



ALBERTA

Report and Recommendations

of the:

**2017 ALBERTA JUDICIAL COMPENSATION
COMMISSION**

PRESENTED TO:

**THE MINISTER OF JUSTICE AND SOLICITOR GENERAL
IN AND FOR THE PROVINCE OF ALBERTA**

THE ALBERTA PROVINCIAL JUDGES' ASSOCIATION

As amended, May 23, 2019

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I. COMMISSION COMPOSITION, TERMS OF REFERENCE AND PROCESS

The 2017 Alberta Judicial Compensation Commission (“the Commission”) was established by the *Provincial Judges and Masters in Chambers 2017 Compensation Commission Regulation*, Alberta Regulation 62/2017 (“the *Regulation*”), pursuant to the *Judicature Act*, RSA 2000, c. J-2, as amended. The Commission consists of one commissioner appointed by the Minister of Justice and Solicitor General (“the Minister”), one commissioner appointed by the Minister on the nomination of the Alberta Provincial Judges’ Association (“the Association”), and one commissioner appointed by the Minister on the nomination of those two commissioners.

The 2017 Commission members appointed by the Minister are: Peter A. Gall, Q.C.; Andrew C.L. Sims, Q.C., who was nominated by the Association; and The Honourable C. Lynn Smith, Q.C., who was appointed on nomination by the first two Commissioners, and is the Chair of the Commission.

The terms of reference for the Commission are set out in section 4(1) of the *Regulation*. Its role is to conduct an inquiry and prepare a report respecting the appropriate level of compensation for provincial court judges and Masters in Chambers for the period April 1, 2017 to March 31, 2021, including: the appropriate level of salary for judges sitting full or part-time or on a supernumerary basis; the appropriate design and level of judges’ pension benefits of all kinds; the appropriate level and kinds of

benefits and allowances of judges; and any other issues relevant to the financial security of the judges that the Commission agrees to resolve. The Commission is to “determine issues relating to compensation independently, effectively and objectively”, and it is to “contribute to maintaining and enhancing the independence of the Provincial Court and the judges through the inquiry process and the report.” In making its recommendations, the Commission is to consider the following criteria (section 13 of the *Regulation*):

- (a) The constitutional law of Canada;
- (b) The need to maintain the independence of the judges and the Provincial Court;
- (c) The unique nature of the role of judges;
- (d) In the case of Provincial Court judges, the need to maintain a strong Provincial Court by attracting highly qualified applicants;
- (e) The remuneration and benefits that other judges in Canada receive;
- (f) Increases and decreases, as applicable, in the Alberta real primary household income per capita;
- (g) The need to provide fair and reasonable compensation in light of prevailing economic conditions in Alberta and the overall state of the economy, including the financial position of the Government;
- (h) The Alberta cost of living index and the position of the judges relative to its increases or decreases, or both;
- (i) The nature of the jurisdiction of judges;

- (j) The level of increases or decreases, or both, provided to other programs and persons funded by the Government;
- (k) Any other factors considered by the Commission to be relevant to the matters in issue.

The Commission published a Notice regarding its public hearing dates and the closing date for written submissions to the Commission (October 17, 2018) on its website (hosted by the Alberta Government) and in the *Edmonton Journal* and the *Calgary Herald*. It held public hearings at the Law Courts in Edmonton on November 8 and 9, 2018. Written submissions were received from the Law Society of Alberta; the Canadian Bar Association made written and oral submissions. The Minister and the Association made extensive written and oral submissions. In addition, expert witnesses filed reports and, in some cases, testified.

II. HISTORY

In its Report of February 17, 2015, the 2013 Alberta Judicial Compensation Commission provided a succinct overview of the history of Compensation Commissions in Alberta up to 2015.¹ We will not duplicate its work, but will briefly summarize it and add reference to the 2013 Commission's conclusions.

¹ At pp. 10-17.

The Provincial Court was established as a Court of Record in Alberta in 1973. Prior to 1998, there was no judicial compensation commission; instead, there were *ad hoc* negotiations between representatives of the judges and representatives of government, or a determination of provincial court judges' salaries as a percentage of District Court judges' salaries (who, in turn, were paid a percentage of Supreme Court of Alberta judges' salaries.) After a rollback of judicial wages in 1994 as part of a rollback of public servants' wages, there was a constitutional challenge which became part of the proceedings before the Supreme Court of Canada in the *PEI Reference* case². After the decision in that case, the Association and the Alberta Government entered into a *Framework Agreement* on March 3, 1998, establishing the first judicial compensation commission. In the end, following judicial review, its recommendations were implemented in full.

The practice of establishing a Judicial Compensation Commission by Regulation began with the 2000 JCC. Judicial Compensation Commissions were established, and made recommendations, in 2000, 2003, 2006, and 2009.

The 2013 Commission stated that a leading factor for its consideration was the state of Alberta's economy. Although at the date of its hearing, the economy had been thriving, by the date of its report (February 17, 2015 and amended March 18, 2015)

² Reference re: *Remuneration of Judges in the Provincial Court (Prince Edward Island)* [1997] 3 S.C.R. 3. ("the *PEI Reference*")

there had been a significant decline in world oil prices and, as a consequence, a drop in resource-based royalty revenues. The Commission noted, however, the history of waxing and waning world oil prices, and said that the recent drop in the price of oil should not outweigh all other factors in its recommendations because that would be a disservice to the JCC process, and an abdication of the *PEI Reference* mandate to be “independent, objective and effective”.

A second important factor for the 2013 JCC was the nature of the jurisdiction of provincial court judges, whose workload and responsibilities had expanded.

A further notable factor was the remuneration paid to other judges in Canada. With respect to federally appointed judges, the 2013 Commission observed that the 2009 Commission had determined that something close to a 93% level for Provincial Judges preserved the “suitable difference” between the salaries of the two courts. With respect to other Canadian provincial court judges’ salaries, the Commission stated:

We agree that there should not be a hard and fast rule to keep salaries at say, 95% of those of Ontario Provincial Court judges. Ontario is a large manufacturing based economy while Alberta’s economy depends to a large extent on its fluctuating natural resource revenues. Yet there is a recognition by past commissions that salaries for judges in Alberta should be close to those of Ontario. We agree with the perspective adopted by previous Alberta judicial compensation commissions that approximate parity between Alberta and Ontario should be maintained.³

³ At p. 45.

Finally, the 2013 Commission considered the Association's submission that it should implement the Industrial Aggregate Index ("IAI") as a built-in method to ensure proper adjustments to salaries. It rejected that submission because the IAI does not measure changes in the cost of living, but rather reflects changes in total earnings received by workers.

In the end, the 2013 Commission recommended that salaries should be set so as to effect regular increases of 2.5% starting in 2014/15. Thus, it recommended annual salaries as follows: for the period April 1, 2013 – March 31, 2014 of \$273,000.00; for the period April 1, 2014 – March 31, 2015 of \$279,825.00; for the period of April 1, 2015 – March 31, 2016 of \$286,821.00; and for the period April 1, 2016 – March 31, 2017 of \$293,991.00. It also recommended that the *per diem* rate formula for supernumerary judges and part-time/ad hoc Masters be maintained at 1/207.5 of the salary of a full-time *puisne* judge, and that part-time judges and half-time Masters have access to the full amount of the professional development allowance of \$3,750 per year.

With respect to pension, it made two recommendations (as agreed by the parties). One related to the options available to a surviving pension partner, and the second was to reduce the vesting period for the judicial pensions from five years to two years. It recommended that a Judicial Indemnity Agreement be implemented between the Government of Alberta and the Association, to protect judges from the costs associated with legal proceedings in certain defined circumstances. It declined to make a

recommendation with respect to an increase in vacation time, stating that it could not be justified in the present circumstances and that scarce government resources would be more appropriately allocated to maintaining the Provincial Court judges' position relative to other judges across Canada.

The Government accepted all of the 2013 Commission's recommendations, by Order in Council 172/2015. It did not give reasons for its decision. The salary recommendations were implemented by Regulation on November 26, 2015. Implementation of the recommendations regarding pension and judicial indemnity was delayed until November 2017. The Association's position is that more needs to be done to implement the judicial indemnity, as will be discussed later in our Report.

III. GUIDING PRINCIPLES

The Supreme Court of Canada has, over the past two decades, set out the principles that explain this Commission's existence and inform its work.

