



Report and Recommendations  
of the **2009 ALBERTA JUDICIAL COMPENSATION**  
**COMMISSION** containing amendments to October 6, 2011

PRESENTED TO THE  
MINISTER OF JUSTICE AND  
ATTORNEY GENERAL AND  
THE ALBERTA PROVINCIAL JUDGES ASSOCIATION

September 6, 2011

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CORRIGENDA

## **I. COMMISSION'S APPOINTMENT AND TERMS OF REFERENCE**

The 2009 Alberta Judicial Compensation Commission ("2009 Commission") was established pursuant to the *Judicature Act* and the *Alberta Provincial Judges and Masters In Chambers Compensation Commission Establishment Regulation 73/2009* and was continued by the *Alberta Provincial Judges and Masters in Chambers Compensation Commission Regulation 205/2010* ("the Regulation") ("Appendix i"). The Regulation sets out the terms of reference for the 2009 Commission.

### **A. Role of the 2009 Commission**

The role of the 2009 Commission is set out in Section 2 of the Regulation:

- 2(1) The Commission must make recommendations respecting the compensation of Judges.
- (2) The Commission must determine issues relating to compensation independently, effectively and objectively.
- (3) the Commission is to contribute to maintaining and enhancing the independence of the Court and the Judges through the inquiry process and its report.

Section 6 of the Regulation provides:

6. The Commission must conduct an inquiry respecting
  - (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 allowance of Judges, and
  - (d) any other issues relevant to the financial security of the Judges that the Commission agrees to resolve.

The recommendations are to cover the period April 1, 2009 to March 31, 2013.

## **B. Composition of the 2009 Commission**

The 2009 Commission consists of three members who were appointed by ministerial orders of the Honourable Alison Redford, Q.C., Minister of Justice and Attorney General (the "Minister") on January 13, 2011:

Andrew C.L. Sims, Q.C. who was appointed by the Minister on nomination by the Alberta Provincial Judges Association ("Association")

Craig W. Neuman, Q.C. who was appointed by the Minister, and

J. Patrick Peacock, Q.C. who was appointed by the Minister on nomination by the first two Appointees. Mr. Peacock is the Chair of the Commission.

## **II. CONDUCT OF THE 2009 INQUIRY**

Notice of the establishment of the 2009 Commission, the public hearing dates and closing date for written submissions was published on Thursday, March 3, 2011 in the Calgary Herald, and Edmonton Journal. Public Hearings were held at the Law Courts Building in Edmonton on May 16, 17 and 18, 2011. Prior to the commencement of the public hearings, the 2009 Commission received the following written materials:

1. Submission from the Association together with extensive supporting materials and attachments.
2. Submission from the Minister of Justice and Attorney General for Alberta with extensive supporting material 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 Association and the Minister.
5. Reply submissions of the Minister and the Association.
6. A submission by the Canadian Bar Association, Alberta Branch.
7. A submission of Judge Cheryl L. Daniel.
8. A Reply Submission to the submission of Judge Cheryl L. Daniel by the Minister; and

9. A Reply Submission by Judge Cheryl L. Daniel

At the public hearing on May 16, 2011, the Commission heard the evidence of a witness for the Association, André Sauvé, an Actuary; the evidence of a witness for the Minister Robert Thiessen, an Actuary, and the evidence of a witness for the Association, Melville Lloyd McMillan, an Economist. On May 17, 2011 the Commission heard the final submissions of the Association by its counsel, Susan Dawes and the Minister by its counsel, Mr. William Olthuis. On May 18, 2011 the Commission heard submissions by Ms. Marion DeSouza on behalf of the Alberta Branch of the Canadian Bar Association, and Mr. John D. James, Q.C. on behalf of Judge Cheryl Daniel, submissions by Ms. Kate Bridgett for the Minister and final submissions by Mr. Olthuis and Ms. Dawes.

Following the conclusion of the public hearing, the Commission by agreement received an updated pension costing report from Johnson Inc. and submissions from both Mr. Olthuis and Ms. Dawes with respect thereto. The Commission also received a Reply by the Minister to Judge Cheryl Daniel's request for costs. Finally, the Commission received a submission from the Law Society of Alberta.

### III. CONTEXT OF THE 2009 INQUIRY

On September 18, 1997 the Supreme Court of Canada issued its decision in *Reference re: remuneration of Judges of the Provincial Court (PEI)* (1977) SCR 3 ("the *PEI Reference*") in which the Supreme Court held that in order to protect the constitutional role discharged by the judicial branch in Canada, judicial compensation must be determined through the establishment of independent, objective and effective compensation commissions.

Lamer, CJC outlined the three aspects of judicial independence which include (a) financial security; (b) administrative independence, and (c) security of tenure. Lamer, CJC stated that judicial compensation commission process is necessary to ensure financial security for Judges.

Lamer, CJC, discussed the principles in the *PEI Reference*:

"...financial security for the courts as an institution has three components, which all flow from the constitutional imperative that,

to the extent possible, the relationship between the judiciary and the other branches of government be depoliticized...”

“First as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as a part of a measure which is directed at provincial court judges as a class. However, any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation. What judicial independence requires is an independent body... those bodies are often referred to as commissions...”

“Second, under no circumstances is it permissible for the judiciary-not only collectively through representative organizations, but also as individuals - to engage in negotiations over remuneration with the executive or representatives of the legislature... The prohibition on the negotiations therefore does not preclude expressions of concern or representations by chief justices and chief judges, and organizations that represent Judges to governments regarding the adequacies of judicial remuneration.

Third, and finally, any reductions to judicial remuneration, including defacto reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge.”

With respect to the commissions themselves, Lamer, CJC explained that while the effectiveness requirement could mean that the commission’s report is binding on government, a variety of models would be consistent with judicial independence. Where the judicial compensation committee recommendations were not binding, the government could refuse to implement the recommendations if it gave legitimate reasons and could justify its decision, if necessary, in a court of law.

The effectiveness of judicial compensation commissions became an issue almost immediately after the *PEI Reference* decision was released. In many jurisdictions governments decided for various reasons not to follow the recommendations of the commissions, and the Judges through their associations then challenged those decisions based on the principles outlined in the *PEI Reference*. In 2005, the Supreme Court of Canada issued its decision in *Provincial Court Judges*

*Association (NewBrunswick) v. NewBrunswick (Minister of Justice)* (2005) SCC 44 (*Bodner*) which involved cases from Alberta, Ontario, Quebec and NewBrunswick. In that case the Supreme Court of Canada dealt with the issue of the appropriate test to be applied by a reviewing court to a government's response to the recommendations of a Commission.

The Court held that a commission's task is unique, and that "the process is neither adjudicative interest arbitration nor judicial decision making." Rather a Commission must focus on what is appropriate remuneration for judges in light of the relevant criteria set out in the *Regulation*.

The Court also clarified the test to be applied by a reviewing court when a government fails to implement the recommendations of a commission report. According to the Supreme Court in *Bodner*, a reviewing court must consider the following questions:

1. Has the government articulated a legitimate reason for departing from the commission's recommendations?
2. Do the government's reasons rely on 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 setting of judicial remuneration - been achieved?

