



ALBERTA

Report and Recommendations

of the:

**2013 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

February 17, 2015

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I. APPOINTMENT AND TERMS OF REFERENCE COMMISSION

The 2013 Alberta Judicial Compensation Commission (“the Commission”) was established pursuant to the *Judicature Act*, RSA 2000, c.J-2, as amended, and the *Provincial Judges and Masters in Chambers 2013 Compensation Commission Regulation*, AR 33/2013 (the “Regulation”). The Regulation sets out the terms of reference for the 2013 Commission.

A. Composition of the 2013 Commission

The 2013 Commission, the sixth Alberta Commission of its kind, consists of three members appointed by Ministerial Orders of the Honourable Jonathan Denis, QC, Minister of Justice and Solicitor General (“the Minister”): Andrew C. L. Sims QC who was appointed by the Minister on nomination by the Alberta Provincial Judges’ Association (the “Association”); Damon S. Bailey who was appointed by the Minister; and, John M. Moreau QC, who was appointed by the Minister on nomination by the first two appointees. Mr. Moreau is the Chair of the Commission.

B. Role of the 2013 Commission

The role of the 2013 Commission is set out in section 4 of the *Regulation*:

4(1) The Commission shall conduct an inquiry respecting the appropriate level of compensation with a view to preparing the report, including:

- (a) The appropriate level of salary for judges sitting full or part-time or on a supernumerary basis,
- (b) The appropriate design and level of judges' pension benefits of all kinds,
- (c) The appropriate level and kinds of benefits and allowances of judges, and
- (d) Any other issues relevant to the financial security of the judges that the Commission agrees to resolve.

(2) The Commission shall, in the report, make recommendations respecting compensation for the period April 1, 2013 to March 31, 2017, the effective date of the recommendations, unless otherwise stated, being April 1, 2013.

(3) The Commission shall determine issues relating to compensation independently, effectively and objectively.

(4) The Commission shall contribute to maintaining and enhancing the independence of the provincial court and the judges through the inquiry process and the report.

C. The 2013 COMMISSION PROCESS

The Notice indicating the public hearing dates of the Commission and the closing date for written submissions to the Commission was published on June 23, 2014 in the *Calgary Herald* and the *Edmonton Journal*. The Notice was also published on the *2013 Judicial Compensation Commission* website. Public hearings were held at the Law Courts in Edmonton on October 7 and 8, 2014. Prior to the commencement of the public hearings the Commission received the following written materials:

1. A Submission from the Association together with extensive supporting materials and attachments;
2. A Submission from the Minister with extensive supporting materials and attachments;
3. A Joint Book of Authorities submitted by the Minister and the Association;
4. A Joint Book of Agreed Facts and Exhibits submitted by the Minister and the Association;
5. A Reply Submission from the Minister;
6. A Reply Submission from the Association;
7. A Submission by the Canadian Bar Association, Alberta branch;
8. A Submission by the Law Society of Alberta.

At the public hearing on the morning session of October 7, 2014, the Commission first heard the submission of Mr. Steven Mandziuk QC, President of the Canadian Bar Association (Alberta branch).

Following the presentation from Mr. Mandziuk, the Commission heard from Dr. Melville McMillan, an economist, who testified on behalf of the Association. Dr. Mark Parsons, also an economist, then provided testimony on behalf of the Minister. Both witnesses testified during the morning session on October 7, 2014.

The oral submissions for the Association and the Minister took place over the course of the afternoon session of October 7, 2014, as well as during the morning and afternoon sessions on October 8, 2014.

A written submission was also received, in letter form, from the President of the Law Society of Alberta, Kevin Feth QC.

II. LEGAL PRINCIPLES APPLICABLE TO JUDICIAL COMPENSATION

The legal principles that are applicable to judicial compensation commissions were ably set out in the parties' submissions.

As the Minister pointed out in his brief, the starting point for guaranteeing the independence of the judiciary is found at section 11(d) of the *Canadian Charter of Rights and Freedoms* (Constitution Act, 1982) (the "Charter") which guarantees the right to a fair hearing before an "independent and impartial tribunal". The Minister cites, in support, the 1985 decision of *R.v Valente* [1985] 2 S.C.R. 673, a criminal law case which considered whether a judge of the Provincial Court of Ontario was an "independent and impartial tribunal" within the meaning of s. 11(d) of the Charter. That decision set out three essential conditions to achieving judicial independence: security of tenure, financial security and institutional independence.

The second condition of “financial security” is particularly relevant to commissions like ours that are tasked with recommending compensation for provincial court judges. As noted in the judgement of Ledain J. at paragraph 40:

[40] The second essential condition of judicial independence for purposes of section 11(d) of the Charter is, in my opinion, what may be referred to as financial security. That means security of salary or other remuneration and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to a pension and a pension that depends on the grace or favour of the executive.

The Supreme Court of Canada referred to the three conditions of security of tenure, financial security and institutional independence, set out in *R. v. Valente*, more than 10 years later in the 1997 seminal decision, the *PEI Reference*¹. In that case, the court considered whether the Governments of Prince Edward Island, Alberta and Manitoba violated section s. 11(d) of the Charter by compromising the financial security of provincial court judges. Lamer C.J., writing for the majority, noted that the court in *Valente* only dealt with the individual dimensions of financial security for provincial court judges. In Lamer C.J.’s view, financial security for provincial court judges has both an individual and an institutional dimension. He states in that regard at paragraph 126:

[126]...The point I want to make first is that the institutional role demanded of the judiciary under our Constitution is a role which we now expect of provincial court judges. I am well aware that provincial courts are creatures of statute, and that their existence is not required by the Constitution. However, there is no doubt that the statutory courts play a critical role in enforcing the provisions and protecting

¹ *Reference re: Remuneration of Judges in the Provincial Court (Prince Edward Island)* [1997] 3 S.C.R. 3.

the values of the Constitution. Inasmuch as that role has grown over the last few years, it is clear therefore that provincial courts must be granted some institutional independence.

Chief Justice Lamer then goes on to discuss the importance of “objective commissions” to deal with the issue of judicial remuneration:

[166] Although provincial executives and legislatures, as the case may be, are constitutionally permitted to change or freeze judicial remuneration, those decisions have the potential to jeopardize judicial independence. The imperative of protecting the courts from political interference through economic manipulation is served by *interposing* an independent body—a judicial compensation commission—between the judiciary and the other branches of government. The constitutional function of this body is to depoliticize the process of determining changes or freezes to judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature, responding to the particular proposals made by the government to increase, reduce, or freeze judges’ salaries.

The Chief Justice then sets out the guiding principles for judicial compensation commissions to be independent, objective and effective²:

[170] First and foremost, these commissions must be *independent*. The rationale for independence flows from the constitutional function performed by these commissions – they serve as an institutional sieve to prevent the setting or freezing of judicial remuneration from being used as a means to exert political pressure to the economic manipulation of the judiciary. It would undermine that goal if the independent commissions were under the control of the executive or the legislature.

...

[173] In addition to being independent, the salary commissions must be *objective*. They must make recommendations on judges’ remuneration by reference to objective criteria not political expediencies. The goal is to present “an objective and fair set of recommendations dictated by the public interest”. (Canada,

² Referenced in s. 4(3) of the Regulation.

Department of Justice, *Report and Recommendations of the 1995 Commission on Judges Salaries and Benefits*)...

...

[174] Finally, and most importantly, the commission must also be *effective*. The effectiveness of these bodies must be guaranteed in a number of ways. First, there is a constitutional obligation for governments not to change (either by reducing or increasing) or freeze judicial remuneration until they have received the report of the salary commission. Changes or freezes of this nature secured without going through the commission process are unconstitutional...

As pointed out in the Association's submission and in the Report of the 2009 Alberta Judicial Compensation Commission (the "JCC"), the effectiveness of the judicial compensation processes across Canada became an issue shortly after the *PEI Reference* decision was released. Governments in a number of provinces had decided not to follow the recommendations of their appointed commissions. The judges' associations of those provinces in turn decided to judicially challenge their respective governments' decisions based on the principles set out in the *PEI Reference*.

In 2005, the Supreme Court of Canada issued the *Bodner*³ decision, which dealt with appeals from Alberta, Ontario, Quebec and New Brunswick. The common issue from those four challenges was "...the appropriate test to be applied by a reviewing court to the government's response to the recommendations of a JCC". According to the Court in *Bodner*, a reviewing court must consider the following questions:

1 Has the government articulated a legitimate reason for departing from the commissions' recommendations?

³ *Provincial Court Judges' Associations (New Brunswick) v. New Brunswick (Minister of Justice)* [2005] S.C.C. 44.

2. Do the government's reasons rely upon a reasonable factual foundation?

3. Viewed globally, has the commission process been respected and have the purposes of the commission – preserving judicial independence and depoliticizing the settling of judicial remuneration – been achieved?

The court in *Bodner* also made it clear that the task of a judicial compensation commission is unique. The court indicated that “*the process was neither adjudicative interest arbitration nor judicial decision-making.*” As pointed out by the Association, the court in *Bodner* is clear that a judicial compensation commission must focus on what is appropriate remuneration for judges in light of all the relevant factors, including most importantly those factors set out in the commission regulation.

III. COMPENSATION COMMISSIONS IN ALBERTA

Background

The Association notes that there were three periods of significance in the history of compensation for provincial court judges in Alberta. The first period began when the provincial court in Alberta was established as a Court of Record in 1973. Between the years 1973 to 1975, salaries of provincial court judges were determined on an *ad hoc* basis through negotiations between representatives of the judges and representatives of the Government of Alberta (the “Government”).