Canada's unwritten constitution recognizes the principle of judicial independence, both for individual judges and for the courts as institutions. The three core characteristics of judicial independence are: security of tenure, financial security and

administrative independence.⁴ Political relationships between the judiciary and other branches of government must be avoided because courts must be, and appear to be, free from interference by government including by the use of economic levers on the judges or courts.

With respect to financial security, the three core requirements are: judicial salaries can be maintained or changed only by recourse to an independent commission; no negotiations are permitted between the judiciary and the government; and salaries may not fall below a minimum level.⁵ In that regard, the Supreme Court of Canada wrote:

Third, and finally, any reductions to judicial remuneration, including *de facto* reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries.⁶

The creation of commissions such as this 2017 Alberta Judicial Compensation Commission is a way to deal fairly and rationally with the question of judicial compensation while observing those constitutional principles.

⁴ *PEI Reference, supra*, note 2, at p. 118

⁵ *Provincial Court Judges' Assn. (New Brunswick) v. New Brunswick (Minister of Justice)* 2005 SCC 405 (“*Bodner*”)

⁶ *PEI Reference, supra* note 2, at para. 135

The authority to set judicial compensation rests with government, and it is open to governments to change or freeze judges' salaries either as part of a global measure, or on their own, so long as the government has gone through the commission process.⁷ Measures that depart from the recommendations of commissions must be justified as rational.⁸ There is nothing inherently irrational in including judges in across-the-board measures, since

[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.⁹

IV. POSITIONS OF THE PARTIES

In this section we provide an overview of what the Alberta Provincial Judges' Association sought, followed by an overview of the Minister's position. We will refer in more detail to the positions of the parties when we discuss the prescribed criteria and analyze their application in this case.

A. Alberta Provincial Judges' Association

⁷ *Ibid* at para. 174-179

⁸ *Ibid*, at para. 180-183

⁹ *Ibid*, at para. 196

The Association emphasized that its position is founded on a careful analysis of the prescribed criteria, including the economic factors. The Association described its members' approach as temperate, and informed by a realistic understanding of Alberta's economic situation and by a recognition that judges should not be exempt from the need to share the burden of dealing with tough economic times. It referred to the historic position of Alberta judges as at or near the top of salary levels (although not total compensation levels) for provincially-appointed judges in Canada, normally at rough parity with Ontario judges, and in the neighbourhood of 5-7% below the base salary of federally-appointed judges.

The Association sought recommendations as follows:

1. Salary increases

- Effective April 1, 2017, puisne judges' salaries¹⁰ to be increased to \$296,382;
- Effective April 1, 2018, puisne judges' salaries to be increased to \$302,304;
- Effective April 1, 2019, puisne judges' salaries to be increased to 94.5% of the salary of a federally appointed judge;
- Effective April 1, 2020, puisne judges' salaries to be increased to 95% of the salary of a federally appointed judge.

The Association did not seek an increase in the annual professional allowance (although it said that the professional allowance is too low), preferring instead to seek a

¹⁰ The Association noted that the Minister has agreed that administrative judges will continue to receive, in addition to the puisne judge salary, administrative stipends as recommended by the 2009 Judicial Compensation Commission: 10%, 7.5%, and 5% of a puisne judge's salary for the Chief Judge, Deputy Chief Judge and Assistant Chief Judge, respectively.

moderate salary increase. Nor did it seek a change in the pension arrangements, though it argued that when salary and pension are viewed together, Alberta judges are not as well compensated as Ontario or federally-appointed judges. Counsel for the Association submitted that the discrepancy in total compensation will persist whether or not the Association's proposed salary increases are implemented.

2. Reduction in the age of eligibility for part-time service from age 60 to age 55.
3. Passage of a Regulation containing the provisions of the Judicial Indemnity such that its terms and conditions are clear and transparent, like all other aspects of judicial compensation.

B. Minister of Justice and Solicitor General in and for the Province of Alberta

The Minister emphasized her opposition to a formulaic approach based on judicial salaries in other jurisdictions and argued instead for a “made in Alberta” balancing of the prescribed criteria. The Minister’s proposal was said to be consistent with the Alberta government’s overall economic measures aimed at recovering from the recent economic downturn and balancing its budget by 2023-24. The Minister’s submission was that it is not inherently irrational to include judges in across-the-board measures affecting substantially every person paid from the public purse, and quoted the Supreme Court of Canada in *PEI Reference*¹¹:

¹¹ *PEI Reference*, *supra* note 2 at para. 196

Nothing 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.

1. Salaries

The Minister's position was that there should be no salary increases for the term of the Commission's mandate, thus, 0% in each of 2017, 2018, 2019 and 2020. However, the Minister stated that the Government is agreeable to an increase in the judges' annual professional allowance from \$3,750 to \$4,500 effective April 1, 2017.

2. Reduction in the age of eligibility for part-time service

The Minister agreed with the Association with respect to this issue.

3. Regulation creating judicial indemnity

The Minister's position was that there is no need to include reference to judicial indemnity in an additional Regulation as proposed by the Judges' Association.

V. REVIEW OF SPECIFIED CRITERIA

We will consider some of the criteria in groups, beginning with those focused on the role of the judiciary under the Canadian constitution.

Non-economic considerations related to the role of the judiciary under the Canadian constitution

A. The constitutional law of Canada

B. The need to maintain the independence of the judges and the Provincial Court

C. The unique nature of the role of judges

This Judicial Compensation Commission exists because the Supreme Court of Canada, interpreting the Constitution of Canada, has determined that the constitutional principle of the rule of law requires independent courts staffed by independent judges. Independence requires that Courts and their judges are insulated from interference by parties, governments, and the public generally, in order that important societal goals be served: impartial adjudication, and public confidence in the impartiality of the judiciary and the courts. The required insulation entails a degree of financial independence. In *PEI Reference*,¹² Chief Justice Lamer specified that there must be an independent, effective and objective process for determining judicial compensation, that judges should not be engaging in negotiations over remuneration with the executive or legislative branch, and that any reductions in judicial remuneration, including *de facto* reductions through the erosion of judicial salaries through inflation, must not take the salaries below a basic minimum level required for the office of a judge. The goal is to depoliticize the relationship between the judiciary and the other branches of government. We echo this comment by the 2013 JCC:

¹² *PEI Reference*, *supra* note 2, at para 131 and following.

It is important for our Commission to state at the outset that we agree with the view expressed by the Association that the protection of judicial independence is the very '*raison d'être*' of the Commission process. The Commission process is meant to reinforce the historical separation of powers between the judiciary and the legislative/executive branches of Government. A judicial compensation commission, as recommended in *Bodner*, safeguards that arms-length separation and ensures a result uninfluenced by any political considerations.¹³

Judges have a unique and demanding role. They are responsible for decisions affecting the lives of others in sometimes central ways. They are required to reach those decisions through an impartial, careful, reflective and of course evidence-based process. As well, judges are entrusted with the responsibility to uphold the constitution, and to ensure that the constitutional rights of citizens and residents of Canada are respected by legislatures and governments.

Judicial work is transparent, in that it is largely carried out in public, and judges are accountable in that their decisions are reviewable by higher courts and subject to comment and criticism by the public and the press (to which judges are usually unable to respond). The evidence and arguments that judges must consider in hearing and deciding cases can be highly emotional and disturbing.

¹³ At p. 40.

Though judges remain members of the community and must understand community expectations and values, they also occupy “a place apart”.¹⁴ A judicial appointment is a life-changing event, among other reasons, because it brings with it constraints on expression and associations as well as a heavy workload. Judicial independence is a key mechanism for ensuring that judges are able to carry out their unique, and very demanding role.

D. In the case of Provincial Court Judges, the need to maintain a strong Provincial Court by attracting highly qualified applicants

The Association points out that the very existence of a meaningful and effective Judicial Compensation Commission process can assist in attracting highly qualified applicants for judicial appointment; it provides some assurance that levels of compensation will, over time, be reviewed and adjusted by government acting in good faith. It also emphasizes the need for retention and motivation of qualified judges. The Association argues that there has been a significant drop in the number of “approved candidates” in the Provincial Court appointment process, from 136 as of November 15, 2003, to 54 as of April 10, 2018. It submits that the wording of Criterion D (“highly” qualified applicants) is significant.