#### **IV. JUDICIAL COMPENSATION COMMISSIONS IN ALBERTA**

##### **A. 1998 Commission**

The first Alberta Commission was established by a Framework Agreement dated March 3, 1998. The 1998 Commission recommended significant improvements to the compensation of Alberta Provincial Court Judges:

- (a) Salary: increases from \$113,964 to \$142,000 and \$152,000 effective April 1, 1998 and April 1, 1999 respectively:
- (b) Administrative Stipends: 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.
- (c) Pension: several changes including: a supplemental or an unregistered plan to deal with the maximum salary cap determining pensionable salaries in the federal Income Tax Act; on a go forward basis an increase in the pension accrual rate



increase 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 five 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 the Judges contribute 9% of their annual salaries for a maximum of 25 years and that maximum benefits be accrued after 25 years.

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

The recommendations of the 1998 Commission were not fully accepted by the Government and the Association sought judicial review of the Order in Council where the Government rejected the recommendations. Ultimately the Alberta Court of Appeal held that the reasons offered by the government did not meet the standard of rationality established in the *PEI Reference*, and the recommendations were required to be implemented in full.

#### **B. The 2000 Judicial Compensation Commission**

The second Judicial Compensation Commission was the first commission to be established by regulation, and resulted in the presentation of a joint submission to a sole commissioner.

The joint submission was a product of the settlement agreed to by the parties following the government's challenge of the 1998 Commission's recommendations. The recommendations included an increase in salary to \$170,000 for the period April 1, 2000 to March 31, 2003 and some 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 accepted although it was not part of the joint submission.

#### **C. 2003 Judicial Compensation Commission**

The third Alberta Judicial Compensation Commission issued a report on February 5, 2004 making recommendations with respect to the period April 1, 2003 to March 31, 2006.

The recommendations included a salary of \$200,000, \$210,000 and \$220,000 effective April 1, 2003, 2004 and 2005 up from the \$170,000 salary in place since 2000. Administrative stipends

remained the same and the per diem for supernumerary judges increased from \$760 per day to \$1,000, \$1,030 and \$1,060 effective April 1, 2003, 2004 and 2005 respectively. Other recommendations included indexing LTDI benefits at a rate of 60% of the increase in Statistics Canada Consumer Price Index for Alberta, increase in the professional allowance from \$2,500 to \$3,000, and removal of the \$300 annual cap on extra vehicle insurance required for business use.

The Government accepted the recommendations regarding pensions and other benefits but did not accept the salary and per diem recommendations and set compensation pursuant to Judicial Compensation Order OC161/2004. On the Association's application for judicial review, the Court of Queen's Bench held that the government's justification standard must comply with the Court of Appeal's decision in *Bodner* and ordered the Government to reconsider its position and within 90 days provide reasons justifying any rejection of the recommendations on the ground of exceptional circumstances, failing which the recommendations would become binding on the Crown.

Further reasons were not provided within the 90 days period, rather the government continued to pay Judges and Masters in accordance with the 2003 Commission recommendations even though the *Compensation Regulation* had never been amended or rescinded.

The Association appealed and the Government cross-appealed the Queen's Bench decision but before the appeals were argued the Supreme Court of Canada reversed the Alberta Court of Appeal in *Bodner* and confirmed that the test for judicial review of the reasons for rejecting Commission recommendations is simple rationality and no exceptional circumstances need be shown. The Government did not amend the *Compensation Regulation*, but continued to pay the salaries and per diems recommended by the 2003 Commission.

#### **D. 2006 Judicial Compensation Commission**

In the aftermath of the legal dispute following the 2003 Commission, the Government and the Association supported a joint submission to the 2006 Commission which consisted of a single commissioner John Moreau, Q.C. The 2006 Commission Report recommended a salary of \$220,000 for the period April 1, 2006 to March 31, 2009. The report stated:

“The 2006 commission accepts the submission of both the Minister and the Association that the current agreed salary of \$220,000 for the next three years is a compromise which reflects the current uncertainty surrounding the salary to be paid to federally-appointed judges and the public interest in determining with certainty the salary to be paid to judges in Alberta for the period April 1, 2006 to March 31, 2009.”

The commission also endorsed and recommended the agreed per diem salary rate for supernumerary judges and the adoption of a universal “best three consecutive years” rule when calculating pension benefits. It also approved the compensation paid to part time judges and, in response to the independent submission of a Judge, recommended a change to the LTD program where LTDI benefits would be payable at 70% of the current salary being paid to judges performing regular duties.

The Government accepted and implemented the recommendations of the 2006 Commission in full.

#### **E. 2009 Judicial Compensation Commission**

The current commission is the fifth commission in Alberta, which pursuant to the *Regulation* is to make recommendations respecting the compensation of Provincial Judges and Alberta Masters for the period April 1, 2009 to March 31, 2013.

In *Bodner*, the Supreme Court of Canada stated:

“Each commission must make its assessment in its own context. However, this rule does not mean that each new compensation commission operates in a void, disregarding the work and recommendation of its predecessors. The reports of previous commissions and their outcomes form part of the background and context that a new compensation committee should consider. A new commission may very well decide that in the circumstances its predecessors conducted a thorough review of judicial compensation and that, in the absence of demonstrated change, only minor adjustments are necessary. If on the other hand, it considers the previous reports failed to set compensation and benefits at the appropriate level due to the particular circumstances, the new commission may legitimately go beyond the findings of the previous commission, and after careful review, make its own recommendations on that basis.”

## V. SUMMARY OF SUBMISSIONS

The parties to this proceeding have advanced the following positions:

### A. The Association

#### 1. Salaries

Recommendation sought:

- That effective April 1, 2009 the annual salary for *Puisne* judges shall be increased to \$250,000;
- That effective each of the April 1, 2010, April 1, 2011 and April 1, 2012 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.

#### 2. *Per diem* rate for supernumerary judges

Recommendation sought:

- That effective April 1, 2009, the *per diem* rate payable to supernumerary Judges shall be set at 1/200 of the salary of a full time judge.

#### 3. Pension

Recommendation sought:

- Effective April 1, 2009 and applying to any judge who retires on or after that date, 100% indexing of the judicial pension based on the annual percentage of change in the CPI for Alberta.

#### 4. Professional Allowance:

Recommendation sought:

- The professional allowance shall be increased for full-time Alberta judges from \$3,000 per year to \$3,750 per year and for part-time Alberta judges from \$1,500 per year to \$1,875 per year effective April 1, 2009.
- Where an expenditure is for one of the specified purposes incurred in one year and there is not a sufficient amount of allowance available in that year for payment of that expenditure, that expenditure of the remaining unreimbursed portion thereof may be carried forward one further year for payment.