Following the issuance of the *Kirby Report* in 1975 (Justice W.J.C. Kirby), the Government determined that Provincial Court of Alberta judges would be paid salaries

equal to 90% of the salaries paid to judges of the District Court of Alberta, who in turn were paid an amount equal to 90% of the salaries paid to judges of the Supreme Court of Alberta. In 1980, when the District Court and Supreme Court were amalgamated into the Court of Queen's Bench of Alberta, the Government determined that judges of the Provincial Court of Alberta would be paid a salary of 80% of the salary paid to Court of Queen's Bench judges.

The third period began in 1988 when the Government determined that it would no longer link salaries of provincial court judges to those of Queen's Bench judges on a percentage basis (the "80% rule"). By 1994, the Government included judges of the Provincial Court of Alberta when it rolled back the wages of its public servants. This led to a judicial challenge based on a lack of financial security, which later became part of the proceedings before the Supreme Court of Canada in the *PEI Reference* case.

The 1998 Commission

Following the *PEI Reference*, the Government and the Association entered into a *Framework Agreement* (March 3, 1998) which established the first judicial compensation commission in Alberta. The groundbreaking 1998 JCC made a number of recommendations. They are worth noting as an indication of the breadth and scope of recommendations submitted by the initial 1998 JCC.

Salary: Increases from \$113,964 to \$142,000 and \$152,000 effective April 1, 1998 and April 1, 1999 respectively.

Administrative Stipend: An increase in the extra salary paid to the Chief Judge and Assistant Chief Judges from \$14,256 to \$15,000, and from \$7,288 to \$7,500, respectively.

Pension: Several changes, including:

- A supplemental or unregistered plan to deal with the maximum salary cap determining pensionable salaries in the federal *Income Tax Act* (“ITA”);
- On a go-forward basis, an increase in the pension accrual rate from 2% to 2.67% per year, and a change in the benefit formula to the best three consecutive years in place of the best 5 consecutive years rule;
- For post-1998 judicial service, an early retirement penalty of 3% per year for every year below age 65 or for every year by which the total of age plus years of service was less than 80; and
- A requirement that judges contribute 9% of their annual salaries for a maximum of 25 years, and that maximum benefits be accrued after 25 years.

Other Benefits: An extension of LTDI from age 65 to age 70, and removal of the \$78,000 coverage ceiling.

The salary recommendations of the 1998 JCC were not fully accepted by the Government’s Order-in-Council. The Association then moved for judicial review of the Order-in-Council. The Alberta Court of Appeal ultimately found that the reasons offered by the Government in the Order-in-Council did not meet the detailed judicial standards established in the *PEI Reference*. As a result, the recommendations of the JCC were ordered by the court to be implemented in full.

The 2000 Commission

The Association and the Minister agreed to a single commissioner for the 2000 JCC. This was the first commission to be established by Regulation, a practice which has continued since that time for subsequent commissions.

The Association and the Minister presented a joint submission to the Commission with a number of recommendations. The recommendations included an increase in salary to \$170,000 for the period April 1, 2000 to March 31, 2003; and, changes to the pension arrangements, including an increase in the pension accrual rate to 3% for judicial service after April 1, 2000. A professional allowance of \$2,500 was also recommended (and also accepted by Government and implemented) notwithstanding that the joint submission had not raised the issue of professional allowances. The recommendations of the 2000 JCC were accepted by the Government, including one that allowed payment of the Association's legal fees for both the previous 1998 JCC as well as the 2000 JCC.

The 2003 Commission

1. The 2003 Commission, which consisted of a panel of three Commissioners, recommended as follows:

Salary: Increase to \$200,000 from April 1, 2003 to March 31, 2004; to \$210,000 from April 1, 2004 to March 31, 2005; and to \$220,000 from April 1, 2005 through March 31, 2006.

Administrative Stipends: Maintain a stipend at \$15,000 and \$7,500 for the Chief Judge and Assistant Chief Judges respectively.

Per Diem for Supernumerary Judges: Increase from \$760 per day to \$1,000, \$1,030, and \$1,060 effective April 1, 2003, 2004 and 2005 respectively.

Pension: No changes.

Other Benefits:

- Introduction of indexing LTDI benefits at a rate of 60% of the increase in the Statistics Canada Consumer Price Index for Alberta;
- Increase the Professional Allowance from \$2,500 to \$3,000; and
- Remove the \$300 annual cap on extra vehicle insurance required for business use.

Though it accepted the recommendations regarding pension and other benefits, the Government did not accept the salary and *per diem* recommendations of the Commissioners. The Association then applied for judicial review of the Order-in-Council to the Court of Queen's Bench. The court gave the Government 90 days to reconsider its position with respect to the 2003 JCC's salary and *per diem* recommendations and provide reasons justifying any rejection of the recommendations, failing which the recommendations would become binding on the Government. The Government did not provide further reasons within the 90-day period. Rather the Government continued to pay judges and masters in accordance with the recommendations of the 2003 JCC, without further amendment.

The 2006 Commission

Both parties supported a joint submission to the 2006 JCC, which consisted of a single Commissioner. This joint submission occurred in the aftermath of the ongoing legal dispute which followed the 2003 Commission. Each party prepared separate written arguments supporting the joint submission, but for different reasons.

The Minister compared provincial court judges' salaries in Alberta from 1998 to 2006 with those of all other provincial, territorial and federally appointed judges in the same time period. The analysis showed that the 2003 JCC's recommendations increased Alberta's salaries significantly in relation to every other Canadian jurisdiction. The Minister also showed that if the joint proposal was accepted, Alberta's provincial court judges' salary would be second only in the country to the salary paid to federally appointed judges.

The Association submitted that the salaries recommended by the 2003 JCC were appropriate. It also noted that Alberta provincial court judges' salaries should reflect the "*narrowing of any meaningful functional difference*" between the Provincial Court and the Court of Queen's Bench. The Association also submitted that the uncertainty over the salary of federally appointed judges from 2004–2008 made it difficult to make any meaningful submission on the extent to which salaries for Alberta provincial court judges should be adjusted for the period 2006–2009 beyond \$220,000 per annum. The Association noted that it was in the public interest to determine the issue of judicial compensation for the next three years with certainty, and described its submission to maintain salaries as "*moderate and restrained*". After considering written and oral submissions by the parties, the Commissioner accepted the joint submission and made the following recommendations:

Salary: \$220,000 for the period April 1, 2006 – March 31, 2009.

Administrative Stipends: For the Chief Judge and Assistant Chief Judges remain at \$15,000 and \$7,500 respectively.

Per Diem for Supernumerary judges: \$1060 per scheduled sitting day and, where a sitting is cancelled with less than 24 hours' notice, the supernumerary judge who would have held the sitting is entitled to be paid for that sitting, as well as for the allowances provided for all judges in sections 4 and 5 of the *Compensation Regulation*.

Part-time judges: The part-time judges program should continue operating as it has been since October 1, 2005. For the period April 1, 2006 through March 31, 2009, part time judges be paid a salary of 50% of the amount payable to a full-time judge, but if the aggregate of the part-time judge's annual salary and pension benefits payable during a 12 month term of appointment exceeds the annual salary of a full time judge for that 12 month term of appointment, the annual salary payable to the part-time judge shall be reduced by the amount exceeded.

Pension: For Judges' and Masters' retiring on or after April 1, 2006, the pension plan be enhanced by the adoption of a universal "best three consecutive years" rule when calculating pension benefits.

Other benefits: For the period April 1, 2006 – March 31, 2009 the other benefits for Judges and Masters be as provided in the *Compensation Regulation*.

LTDI: Effective April 1, 2006, LTDI benefits be payable at 70% of the current salary being paid to judges performing regular duties.

2009 Commission

The 2009 JCC was appointed to make recommendations with respect to the period from April 1, 2009 to March 31, 2013. The 2009 JCC recommended a salary of \$250,000 effective April 1, 2009, with an increase to \$255,000 effective April 1, 2010. On April 1st, in each of 2011 in 2012, the Commissioners recommended that the salaries of judges be increased in each of those years by the annual Alberta Consumer Price Index ("CPI") rate.

The 2009 JCC also recommended that there should be 100% indexing of the judicial pension based on the annual percentage CPI rate for Alberta. The Commissioners also dealt with other issues which were part of a joint submission by the

parties, including an increase in the amount of the professional allowance as well as the percentage differential to be paid to the administrative judges.

A number of the other issues addressed by the comprehensive report of the 2009 JCC are referenced in this Report.

IV. SUMMARY OF THE PARTIES SUBMISSIONS

A. Summary of the Association's Recommendations:

Salary

That, effective April 1, 2013, the annual salary for *puisne* judges⁴ shall be increased to \$275,000;

That, effective each of April 1, 2014, April 1, 2015 and April 1, 2016, the salaries for *puisne* judges shall be further increased by a percentage equal to the percentage change in the Industrial Aggregate Index for Alberta over the preceding year;

That this recommendation shall apply to all who were Provincial Court Judges as at April 1, 2013 (regardless of later death or retirement) and all Provincial Court Judges since appointed.

Vacation

That, effective April 1, 2015, judges shall be entitled to seven weeks of vacation per annum; and

That, effective April 1, 2016, judges shall be entitled to eight weeks of vacation leave per annum.

That part-time judges shall continue to be entitled to half the vacation leave available to full-time judges.