Highly qualified applicants for judicial appointment in Alberta with ten years or more at the Bar can choose to apply to the Provincial Court of Alberta, or to federally

¹⁴ Friedland, Martin L., *A Place Apart: Judicial Independence and Accountability in Canada*, Ottawa, Canadian Judicial Council, 1995

appointed courts (the Court of Queen's Bench of Alberta, the Alberta Court of Appeal, or the Federal or Tax Court of Canada).

In comparison with judges of the federally appointed courts, Alberta Provincial Court Judges are not as well compensated, either in base salary, annuity/pension, or entitlement to paid vacation. This comparison will be discussed further below, as we address Criterion E.

The Association also pointed to evidence that a number of Provincial Court Judges have moved from the provincial court to federal courts (seven between 2006 and 2011, and five since 2011).

With respect to the background expertise of applicants, the Association referred to evidence that over the periods of 2008-2014 and 2014-2018, the proportion of the total number of approved candidates for the Alberta Provincial Court originating from the private bar has decreased significantly, from a high of 73% in 2008 to a low of 33% in 2018. Some 68% of Alberta lawyers practice in a private law firm. Though lawyers employed by Government and Legal Aid make up only 12% of the Bar as a whole, from April 1, 2013 to September 2018, 50% of those appointed to the Provincial Court came from that sector (Government, including the Crown's office and Legal Aid).

On the other hand, the Minister argued that the 28 judges appointed to the Provincial Court since July 2014 demonstrate the Court's present ability to attract highly

experienced, qualified and competent applicants. Of the appointments, fifteen of twenty-eight judges had spent most of their careers in the private sector. Further, counsel for the Minister submitted, there is no evidentiary basis for an inference that a background in the private sector makes an applicant more qualified for the Provincial Court than a background in the public sector, nor that the rate of application to the Court from any sector has been affected by salary levels.

As discussed below under Criterion I, the work done by Alberta provincial court judges differs from that done by federally appointed judges in some important respects. Lawyers with a background as Crown or Legal Aid counsel are likely to have experience with criminal law work, a highly relevant consideration with respect to the Provincial Court. An individual lawyer may have a variety of reasons, not just the level of compensation, for choosing to apply to one court as opposed to the other. Among these reasons may be the nature of the work, a desire to join a court that is higher in the formal hierarchy, or perceptions about the comparative workload. There was no evidence on the suitability of various kinds of legal background, and we do not see an inherent advantage in a private practice background for the work of provincial court judges in Alberta.

There is no evidence before us as to the number of applicants to the provincial court over time, nor as to the number of provincial court judges who seek to move to a federal court.

We do note that the overall dramatic decline in “approved candidates” suggests that the Alberta Provincial Court’s ability to attract highly qualified candidates may not be improving and possibly could be declining.

E. The remuneration and benefits other judges in Canada receive

Historically, Judicial Compensation Commissions in Alberta have accepted that since Alberta’s economy has been among the nation’s strongest, the most appropriate comparisons have been to the provinces with the strongest economies, particularly Ontario. As well, Commissions have found that, although it is appropriate for there to be some difference between Alberta provincial and federally-appointed judges’ salaries (given the hierarchy of courts and the differences between the courts), nevertheless the difference in compensation should not be so large as to create a disincentive for well-qualified candidates to apply to the provincial court.

The Association’s position is that, in order to maintain the relative position of Alberta provincial judges with respect to Ontario and federal judges, the Alberta salaries should be set at \$296,382 for 2017 and \$302,304 for 2018, and for 2019 and 2020 should be set at 94.5% and 95% of the salary of a federally appointed judge for each respective year. Federal judges’ salaries are increased each year according to

increases in the Industrial Aggregate Index (“IAI”).¹⁵ The Association’s position is summarized in the chart below¹⁶:

Fiscal Year	Federal Salary (actual or <i>predicted</i>)	Association’s proposal	% relationship
2017	\$315,300	\$296,382	94%
2018	\$321,600	\$302,304	94%
2019	\$328,032 <i>(assumes 2% increase in IAI for Canada)</i>	\$309,990	94.5%
2020	\$334,593 <i>(assumes 2% increase in IAI for Canada)</i>	\$317,863	95%

Since our hearing, the Office of the Commissioner for Federal Judicial Affairs Canada has confirmed that IAI for the purposes of section 25 of the *Judges Act* was 2.6% for 2018. The salary of federally appointed judges has as a result been adjusted, effective April 1, 2019, to \$329,900. This has the effect of lowering somewhat the percentage relationship between the Association’s proposals and the actual federal salaries. Since the Ontario judges used the same point of reference, that relationship too alters somewhat.

¹⁵ The terms IAI and AWE (“Average Weekly Earnings”) are used interchangeably now and hereafter.

¹⁶ *Association’s Submission*, para. 268

In arguing for linkage to federal salaries, the Association places considerable weight on the outcome of the Ninth and Tenth Provincial Judges Remuneration Commissions in Ontario. These two Commissions were held together, and a single Report deals with the years April 1, 2014 to March 31, 2022.¹⁷ As a result of the Ontario Commissions' recommendations, in Ontario the salaries of Ontario Court of Justice judges, going forward, are to be linked with those of federally-appointed judges in the manner set out in the chart below, which also sets out a comparison with the Association's proposal before this Commission¹⁸:

285. The chart below compares Ontario judges' salaries with the Association's proposed salaries for Alberta judges for the years within this JCC's mandate. Because the Ontario salaries are linked with those of federally-appointed judges going forward, we have assumed a 2% adjustment to federal salaries in each of 2019 and 2020 (based on an estimated 2% increase in the IAI for Canada). The estimated figures are shown in *italics*.

Year	Ontario judges Salaries	APJA Proposed Alberta Salary	Federally appointed judges
2017	\$292,829 (92.87% of feds)	\$296,382 (94% of feds)	\$315,300
2018	\$300,600 (93.47% of feds)	\$302,304 (94% of feds)	\$321,600

¹⁷ Ontario: *Report of the Ninth and Tenth Provincial Judges Remuneration Commission (2014-2018, 2018-2022)* – The Second Kaplan Commission's Report.

¹⁸ *Association's Submission*, para. 285

2019	94.07% of feds \$308,579	94.5% of feds \$309,990	IAI for Canada \$328,032 (assuming 2%) ¹⁹
2020	94.67% of feds \$316,759	95% of feds \$317,863	IAI for Canada \$334,593 (assuming 2%)

Looking beyond Ontario and the federal jurisdiction, the Minister provided nationwide data. The following extract from a chart provided by the Minister²⁰ sets out the salaries payable to judges across Canada for the years 2016 – 2022, insofar as they are known or determinable:

Judicial Compensation – Canada – Puisne Judge Salaries Across Canada						
	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
Fed	314,100	315,300	321,600	[329,900]	+IAI	+IAI
BC ²¹	252,290	262,000	266,000	270,000		
AB	293,991					

¹⁹ This has since been determined to be \$329,900, based on IAI at 2.6% for 2018

²⁰ *Attachments to the Minister's Submissions*, Tab 12. In this chart, but subject to the notes below, red indicates judicial review sought or still possible, yellow indicates a recommendation subject to a government decision and green indicates not yet reported, but with statutory indexing shown where applicable.

²¹ Subject to a pending judicial review and litigation

SK	282,184	290,848	295,792	+CPI+0.5% ²²	+CPI+1%	
MB ²³	254,263	259,000	+% change in AWE for MB	+% change in AWE for MB		
ON	290,793	292,829	300,600	94.07% of Federal	94.67% of Federal	95.27% of Federal
QC	250,000	251,500	254,518			
NB	251,280	252,240	257,280	+IAI		
NS ²⁴	236,151	236,151	236,151	238,513		
PE	258,734	263,685				
NL	247,546					
NT	272,000	278,828	289,733	+CPI+1.5%		
YT						

The historic relationship between Alberta provincial judges' salaries and those in other jurisdictions is set out in this extract from a table showing salaries expressed as a percentage of the Alberta salaries, again provided by the Minister:²⁵

²² The Saskatchewan salaries for 2019 have since been quantified, based on a 2.3% CPI figure, at \$304,074

²³ Recommended by the Commission; no government decision as yet. The Manitoba budget documents tell us the AWE figures for Manitoba are now known to be 2.5% for 2017 and 2.9% for 2018. The 2020 figures must, as a result, be adjusted.