- A fifth purpose be identified for the professional allowance: namely, for individual (i) fitness facility (including membership) fees; (ii) fitness, health and nutrition lessons, programs and courses; (iii) fitness equipment; and (iv) library memberships.
- That each Alberta judge shall have available the portion of the allowance for fiscal years 2009 and 2010 that represents an increase over what was actually available to judges in those years (based on the above proposal, \$750 per year for a total of \$1,500 for a full-time Alberta judge and \$750 in total for a part-time Alberta judge (until March 31, 2013). To be clear, this provision is unrelated to, in addition to and notwithstanding, the provision regarding the carryover of expenditures set out above.

#### **5. Stipends for Administrative Judges:**

Recommendations sought:

- The salary differentials for Provincial Court of Alberta administrative judges shall be increased for the fiscal year 2009 - 2010 by \$5,000 in the case of the office of the chief judge (from \$15,000 to \$20,000 per year); by \$3,750 in the case of the office of deputy chief judge (from \$11,250 to \$15,000) and by \$2,500 in the case of the office of assistant chief judge (from \$7,500 to 10,000).
- The salary differentials for Alberta's administrative judges in each of the three remaining years of this commission's mandate be fixed as a percentage of the salary of a Puisne judge: 10%, 7.5% and 5% for the offices of chief judge, deputy chief judge and assistant chief judge respectively.

#### **6. Costs**

Recommendations sought:

- That the government shall pay 100% of the association's reasonable legal fees and disbursements including 100% of the cost of any expert evidence.

### **B. Judge Cheryl Daniel**

#### **1. Pensions**

Recommendations sought:

- That all Alberta provincial court judges and masters retiring on or after April 1, 2009, be entitled to receive a pension calculated at a harmonized accrual rate of 3% from September 1, 1988 to the date of retirement. The

maximum pension benefit shall remain at 70% of the average of a judge's three best consecutive years of salary.

## 2. Costs

Recommendations sought:

- That the commission order or recommend payment of Judge Daniel's legal costs for her written submission and oral submission in addition to incidental costs occurred.

## C. The Minister of Justice

### 1. Salaries:

Recommendations sought:

- That the salaries for provincial judges and masters in chambers be set for the period April 1, 2009 through March 31, 2013 as follows:

April 1, 2009 - March 31, 2010: \$235,654 (approximately 7% increase);

April 1, 2010 - March 31, 2011: \$240,367 (2% increase from previous year);

April 1, 2011 - March 31, 2012: \$245,174 (2% increase from previous year);

April 1, 2012 - March 31, 2013: \$250,078 (2% increase from previous year);

### 2. Per diem rate for supernumerary Judges

Recommendations sought:

- That in accordance with the Minister's Salary Increase Proposal, for the period April 1, 2009 - March 31, 2013 the per diem for supernumerary judge should be maintained at the current ratio to the salary of a full-time puisne judge,  $1/207.5$

April 1, 2009 - March 31, 2010:  $1/207.5 \times \$235,654 = \$1136$

April 1, 2010 - March 31, 2011:  $1/207.5 \times \$240,367 = \$1158$

April 1, 2011 - March 31, 2012:  $1/207.5 \times \$245,174 = \$1182$

April 1, 2012 - March 31, 2013:  $1/207.5 \times \$250,087 = \$1205$

### **3. Pensions**

Recommendations sought:

- That there be no specific changes to current pension benefits;

### **4. Administrative Stipends**

Recommendations sought:

- That for the period April 1, 2009 - March 31, 2010 in addition to the base salary of \$235,654, the chief judge, deputy chief judge and assistant chief judges receive administrative stipends of \$20,000, \$15,000 and \$10,000;
- That for the period April 1, 2010 - March 31, 2013, the chief judge, deputy chief judge and assistant chief judges annually receive administrative stipends of an additional 10%, 7.5% and 5% of a puisne judges salary.

### **5. Professional Allowance**

Recommendations sought:

- That for the period April 1, 2009 through March 31, 2013 the Alberta provincial court judges and Alberta Masters should receive a professional allowance in the amount of \$3,750 per annum;
- That the professional allowance include expenditures for health and wellness and masters business clothing; and
- That unpaid eligible expenditures that are not reimbursed in a year can be carried over for one further year for payment.

### **6. Costs**

Recommendations sought:

- The 2009 Commission does not have jurisdiction to recommend payment of 100% of the association's reasonable legal fees and disbursements including 100% of the costs of any expert evidence, as the commission regulation specifically provides that the Crown must pay 2/3 of the reasonable costs incurred by the association in making its submissions to the commission up to a maximum of \$200,000.

- That the *Regulation* does not provide authority to award representational costs to any party. Section 13(12) of the *Regulation* prohibits the commission from awarding costs for written submissions but permits the commission to award reasonable travel accommodation and meal expenses required by the commission to attend. The commission may order reasonable travel accommodation and meal expenses to Judge Daniel should those expenses not be claimable under the *Public Service Subsistence Travel and Moving Expenses Regulation* in accordance with Section 4 of the *Provincial Court Judges and Masters In Chambers Compensation Regulation* AR176/1998. (*The Compensation Regulation* (Appendix ii))

## VI. CRITERIA THE COMMISSION MUST CONSIDER

The *Regulation* sets out in Section 14 that in making recommendations in its report, the commission “must consider” the following criteria:

- (a) The constitutional law of Canada;
- (b) The need to maintain the independence of the court and judges;
- (c) The unique nature of the judges’ role;
- (d) The need to maintain a strong court by attracting highly qualified applicants;
- (e) The compensation of other judges in Canada;
- (f) The growth and decline in real per capita income;
- (g) The need to provide fair and reasonable compensation for judges in light of prevailing economic conditions in Alberta and the overall state of the economy, including the financial position of the government;
- (h) The cost of living index and the position of the judges relative to its increases;
- (i) The nature of the jurisdiction of the court and masters in chambers;
- (j) The level of increases provided to other programs and persons funded by the government;
- (k) Any other factors considered by the commission to be relevant to the matters at issue.

In determining appropriate compensation, this commission must apply the objective criteria and make appropriate comparisons.



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

Both the *PEI Reference* and *Bodner* reflect the principle that the design and level of compensation arrangements are one of the key elements in securing and maintaining an independent and impartial court as required by the *Constitution*.

As confirmed by the Supreme Court of Canada in *R. v. Valente* (1985 Carswell Ont.) 129, the independence of provincial court judges is guaranteed by section 11(d) of the *Charter*. Judges must be compensated in a manner which meets this guarantee. Therefore: 1) changes to compensation must be developed through recourse to an independent commission; 2) there must be no negotiations regarding compensation as between government and the judges; and 3).. compensation must not fall below a minimum standard.

The court in the *PEI Reference* did not purport to prescribe an acceptable minimum level of judicial remuneration. The court did state that “the guarantee of a minimum acceptable level should not be seen as “a device to shield the courts from the effects of deficit reduction.”

As a result, this Commission, in order to acknowledge the Constitutional Law and with a view to maintaining the independence of the court and judges, must carefully consider and weigh the positions advanced by the Minister and the Association in these proceedings, and provide reasons for the recommendations, in order to determine the appropriate level of compensation.