⁴ The Association understands the Government to agree that, in addition to the *puisne* judge salary, the administrative judges will continue to receive the administrative stipends recommended by the 2009 Commission and subsequently implemented by the Government. These are 10%, 7.5% and 5% of a *puisne* judge's salary, for the Chief Judge, Deputy Chief Judge and Assistant Chief Judges respectively.

That this recommendation shall apply to all who are Provincial Court Judges as at April 1, 2015 and all who are subsequently appointed.

Pension

The Association seeks the following adjustments to the judicial pension plans:

That the vesting period shall be reduced from 5 years to 2;

That, in circumstances where a judge dies in office, the pension partner shall be entitled to elect any of the alternate forms of pension that would have been available to the judge pursuant to section 29(1) of the *Pension Regulation* had he or she retired from office; and

That the recommendations be effective April 1, 2013 and shall apply to all who were Provincial Court judges as at April 1, 2013 (regardless of later death or retirement) and all Provincial Court judges since appointed.

Professional Development Allowance

That, effective April 1, 2013, part-time judges shall have access to the full amount of the professional development allowance in the amount of \$3,750 per year, an increase from their current entitlement to an allowance of \$1,875 per year.

This recommendation shall apply to all who were part-time judges as at April 1, 2013 and those who became part-time judges thereafter. In addition, because the 2013 fiscal year has already passed, each part-time judge shall have available during the mandate of this Commission the portion of the allowance for the fiscal year 2013 (and potentially 2014) that represents the increase over what was actually available to part-time judges in that or those years (i.e. \$1,875). Expenses incurred in any of 2013, and 2014 if applicable, would be eligible for reimbursement during the mandate of this Commission.

Judicial Indemnity

That effective April 1, 2013, the Government shall be bound by the Judicial Indemnity set out in the Association's Documents. For greater certainty, the Association proposes that the Indemnity would apply to Proceedings commenced on or after April 1, 2013.

Costs

The Association is not requesting a recommendation for further costs beyond what is stipulated in the Regulation.

B. Summary of the Minister's Recommendations:

The Minister submits that the 2013 Commission should recommend the following as reasonable compensation and benefits for Provincial Court Judges and Masters in Chambers:

Salaries: That the salaries for provincial judges ("Alberta Provincial Court Judges") and masters in chambers be set for the period April 1, 2013 through March 31, 2017 as follows:

The judicial salaries are to be increased during each year of the said period equal to the percentage increases in the Alberta Consumer Price Index (Alberta CPI) as of December 31 of the previous calendar year, to a maximum of 5% per year.

Per Diem for Supernumerary Judges: That in accordance with the Minister's Salary Increase Proposal, for the period April 1, 2013 through March 31, 2017, supernumerary judges and part-time/ad hoc masters should receive increases in their annual per diem rate equal to the above noted annual salary increases paid to full-time judges, maintaining the ratio of 1/207.5 of a full-time *puisne* judge's salary.

Judicial Indemnity Policy: The Minister agrees in principle with the Association regarding developing and implementing a judicial indemnity that will provide full indemnification for legal fees and other costs incurred by judges and masters for all proceedings which may affect their judicial function or their capacity as a judge or master. To that end, the parties have developed a draft Judicial Indemnity document and discussions continue in respect of its specific provisions.

Pension: That there be certain specific changes to current pension benefits in accordance with the joint position of the Minister and the Association, as summarized below.

Vacation: That there be no change in regard to judicial vacation leave.

Professional Allowance: That part-time judges be entitled to the full annual professional development allowance of \$3,750.

Health Spending Account (HSA): The HSA is currently being provided to judges as part of their compensation⁵.

V. CRITERIA THE COMMISSION MUST CONSIDER

The *Commission Regulation* sets out the objective criteria the Commission must consider in conducting its inquiry and in framing its recommendations.⁶ The criteria, which are nearly identical to those considered in the five previous Alberta Commissions, are:

- 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 other judges in Canada receive;
- f) the growth and decline, or both, in real per capita income in Alberta;
- 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;

⁵ The HSA is a non-taxable benefit in the amount of \$950 per year that assists with the payment of health and dental expenses that are either partially covered or not covered by the group benefits program.

⁶ *Commission Regulation* ss.13(a) – (k).

- 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.

(a)(b) The Constitutional Law of Canada and the Need to Maintain the Independence of the Judges and the Provincial Court

In fulfilling its role within the framework of the constitution, this Commission, similar to its predecessors, has considered the positions advanced by the parties in these proceedings. Both parties have, as noted, provided our Commission with extensive briefs, supporting case law and expert testimony. We have carefully reviewed and discussed all the evidence and materials placed before us for consideration.

We are aware that a Commission like ours, as noted in the *PEI Reference*, must ensure that judicial compensation is fixed in a manner that fulfills “*the structural requirement of the Canadian Constitution*”. That in turn requires a recognition that the relationship between the judiciary and the other branches of government must be depoliticized notwithstanding that the fixing of remuneration from the Government’s budget is, as Lamer C.J. put it, “*...inherently political*”.

The court in *Bodner* resolved that the best way to achieve a depoliticized result when fixing judicial compensation is through an “*independent, objective and effective commission*”, as set out in *R v. Valente*.

We do recognize and are grateful for the submissions of both the Canadian Bar Association, Alberta branch, and the Law society of Alberta. As noted in the comments of the Law Society of Alberta, judicial independence “... *is essential to a fair and respected justice system in a free and democratic society.*” In that regard, we underline the point advanced by the Association that the “*same qualities of judicial temperament, legal knowledge and an abiding sense of fairness is required of all judges*”, no matter in what level of court they preside.

Our Commission recognizes the importance of its role in recommending compensation to the provincial court judges and masters for the period April 1, 2013 through to March 31, 2017. It is our obligation to assure a strong and independent judiciary by setting a fair and reasonable level of compensation. That goal remains at the forefront of our deliberations and the recommendations set out in this report.

This process does constitute a structural separation between the government and the judiciary and in our view fully meets the description of an “*institutional sieve*”, as set out by the Supreme Court of Canada in the *PEI Reference*.

(c) *The unique nature of the judge's role:*

Judges of the Provincial Court of Alberta preside over a wide range of public issues, from criminal law and family law matters right through to civil claims. They must dispense justice fairly, efficiently and with deference to all those citizens appearing before them. Judges cannot show favor or be swayed by their own personal biases. Society demands that judges dispose of all breaches of the law and grievances placed before them with dispassion and reasoned judgment. They must be able to absorb criticism for their judgments without the ability to respond directly to such criticism.

Judges accept that their personal behavior, both inside and outside the courtroom, must be beyond reproach. They must at all times behave with dignity and be circumspect in their daily lives. A judge cannot let his or her guard down or speak out spontaneously on matters that affect the many and varied subjects that are presented for resolution in court. A judge must at all times be aware that their reputation, and that of the court, is rooted in the public's perception of a stable and reliable judicial bench. That reputation is a heavy burden which a judge must bear on a daily basis and which cannot be compromised.

As succinctly stated in the 1998 Judicial Compensation Commission:

The office of Judge cast on the recipient at once the glory of appointment and the burden of office. On the one hand, the judge is entitled to very substantial independence, power over the lives and property of his or her fellow citizens,

prestige of office and security of position. These, in turn, are counterbalanced by the office's significant obligations and restraints.

(d) The need to maintain a strong court by attracting highly qualified candidates:

With respect to this criteria, the Association urges our Commission to consider five points:

- (i) *The relevance of the Commission process itself.* The very existence of the Commission in and of itself ensures highly qualified applicants, and especially those that might not otherwise be attracted to a position on the bench for financial reasons. The expectation of lawyers seeking judicial office is that their compensation will be regularly, meaningfully, and effectively reviewed and adjusted by Government acting in good faith. The Commission process also assures the retention of judges in the Provincial Court of Alberta, in addition to attracting highly qualified applicants. Further, the existence of a Commission process has the effect of assuring the presence of a judiciary which stays motivated over the course of their judicial careers.
- (ii) *The number of applicants.* The Association recognizes that there are now and will always be applicants for judicial positions. Nevertheless, statistics show that the number of approved candidates is now substantially lower than the 136 approved candidates in 2003. In that regard, the number has fallen over the period of the 2009 JCC's mandate to as low as 65 effective June 11, 2014-less than half the 2003 number. Accordingly, it is important that the remuneration of judges be placed at a level that is sufficient to encourage qualified applicants, including applicants for positions in non-metropolitan areas.
- (iii) *Attracting highly qualified applicants.* The remuneration must be at a level that attracts not just qualified lawyers but specifically those that are "highly" qualified.
- (iv) *The Competition for Applicants:* In order to attract qualified candidates, the compensation gap between provincially and federally appointed judges must not be too wide. It is also noteworthy that a federally appointed judge accumulates a full judicial annuity (pension) after 15 years of service with an accrual rate of 4.4% per annum. By contrast, the Alberta judicial

pension requires 23.3 years of service with an accrual rate of 3%. The Association notes that successive Commissions have acknowledged that the greater the gap in remuneration between provincially and federally appointed judges, the greater the likelihood highly qualified applicants will refrain from applying for a provincial appointment.

- (v) *Legal Diversity.* The Association makes the point that, in our pluralistic society, it is well recognized that a bench consisting of members of diverse backgrounds is essential to maintaining the public confidence in the courts. The Association points to statistics which show that approved candidates originating from the private bar has steadily decreased in the last five years. The Association submits that the decline in highly qualified applicants from the private bar risks reducing the Provincial Court of Alberta to what it was once widely known as a “police court”. The Association submits that our Commission can assist with ensuring legal diversity in the court by also ensuring that the level of remuneration is attractive to qualified applicants from the private bar.