²⁴ The government rejected the salary recommendations in the Report and substituted an increase of 1% to take effect 2019-20, but under judicial review.

	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
Federal	109.1%	109.2%	108.2%	107.5%	107.6%	106.8%
BC	89.7%	87.6%	88.8%	87.5%	86.7%	85.8%
AB	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
SK	92.8%	94.0%	93.2%	93.2%	94.9%	96.0%
MB	84.6%	85.0%	84.3%	85.4%	86.9%	86.5%
ON	101.8%	101.4%	100.6%	100.0%	100.2%	98.9%
QC	88.3%	87.5%	86.7%	85.2%	84.4%	85.0%
NB	79.5%	77.6%	75.0%	73.2%	86.1%	85.5%
NS	83.1%	82.0%	81.7%	82.7%	81.8%	80.3%
PE	86.9%	89.1%	87.7%	87.0%	87.2%	88.0%
NL	81.3%	81.8%	81.4%	81.8%	83.0%	84.2%
NT	90.6%	94.6%	92.5%	91.5%	90.8%	92.5%
YT	94.3%	94.8%	94.4%	93.9%	93.4%	

As depicted by the table above, with respect to basic salaries, Alberta judges have consistently been at the second from the top or the top rank among provincial courts in Canada.

In making comparisons, however, it may be appropriate to take into account other forms of compensation, such as pensions. The Association produced a report from André Sauvé, F.C.I.A., F.S.A., a consulting actuary with 35 years' experience. He compared compensation taking into account the value of the two most significant elements of compensation for judges: salaries and pensions. He looked at Alberta, Saskatchewan, Ontario and federally appointed judges. In his report, he stated that the value of judicial pension arrangements as a percentage of salary was lowest in Alberta, and would remain the lowest even with the salary increases proposed by the Association. Mr. Sauvé stated that, for judges appointed at the age of 40, the compensation value of the judicial pension arrangement in Alberta is comparable to the average compensation value of the pension arrangements in the other three jurisdictions. However, he wrote, the pension is not competitive for judges appointed at or after age 50. For those judges, the negative difference in value represents 11.9% of salary at age 50 and increases to a negative difference of 24.9% of salary at age 60.

Using weighted calculations taking into account the distribution of judges, by age at appointment, he estimated that the compensation value of the judicial pension arrangement in Alberta is 39.3% of salary, compared to an average compensation value of 54.2% for the other three jurisdictions. (Individually, the values were 47.4% of salary

for Saskatchewan judges, 57.1% for Ontario judges, and 58.1% for federally appointed judges.) With the Association's proposed salary increases, the salary plus pension compensation for Alberta judges (labelled for these purposes "total compensation") would be 17.2% less than for federal judges and 10.3% and 10.8% less than for Ontario judges in each of 2017 and 2018.²⁶

The Association further argued that while Alberta Provincial judges can only take six weeks' paid vacation, federally appointed judges and Ontario judges are entitled to take eight weeks. This difference of two weeks paid vacation per year, the Association said, is the equivalent of 4% less compensation for Alberta Provincial Court Judges when compared to their Ontario and federal counterparts.

The Association seeks no increase in vacation entitlement. However, it correctly submits that vacation entitlement (like the pension differences) significantly qualifies the view that Alberta judges are at the top of the compensation scale. With respect to total compensation, they are not.

The Minister took strong issue with the proposition that Alberta judicial salaries should be linked with those paid in Ontario or federally, either directly, or indirectly with an automatic increase mechanism such as IAI. While the Minister agreed that in the past, Judicial Compensation Commissions had recognized a traditional linkage between

²⁶ These calculations are based on the estimated 2% increase in IAI for 2019, not the actual figure of 2.6% now known

the salaries for provincial judges in Alberta and Ontario, described as “approximate parity”, and between Alberta and federally appointed judges’ salaries, she argued that the problem of judicial compensation in Alberta requires a “made in Alberta” solution.

We are persuaded by the Minister’s position in this regard. Tethering future salaries for Alberta provincial judges to salaries elsewhere seems inconsistent with the mandate we have been given, which is to examine carefully and take into account all of the criteria set out in the *Regulation*. A tethering approach seems to place far too much weight on a single one of those criteria, that is, the remuneration and benefits other judges in Canada receive. Although to proceed in this way would have the advantage of simplicity, it would carry the disadvantage that it arguably abdicates responsibility. We note that the Ontario Commissions did not give reasons for their decision to link provincial judges’ salaries to those of their federal counterparts. The decision flowed from an agreement between the parties, and the parties gave no detailed rationale for that agreement. This Commission declines to adopt such an approach.

As for the “total compensation” comparison set out in Mr. Sauvé’s report, the Minister filed an actuarial report by William Moore, F.S.A., F.C.I.A., an actuary since 1975. Mr. Moore stated that the pensions provided to Alberta judges remain generous, and that because of features of those pension plans, the total compensation of judges appointed at older ages will always be less competitive than the total compensation for judges appointed at younger ages, a disparity that cannot be corrected or eliminated by

across the board increases in salary. He also produced data from a 2011 report²⁷ showing that, when compared to judges in all jurisdictions across Canada, Alberta provincial judges rank sixth in total compensation. (That report, he said, was based on 2010 data and used slightly different economic and demographic assumptions and methodology.)

We have considered the evidence provided by the Association and the Minister, and accept the Association's position that it is appropriate to look beyond salaries and to take into account pension and vacation entitlements. We conclude that Alberta judges, viewed from that broader perspective, will rank well below federally appointed and Ontario judges in terms of total compensation even if the Association's salary proposals are accepted.

Considerations related to the Alberta economy

F. Increases and decreases, as applicable, in the Alberta real primary household income per capita

G. The need to provide fair and reasonable compensation in light of prevailing economic conditions in Alberta and the overall state of the economy, including the financial position of the Government

H. The Alberta cost of living index and the position of the judges relative to its increases or decreases, or both

We begin with an overview, and then will address specifically Criteria F, G and H.

²⁷ Aon Hewitt Report dated March 28, 2011, based on 2010 data

There is no sugarcoating the fact that, as a result of the collapse in world oil prices in mid-2014, the Alberta economy has been hard hit and in a prolonged and sustained way. This in turn has had a profound and negative effect on the Province's fiscal situation. Alberta's economic difficulties are the primary justification advanced by the Minister for a four year pay freeze. The Association accepts that there are economic difficulties; but maintains that its proposals would have been significantly higher and broader had they not deliberately tempered them in recognition of the current need for restraint.

With the aid of the parties' submissions and the data and expertise provided by their economists, we have assessed the economic data for the period of our mandate. Criterion G requires us to assess broad economic and fiscal conditions. Criteria F and H direct attention to two specific indicators. We note that F, with its reference to "real" data, incorporates an inflation adjustment. Inflation is also dealt with in H. These two criteria must be read together to avoid "double discounting" for erosion based on inflation.

The Association provided reports from and the testimony of Dr. Melville McMillan, Professor Emeritus in the Department of Economics at the University of Alberta. He provided an initial report entitled "Report on the State and Prospects of the Alberta

Economy and the Fiscal Position of the Alberta Government.” He also prepared, and spoke to, the initial reports provided by the Government’s experts.

The Minister provided evidence from Dr. Bev Dahlby, the Research Director and a Distinguished Fellow with the University of Calgary’s School of Public Policy, and Ms. Catherine Rothrock, Alberta Treasury’s Chief Economist – Economics and Fiscal Policy. Dr. Dahlby provided an initial “Report on the Alberta Economy and the Government of Alberta’s Finances and Fiscal Situation, August 31, 2018” plus a response to Dr. McMillan’s report. Ms. Rothrock authored three documents:

- Key Economic and Fiscal Developments in Alberta since 2013
- The Alberta Economy – The Finance Economic Outlook Report
- Response to Dr. McMillan’s August 30, 2018 Report

The Minister argued, specifically with respect to Criterion F, and implicitly regarding Criterion G, that we are called upon to look at Alberta data and Alberta changes on their own, without comparisons with other jurisdictions. Counsel for the Minister says:

At the outset ... it is important to note in general that none of the specific Criteria directly refer to a comparison of Alberta with other provinces. That is especially important to note in respect to criterion G....