Regard must be had to what has been said by previous commissions, the appropriateness of comparisons with other provincial courts and judges, and federal courts and Section 96 judges. The commission and its process constitute a structural separation between the government and the judiciary. The Commission process fully meets the description of a “an institutional sieve” as envisaged by the Supreme Court of Canada.

The parties to the process of the 2009 Commission were *ad idem* that the independence of the judiciary is constitutionally guaranteed and is promoted by the Commission process to ensure appropriate compensation levels are arrived at, and recommended. We are grateful to the Canadian Bar Association Alberta Branch and the Law Society of Alberta. They each provided

this Commission with submissions supporting the commission process, as a structural separation between the government and the judiciary, to recommend the design and level of compensation arrangements to protect and promote the independence of the judiciary and strengthen and advance the judiciary through sufficient financial independence of its members.

This Commission accepts these principles as governing its deliberations and recommendations.

**(c) The Unique nature of the Judges' Role.**

This criterion focuses attention on the differences between what is required of judges and that required of others employed in important roles in society. The 1998 Commission observed that:

... there is no question about the critical role that our judges play in enforcing the law and protecting the values of our society. In the end, it is the judge who must take away the liberties of the individual, sentence an individual to incarceration and adjudicate on issues of survival, security and development of children. No other member of our society has the same responsibility and authority of a judge.

The office of judge casts 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 counter-balanced by the office's significant obligations and restraints.

The question of whether laws have been violated cannot be decided by popular vote. Such decisions, out of necessity, fairness, and justice must be decided by persons knowledgeable in the law and acquainted with the detailed facts of each individual case. That is the role assigned to judges, and it is what makes their role different and unique. They must be true to the expression of the public will contained in our laws, many of which are highly complex. They must decide individual cases based on the evidence put before them, free of improper influences like the momentary public mood, the status (or lack of status) of those before them, or the opinions expressed, often by those less informed of the circumstances, in the media. Justice depends upon judges being truly independent and independence requires courage, wisdom and fortitude. Society expects nothing less from those appointed to the Provincial Court Bench.

Judges are unique in the extent to which they are subject to public scrutiny. In their public role, their decisions are routinely commented upon in the media and in public discourse. The bail

applications they hear, the cases they adjudicate upon, and the sentences they impose are very often subject to widespread and almost instant scrutiny. While the Judge often has a much more detailed understanding of the laws and facts in issue, they unlike others, have no ability to respond to criticism, no matter how unfair or ill informed.

In their private lives, judges are required maintain the highest standards of personal conduct. Judges must protect their ability to remain independent by avoiding personal conduct and associations that might compromise, or even appear to compromise, the Court. They must maintain a moral authority to judge, which imposes extraordinary restraints upon them and, to a significant degree, upon their families. They must forego all outside business interests.<sup>1</sup> As the Court noted in the *PEI Reference* case:

Independence of the judiciary implies not only that a judge should be free from executive or legislative encroachment and from political pressures and entanglements but also that he should be removed from financial or business entanglement likely to affect or rather to seem to affect him in the exercise of his judicial functions.

The 1998 Commission also noted that:

Appointment to the bench is viewed as a long-term commitment, not a stepping stone to another career. Following retirement, the options are limited for a number of reasons. The Rules of the Law Society preclude a judge for an extended period from returning to practice before a Court over which he or she has presided, or any Court over which that Court has jurisdiction. Moreover, judges from private practice (approximately 80 percent in Alberta) would have given up their practice and severed business relationships years before.

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

The Court's reputation depends on every member of the Court. Any lapse in the quality and integrity of any individual judge has the potential to undermine the reputation of the entire Court. Individuals who appear before the Court, and the Crown in presenting cases to the Court are entitled to even handed and uniformly high quality justice, independent of which judge is sitting on any given day.

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<sup>1</sup>See s. 9.41 of the *Provincial Court Act*.

If the persons best qualified to sit on the Court are deterred from applying for, or accepting, judicial appointment for any reason, both the quality of the court and its reputation will suffer. We are therefore required to consider just what attracts, and by inference may serve to distract, applications by those best qualified to serve. It would be simplistic to say ever higher salaries will attract the best people. Indeed, if judicial compensation becomes too high it may attract too many less qualified persons who want the job for its financial benefits rather than its public service and responsibility aspects.

The Association urges us to weigh the following points when applying this criterion:

1. This Commission mechanism is itself an important factor in attracting qualified candidates. It reassures applicants that their future compensation, which they will be precluded from negotiating for themselves, will be set through an independent, rational and objective process.
2. The number of applicants alone does not prove the criterion has been met. That can only be determined by a steady flow of highly qualified applicants, including those willing to sit outside of Edmonton or Calgary.
3. The Commission should recognize that the Provincial Court competes with the other Courts – the Queen's Bench, the Court of Appeal and the Federal Court of Canada, all seeking to attract candidates from a pool of lawyers with at least 10 years at the bar. Any "financial gap" between these alternatives cannot be too wide. This applies not only to base pay but to issues like pension indexing, pension benefits and other aspects of remuneration. This concern applies beyond recruitment, since sitting Provincial Court Judges are increasingly seeking and accepting Superior Court appointments.
4. Recruiting highly qualified judges requires a diversity of legal knowledge and experience. It also requires diverse racial, ethnic, cultural, linguistic and gender characteristics. The Court will not thrive if it can only attract persons from the Crown and Criminal bars.

The Minister acknowledges the need to keep compensation competitive with other courts and to avoid any "economic disincentive" to accepting an appointment to the Court for which the candidate is best suited. However, the Minister is also of the view that there will always be some who will prefer a Superior Court appointment. The Minister rejects any moves towards "judicial parity."

The Minister canvassed the list of appointees to the Provincial Court and provided biographies in support of the view that a high caliber of candidates has been attracted to the Court. These appointees had an average of 24 years at the bar and averaged 52.74 years of age on appointment.

The Minister provided statistics in support of the view that the flow of candidates is strong and that there is an available pool of applicants who have been recommended by the Provincial Court Nominating Committee as “Recommended” or “Highly Recommended”. This, the Minister asserts, will ensure that the Court’s overall high standard of excellence will continue.

**(e) The Compensation of other Judges in Canada**

We have already observed that the role of judges and masters is unique. It should come as no surprise, then, that when we look for the most apt comparisons to draw for purposes of assessing the appropriate level of compensation for individuals in these roles, we should look to compensation paid to their colleagues in other jurisdictions. Consideration of remuneration paid to other professions and occupations will inevitably be less meaningful.

What judges and masters performing similar functions in other jurisdictions are being paid can provide guidance with respect to the adequacy of their remuneration in this province, and offer a measure of assurance that the key constitutional requirements associated with the compensation of judges, as previously articulated, are being met.