The Minister submits that there is no basis upon which the Commission should be concerned about the quality of judicial appointments, either in the past or in the future. In order to illustrate the quality of applicants from both the public and private sector, the Minister provided a Table with the names of all appointees to the Provincial Court of Alberta for the period April 1, 2011 to May 2014 and their respective credentials. In the Minister’s view, recent judicial appointments represent a balanced cross-section of Alberta’s relatively senior lawyers from the private, public and corporate sectors.

The Minister also presented a number of recent profiles of “recommended” and “highly recommended” judicial candidates who were interviewed and approved by the eleven-member Provincial Court Nominating Committee. The Minister also pointed out that all of these candidates were first screened by representatives of the Judicial

Council. The Minister agrees that because all judicial appointments in Alberta originate from the same pool of lawyers, previous commissions have acknowledged that the salary gap between federally and provincially appointed judges should be narrow enough so as not to economically dissuade prospective judicial candidates from selecting the court to which they are best suited. Nevertheless, the Minister pointed out that the 2009 JCC stated that distinguishing pay levels for federally and provincially appointed judges is justifiable given the difference between their roles and jurisdictions.

(e) The Remuneration and Benefits Other Judges in Canada Receive

The Association's position is that other judges are the best comparators to consider in assessing appropriate compensation. This stems from the uniqueness of the judicial role, as outlined above. The Association addressed the comparison with judges in other jurisdictions in detail in its reasons for seeking the recommended increases.

The Association pointed out that the 2009 JCC accepted the "*consistent view expressed by past commissions*" as the main justification to distinguish pay levels for federally and provincially appointed judges. The Association noted that the 2009 JCC, in reference to the difference between the two levels of court, framed their recommendation in the following terms: "*Our salary recommendation is intended to preserve what we consider to be a suitable difference between salaries for judges of these courts.*"

The Association noted that the 2009 JCC recommended a salary of \$250,000 effective April 1, 2009 which amounted to 93.6% of the salary paid to federally appointed judges in the same year, that is \$267,200. The same relationship was maintained in 2010, for which the 2009 JCC recommended a salary of \$255,000, which was 94% of the federal salary. The salary proposed by the Association to be effective April 1, 2013, \$275,000, amounts to 93% of the \$295,500 salary paid to federally appointed judges in 2013. This current salary difference is consistent with the pattern of narrowing the gap between the two levels of courts that began with the increases agreed to by the parties in the 2006 JCC.

The Association also compared salaries with those paid to provincial court judges in other provinces, in particular Ontario. The Association pointed out that the 2009 JCC accepted that approximate parity with Ontario salaries was appropriate even though the global recession had a profound effect on the Alberta economy in 2008. The Association cites in support the conclusions of the 2009 JCC:

Maintaining approximate parity between Alberta and Ontario provincial judges over the term of our mandate reflects the pattern of recommendations from judicial compensation commissions in Alberta over the last decade. There have been individual years when one of these provincial comparators has diverged from the other; primarily, it seems, because of the vagaries of the timing of compensation review processes in the two jurisdictions. However, overall, we detect a strong linkage between pay levels in these courts which we think reasonable to maintain.

The Minister also referred to a number of comments found in the 2009 JCC report on this criterion. The Minister underlined the differing submissions between the Association and the Minister at that time:

Both parties agreed, generally, that Alberta appointees, when compared to other provincial judges and masters, should receive compensation “near the top” in Canada. However, this general consensus did not translate into agreement, as has happened in the past (most recently in 2006) to jointly support specific salary recommendations. Indeed, while expressing a similar sentiment, it was apparent from the written briefs and the oral submissions we received that there was significant divergence about how this common general observation should translate into concrete salary positions.

The Minister did not dispute the Association’s submission that both parties referred to Ontario in the 2009 JCC as the key jurisdiction (in addition to the federal jurisdiction) when considering this part of the Regulation. The Minister noted, however, that the 2009 JCC expressly indicated that Alberta should not base its judicial compensation solely on the compensation paid to Ontario provincial court judges. The Minister further noted that the consideration of judicial compensation from other jurisdictions was only one criterion under the Regulation. In the end, the 2009 JCC, the Minister noted, sought to maintain “*approximate parity*”⁷ of salary between the Alberta and Ontario judges over the term of the commission, subject to certain “*made in Alberta*” considerations, such as the economic formula used to trigger annual judicial salary adjustments.

⁷ Mr. Olthuis pointed out in his oral submission that, to his knowledge, this was the first occasion (the 2009 JCC) that the term “approximate parity” was used in reference to the comparison between Ontario and Alberta.

The Minister also indicated that in previous commissions, the Association has argued that the compensation of Alberta provincial court judges should be “*broadly equivalent*” to that of federally appointed judges. The Minister points out that this particular point was thoroughly canvassed and rejected by the 2003 JCC. The 2003 JCC further noted that the court system in Canada is hierarchical in structure, and endorsed the conclusion of the 1998 commission that this historical hierarchy should continue to be observed. The Minister further indicated that although previous commissions, in both Alberta and in other jurisdictions, have recognized that the courts are “hierarchical” in nature, they have also accepted the Association’s submission that the gap between the salaries of the superior court and provincial court judges should not be too wide.

Finally, the Minister notes that, unlike Alberta, federally appointed judges, similar to the Ontario provincial court judges, are entitled to statutorily prescribed annual salary increases. In the case of the federally appointed judges, those prescribed increases are computed in accordance with the Industrial Aggregate Index (“IAI”) for Canada to a maximum of 7%.

(f) Growth and Decline, or both, in Real Per Capita Income in Alberta

Both the Minister and the Association noted that the statistical measure of “real per capita income” is no longer tracked by Statistics Canada. In 2012, it switched to using a new economic measure of income called *Primary Household Income* which

more accurately captured the income of households in Canada and is more in line with international standards.

The Minister's materials includes a document published by Alberta Treasury which shows the growth in percentage household income on an inflation adjusted basis, the *Alberta Real Primary Household Income Per Capita* (the "ARPHIPC"). The reported and projected growth for ARPHIPC for 2013 was 2.7%; and for 2014, 1.4%. Further projections are as follows: for 2015-1.0%, for 2016-1.3% and for 2017-1.1%.⁸ The Minister relies on the statistics for the ARPHIPC as the most appropriate measure for this criterion.

As noted, the Association retained Dr. Melville McMillan to prepare a report on the economic and fiscal circumstances of Alberta. We note that Dr. McMillan identified primary household income in his report as a "*broad measure of the market income of households; that is notably income from labor, businesses property and is prior to government transfers and taxes.*" Using this measure, Dr. McMillan concludes that the level of income in Alberta, by 2013, was about one third larger than in the provinces of Ontario, British Columbia and Saskatchewan. He predicts this disparity will continue, and even to widen somewhat, during the five-year period between 2014 and 2018.

⁸ The Ministers' materials also included statistics from the 2014 Budget which measures "Primary Household Incomes" which are higher than the ARPHIPC statistical measure for the same period. i.e. 7.1% for 2013, 6.7% for 2014, 6.2% for 2015, 5.8 % for 2016 and 5.5% for 2017.

Dr. McMillan also considered the economic statistic of Average Weekly Earnings⁹ (“AWE”) per employee. He noted that, in 2013, the AWE in Alberta was about 20% above the AWE in British Columbia, Saskatchewan and Ontario. He further predicted that incomes are likely to grow faster in Alberta than in those three provinces over the next five years.

The Association pointed out that all the various economic indicators suggest that solid growth is anticipated and that growth in wages and primary household incomes of Albertans is expected to exceed increases in the cost of living.

(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.

With the world price of oil having dropped in half since our proceedings in October, 2014, the economic conditions in Alberta are certainly less favorable than they were at the time of our hearing in October 2014. Nevertheless, it is worth reviewing the positions of the parties and their assessment of the financial health of the Alberta economy set out in their respective submissions.

The Minister pointed out that the 2014 budget estimates (updated to August 27, 2014) set out in the Government's *2014 First-Quarter Fiscal Update* projected revenues

⁹ Often used interchangeably with the IAI economic index.

of \$45.3 billion, with a surplus of almost \$1.4 billion. In regards to fiscal year 2015 (ending March 31, 2016), the Government predicted revenues of \$45.8 billion and a surplus of \$940 million. In regards to fiscal year 2016, the Government projected revenues of \$48.6 billion, with an overall surplus of \$2.6 billion. It is interesting to note that the Government's 2014 Operational Plan states as follows with respect to oil royalties:

Bitumen and conventional oil royalties are forecast to account for 83% of non-renewable resource revenue in 2014–15. The North American benchmark West Texas Intermediate oil price is expected to remain relatively flat over the forecast period, at US \$95.22 in 2014–15 and \$94.80 in 2016-2017, largely as a result of ongoing rapid supply growth from North America nonconventional production, slow, steady demand growth from the strengthening US economy, and increased access to and therefore demand from, US Gulf refineries.

... Bitumen royalties are forecast to account for 61% of non-renewable resource revenue in 2014–15 and by 2016–17, they are expected to be 70% of the total.

... The royalty revenue thus is driven almost entirely by higher production, with projects completing construction or expansion, and by projects reaching "payout". Oil sands production is forecast to increase 36%...