... [Criterion G] does not directly refer to or otherwise contemplate any comparison of the results of such an analysis with an analysis of such factors in respect to any other province.²⁸

Despite this caution, the Minister herself provided many comparisons to changes elsewhere; in matters such as GDP growth, unemployment rates, primary household income per capita, average weekly earnings and the performance of Alberta's provincial economy generally. Several were included in Dr. Dahlby's report, filed by the Minister.

Such comparisons are inevitable. We accept the paramount importance of Alberta data but often, for those data to be meaningful, they must be compared with similar data from elsewhere. Where that is so, we have weighed comparative data, under the individual criteria as well as under Criterion K.

The Minister argues directly that the 2013 Judicial Compensation Commission was over-optimistic on certain points and, as a result, recommended higher increases than, in hindsight, the Minister feels were justified. The Minister attributes this to what she says was the 2013 Commission's undue reliance on predictions for the cost of living.

²⁸ *Government of Alberta brief*, para. 148 and 149

Our assessment, however, is that the 2013 Commission’s recommendations did not just rely on that one criterion. The 2013 Commission’s Report, read as a whole, refers to much broader considerations and takes into account all the criteria. Indeed, we must presume that the reports of previous Commissions reflect the statutory requirement to weigh all relevant criteria, at least in the absence of evidence to the contrary.

In any event, it is not this Commission’s task to sit in appeal of previous Commissions with the benefit of hindsight or to second-guess what went before. Instead, our task is to make recommendations for the period from April 1, 2017 to March 31, 2021. We appreciate, as noted below, the significant economic changes for 2014-2016, and particularly the 2016 drop in household income per capita. However, we are not persuaded that we could or should recommend any “claw back” from the outcome of the 2013 Commission’s recommendations as accepted and implemented by the Alberta government. (It is a different matter to conclude that economic changes give some justification for a tempered increase during the term of our mandate.) We note that it was the Minister who asked the 2013 Commission to make recommendations based on CPI growth²⁹ (rather than using the Average Weekly Earnings (“IAI”) data that have been and continue to be used to provide automatic changes in the compensation for federally appointed judges.³⁰)

²⁹ 2013 JCC Report, p. 35

³⁰ 2013 JCC Report, p. 46

Actually, the 2013 Commission had firm data for a significant portion of its mandated term. The Association made the point that, while the 2013 Commission made its report in February 2015, the Government's acceptance of the report only occurred in July 2015. There is some force to that point. Further, prior to the report being issued, the Association wrote to the Minister inviting further submissions to the 2013 JCC if the Minister believed that declining oil prices and reduced government revenue affected the government's position. The Minister declined that invitation.

The Minister urged us not to base our recommendations on any linkage to other jurisdictions, whether directly, or indirectly by adopting the same or some similar indexing mechanism to that used elsewhere (primarily in Ontario and federally). As explained above, we accept the Minister's position in this regard and have not approached our task through linkage with other jurisdictions or the adoption of a formula. Like the 2013 JCC, we have not adopted the IAI index or any other formula for calculating increases. Our recommendations instead are based on a consideration of all the criteria specified in Section 13 of the *Regulation*.

The purpose of the listed criteria is to illuminate factors relevant to fair and equitable compensation for Alberta's Provincial Court Judges. However, at times, submissions on behalf of the Minister implied that the focus was more on how the compensation recommended for Provincial Court Judges might influence, and further

exacerbate, Alberta's economic problems and the Province's fiscal position. As we will discuss later, it is our view that such a very small tail does not wag such a very large dog.

Ours is a narrow question which is essentially this: given all the criteria, should the 160 or so judges and Masters see the buying power of their salaries erode each year? Should they maintain their relative buying power, keeping abreast of inflation? Or should they advance somewhat beyond the rate of inflation? The Minister, asking that we recommend four years at 0%, advocates the first outcome -- erosion of the buying power of judges' and Masters' salaries. The Association advocates the last -- some advance beyond the rate of inflation -- but in its submission only modestly so, since its proposals, for the first year at least, in fact fall short of the known rate of inflation.

F. Increases and decreases, as applicable, in the Alberta real primary household income per capita

This specific criterion is new since the last Commission process. It results from Statistics Canada's having ceased to track "real income per capita."³¹ Dr. McMillan explained that real primary household income per capita data reflect increases in the market sector of the economy, excluding pensions, government transfers and so on. They show market income earned by individuals.

³¹ See the 2013 JCC Report at pages 29-30

Dr. Dahlby's report provides data on this topic, but we note that, as he concedes, he used projected CPI data, on this and other derivative data, based on an assumed inflation rate of 1.6% per year. That was the average inflation rate experienced over the five years prior to his preparing his report. He explained: "I used the very simple forecast; the next five years will be like the last five years". On the other hand Ms. Rothrock's report, based on the government's own figures (see below), projects higher inflation rates that are also more in accord with other economic commentaries. This difference qualifies a number of Dr. Dahlby's projections, some going up and others down. We rely upon Ms. Rothrock's data because the data are more current.

Ms. Rothrock's reports provided past and projected data on Alberta's Primary Household Income Per Capita on a raw and inflation (CPI) adjusted basis. Criterion F, the Minister points out, refers to the "real", that is inflation adjusted, data. It is useful to have both numbers since, in Alberta (unlike federally or, for example, in Saskatchewan), judicial salaries are not automatically adjusted for inflation. The "real" table tells us how much household income per capita in Alberta has gone up beyond the level of inflation. Both data sets are recorded below:

Row 1 shows Growth in Personal/Primary Household Income per capita

Row 2 shows Growth in Real (CPI Inflation Adjusted) Personal/Primary Household Income per capita

(f) = forecast (e) = estimate												
2010	2011	2012	2013	2014	2015	2016	2017e	2018f	2019f	2020f	2021f	2022f
2.2	6.9	6.2	3.6	3.6	1.4	-8.7	3.2	3.1	3.2	3.3	3.2	3.5
1.2	4.3	5.0	2.2	1.0	0.3	-9.7	1.6	0.8	1.3	1.2	1.2	1.5

The forecasted data thus show that, over the 2017-2021 period, Alberta Finance predicts that Personal/Primary Household income per capita will average about 1.2% above the CPI rate of inflation. The Minister drew particular attention to the drastic fall in 2016. In that one year, this figure went down 1% lower than the already significant drop in inflation. Dr. Dahlby notes that by 2021 the current figure will still be lower than it was in 2013, although without adjusting for inflation.

As noted below with respect to employment data, this drop in household income per capita is distributed very unevenly among different industrial sectors. The data not only reflect a drop in wages but also a drop in such factors as overtime worked, something significant in what was previously the overheated petrochemical construction sector.

The figures set out above are somewhat lower than those predicted in the Government's own 2018-2021 fiscal plan. There, the actual 2016 drop is listed at minus 7.4%, not minus 9.7%, and the 2018-2021 projections are for 4.4%, 4.5%, 4.7% and 4.8%. Ms. Rothrock advises that, in any comparison, one must recognize that: (1) the

budget figures report the growth in total primary household income (i.e. wages, non-labour income and population growth); (2) there has been a growth in population; and (3) these figures too are inflation adjusted.

Ms. Rothrock's August 31, 2018 report, at p. 5, included the following prognosis for wage and income growth over the term of our mandate.

Wage growth in Alberta is sensitive to general economic conditions in the province and their impacts on the overall labour market. Growth in average weekly earnings is expected to average around 3.3% by 2022, a more moderate pace than in past years as a result of slower employment growth and business investment. Similarly, the rate of growth in average hourly wages will average about 3.3% by 2022. These, along with the pickup in investment income, should support growth in primary household income per capita of around 3.5% by 2022. The current forecast for growth in real primary household income per capita (i.e. adjusted for inflation) is an average of about 1.2% between 2018 and 2022. Alberta Treasury Board and Finance is not currently forecasting a return to Alberta's boom years in the mid-2000s over the medium term.

Dr. McMillan provided a chart and data comparing Primary Household Incomes Per Capita between Manitoba, Saskatchewan, B.C. and Ontario, using CANSIM data and Conference Board of Canada forecasts compared to the Alberta Budget figures. Again, the Minister takes issue with the relevance of data from anywhere but Alberta. However, we find this comparison helpful, particularly when we consider the position of Alberta's judicial salaries vis-à-vis those elsewhere, as required by criterion E.