Past commissions have all identified this criterion as one of the more important ones to have regard to in developing recommendations. At the same time, past commissions have also expressed the caution, which we adopt, to not let this one criterion completely overshadow other factors that need properly to be taken into account to arrive at our conclusions. As the 1998 Commission said in its report (*Joint Book of Authorities*, Tab 15, at page 31):

From our perspective, at the risk of generalizing, a comparative analysis of other jurisdictions is clearly instructive but not determinative of the appropriate compensation for our Provincial Court judges, for a number of reasons [emphasis added].

The submissions of both the Association and the Minister attached significance to this criterion, and dwelt on it at some length. There were differences of emphasis in their respective positions. This is understandable.

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 gist of the Association’s submission was that the most important jurisdictions for Alberta to be compared to for our purposes were Ontario and the federal jurisdiction. The Association advocated for parity of pay with Ontario provincially appointed judges. While arguing that there was also a case to be made for parity between Alberta Provincial Court and superior court judges, the Association did not seek to match compensation levels of federally appointed judges. The submission was that the gap between these comparators, if not narrowing, should at least not be permitted to widen.

The Minister’s presentation also focused on Ontario as a key jurisdiction to measure compensation levels for judges and masters in Alberta against, though arguing that the objective should be to set Alberta salaries somewhat below current Ontario levels, rather than on a par, to reflect a longer view of the historical relationship between judges’ pay in these two jurisdictions.

The Minister’s submission took issue with the notion that compensation for provincially appointed judges should equal, or be formulaically linked to, salaries of federal judges. The argument advanced was twofold: that superior court justices continue to perform different duties from their provincial counterparts within a hierarchical justice system in Canada that should be acknowledged in different levels of pay; and that the method of determining compensation for judges at the federal level engages criteria extraneous to, and therefore inappropriate to be considered when, setting salaries for our provincial appointees.

One of the challenges identified in undertaking comparisons of judicial compensation between jurisdictions is that parallel compensation review processes take place federally and in other provinces at different times. The periods for which compensation arrangements are in place in one jurisdiction will not necessarily align with periods for which judges' pay has been fixed in another jurisdiction.

This phenomenon led to competing submissions before us about the significance of "point-in-time" comparisons, whether or not "catch-up" was required to address differentials in compensation relative to other locales that had arisen over the time frame since the last Compensation Commission recommendations were implemented in Alberta in 2006, and speculation about what might transpire in other jurisdictions with respect to salaries over the period of our Commission's remit where compensation levels are not yet known, notably in Ontario.

One way for us to address the vagaries of timing of different compensation-setting processes in different jurisdictions is to consider trends that the comparators exhibit, rather than isolating data on specific dates. This will tend to even out year-to-year variations.

Broadly speaking, key trends that we derive from an examination of the data the Association and the Minister presented to us about inter-jurisdictional comparisons include the following:

- Salaries of federally-appointed superior court judges have typically exceeded salaries of Alberta Provincial Court judges; in the period that independent compensation commissions have been operating, since 1998, up to April, 2009, the gap has ranged between 7% and 19%, averaging 13% over this time frame.
- Pay of Ontario and Alberta Provincial Court judges has historically been aligned more closely; since 1998 differences have varied between 0% and 14%, averaging 5% (with Ontario salaries exceeding Alberta salaries) over this full period.
- In 2000, 2003 and 2006, when the past three Alberta Judicial Compensation Commissions issued their respective reports, they recommended salaries for Alberta judges and masters equating to 99%, 97% and 100% of Ontario salaries in place at those respective times; the trend has been to more closely match pay between these jurisdictions over the last decade.

Another way in which these different views about the impact of the timing of judicial compensation processes manifested itself in argument before us was the Association's contention

that a commitment had effectively been made on behalf of the Minister, during the 2006 Commission proceedings, to maintain equivalent compensation for Alberta judges and masters with their Ontario counterparts in the intervening years following 2006. In this regard, we were referred to comments made by the Minister's legal counsel (David Kinloch) during the 2006 Commission hearing (Transcript of the 2006 Judicial Compensation Commission hearing, page 23, line 24 to page 24, line 1):

...we're proud of the compensation being paid to Alberta Judges, which will probably still leave them as the highest paid Provincial Judges in Canada. We don't know what Ontario is going to do, so Ontario may nose us out and that may have to be rectified in the future.

We do not take the comments made by the Minister's representative at the 2006 hearing as amounting to any sort of binding commitment to ensure that salaries for Alberta judges and masters were always to remain at or above Ontario salaries, or as a promise to make retrospective adjustments if Ontario compensation levels rose above those in Alberta. We do not interpret these comments as constraining the position that the Minister was entitled to advance before us in this proceeding.

We must remain cognizant of temporal limits that circumscribe our role. Our recommendations concern a defined time frame set out in section 9 of the *Regulation*. While we can certainly consider what has transpired with judges' and masters' salaries over the last number of years in deciding what to recommend today, our recommendations can only deal with compensation arrangements effective April 1, 2009, and forward-looking to March 31, 2013. Indeed, neither party suggested that we should contemplate recommendations to make retroactive adjustments to pay for any time period prior to April 1, 2009.

#### **(f) The Growth and Decline in Real Per Capita Income**

We were informed that Average Real Personal Income Per Capita ("ARPIPC") is a broad measure of personal income (including labour and investment income), expressed on a per capita basis, and adjusted for inflation. Data supplied indicated that in Alberta in 2009 ARPIPC decreased by 2.6%, that it was estimated to have increased by 1.5% in 2010, and that it was forecast to increase at an average rate of 2.3% per year in 2011, 2012 and 2013 (Report of Mary MacGregor, Chief Economist, Alberta Finance and Enterprise ("AFE"), March 18, 2011 (*the*



*MacGregor Report*) (Ministers' Submission Tab 6), relying on source data and forecasts contained in the Alberta Finance document, (*Budget 2011*) (Tab 38, Agreed Facts and Exhibits) (AFE).

It was noted that the decline in ARPIPC in 2009 was unprecedented -- it was the first annual decline since the data series was established in Alberta in 1981. That is an indication of the negative economic conditions that affected the province that year. However, it was also noted that the main source of the decline in ARPIPC in 2009 was a drop in personal investment income, as opposed to a drop in labour income (MacGregor Report, March 18, 2011, pages 3 and 4).

In its submission, the Association focused its comments about this criterion on comparing historical levels of ARPIPC in Alberta with levels of this economic measure in other Canadian jurisdictions. It was observed that real personal incomes in Alberta have increased faster relative to other provinces for a number of years, to the point where, "[i]n 2008 [the year before the drop noted earlier], the real per capita personal income in Alberta was 19.3 per cent greater than in Ontario and 22.3 percent greater than the Canadian average". Melville L. McMillan, Report on the State and Short and Medium Term Prospects of the Alberta Economy and the Financial Position of the Alberta Government (*the McMillan Report*) (Associations submission Tab 12).

The Association points to Alberta's position today leading the country in levels of average real personal income; this position is expected to be maintained throughout the period that our recommendations are to address.