The Minister noted the uncertainties in the Alberta economy and referenced in that regard the Alberta Treasury Board and Finance Department's *Economic Outlook* briefing report of August 5, 2014 which states:

As a small open economy, Alberta remains exposed to global risks. World oil prices could fall as a result of further weakness in emerging markets or higher-than-expected increases in US oil production. A fall in oil prices could slow oil and gas investment and job growth.

Finally, the Minister pointed out that the Government's fiscal summaries illustrated the considerable variance in government revenues in recent years: \$35.01 billion in fiscal year 2010; \$39.5 billion in fiscal year 2011; \$38.8 billion and fiscal 2012 and \$45.2 billion in fiscal 2013.

The Association for its part noted from Dr. McMillan's Report that the Province of Alberta has experienced dramatic economic movements during the past two decades in the oil and gas industry. At the same time, however, Alberta's economy has expanded and diversified beyond these natural resource sectors. Dr. McMillan notes that the services, goods and industrial sectors each contribute more to GDP growth than the primary sector. The McMillan Report also shows Alberta's economy significantly better positioned than the economies of British Columbia, Saskatchewan and Ontario. The Association cites numerous statistics (using British Columbia, Saskatchewan and Ontario as comparator jurisdictions) from Dr. McMillan's report for the years leading up to 2013, including the following:

- Alberta's unemployment rate has been well below the rates in British Columbia and Ontario since 2000 and has only occasionally exceeded those in Saskatchewan. Lower unemployment rates in Alberta are expected to persist over the next five years and are expected to lead the country over that period.
- Primary household income levels in Alberta equalled those in Ontario and British Columbia into 2000 (Saskatchewan's was much lower at the time). Today, a significant difference exists, as levels in Alberta are roughly one-third larger than in the other three provinces.
- While the *average weekly earnings* in Alberta track very closely to those in Ontario and the Canadian average up until early in the 2000's, since 2005 particularly, it has diverged from the other provinces in the Canadian average. As of 2013 average weekly earnings in Alberta are about 20% above those in the other three provinces...

- Alberta experienced population growth of 24% from 2004–2013, which is twice as high as increases in the three comparator provinces...

The McMillan Report also notes that Alberta's unique strength is highlighted when comparing it with the economic circumstances in other provinces. In that regard, Dr. McMillan points out that Alberta has net assets while the other provinces have net debt. The statistics show, for example, that Alberta had net assets of \$2,402 per Albertan in 2013-14 while Ontario had a net debt equal to \$19,881 in the same year.

Dr. McMillan concluded at the time he prepared his report in August 2014:

Alberta's provincial finances are in good stead. Although economic and fiscal circumstances can change, as especially those in a resource centered economy appreciate, the economic and fiscal future looks remarkably positive. As RBC noted, the province has reason to be 'upbeat'. The provincial government, with its exceptional fiscal capacity and considerable assets, has the scope to pursue the fiscal path of its choice.

(h) Alberta Cost of Living and the Position of Judges Relative to its Increases, or Decreases, or both

The Regulation focuses specifically on the cost of living as a factor in considering compensation for judges in Alberta.

The Association notes that Lamer C.J. indicated in the *PEI Reference* that it was important to regularly convene a commission in order to guard against the erosion of judicial salaries because of inflation. The statistics provided for 2013 show an annual

change in the CPI for the year 2013 at 1.4%. The predictions for Alberta CPI, as provided by Statistics Canada are: 2.6% for 2014; 2.5% for 2015; 2.1% for 2016; and 2.0% for 2017.

The Association's proposals are based on all the relevant economic factors, including the prediction that household incomes and average weekly earnings of Albertans are expected to increase at a rate that exceeds the increase in the cost of living. For this reason, the Association proposes salary adjustments that would increase the compensation of judges in real terms; that is, beyond simply the increases in CPI.

The Minister submits that the most reasonable and appropriate statistical measure to utilize in order to ensure that judicial salaries are not eroded by the effects of inflation is the Alberta CPI. CPI, as noted in the Minister's documents, is calculated by reference to the cost of a fixed basket of goods. The Minister references in that regard the Alberta Treasury Board and Finance document prepared on August 4, 2014 entitled "*Comparisons of Various Indicators Used to Measure Wage and Earnings Growth*":

Many contracts that provide for cost-of-living adjustments use the growth in the consumer price index as the benchmark indicator. The CPI basket of goods and services reflects the consumption of goods and services at the national, provincial and some cases the city level. Wages that rise with the CPI ensure that purchasing power remains constant and are not subject to the disturbances caused by indexing to other earnings and wage measures.

The Minister noted that the 2009 JCC made a specific recommendation to utilize changes in the Alberta CPI to trigger annual judicial salary adjustments. In doing so, the 2009 JCC declined to recommend the use of the IAI to adjust salaries.

The Association, by contrast, urged our Commission to consider the IAI index as the benchmark for triggering annual judicial salary adjustments. The Associations' rationale for using the IAI index, and the Ministers differing view on this topic, will be addressed in more detail in the Recommendations portion of our Report.

(i) The nature of the Jurisdiction of the Court

The jurisdiction of the Provincial Court of Alberta has continued to expand. The provincial court exercises jurisdiction in five areas of the law: adult criminal, provincial offenses and inquiries, civil, family and youth. The 2009 JCC detailed accurately and at length the workload of the provincial court in each of these areas:

...What our review of the court's jurisdiction reveals is a refocusing of the trial jurisdiction in criminal cases into the Provincial Court. There is now little difference between the responsibilities of the judges in the two courts, except in the area of jury trials¹⁰. They must apply the same Charter rules, admit evidence according to the same criteria and sentence within the same range as Queen's Bench judges. They must keep abreast of the same law and, if anything, remain familiar with an even wider range of offenses given their exclusive jurisdiction over important regulatory and municipal laws.

¹⁰ The Association notes in their current brief that while all criminal prosecutions start in the provincial court, more than 97% of them are also concluded in the provincial court.

The civil jurisdiction of the provincial court has changed dramatically when it was "Small Claims Court". The court can currently hear cases involving claims up to \$25,000 and the Lieut. Gov. and Council can increase that, without new legislation to \$50,000. The combination of different claimants or counterclaims increases these figures even higher. More significantly, there has been an expansion in the type of claims the Court can hear, going beyond matters of debt or damages. This expands the type of human and business activity over which the court must adjudicate. It has also expanded the Court's facilities and its supervisory jurisdiction over mediation, pre-trial conferences and judicial resolution processes, now responsible for resolving about 70% of the claims brought forward.

While the Court's jurisdiction under the *Fatality Inquiry Act* has not altered significantly in the last decade, it is nonetheless a vital jurisdiction encompassing all and more of the work historically carried out by Coroner's inquests. Judges of the Court hear evidence about deaths in a wide variety of circumstances and make recommendations as to how such deaths may be avoided...

The Provincial Court's jurisdiction in family law, young offender and child protection matters is complex. Such matters can involve highly personal and emotional issues like domestic abuse, youth justice and the apprehension and protection of children at risk. The change, in 2003, from the *Young Offenders Act* to the *Youth Criminal Justice Act* expanded and added complexity to the Court's authority in this area. Virtually all charges involving under 18 year olds are fully disposed of in the Provincial Court. Sentences must balance fairness, youth accountability, rehabilitation and other factors.

In child protection cases, the Court is required to balance the rights of families to self-determination and of the child to safety and security. Judges have to decide delicate issues like whether to override parental religious beliefs to secure essential medical treatment. The Court now has the added responsibility of authorizing the apprehension of children where there is an allegation of sexual abuse or drug dependency.

The Association submits that the jurisdiction of the Provincial Court of Alberta has and will continue to expand as a result of the positive reputation the court has among counsel and litigants alike. The need to attract highly qualified applicants for these positions supports the Association's view that the compensation paid to federally appointed judges should be a leading comparator, given that judges for both levels of courts are selected from the same pool of potential applicants.

The Minister advances a different view with respect to comparing the jurisdictions of the Court of Queen's Bench and the Provincial Court. The Minister points out that constitutionally, superior courts are courts of inherent jurisdiction while provincial courts derive their powers from statute. The Minister notes that Court of Queen's Bench Justices hear appeals from certain Provincial Court decisions and sit on jury trials. The Court of Queen's Bench also deals with all civil matters (with no monetary limit), all torts, estate matters, matrimonial property and divorce proceedings, class proceedings and judicial review-all of which are outside of the Provincial Court of Alberta's jurisdiction. Further, the Court of Queen's Bench deals with more complex and serious criminal matters.

(j) The Level of Increases Provided to other Programs and Persons Funded by the Government

The Minister submits that it is an onerous obligation on the part of the Government to determine exactly how to allocate its financial resources. Even though Alberta may be better placed financially compared to other provinces, the Government does not take its fiscal obligations lightly. It must strike a reasonable balance in making its allocation decisions in the face of a myriad of financial demands on the public purse.

The Government, as pointed out in Dr. McMillan's report, has dealt with its ongoing fiscal challenges in a reasonable and responsible manner. In that regard, it has

shown restraint in its overall spending while at the same time invested in capital projects to maintain the momentum of the economy. Accordingly, any increases in the compensation payable to the provincial court judges and masters must reflect the reasonableness of the Government's prudent fiscal policy and its obligation to responsibly allocate its limited financial resources. By way of reference, the Minister noted from its documents that the average annual wage percentage changes related to Alberta public-sector settlements were as follows: for 2013, 1.79%; for 2014, 1.8%; for 2015, 2.35%; for 2016, 2.86%; and for 2017, 3.88%. The average annual unionized public-sector wage increases in Alberta were as follows: for 2013 2.1%; for 2014 2.2%; for 2015 2.3%; for 2016 2.8%.