Dr. McMillan reported that Alberta's primary household income per person has exceeded that in every other province for many years.

The data show that in 2016, Alberta's household income premium decreased from 39% to 22% over Ontario. However, Alberta's per capita income growth was restored in 2017 and Dr. McMillan says further sustained growth is forecast. That projected growth is expected to maintain the percentage differential with Ontario at about 22 per cent higher (and an even higher differential with other provinces except British Columbia). His report concludes at p. 19:

Thus, the recession in Alberta has resulted in the premium of Alberta's primary household incomes per person relative to those in other provinces being reduced but that premium is still considerable (perhaps substantial). In addition, if incomes recover as well as the Alberta government expects, the premium relative to Ontario will be about 25 per cent and relative to British Columbia about 15 per cent.

This per capita household income premium over Ontario is relevant when considering the Minister's position that any earlier link to the Ontario judges' salaries should be abandoned. In saying that, we are not suggesting there has ever in fact been any direct or formulaic link. Rather, the references have been to "approximate parity".

Inter-provincial comparisons aside, the central point is that our assessment of Criterion F indicates that without any increases – that is, with the Minister’s recommendation of zero percent per year -- judges and Masters would fall significantly behind the overall Alberta population, and increasingly so over the four-year term.

G. The need to provide fair and reasonable compensation in light of prevailing economic conditions in Alberta and the overall state of the economy, including the financial position of the Government.

The sudden and precipitous decline in the price of oil has had a profound and lasting effect on Alberta’s economy. It has had a similar impact on the Province’s fiscal position. The present inability to overcome the shortfall in pipeline capacity has limited the available options to counter these changes, and has added further economic as well as political frustration. As Dr. McMillan reported, the “abrupt fall in oil prices dramatically changed the course of the Alberta economy and its effects were widespread and uneven.”³²

It is important at the outset to identify different, although interrelated, factors. The Alberta economy, although heavily reliant on oil and gas, is broader than just that industry. It includes a diverse agricultural sector, wood products, high-technology and many other industries that contribute to growth, tax revenue and employment. While the decline in oil and gas revenues, and increasingly the restrictions on deliverable

³² *Dr. McMillan’s Report* p. 27

output, constitutes a very significant component, and one which influences other sectors, it is not the totality of the Alberta's economy.

The Government's fiscal position is directly linked to royalty revenues and the sale of oil and gas leases. As the economists agreed, the availability of provincial revenue from these sources has in the past allowed the Province to sustain taxation levels significantly below the rates collected elsewhere. This has included the ability to avoid any provincial sales taxes or healthcare premiums. As Dr. Dahlby notes:

The two distinguishing features of the Government of Alberta's finances are its reliance on resource revenues to fund provincial expenditures and the absence of sales tax. On average, non-resource revenues have covered only 77 percent of total expenditures, with the difference financed from resource revenues, when resource revenues are high, or debt, when they are low. The provincial budget balance is very sensitive to oil price shocks; a \$15 per barrel addition or reduction in the price of oil over the course of a year has a \$4 billion impact on the Government of Alberta's revenues.³³

The health of the Province's fiscal position tends to be judged by its annual budget – income vs. expenditures, and by its accumulated deficit. One cannot expect a sudden and drastic loss in this major source of revenue to simply be absorbed in one or two budgets or counteracted quickly.

³³ *Dr. Dahlby's report*, pp. 29-30

Income, expenses, borrowing, and accumulated debt are all highly significant but interrelated indicators of the Province's financial health. They also fluctuate over time. For current data we have relied most heavily on the Province's own 2017-18 Annual Report, the March 22, 2018 Budget Address and more recently on the 2018-2019 First Quarter Fiscal Update and Economic Statement. Since our hearings, we have been provided with the Second and Third quarter updates which we have considered even where our report refers to the data and submissions available at the time of our hearings.

Most of the information presented in these documents is in chart form and we do not propose to summarize that data in words. Suffice to say we have paid particular attention to this information to help us assess the expert evidence, and to help us understand the data not just in absolute terms, but for the trends it indicates.

The overall theme of these documents is that "The Recovery Remains on Track" despite the depth of the downturn. However, we have also noted the ongoing cautions raised by the economists before us, and the Treasurer in his reports. In the first quarter update he notes:

- Monetary policy elsewhere could slow global growth;
- Growing oil supplies and slowing demand could put downward pressure on oil prices;

- Oil production is expected to outstrip pipeline capacity;
- Protectionist trade policies pose a risk.

Behind the deficit and debt factors are underlying realities. One is the resistance to increasing revenue by raising taxes. In addition, there are two government choices;

(a) to maintain rather than cut levels of service, and thus spending, in areas like education and health care, and;

(b) to fund capital construction on infrastructure and diversification projects so as to sustain employment and foster a more diversified economy.

The validity or efficacy of these approaches is the subject of opinion; indeed Dr. McMillan and Dr. Dahlby offered somewhat differing views on the point. We simply note that the Government's current fiscal position is not solely due to a decline in the price of oil. It is also the consequence of conscious policies aimed at diversified economic growth, maintaining public services, while continuing Alberta's low taxation regime.

We wish to be clear that our recommendations are not in any way based on the proposition that taxes might be raised to accommodate the rates we find justified. We do not presume to pass judgment on Alberta's fiscal or tax policy; that is not part of our mandate. Instead, our recommendations are based on the criteria prescribed for us in the *Regulation*. In any event, Provincial Court Judges and Masters is far too small a group of persons to influence significantly such decisions. We make these observations

only to put the Province's fiscal position in perspective, recognizing that market factors and political choices both help explain the current, albeit difficult, fiscal circumstances.

Fiscal Position

We have reviewed detailed evidence regarding the Province's income and expenditures, and their impact first on the Province's sustainability fund and then on its borrowings.

The figures cited by the economists differ slightly, but in a "broad brush" sense they agree. Provincial deficits, even pre-2014, began to reduce the Province's sustainability fund. With the drastic drop in revenues between 2014 and 2016 the Province experienced substantial deficits. We have considered the actual deficit amounts and the accumulated debt that has resulted. We have also examined the Province's plans to bring the budget into balance, the risks associated with that plan, and the views of the economists: Dr. McMillan being somewhat more optimistic, Dr. Dahlby more pessimistic.

One important economic indicator put before us related to Alberta's fiscal capacity: the Province's ability, should it so choose, to generate revenues. This is most significant when examined in contrast to the similar capacity of other provinces, all of which borrow, but also tax at higher rates. Dr. McMillan's evidence is that Alberta's fiscal capacity is 40% more than the average of all provinces, and 20% higher than the next most favourable province.

Dr. Dahlby's report at p. 29, referred to above in relation to Criterion G, essentially recognizes this same point, although he also goes on to parse out some of the relevant components:

For eight years from 2000-01 to 2007-08, when resource revenues were high, the province had fiscal surpluses and its net financial assets peaked at \$31.7 billion in 2008-09. Over the last nine years, the province has run large deficits because of downturns in resource revenues and higher spending. As a result, the province has become a net debtor and there is no prospect for an early return to balance[d] budgets. Part of the Alberta's fiscal problem can be attributed to the high level of government spending – 18.6 percent higher than in Ontario and 36.3 percent higher than in British Columbia I 2016-17. The absence of a sales tax also contributes to Alberta fiscal vulnerability because sales tax revenues are relatively stable. Alberta relies more heavily on personal and corporate income tax revenues than the other provinces and these are more responsive to fluctuations in economic activity than the sales. With the downturn in the provincial economy in 2015 personal income tax revenue in Alberta declined by \$594 million and corporate income tax revenues declined by \$426 million at the same time as the decline in resource revenues.

We note that these changes date back to the 2008-2009 downturn, but were clearly exacerbated by the 2015 decline in the price of oil.

More specific economic data, beyond Criteria F and H, generally subdivides into economic growth data, primarily GDP, and employment data.