**(g) Need to Provide Fair and Reasonable Compensation for Judges in Light of Prevailing Economic Conditions in Alberta and the overall state of the economy, including the Financial Position of the Government.**

It was acknowledged at the hearing before this Commission that this criteria requires the Commission to consider the general economy in Alberta, the financial position of the government, and the overall state of the economy, including the state of the economy in the rest of Canada.

The opening submissions on this criteria, in each of the Minister's and Association's submissions are interesting on their opposing perspectives.

“Alberta’s fiscal position through 2009 and to the present is arguably the worst it has ever been.”

The Association’s submission states:

“Alberta’s economy continues to be remarkably prosperous, a fact which becomes particularly obvious when Alberta’s economy is compared with the economies of other provinces and territories across Canada.”

The Association’s submission addresses the Alberta economy. The Minister’s position addresses the financial position of the Government. The opposing perspectives require us to objectively assess the criterion on the evidence put forward.

The *McMillan Report* and the *MacGregor Report* in summary, establish that the recession has had severe negative effects on the Alberta economy where GDP growth contracted by 4.5% in 2009. In 2010 the economy grew by 3.5% and projections for 2011, 2012 and 2013 are predicted by Alberta Finance to be 3.3%, 3.2% and 3.3% respectively.

With respect to recovery, the *MacGregor Report* notes that there are indications of recovery on a global scale and also in Canada including Alberta, but the extent of the rate of recovery is subject to uncertainty:

- Canada’s “... overall economic growth for 2010 came in at 3.1% while Alberta’s ... economic growth in 2010 is estimated at 3.5%.”
- It is noted that the consensus of “private sector forecasters” is for an increase in the Alberta GDP at 3.1% for 2010. It is further noted that “most analysts expect Global Economic Growth to be slow in 2011”.
- In terms of wage growth for 2010 it is noted that the growth in the Average Hourly Wage Rate was only 1.3%, the growth in AAWWE was 4.6% and the estimated growth in ARPIPC was 1.6%.
- Risk to the global economy remains unusually high.
- Canada’s economic performance is expected to be “... weighed down by the high Canadian dollar and its dependence on the US economy, which continues to struggle...”
- “Much of the strength in the Alberta economy is expected to come from the oil sector.” There is an expectation of relatively high oil prices but relatively weak natural gas prices.”

The *McMillan Report* indicates that the global recession of 2008 to 2009 “set back the Alberta economy just as it did many others.” “However, Alberta appears to be recovering well and better than most other Provinces.”

The government has budgeted deficits for fiscal 2009, 2010, 2011 and 2012 but a projected surplus in fiscal 2013.

The significant declines in Provincial government revenues require caution to be exercised in future revenue projections because of the volatility in energy prices, currency rates and equity markets.

The *McMillan Report* at page 32 states:

“Alberta is expecting deficits in 2010-11 and for another two years with budget balance being restored in 2012-14.” “Alberta is an exceptionally good position to cope with the expected deficits.”

Reference is made to the fact that since the 1990’s and by 2004-5 the provincial debt was effectively eliminated. That, in addition to the “sustainability fund”, has cushioned the deficit position.

Ontario remains the most useful comparator among the other provinces and territories, but the *McMillan Report* demonstrates that the Ontario economy has fallen behind that of Alberta when measured by the key economic indicators. According to the *McMillan Report*, despite the impact of the recession, Alberta’s economy is clearly the envy of the nation. A reference to the comments of Minister Snelgrove contained in the 2011 budget speech, suggests the same is true of the Province’s finances. Minister Snelgrove stated: “thanks to a combination of prudent management and forethought, Alberta has weathered the downturn - and emerged from it in a stronger fiscal position than any other province. (Joint Book of Agreed Facts and Exhibits, Tab 31, page 2)

The Minister, in its submissions, stated as follows:

“... The Minister would submit that the fact that the GOA by previous cautious and prudent financial management, was able to pay off its debt and was able to accumulate substantial “rainy day assets” (ie: the Sustainability Fund) should not be seen to diminish the seriousness of the

GOA present financial situation, ie: the series of success of substantial deficits which, as noted above, total something in the range of \$10 billion dollars over five years, and the uncertainty of the degree and nature of the anticipated economic recovery.”

This Commission accepts that the global recession of 2008-9 has had a profound effect on the economic conditions in Alberta and on the overall state of the economy including the financial position of the government. We accept as stated by Professor McMillan, and Minister Snelgrove, that the unique Alberta economy is in a recovery mode and that Alberta has weathered the economic downturn in a manner that is the envy of the other provinces and territories in Canada. That said, the rate and speed of the recovery is by no means certain.

It is our view, the state of the economy and the fiscal position of the Government requires us to examine what is fair and reasonable compensation for the mandate of this Commission, with caution. Increases in judicial compensation must be tempered by the reality of the economic conditions in the province gauged by the economic conditions in the rest of Canada, including, and particularly, in Ontario.

#### **(h) The Cost of Living**

Changes in the cost of living are a factor we need to consider in formulating our compensation recommendations for judges and masters. Section 14(h) of the *Regulation* says we must examine “the cost of living index and the position of the judges relative to its increases”.

The effects of inflation are important to bear in mind; they were singled out as a consideration by the late Chief Justice Lamer in the *PEI Reference* (at [1997] 3 S.C.R. 3, paragraphs 135, 174 and 195) in the context of stipulating that independent judicial compensation commissions, to be effective, needed to convene and assess pay levels regularly, in order to guard against the erosion of judicial salaries because of inflation.

The Association maintains that because salaries of masters and Provincial Court judges have been fixed at the same amount since 2005, changes in the cost of living since then are particularly important for us to take into account. The economist who was called to give evidence by the Association, Dr. McMillan, calculated that the value of the \$220,000 annual salary of a judge in 2005, adjusted for changes in the cost of living index for Alberta, had been

effectively reduced to \$195,576 by the end of 2008, a “reduction” in terms of purchasing power of more than 10% in a four year period (*McMillan Report* page 8).

The Minister’s representations to us about this criterion emphasized that inflation has moderated as a feature of the Alberta economy in the time frame that is relevant to our review. Indeed, 2009 featured the unusual experience of a slight deflation in consumer prices in this province -- yet another indicator of the significant economic retrenchment experienced that year. The Minister referred to a commentary from an Alberta Finance publication (“Economic Spotlight -- Alberta Wage Update”, March 4, 2011, at page 3) (AFE Tab 18):

While Alberta’s inflation rate was consistently above the Canadian average during the investment boom, it came down sharply during the downturn . . . . After virtually disappearing in 2009 (-0.1%), inflation in Alberta remained subdued in 2010 with a growth of only 1.0% -- below the Canadian rate of 1.8%. Alberta (1.0%) had the second lowest rate of inflation among the provinces, with only Manitoba (0.8%) having a lower rate.

Forecasts about the expected changes in the Alberta (All Items) Consumer Price Index for this year and the next two were supplied to us by the parties. The AFE, *Budget 2011* document set out predictions of inflation of 1.9% for 2011, 2.3% in 2012 and 2.2% for 2013. The Association pointed to forecasts from a different source suggesting lower rates of increase in the cost of living index anticipated for 2011 and 2012 1.7% and 1.9% respectively; (*McMillan Report* page 10).