The Association submits that a province like Alberta cannot reasonably argue that it does not have the ability to pay its provincial court judges and masters. The budget for their payroll represents only a very small portion of the overall budget for the Government of Alberta. When considered as an indicator of the willingness of the Government to pay, the levels of the increases provided to other public sector groups are a useful comparable. At the same time, it should also be recognized that the wages for these groups do not reflect the specific factors set out in the Regulation.

Both the Minister and the Association provided other information on salary increases to various groups in the public service for the Commission's consideration as part of their detailed submissions on salary increases.

VI. RECOMMENDATIONS

A. Salaries

We recommend the following increases from the current salary of \$263,731.00:

YEARS (April 1 st to March 31 st)	INCREASES	SALARY
2013-2014	3.5% ¹¹	\$273,000
2014-2015	2.5%	\$279,825
2015-2016	2.5%	\$286,821
2016-2017	2.5%	\$293,991

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 historic 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.

Our conclusions with respect to the proposed salary increases are rooted in the statutory criteria. The one difference from previous Commissions is that two of the

¹¹ Actual increase is 3.5145%

economic considerations now focus exclusively on Alberta: the cost of living criteria and the real per capita income criteria. Otherwise, we are left to base our recommendations on the same mandatory considerations as prior commissions. We have taken all of these criteria into account in forming our recommendations, while at the same time focussing on what we consider to be some of the more significant factors, as detailed below.

One of the leading factors for our consideration from the list set out in the Regulation is the state of Alberta's economy. Dr. McMillan noted in his report that the *"...energy sector is the primary determinant of Alberta's economic performance..."* Dr. McMillan rightfully described the economy as "thriving" based on all economic measures as at October 2014 and suggested that this prosperity was expected to continue "...in the near, mid and even longer term". In the few months that have passed since our hearing, however, a significant decline in world oil prices has taken place.

The precipitous drop in the price of oil beginning in late 2014 to half its former price has changed the current economic forecasts of Alberta's revenue stream. The Operational Plan for the Government of Alberta for the period 2014-2017 predicted that West Texas Crude Intermediate oil price to "remain relatively flat over the forecast period, at (U.S. dollars) \$95.22 in 2014-2015, and \$94.80 in 2016-2017". Bitumen and conventional oil royalties were forecast to account for 83% of non-renewable resource revenue in 2014-2015. The price of oil has since fallen to around \$50.00 per barrel.

The consequential drop in resource-based royalty revenues in the near term will impact Alberta's finances and likely result in a return to budget deficits.

This is not the first time the Government of Alberta has had to cope with reduced revenues. As Dr. McMillan pointed out in his questioning by the Minister's counsel, natural gas revenues fell from 12 billion dollars in 2006/07 to less than 2 billion dollars in 2014. Dr. McMillan went on to provide a helpful explanation of this cyclical phenomenon:

The dramatic increase in natural gas prices and the volumes of gas that were-- resulted in that very large natural resource-- or, sorry, natural gas revenues generating royalties to the province, you know, is a good example of you have a boom, an unexpected period of very large output and prices, and hitting the bottom line in the-- budget, and *a good example of something that you should not expect to happen or continue on a long-term basis.*

Dr. McMillan, after reviewing the figures showing fluctuating resource revenues (from 2008/09 to 2013/14) set out in the Government's 2013-14 Annual Report, confirmed the comments found in his report that the *"...waxing and waning of natural resource revenues appears to quickly impact the province's bottom line"*.

Given the *"waxing and waning"* effect of world oil prices on the Alberta economy, it would not be appropriate to focus on the recent drop in the price of oil as the deciding factor which outweighs all others in our recommendations. That would be a disservice to this process. It would also amount to an abdication of our mandate set out in the *PEI Reference* to be "independent, objective and effective".

Another significant consideration for our Commission is the nature of the jurisdiction of our provincial court judges in Alberta. The Provincial Court of Alberta has become a specialized court in its own right with jurisdiction over family, youth, civil and criminal matters. In terms of the latter, the Association cites that the criminal court now sits on over 97% of the criminal cases in Alberta. The Youth Court handles virtually all offences set out in the *Youth Criminal Justice Act*. Family Court judges in the Provincial Court continue to deal with child protection proceedings, including the issuance of Emergency Child Protection Orders.

The limit on civil claims has now been raised from \$25,000.00 to \$50,000.00, and the types of causes of actions (i.e. personal injury) that can be litigated in the Civil Division of the Provincial Court of Alberta has also expanded. The significant workload and responsibility of the Provincial Court of Alberta in so many aspects of Albertans lives is a significant factor when considering the remuneration for the prescribed period of our Commission. In our view, the suggested increases reflect the considerable workload and responsibilities of the judges sitting in the Provincial Court of Alberta.

A further criterion which merits close attention is the remuneration paid to other judges in Canada. Although the salaries paid to provincial court judges in other jurisdictions is an important comparator, commissions in the past have also viewed the salaries paid to federal court judges as an important benchmark. In that regard, the consensus of past commissions is there is a traditional “gap” that has been recognized between the two levels of courts given the “recognized hierarchy within the judiciary”

and the differences in the jurisdictional roles of the federal and provincial courts. Although that gap is closing with a significant overlap in the daily work of both courts, there still remains a recognizable difference in the role of judges at the provincial court and superior court levels.

The Association points out that the Minister's submission amounts to a 90% difference in the salaries of the two courts. The 2009 JCC determined that something closer to a 93% difference preserved the "suitable difference" between the salaries of the two courts.

In reviewing the salaries paid to Alberta Queen's Bench Justices, indexed to 2013 levels and 2014 levels, the above recommended increases are similarly close to the 93% amount paid to federal court judges¹². In endorsing the 93% figure, we do not blindly adhere to a number set by the 2009 JCC. We take the view that the 93% margin is a fair and appropriate difference, particularly given the most recent downward trend in the Alberta economy. If the 2009 JCC tempered its recommendations because of the economic and fiscal situation that started with the 2008 recession, as counsel for the Association submits, we find ourselves in a similar position when considering the sudden transition in the economy at this time in early 2015.

¹² $\$273,000/\$295,500=.9238\%$ for 2013/14;

$\$279,825/\$300,800=.93026\%$ for 2014/2015

The parties have also addressed in detail the salaries paid to the provincial court judges in other provinces. The Minister noted in that regard that the salary level for Provincial Court of Alberta judges has, in the 10 year period to 2012/13, usually been either first or second in the overall provincial rankings. As noted by the 2009 JCC, the compensation paid in other jurisdictions, and more particularly Ontario, was only one of the criteria we must consider in arriving at our compensation recommendations.

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.

The salaries of judges in Ontario were fixed by their judicial Commissions for 2013 and most recently for 2014. Our recommendation reflects comparable salaries for those same time periods. We note in that regard that the recommended salary for 2013/14 is \$273,000.00 compared to Ontario's at \$274,574 for 2013/14; and \$279,825.00 compared to Ontario's \$279,791.00 (recently confirmed) for 2014/2015. We are aware of the results of other provincial commissions, including recent increases in both Saskatchewan of \$272,295.00 starting April 1, 2015 (recently confirmed) and in Prince Edward Island of \$243,537.50 starting April 1, 2014. Although helpful in the

sense of being apprised of the national picture, we are more focussed on Ontario as the main comparable jurisdiction.

The Association submits that we should consider implementing the IAI for Alberta, as a built-in method to insure proper adjustments to salaries. The submission of the Association is that implementing the IAI economic formula for Alberta would avoid the need for more significant adjustments in the first year of a commission's mandate. The Association notes that the IAI takes into account a number of the economic factors set out in the Regulation, and not just the single criterion of the increases in the CPI for Alberta i.e. whether a cost of a basket of goods has increased.

We disagree. In that regard, we adopt the view expressed by the 2009 Commission that the IAI index does not measure changes in the cost of living (i.e. changes in the cost of purchasing goods and services) but rather reflects changes in total earnings received by workers. Those earnings, as the Minister points out, are heavily affected by the number of hours worked and overtime pay, which in turn varies with each industry¹³. In any event, our Commission has elected, after consideration of all the criteria, including today's economic climate, to fix the salaries based on regular increases of 2.5% starting in 2014/2015 rather than relying strictly on the CPI increases

¹³ A helpful explanation of AWE is found in the Government document entitled: "Comparisons of Various Indicators Used to Measure Wage and Earnings Growth. It states: "Average weekly earnings (AWE) area a measure of earnings, not the wage rate. AWE is also affected by the amount of overtime paid and the average weekly hours worked by an employee. Average weekly hours can be affected by compositional shifts in employment such as shifts between the number of full-time and part-time employment, and changes in the amount of overtime worked. Average weekly earnings also tend to rise during a boom and fall during a recession which affects AWE".

for Alberta, as occurred in the 2009 Commission. We have done so deliberately considering all the above factors set out in the Regulation, and more particularly the certainty it provides to both the Government and the judges of the Provincial Court of Alberta through to 2017.

B. Vacation

Judges of the Provincial Court of Alberta currently receive six weeks of vacation per annum. The Association seeks an increase to seven weeks effective April 1, 2015 and 8 weeks effective April 1, 2016. The Association points out that Ontario provincial court judges, since the recommendations of the 1988 JCC, were granted an increase from 6 to 8 weeks of vacation leave per annum. Federally appointed judges also receive eight weeks of vacation leave per annum. The Association notes that management employees in the Alberta public service with 21 years of service are entitled to seven weeks of vacation and eight weeks after they reach 30 years of service.