Gross Domestic Product

GDP is a measure of the value of an economy's output, made up of consumption, investment and net exports. We were provided with substantial information on Alberta's GDP; both in "nominal" and "real" numbers. Nominal GDP reports the GDP figures unadjusted for inflation, while Real GDP offsets these figures by the rate of inflation; changes in output as opposed to changes in the value of output. We were also provided with comparisons to GDP in other provinces, and to GDP numbers on a per capita basis to compensate for growth due to population increase.

Dr. Dahlby notes that Alberta's real GDP per capita declined by 10% between 2014 and 2016. Saskatchewan's also declined but by a lesser amount, while Ontario's and B.C.'s increased. However, throughout, Alberta's per capita real GDP remained significantly above those of all other provinces. Dr. Dahlby's analysis identifies particularly for 2014-2016, a 41.5% decline in non-residential structure investment, a

29.6% reduction in machinery and equipment and a 16.8% reduction in residential structures. Government capital formation increases of 21.3% offset some of this.

We heard several references to the boom or bust, or cyclical nature of Alberta's petrochemical dependent economy. We were appropriately cautioned that we should not assume from this that every downturn in the price of oil, or in investment, will be followed by an upturn. We accept that. However, we also accept the view that it is unrealistic and inappropriate to judge the likely conditions over the term of our mandate solely in comparison to the previous three or four boom years. They involved very high oil sands extraction investment which overheated the economy to the point where commentators of the stature of former Premier Peter Lougheed were urging more restrained development.

We found that Dr. Dahlby's evidence particularly tended to compare the post-oil price drop period with the data experienced in the boom years immediately before that drop. This tended to overemphasize the magnitude of the negative changes, taking insufficient account of the extraordinary nature of the preceding period due to ongoing capital investment in the oil sands.

Dr. Dahlby saw much uncertainty on the horizon. In his view the potentially negative factors outweighed the positive factors. He referred to the risks inherent in a

potential U.S. – China trade war, rising interest rates, U.S. tax rates, the difficulty of getting pipelines approved, and uncertainty in the future price of oil. We found Dr. Dahlby's concern for the future somewhat less optimistic than was expressed by the Province in its budget and economic update documents, and than in the opinion expressed by some of the banks and similar private sector commentators.

Dr. McMillan was less pessimistic. He expressed the view that the more likely future will be a return to a more modest, but nonetheless positive, growth in real GDP and similar indicators. In his report, Dr. McMillan's projections were more in line with the government's own projections. Interestingly, Dr. Dahlby, the Government's own expert, took direct issue with the provincial treasurer's stated position, describing his concerns at p. 30 of his initial report. While Dr. Dahlby views Dr. McMillan as overoptimistic in respect to Alberta's comparative fiscal position, he says a more objective statement would be to say that Alberta's overall fiscal position "remains relatively favourable overall in a national context", or "remains favourable overall compared to the majority of other provinces".

Two particular components of GDP were put before us: the price of oil, and the level of capital investment in petrochemical facilities.

Revenue from oil and gas sales contributes heavily to GDP. Data on the West Texas Intermediate and Western Canada Select benchmark prices document the precipitous decline in the 2014-2016 period and the steady but modest recovery from the trough in early 2016 up to mid-2018.

Dr. Dahlby's report says there is a consensus that no new major oil sands projects are likely in the foreseeable future, only incremental investments in existing plants. That has not proven entirely correct, as new investments have continued to be announced, but not to the pre-2014 level.

Employment Indicators

Any assessment of fair and equitable compensation for Provincial Court Judges requires a look at a variety of employment and income factors. This involves how many people are working, and changes in what they are earning. We were provided data and opinions on unemployment rates and employment growth in Alberta and, by comparison, elsewhere. We have already referred above to the household income levels. The Province's information on some of the other significant indicators is set out in the chart it provided³⁴:

³⁴ Ms. Rothrock's Aug. 31, 2018 report at p. 5. (f) = forecast, (e) = estimate.

	2010	2011	2012	2013	2014	2015	2016	2017e	2018f	2019f	2020f	2021f	2022f
Employment Growth	-0.3	3.7	3.5	2.5	2.2	1.2	-1.6	1.0	1.9	1.7	1.8	1.6	1.6
Unemployment Rate	6.6	5.4	4.6	4.6	4.7	6.0	8.1	7.8	6.7	6.1	5.7	5.3	5.1
Growth in Weekly Hours (LFS)	2.0	1.7	0.8	-0.3	-1.4	-2.0	-1.4	1.4	0.6	0.3	0.1	0.1	0.0
Growth in Average Hourly Wage Rate (LFS)	1.7	1.9	4.8	3.8	1.6	3.3	1.9	1.4	2.7	3.0	3.1	3.2	3.3
Growth in Average Weekly Earnings (SEPH)	4.5	4.4	3.5	3.5	3.8	-0.3	-2.4	1.0	2.7	3.0	3.1	3.2	3.3

Level of Employment

Total employment in Alberta fell from the beginning of 2015 to April 2016, trailing the fall in oil prices by about a year. It has slowly increased since then. The changes in employment by industry tables show wide diversity in how different sectors of employment have been affected. The distribution of this effect was different in the 2017-2018 period from that in 2015-2017, perhaps as employers, both public and private, took advantage of a better labour supply.

Dr. Dahlby noted the increase in Alberta unemployment following the oil price drop which reached 9% in 2016. By 2018 the figure was down again to 6.6% compared to 5.6% in Ontario, 4.9% in British Columbia, and 6.1% in Saskatchewan. We note the

data project a steady decline in unemployment down to 5.1% over this term which is perhaps over-optimistic. Dr. Dahlby suggested however that the unemployment rate can give a misleading view of the Province's employment opportunities as some persons stop looking for work. He suggests a better measure of the degree the provincial economy is generating employment is the percentage of the working age population that is employed. On that score, Alberta was substantially above the other provinces, initially at 70% in 2007/2008 and still at 67%. This is a significant drop, but leaves Alberta well above other provinces. Ms. Rothrock argues that, compared to Ontario, Alberta has a larger share of its population in the prime work range of 25-54, so Alberta's unemployment rate should be lower than Ontario's, as it has been in the past.

H. The Alberta cost of living index and the position of the judges relative to its increases or decreases, or both

This criterion reflects most directly a recognition of the fact that the value of a judge's remuneration is vulnerable to inflationary or deflationary changes.

As the Minister says, Alberta CPI "is the standard and appropriate statistical measure to utilize to ensure that Alberta Judicial salaries are not eroded by the effects of inflation." We see, in this criterion, a general intention (subject to changes due to the other criteria) that fair compensation requires a maintenance of real income rather than

erosion through inflation. In submissions to the 2013 Commission, the then Minister advocated CPI as the only appropriate indexing factor.

Ms. Rothrock’s data on consumer price index growth showed:

Consumer Price Index Growth												
(e) = estimate, (f) = forecast												
2010	2011	2012	2013	2014	2015	2016	2017e	2018f	2019f	2020f	2021f	2022f
1.0	2.4	1.1	1.4	2.6	1.1	1.1	1.6	2.3	1.9	2.0	2.0	2.0

The Association’s calculations show that, if the Minister’s proposed four year freeze were adopted, judges would see their buying power decline by a cumulative total of \$46,964 over the four years, just due to salary erosion from inflation. Over that same period, the salaries of federally appointed Alberta judges would be increasing, not just by CPI, but by the predictably higher increases in the IAI, widening further the gap between the two. A similar result would follow in comparison with judges in other jurisdictions, particularly Ontario.³⁵

³⁵ We noted above the somewhat higher than projected IAI data for 2018, influencing both the federal and Ontario salaries as well as the figures that would result from the Association’s proposal for 2019.

In contrast, the Association produced a chart showing what judicial salaries would be if adjusted only by the percentage change in Alberta's cost of living, comparing those figures with the Association's proposal:

	2016	2017	2018	2019	2020
Alberta CPI (fiscal year)	1.1%	1.6% (estimate)	2.1% (forecast)	1.9% (forecast)	2.0% (forecast)
Salaries if adjusted only for CPI	\$293,991	\$297,225	\$303,467	\$309,232	\$315,107
APJA proposal	n/a	\$296,382	\$302,304	\$309,990 <i>(assuming IAI for Canada is 2%)</i>	\$317,863 <i>(assuming IAI for Canada is 2%)</i>

Again, we note that since IAI for Canada in 2018 is now known to be 2.6% the Association's proposals would rise somewhat higher than in this chart, to \$311,756 for 2019 and at least \$317,991 (if IAI 2%) for 2020.