#### **(i) The nature of the Jurisdiction of the Court**

This criteria requires us to consider the nature of the Court’s jurisdiction. Implicitly, since all prior Commissions have considered this factor, it focuses particularly on changes in the Court’s jurisdiction.

Three factors are altering the scope of the Court’s work. The first is legislation that expands and broadens its jurisdiction. The second is pressures of time and economy that lead people to seek judicial resolution of their affairs at the Provincial Court level. The third is the Court’s growing reputation among litigants and their counsel for its ability to handle their matters fairly and efficiently.

The Provincial Court is geographically the most available Court. The Provincial Court travels to more places and with greater frequency than other Courts. The Court conducts its proceedings in 71 locations across Alberta, in contrast to 13 for the Court of Queen's Bench and two for the Court of Appeal.

At one time the Provincial Court was largely involved in preliminary hearings and summary conviction matters with more serious matters more frequently being tried in the Superior Courts. Now, it handles a vast majority of the criminal trials. An astounding 97% of charges laid are now concluded in the Provincial Court.

This change is partly a result of changed legislative options and a desire to have proceedings dealt with as soon as possible. However, it also reflects a change in the choices the accused and their counsel make, accepting more willingly than in the past, that the quality of adjudication in the Provincial Court is as good as they will receive in any Court.

New police powers, and the judicial control on the exercise of some of those powers has resulted in a significant increase in the Judge's pre-hearing work. This includes applications for search warrants, general warrants, DNA warrants, wiretap orders, production orders, assistance orders and prisoner transfer orders. The Court has jurisdiction over several aspects of Canada's firearms legislation. The Court continues to carry primary responsibility for judicial interim release. This type of work increasingly adds to the intensity of the judicial day.

All new offences under Provincial statutes or municipal bylaws fall within the jurisdiction of the Provincial Court. Many of these quasi-criminal or regulatory matters involve significant penalties and remedies designed to adjust social standards. This includes vital matters like environmental protection, and workplace safety. For example, now that new distracted driver legislation is proclaimed, all resulting prosecutions will go to, and expand the workload of, the Provincial Court. With that will go the responsibility of establishing the meaning and scope of that legislation.

The increasing use of judicial processes in new legislation not only increases the Court's workload but also steadily widens the subject matter on which the members of the Court must

remain current. Provincial and municipal offences between 2002/03 and 2008/2009 grew 74.5% from 229,927 to 401,186 changes.

This criterion; the nature of the Court's jurisdiction, is linked particularly to "(e), the compensation of other judges in Canada" and to the inevitable comparison between the judges of the Provincial Court of Alberta and of the Court of Queen's Bench. 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 trials. 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 offences given their exclusive jurisdiction over important regulatory and municipal laws.

The civil jurisdiction of the Provincial Court has changed dramatically from when it was "Small Claims Court." The Court can currently hear cases involving claims up to \$25,000 and the Lieutenant Governor in 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 dispute 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. As the inquiry into the murder of 4 RCMP officers in Mayerthorpe illustrated, such inquiries can attract a great deal of public attention. They can also deal with highly sensitive or controversial circumstances.

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 *Youth 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.

While there has been no other major legislative changes in these areas, case law is constantly developing. It is often harder to preside over informal procedures than the more formal. Dealing with children, their parents (often at odds with each other) and a high percentage of unrepresented litigants creates particular challenges for the judges working in these areas of the law.

Courts face added workload and increasing challenges dealing with unrepresented litigants. Such cases take longer and involve the presiding judge in treading a line between decision maker and protector of the procedural rights of all parties. This is particularly pronounced for the Provincial Court's family law jurisdiction. It represents the only affordable route for people unable to retain counsel, yet it has all the emotional intensity of family law proceedings in the Court of Queen's Bench.

**(j) Levels of Increases Provided to other Programs and Persons Funded by the Government.**

The Minister, in its submissions, set out spending priorities with respect to fiscal 2009, 2010, and 2011, all priorities dictated by the drastic declines in revenue following the world wide economic downturn in 2008. The government found savings in 2010-11. "Savings" included "...value review savings... such as reduced discretionary spending, a freeze in public sector hiring and



management salaries, discontinued achievement bonuses, streamlined administration and other noncore functions". It was further noted that "...numerous programs across government were evaluated, prioritized and if appropriate, resources reduced". (*2010 Fiscal Plan Overview, Tab 13 to Minister's submissions* page 12) It was acknowledged by the Minister at the hearing that the government's restraint approach during the mandate of this Commission has been largely through program reduction rather than salary restraints for those who continue to work in the programs. For the most part, public sector employees have in fact received increases in 2009 through 2011.

The Minister in its submissions, cited examples of Government of Alberta restraint measures, including a hiring freeze and a cut in discretionary and low priority spending, as well as a two year wage freeze for civil service managers. On October 15, 2009 the Premier announced that he and his executive team were taking pay cuts effective immediately. The Premier's pay cut was 15% and each Minister's was 10%. MLA salaries were frozen from April 1, 2009 to March 31, 2011 which had MLA's foregoing accumulated increases of 8.88%. Effective April 1, 2010 there was a two year salary freeze put in effect for all GOA Management employees including cancellation of performance bonuses.

The Alberta unionized public sector wage table attached as Tab 23 to the Minister's submission showed average annual unionized public sector wage increases in Alberta to be 4.7% in 2009, 2.5% in 2010, and 2.2% projected for 2011. Average health care wage settlements for 2009 through 2012 were 4.95%, 3.5% and projected 3.3%, respectively.

Alberta public sector management wage increases prior to April 2010 (the salary and bonus freeze) show that the average percentage increase for Alberta public sector managers from April 1, 2009 was 4.3%. This applied to all senior officers including legal officers.

It was urged on this Commission that this Commission acknowledge the legitimacy of the government's priority policy and restraint measures, and acknowledge the relatively high importance of the prevailing economic conditions in Alberta and the overall state of the economy including the financial position of the government, as well as the level of increases provided to other programs and persons funded by the government (criteria (g) and (j)).

The Association in its submissions emphasises that “priority spending” decisions are policy choices and “highly political” and that this Commission must make its recommendation based on “objective criteria, not political expediencies”. The major concern expressed by the Association is that judges salaries were set on the recommendations of the 2006 Commission based on joint submissions by the Association and the Minister, for the period 2006 to 2009, without indexing. The wage freeze or reduction in increases for public sector employees, post 2009, are made after significant cumulative increases ranging from 15.4% to 32.9% during the term of the 2006 commission. At the time the 2006 Commission accepted the joint submissions of the Association and the Minister the \$220,000 salary was the highest in Canada, but the parties and the Commission did not know what was going to happen in Ontario and Federally with judicial salaries to compare the Alberta judges’ position nationally. The Association emphasises that judicial salaries have remained frozen at \$220,000 from 2006 to 2009 and that this was done by the 2006 Commission on the basis that the 2009 Commission could, in the submission of the Minister, take into account the erosion by inflation of the 2006 commission’s salary recommendations when the 2009 Commission deliberates on the appropriate level of compensation that this Commission can recommend.