The Association submits that the vacation needs of judges are at least as significant as those of senior civil servants. The Association points out the uniquely stressful nature of judicial office and that judges require restorative time in order to maintain their judicial serenity. The Association is of the view that judges need sufficient time away from work in order that they can approach their jobs with the necessary enthusiasm and dedication that the public expects from them.

The Minister takes issue with the comparison between judges and senior civil servants. The Minister notes that there is no disagreement that judicial independence is the overriding principle for consideration. As such, there should be no discussion in the Minister's view of civil service vacation entitlement, its purpose, or its level. In short, the Minister submits that civil service vacation entitlement should not form part of the analysis before the Commission. In addition, the Minister submits that it would have to appoint seven new judges to fill the sitting days left vacant as a result of the Association's proposal.

We certainly do not disagree with the Association's submission that restorative time is required by sitting judges in order that they can carry out their judicial duties in a meaningful manner. Nevertheless, an increase in vacations in the amount sought by the Association represents, albeit indirectly, a significant increase in compensation. Such an increase cannot be justified in the present circumstances. In our view, scarce government resources are more appropriately allocated to maintaining the Provincial Court of Alberta judge's position relative to other judges across Canada. Accordingly, for these reasons, we are satisfied that the current allotment of 30 days of paid vacation per year is appropriate.

C. Pensions

The Minister and the Association jointly agreed, and we recommend, two pension amendments, as set out at paragraphs 324 to 333 of the Association's submissions:

i) Permitting Choice of Alternate Forms of Pension for Pension Partner (Only Where Judge Dies in Office)

1. The Association proposes that section 38 of the Pension Regulation should be changed to provide that, when a judge dies prior to termination from the Plans, with a surviving pension partner, that pension partner would nonetheless have the ability to make one of the choices that would have been available to the judge if the deceased judge had terminated from the pension plans prior to death. As discussed below, those choices are set out in ss. 29(1) of the Pension Regulation. To be clear, the choice of the pension partner would override any alternate form selected by the judge prior to his death (while still a participant).

Pension Regulation, Joint Book of Authorities, Tab 17

2. For greater clarity, the proposal contemplates that where the pension partner elects an alternative form of pension under this provision, the pension shall not be less than the pension he or she would receive if the judge had retired immediately before his death and had elected the same form of pension payable to the surviving pension partner.

3. A legislative review should be conducted in order to determine the precise wording changes that are required to the Regulation should this Commission adopt the proposal as a recommendation. If the parties and legislative counsel cannot agree on the wording, the matter should be referred back to the JCC.

4. The mechanics of the proposal and the Association's reasons for advancing it are discussed below.

5. Under the current judicial pension plan, a judge who retires has a number of options which may be selected other than the "normal form" of pension. The alternative forms described in section 29(1) of the Regulation provide for, *inter alia*, a joint and survivor 100% benefit and a guaranteed pension of 5, 10 or 15 years. In ordinary

circumstances where a judge retires from the Bench, the choice of an alternate form is made at the time of retirement and, hence, at the time of termination from the plan.

Pension Regulation, Joint Book of Authorities, Tab 17

6. As the Association understands it, there have been only a handful of cases in which a retiring judge has elected to take one of the alternate forms of pension. This presumably reflects the reality that an alternate form is likely to be more advantageous only when the judge, and/or his pension partner, are known to have shortened joint life expectancies.

Pension Regulation, Joint Book of Authorities, Tab 17, s. 29(1)

7. Under the current provisions, if a full-time judge (and an extended full-time judge or a judge receiving LTD benefits), becomes aware of the fact that he or she has a significantly shortened life expectancy, he or she is forced to choose between continuing his career as a judge or retiring in order to choose the most optimum form of pension to protect the pension partner. This is because the Pension Regulation does not permit a participant with a pension partner to make a valid choice for an alternate form unless the participant “terminates” from the plan. A judge who dies while a participant is not considered to have “terminated”.

8. When a judge dies in office, the pension partner is only entitled to the death benefit provided by s. 38, which provides survivor benefits equal to $\frac{3}{4}$ of the judges' normal pension. The “normal pension” is described in s. 27 of the Regulation and is calculated as the product of the accumulation rate and years of service, taking into account pensionable salary.

Pension Regulation, Joint Book of Authorities, Tab 17

9. Accordingly, the concern is this. The pension partner of a judge who dies while a participant in the plan, i.e. while still in office, is currently restricted to receiving the 75%

survivor pension. A pension partner of a judge who retires before dying can receive survivor benefits in accordance with the judge's choice under s. 29(1).

10. The Association's proposal seeks to ensure that judges are not forced to retire in order to select the alternate form of pension that is most advantageous for their pension partner. It will also protect pension partners in circumstances where a judge dies suddenly and unexpectedly.

(ii) Reducing the Vesting Period in the Pension Plan

That the vesting period for the judicial pensions be reduced from five years to two years.

D. Judicial Indemnity

The Minister and the Association have jointly agreed that a Judicial Indemnity Agreement be implemented between the Government of Alberta and the Association.

The parties have engaged in lengthy discussions on this item and we understand have exchanged numerous drafts of proposed wording for the Indemnity Agreement. Unfortunately, the final wording of the Judicial Indemnity Agreement has yet to be finalized by the Government. The Association is concerned about the delay in concluding this matter. The Association therefore asks our Commission to recommend for immediate implementation the Judicial Indemnity Agreement submitted for our consideration in its written submissions.

We understand the Association's concerns in moving this matter forward. Under the circumstances, however, we believe the best course of action is to accept the Minister's position that it continue to try and finalize this matter as expeditiously as possible.

Accordingly, we recommend that the Government develop and implement a Judicial Indemnity Agreement that fully indemnifies the Provincial Court of Alberta judges and masters for legal fees and other costs incurred which may affect their judicial function or capacity as a judge or master. We will remain seized of this matter and allow further submissions from either side if the Association and Minister are unable to develop satisfactory terms and conditions within a reasonable period of time after the issuance of this Report. In that regard, we would urge the Minister to use its best efforts to seek approval from the Government of the final version of the Judicial Indemnity Agreement.¹⁴

E. Per Diem

The Minister and the Association jointly agreed, and we recommend, that the per diem rate for supernumerary judges and part-time/ad hoc Masters should continue to be set at 1/207.5 of the salary of a full-time *puisne* judge.

¹⁴ The Commission was advised on March 16, 2015 that the Minister and the Association have jointly agreed to a final version of the Judicial Indemnity. The Commission recommends the Judicial Indemnity attached as Appendix A to our Report.

F. Professional Allowance

The Minister and the Association jointly agreed and we recommend the following with respect to the professional development allowance:

- That, effective April 1, 2013, part-time judges and half-time Masters shall have access to the full amount of the professional development allowance in the amount of \$3,750 per year, an increase from their current entitlement to an allowance of \$1,875 per year.
- This recommendation shall apply to all who were part-time judges or half-time Masters as at April 1, 2013 and those who became part-time judges or half-time Masters thereafter. In addition, because the 2013 fiscal year has already passed, each part-time judge and half-time Master shall have available during the mandate of this Commission the portion of the allowance for the fiscal year 2013 (and potentially 2014) that represents the increase over what was actually available to part-time judges and half-time Masters in that or those years (i.e. \$1,875). Expenses incurred in any of 2013, and 2014 if applicable, would be eligible for reimbursement during the mandate of this Commission.

G. Costs

The Association reserved in its written brief the right to seek a recommendation for costs beyond the limit set out in the Ministerial Order. Counsel for the Association advised the Commission at the hearing that it was not seeking a further recommendation for costs, despite the significant legal fees and disbursements it has incurred, including the cost of experts.

VII. SUMMARY OF RECOMMENDATIONS

1. Salaries:

- For the period April 1, 2013 to March 31, 2014, the annual salaries be fixed at **\$273,000.00.**
- For the period April 1, 2014 to March 31, 2015, the annual salaries be fixed at **\$279,825.00.**
- For the period April 1, 2015 to March 31, 2016, the annual salaries be fixed at **\$286,821.00.**
- For the period April 1, 2016 to March 31, 2017, the annual salaries be fixed at **\$293,991.00.**

2. Per Diem Rates:

- For the period April 1, 2013 to March 31, 2017, the per diem rate formula for supernumerary judges and part-time/ ad hoc Masters be maintained at the current rate of 1/207.5 of the salary of a full-time *puisne* judge.

3. Professional Allowance:

- That, effective April 1, 2013, part-time judges and half-time Masters shall have access to the full amount of the professional development allowance in the amount of \$3,750 per year, an increase from their current entitlement to an allowance of \$1,875 per year.

- This recommendation shall apply to all who were part-time judges or half-time Masters as at April 1, 2013 and those who became part-time judges or half-time Masters thereafter. In addition, because the 2013 fiscal year has already passed, each part-time judge and half-time Master shall have available during the mandate of this Commission the portion of the allowance for the fiscal year 2013 (and potentially 2014) that represents the increase over what was actually available to part-time judges and half-time Masters in that or those years (i.e. \$1,875). Expenses incurred in any of 2013, and 2014 if applicable, would be eligible for reimbursement during the mandate of this Commission.

4. Pension:

See detailed pension recommendations set out at pages 48 to 51.

5. Judicial Indemnity

See recommendation on the Judicial Indemnity set out in the attached Appendix "A".