I. The nature of the jurisdiction of judges

The Provincial Court exercises jurisdiction over adult criminal and youth criminal cases, provincial offences and inquiries, child protection, as well as some family and civil matters. Adult and youth criminal law is by far the most significant part of the

Court's work. Provincial court judges exercise the same criminal law jurisdiction as Queen's Bench judges except that they do not preside over jury trials, and in addition handle some matters that Queen's Bench courts do not, such as youth criminal justice. With respect to family law, the court deals with all family law issues except divorce and division of property. Since August 1, 2014, the civil jurisdiction of the Court has extended to monetary claims up to \$50,000, the highest jurisdictional limit in Canada outside Quebec.

The Association submits that the continued expansion of the jurisdiction of the Provincial Court warrants an increase in the compensation for its judges, as well as a close comparison with the compensation for federally appointed judges.

The Minister observes correctly that the jurisdictions of the Provincial Court and the Court of Queen's Bench are meaningfully different, with the federally appointed court exercising inherent as opposed to solely statutory jurisdiction, hearing appeals from Provincial Court decisions, presiding over jury trials, dealing with civil matters over \$50,000 and with estate matters, matrimonial property and divorce proceedings, class proceedings and judicial reviews.

J. The level of increases or decreases, or both, provided to other programs and persons funded by the Government

The Minister cited public sector wage settlements with its major trade unions for 0% for the first two years of this Commission's term as justification for 0% increases for Provincial Court Judges and Masters for all four years of this Commission's term. However, the Minister did not put forward any collective bargaining examples covering the last two years of the term. Indeed, all the major agreements the Minister referred to included wage reopener clauses for their third year, agreed upon by the government. When pressed for justification for the freeze for judges and Masters in years three and four, the Minister fell back on the broader fiscal and economic arguments discussed above.

The Association, in replying to the collective agreement examples, noted not only the wage reopener clauses, but also that, in each case, the Union involved either gained or maintained other monetary advantages. These included grid-level or experience-based increments, protections against layoffs, and so on.

On a broader level, the Association also asserted that the JCC process is not and should not be equated to free collective bargaining. In that vein it views it as inappropriate for the government to advance a four-year freeze position for judges apparently with a view to enhancing its bargaining position with trade unions for the future. It referred us to an observation of the 2013 B.C. Commission which, it argues, is apropos:

... [t]he salary sought by the Government (i.e., no increase for the first two years) also does not sufficiently reflect the true financial position of British Columbia. It is based too heavily on the Government's policies of fiscal restraint and wage freezes in the public sector. It ignores the fact that judges are not public servants, but a distinct branch of government.³⁶

K. Any other factors considered by the Commission to be relevant to the matters in issue.

Beyond the observations already made, the Commission found no additional factors to be addressed under this heading.

VI. RECOMMENDATIONS

With the benefit of full and thoughtful submissions by counsel for the Association and for the Minister, detailed reports from expert witnesses, oral submissions, review of past Judicial Compensation Commission reports, and the guidance provided by the criteria set out in the *Regulation*, we have come to the following conclusions:

1. The annual salaries of *puisne* Provincial Court Judges and Masters in Alberta should be increased to the following amounts as of the following dates:

³⁶ *Report of the 2013 B.C. Judges Compensation Commission* at p. 46

- a. Effective April 1, 2017, to \$296,382
- b. Effective April 1, 2018, to \$302,304
- c. Effective April 1, 2019, to \$309,500
- d. Effective April 1, 2020, to \$318,500

The Association has proposed modest increases in the first two years, and increases based on federally-appointed judges' salaries in the second two years. We are not persuaded that it is appropriate to link Alberta provincial court salaries to those in other courts, for the reasons we have given. However, we conclude that increases over the four years are required.

Our recommendation is, for the first two years, to accept the Association's proposal, which is for increases at or below the cost of living increases, and in the second two years, to give further salary increases to compensate, at least in part, for projected increases in the the cost of living and to a lesser degree in the IAI. These increases are necessary to avoid overall wage erosion and to maintain some semblance of the historic relative position of Alberta judges with respect to those in other jurisdictions, especially taking into account total compensation.

In our view, this recommendation is consistent with the important principles underlying this process, respects the current economic realities, and is fair and reasonable. It has been based upon a careful and comprehensive review of the evidence bearing on all the criteria identified for this Commission by the *Regulation*.

The Alberta economy is currently in some difficulty. Nevertheless, it remains one of the strongest in Canada. Though the Minister emphasized the zero percent increases for two years that have been negotiated with certain public sector unions, or imposed on managerial employees, and argued for no increases in judicial salaries for the four years of our mandate, we reject the Minister's position. It does not reflect the true outcomes of public sector bargaining for the employees covered by the collective agreements in question. It does not give proper weight to the prescribed criteria, including criterion H (the Alberta cost of living index and the position of the judges relative to its increases or decreases) and criterion F (increases and decreases in the Alberta real primary household income per capita). Most importantly, it fails to reflect the fact that courts are an independent branch of government, and that protection of judicial independence, including financial security, is a central underlying principle of the Canadian constitution. While Alberta Provincial Court Judges and Masters are not immunized from the consequences of shifts in the Alberta economy, they should not be required to experience effective declines in the value of their salaries in the absence of justification.

2. The age of eligibility for part-time service should be reduced to age 55, from the current eligibility age of 60.

This recommendation reflects an agreement between the parties.

3. It is unnecessary for the Government to pass a Regulation containing the provisions of the Judicial Indemnity.

The Association seeks a specific Regulation containing the provisions of the judicial indemnity; the Minister says that that indemnity was created by Ministerial Order 80/2017, authorized by s. 12(2) of the *Indemnity Authorization Regulation*, and includes this wording:

... the Crown shall indemnify Alberta Provincial Court Judges and Masters in Chambers in accordance with the attached Appendix, which consists of terms and conditions recommended by the 2013 Alberta Judicial Compensation Commission that are binding on the Crown.

The Minister says that there is no need to include reference to the indemnity in another Regulation. Counsel for the Minister agreed at the hearing that the wording of the indemnity could not be changed without coming before a Commission, and that it is binding on the government.

The Association argues that without a specific Regulation, it is very difficult for judges or members of the public to determine that there is an indemnity and its scope.

We are of the view that the existing indemnity created by the Ministerial Order pursuant to the *Indemnity Authorization Regulation* has carried out the 2013 Commission's recommendation, and that it is not necessary for there to be another

Regulation creating an indemnity. It is highly relevant to note that, at the hearing, counsel for the Minister agreed that the agreement embodied in the *Regulation* is binding, and is unchangeable except by a further Judicial Compensation Commission.

4. The professional allowance should be increased from \$3,750 per year to \$4,500 per year, effective April 1, 2017.

The Association originally proposed an increase in the professional allowance as part of its overall compensation proposal and this element was initially agreed to by the Minister, but only in the context of no change in base salaries. This led the Association to withdraw its support for a professional allowance increase if it was to be to the exclusion of any salary increase. It nonetheless took the position that the existing allowance was not adequate. In the circumstances, taking into account total compensation for the judges and Masters, we believe that a modest increase in the professional allowance to \$4,500 per year is nonetheless appropriate, given its character more as a recognition of out of pocket expenses than direct compensation.

VIII. CLOSING COMMENTS

We thank counsel for the Association (Susan Dawes, of Myers LLP) and for the Minister (Bill Olthuis, Kate Bridgett and Josh de Groot) for their comprehensive and

thoughtful written and oral submissions, and for assembling a full and helpful evidentiary record. In addition, we acknowledge the contribution of the Canadian Bar Association and the Law Society of Alberta through their submissions and thank them for it.

We also thank Ms. Ruth Fast, legal counsel, Alberta Justice and Solicitor General, for her ongoing administrative assistance throughout this process -- dealing with preliminary matters and setting up all of the logistics around the hearing -- and the Alberta Court of Appeal for permitting us use of a courtroom and Court staff for our hearing.

RESPECTFULLY SUBMITTED

The Honourable Lynn Smith, Q.C. (Supreme Court of British Columbia, retired)

Peter Gall, Q.C.

Andrew C.L. Sims, Q.C.

As amended - May 23, 2019