | 315 | 73 | 68 | 174 |
| Oct2023-Oct2024 | 540 | 95 | 106 | 339 |

**Figure 3: Assessed Applications (2018 to 2024)[24]**

C) No Difficulty Attracting from Private Practice

25. There is nothing to support the judiciary's assertion that the current judicial salary is insufficient to attract candidates from private practice.

26. The evolution of the Judicial Advisory Committees in past decades is evidence of the objectivity of the applications to the judicial process. The responsibility for vetting applications and recommending candidates falls exclusively on Judicial Advisory Committees based on the objective criteria provided for in the federal judicial appointments process.

27. In contrast to the anecdotal evidence of the judiciary, the objective documentary evidence presented for this quadrennial cycle shows that the majority of judicial

Affairs Canada, 1 February 2024) [**Judicial Diversity Statistics**], **Government Supplemental Book of Authorities, Tab 4.**

[24] The data is available is derived from Judicial Diversity Statistics, **Government Supplemental Book of Authorities, Tab 4.**

appointments continue to come from private practice. The judiciary itself recognizes in its main submissions that most applications and appointments are from private practice.[25]

28. As explained in the Government's main submissions, the drop in the percentage of appointments from private practice when compared to past quadrennial periods is a desired outcome of the judicial appointment process aimed at greater diversity on the bench. Outstanding jurists with a wide range of backgrounds and legal experiences come from all facets of the law, and not exclusively from the traditionally highest earning positions in private practice. The results speak for themselves: the bench has never been more diverse, and more qualified women, racialized persons, and Indigenous peoples are accessing judicial roles than ever before.[26] While work remains to be done, this is a positive development and has a salutary impact on improving public confidence in the justice system. It should not be interpreted, in the absence of objective evidence to the contrary, as having occurred to the detriment of applicants from private practice who are presumed to earn higher incomes, and who also continue to be attracted to judicial office and appointed to it.

## II. ASSOCIATE JUDGES' COMPENSATION IS ADEQUATE

29. Proportionality requires that the associate judges' salary remain at 80% of *puisne* judges' salaries of their respective courts. Associate judges are essential judicial officers who play an important role in the operation of the Federal Court and Tax Court of Canada. They do not, however, exercise the same functions as judges of those courts, and 80% of a *puisne* judicial salary is demonstrably sufficient to attract outstanding candidates and guarantee financial security.

30. The increase to 95% of a judicial salary, as proposed by the associate judges of the Federal Court, does not reflect the nature of the work they do in comparison to *puisne* judges of that Court. An increase in caseload does not necessarily result in a role being

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[25] Joint Submissions of the Judiciary at paras 104,111.

[26] David Ebner, "A new generation of judges is redefining what Canada's top courts look like" *The Globe and Mail* (31 December 2024), **Government Supplemental Book of Authorities, Tab 7.**

larger or more complex. Associate judges' powers and duties are defined and limited by the *Federal Courts Rules*.[27] Their duties have not evolved since 2016 to such an extent that a 15% increase in their salary would be warranted. While associate judges' jurisdiction with respect to actions for monetary relief alone has increased to $100,000, this remains a small fraction of what could be sought in proceedings before the Federal Court. Moreover, associate judges largely deal with procedural matters, and there remain a significant number of key functions outside their jurisdiction, and which can only be done by a Federal Court judge. For example, only a Federal Court judge can hear a motion for an injunction, a judicial review application, a motion to certify a class proceeding and any trial or summary trial or summary judgment motion engaging relief beyond the limited jurisdiction set out in the *Federal Courts Rules*.[28]

31. The associate judges' submissions do not provide objective evidence of an inability to attract high-quality candidates to associate judge positions. The Chief Justice of the Federal Court's submissions do not show a difficulty in attracting candidates. Further, the fact that some associate judges are ultimately appointed as Federal Court judges suggests that high-quality candidates do apply.[29]

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**.

Dated at Ottawa, Ontario, this 24th day of January, 2025

**Christopher Rupar**
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[27] *Federal Courts Act*, RSC 1985, c. F-7, s 12 (3), **Government Supplemental Book of Authorities, Tab 5**. Their authority as well as specific limitations are set out in the *Federal Courts Rules*, SOR/98-106, r 50, 382 and 383-387 [***Federal Courts Rules***], , **Government Supplemental Book of Authorities, Tab 6**.
[28] *Federal Courts Rules*, R 50, **Government Supplemental Book of Authorities, Tab 6**.
[29] Submissions of the Associate Judges at para 56.