VIII. CLOSING COMMENTS:

The panel would like to recognize the efforts of Mr. Bill Olthuis, Kate Bridgett and Kerry Whittaker, counsel for the Minister, as well as Susan Dawes of Myers Weinberg

LLP, counsel for the Association. This Commission had the benefit of reviewing in advance of the public hearing a significant volume of material from both sides, all of which was helpful in our deliberations. We are also grateful for their participation and presentations during the course of the October 2014 hearing days. The panel also had the benefit of submissions from the Canadian Bar Association, Alberta Branch, and the Law Society of Alberta. We appreciate their efforts in supporting the work of this Commission.

The panel also would like to thank Ms. Cynthia Bentz, legal counsel, *Legal and Legislative Initiatives*, Alberta Justice and Solicitor General, for her ongoing administrative assistance throughout this process.

RESPECTFULLY SUBMITTED,

[original signed]

John M. Moreau QC

[original signed]

Andrew C. L. Sims QC

[original signed]

Damon S. Bailey

February 17, 2015

(Amended March 18, 2015)

APPENDIX “A”

Government of Alberta

Judicial Indemnity

1. Application

This indemnity applies to all current and former judges of the Provincial Court of Alberta (“judges”) and Masters in Chambers of the Court of Queen’s Bench of Alberta (“Masters”) (collectively, “Members of the Judiciary”).

2. Purpose

- a) It is in the public interest that the Government of Alberta (the “Crown”) and the Minister of Justice and Solicitor General (the “Minister”) in particular defend the judicial independence, jurisdiction, and reputation of the Provincial Court and Members of the Judiciary.
- b) It is also in the public interest that a Member of the Judiciary who is the subject of a complaint under Part 6 of The Judicature Act (a “Part 6 Complaint”) or is subject to any other action, proceeding, complaint, charge or inquiry (a “Proceeding”), arising out of their conduct as a Member of the Judiciary, including Proceedings affecting their ability to act as a Member of the Judiciary, have a complete opportunity to provide full answer and defence.

3. Details and Extent of Coverage

- a) The Crown shall indemnify a Member of the Judiciary for legal fees and other costs, charges and expenses, including amounts paid to settle actions or satisfy judgments, reasonably incurred because of Proceedings initiated against them which arise out of their conduct as a Member of the Judiciary, including:
 - Part 6 complaints
 - civil actions
 - criminal or provincial offences

- proceedings under the *Alberta Human Rights Act* or other administrative proceedings
 - judicial inquiries
 - any other Proceeding which could affect their tenure, independence, or ability to perform the duties of a Member of the Judiciary
- b) The Crown shall also indemnify a Member of the Judiciary for legal fees and other costs, charges and expenses reasonably incurred in seeking standing, testifying or participating in any judicial inquiry which may involve their conduct as a Member of the Judiciary or affect their ability to act as a Member of the Judiciary.
- c) For greater clarity, this indemnity does not apply to any Proceeding that does not arise out of the conduct of a Member of the Judiciary in his or her capacity as a Member of the Judiciary, and does not apply to private matters.
- d) The Minister may seek to recover from a Member of the Judiciary any monies paid under an indemnity and cease any further indemnification if a Court or administrative tribunal having jurisdiction over the Proceeding finds that the Member of the Judiciary has acted in bad faith in one or more of the following ways:
- the Member of the Judiciary is deserving of sanction in respect of a Part 6 Complaint
 - the Member of the Judiciary acted maliciously and without reasonable or probable cause in a civil action and that the protections provided by s. 9.51(1) of the *Provincial Court Act* or s. 14 of the *Court of Queen's Bench Act*, as applicable, do not apply
 - the Member of the Judiciary is guilty of a criminal or provincial offence
 - there is a basis for a complaint against the Member of the Judiciary in an administrative proceeding,
- or
- where a Proceeding terminates before the applicable tribunal or decision-maker renders a decision and in the Minister's opinion the Member of the Judiciary's conduct fell below the acceptable standard.
- e) If the Minister seeks to recover any monies or cease any further indemnification under subparagraph 3(c), and the Member of the Judiciary does not agree, the parties shall resolve the dispute in accordance with paragraph 5.

4. Commencement of Coverage

- a) Upon becoming aware of any potential or actual Proceeding arising out of his or her conduct as a Member of the Judiciary or affecting his or her ability to act as a Member of the Judiciary, a judge must notify the Chief Judge of the Provincial Court as soon as reasonably practicable. In circumstances in which the judge and the Chief Judge reasonably consider that legal counsel is required, the Chief Judge shall forthwith notify the Minister of the potential or actual Proceeding in general terms and shall request indemnity coverage on behalf of the Member of the Judiciary. If the Member of the Judiciary seeking indemnity coverage is the Chief Judge, the Deputy Chief Judge shall assume the duties of the Chief Judge as described herein. In the case of a Master, notice must be provided to the Chief Justice of the Court of Queen's Bench as soon as reasonably practicable, and the Chief Justice shall assume the duties of the Chief Judge as described herein.
- b) Within a reasonable period of time up to 30 days after receiving notice, the Minister shall advise the Chief Judge that the indemnity does or does not apply.
- c) If the Member of the Judiciary does not agree with the Minister's decision in subparagraph (b) or the Minister has not made a decision within 30 days, the matter may be referred to the dispute resolution officer in accordance with the procedure set out below.
- d) If the Minister or the dispute resolution officer decides that the indemnity does apply, then the Minister shall immediately authorize the Member of the Judiciary to retain and instruct private legal counsel, or appoint a lawyer retained by the Department of Justice and Solicitor General to represent the Member of the Judiciary. If the Minister and the Member of the Judiciary disagree over choice of counsel, either may refer the matter to the dispute resolution officer in accordance with paragraph 5.
- e) If the Minister or the dispute resolution officer authorizes the Member of the Judiciary to retain private legal counsel and if the Member of the Judiciary has complied with his or her responsibility to notify the Chief Judge as soon as reasonably practicable of the actual or potential Proceeding, he or she will be indemnified for legal fees and disbursements incurred from the date of the retainer, even if this date precedes the date the retainer was authorized. The government shall indemnify an affected Member of the Judiciary at the "government rates" paid to outside legal counsel for all reasonable legal and other costs incurred, including travel expenses, subject to review by a dispute resolution officer as described in section 5. These rates are currently set out

in the Schedule of Rates and the Disbursement Policy prepared by Alberta Justice and Solicitor General, as revised from time to time. The applicable rates shall be those which apply at the time the work or travel is undertaken.

- f) If the Member of the Judiciary retains private legal counsel, counsel shall on a quarterly basis provide a report to the Minister setting out the status of the Proceeding in general terms, hours and disbursements billed, and the rate charged. In the event the Minister is the complainant, the foregoing information shall be provided to the Chief Judge.

5. Dispute Resolution

- a) A retired justice of the Court of Queen's Bench or Court of Appeal of Alberta, or any other qualified person as mutually agreed upon by the Minister and the Chief Judge (dispute resolution officer), shall be appointed on an ad hoc basis to resolve any disputes under this indemnity, including:
- whether this indemnity should apply in the particular circumstances
 - whether the Member of the Judiciary should be authorized to retain private legal counsel or can be properly and effectively represented by a lawyer retained by the Department of Justice and Solicitor General
 - the choice of lawyer retained by the Member of the Judiciary
 - the reasonableness of the hours, fees, disbursements or other expenses charged by the lawyer retained by the Member of the Judiciary;
 - if and to what extent a Member of the Judiciary should be required to repay any monies paid in respect of the Member of the Judiciary pursuant to this indemnity and/or the extent to which indemnification ought to continue;
 - if and to what extent a Member of the Judiciary is responsible for any costs or other amounts ordered against the Member of the Judiciary personally in matters for which indemnity was provided, and
 - if and to what extent a Member of the Judiciary must pay to the Crown any costs awarded in favour of the Member of the Judiciary. This determination may only be sought if the Member of the Judiciary has not been fully indemnified in accordance with this indemnity.
- b) The Minister and the Chief Judge shall choose the dispute resolution officer by mutual agreement, and shall make all reasonable efforts to engage the dispute resolution officer within 14 days of the Minister and Chief Judge receiving written notice that a dispute resolution officer is required.

- c) The Minister shall compensate the dispute resolution officer subject to the terms set out in the Minister's retainer letter.
- d) The dispute resolution officer shall review the matter on a *de novo* basis and shall adopt whatever procedure he or she determines will be effective to resolve the matter.
- e) A decision of the dispute resolution officer is final and binding on the parties and not subject to appeal or judicial review.

6. Miscellaneous

- a) If a Member of the Judiciary receiving indemnity as described herein is eligible for funding from any other sources, such as an insurance policy, including the Alberta Risk Management Fund, the Member of the Judiciary must (i) exhaust that source of funding before receiving the indemnity described herein, and (ii) reimburse the Crown for any sums already paid to or on behalf of the Member of the Judiciary.
- b) Subject to a determination otherwise by the dispute resolution officer, if the Member of the Judiciary is fully indemnified in accordance with this indemnity, any costs recovered by a Member of the Judiciary who receives indemnity coverage as described herein shall be paid to the Crown.
- c) It is understood and agreed that the principles of *uberrima fides* apply, such that Members of the Judiciary, the Chief Judge and the Minister must act pursuant to this indemnity in the utmost good faith.
- d) The Minister in consultation with the Alberta Provincial Judges' Association, shall review this indemnity every four years from the date it is first implemented.