The level of increases of other programs and persons funded by the government must be considered in this Commission’s recommendations. This Commission is bound to consider the restraint exercised by the government in its approach to public sector wage increases post 2009. This Commission cannot, however, review the restraint in those increases without taking into account what has happened comparatively since 2006 to the present time.

The Association argues that its proposal for an increase of 13.6% to \$250,000 effective April 1, 2009 is only 1.2% more than the cumulative changes in the cost of living over the same period of time, much less than the range of substantial increases granted to public sector groups.

## **VII. MASTERS IN CHAMBERS**

Our mandate is to make recommendations covering remuneration for Judges of the Provincial Court. Subject to provincial acceptance, those recommendations will also apply to Masters in Chambers. There are vastly more Provincial Court Judges than there are Masters in Chambers, the latter office being something of a constitutional anomaly. While the Masters in Chambers

operate within the Court of Queen's Bench of Alberta, they are not Section 96 Superior Court Judges. As a result the remuneration is subject to Provincial not Federal jurisdiction.

For a variety of very practical reasons the remuneration and pension arrangements for the Masters in Chambers are linked directly, by Section 9.1 of the *Compensation Regulation* to those established for Judges of the Provincial Court.

For the reader, we wish to make it clear that the emphasis on the Provincial Court and the absence, in the submissions and in our resulting recommendations, of references to the role of Masters in Chambers, is no indication that we are not cognizant of their special and vitally important role in the court system of Alberta. It is simply a result of a statutory link between the two offices and an apparent acceptance all around of this historical linkage.

Masters in Chambers exercise a wide variety of jurisdictions on behalf of the Court of Queen's Bench. Their ready availability and their particular expertise in important practice matters add considerably to the efficiency of the Court of Queen's Bench and to the speed and quality of justice available to litigants before the court. They have experienced many of the same trends in terms of their jurisdiction and concentration of their work as have their colleagues on the provincial bench. The importance of judicial independence, the need to recruit and retain qualified candidates and the requirement for wisdom in their judicial duties and discretion and propriety in their private lives applies equally to those who hold this important office.

## VIII. RECOMMENDATIONS

### A. SALARIES

We recommend the following with respect to salaries for judges and masters:

- **For the period April 1, 2009 through March 31, 2010, that the annual salaries of judges be fixed at \$250,000;**
- **For the period of April 1, 2010 through March 31, 2011, that the annual salaries of judges be fixed at \$255,000;**
- **For each of the periods April 1, 2011 through March 31, 2012 and April 1, 2012 through March 31, 2013, that the annual salaries of the judges be increased by the percentage amount of the year-over-year increase, if any, in**

**the “Alberta (All Items) Consumer Price Index” for the preceding calendar year, as published by Statistics Canada.**

In arriving at the foregoing recommendation, we have taken all of the statutory criteria into account. In particular, the circumstances described below have weighed most heavily in reaching our conclusions.

First, we accept the consistent view expressed by past Commissions that there remains justification to distinguish pay levels for federally and provincially appointed judges. There is a recognized hierarchy within the judiciary, and there remain differences in the roles of judges of the superior and provincial courts. Our salary recommendation is intended to preserve what we consider to be a suitable difference between salaries for judges of these courts. While opposing arguments were advanced before us about whether or not retaining this compensation gap between superior and provincial court judges was still justified, in reality no one advanced the position that the gap be eliminated.

One might initially question the appropriateness of the \$30,000 pay increase that we commend to government in this report; an almost 14% immediate increment in salary and provincial judges with retrospective effect to April, 2009. The timing of this recommended increase, relative to the economic downturn that year, might add to the questions. However, we maintain that closer examination of the relevant circumstances lends ample support to our recommendation.

Importantly, Alberta judges have not received a salary increase since 2005. Even though 2009 was a challenging year for the Alberta economy in general, as well as for the fiscal situation of the provincial government, we still believe that a significant upward adjustment to the remuneration of judges in this first year of the time frame that our recommendations are to address is justified, to account for the static levels of pay they received during the four years preceding April 1, 2009.

Levels of remuneration in this province, across the public and private sector, experienced broad advances in 2006, 2007 and 2008. A tight labour market in Alberta and a positive economic climate for most of these intervening years resulted in increases to earnings levels and the cost of living that, with the benefit of hindsight that we can exercise at this stage, have left provincial court judges and masters substantially behind in their compensation arrangements.

We are also of the view that a 2% upward adjustment to salaries for the 2010-2011 year is appropriate. This corresponds with the Minister's proposal for incremental increases over the term that our recommendations address (recognizing, as we do, that the Minister's proposal contemplated these increments in relation to a lower salary proposed for the 2009-2010 year).

The increases we recommend for 2009-2010 and 2010-2011 will put judges more or less on a par again with their Ontario counterparts, when viewed over the time frame for which we have comparative data available. As of April 1, 2009 the salary of \$250,000 we recommend for Alberta Judges compares to a \$248,057 salary in Ontario. As of April 1, 2010 the Alberta salary would increase to \$255,000, while the Ontario salary was fixed as of that date (subject to recommendations of a judicial compensation commission in that province that we understand have yet to be released) at \$252,274.

We have very recently been informed by the parties that judges' salaries in Ontario increased again effective April 1, 2011 to \$262,113. Our recommendations do not contemplate Alberta salaries increasing to match this Ontario pay level in 2011; instead they would only increase to \$257,550. This is because of our recommendation to utilize changes in the Alberta Consumer Price Index to trigger salary adjustments in 2011 and 2012, as opposed to adopting the mechanism of tracking increases in the Industrial Aggregate Income Index for Canada, which is used in Ontario. We have more to say about this below.

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.

We disagree with the submission of legal counsel for the Minister that a longer-term view of the relationship between Alberta and Ontario compensation levels supports keeping salaries for Alberta judges at 95% of Ontario salaries. The notion of a persistent 5% gap in judges' pay is not reflected in the recommendations of the past several Judicial Compensation Commissions.

Nor is discounting pay for judges in Alberta compared with Ontario in keeping with what we perceive to be the relative economic standing of these two jurisdictions as it has evolved over the last decade or more. Alberta, despite difficult economic times that impacted the province and the country (indeed, the global economy) in 2009, is still, by many measures, in an enviable fiscal position compared to Ontario and other jurisdictions. Quite simply, Alberta can well afford to match Ontario compensation levels.

We do not suggest that the only criterion for setting pay for judges in this province should be an exercise in following Ontario's lead. We can, and should, have "made in Alberta" salaries for provincial court judges and masters. Our salary recommendations, overall, are intended to achieve this result.

We accept that a method should be adopted to protect judicial salaries against erosion from increases in the cost of living over the term that our recommendations are to address. To this extent, we agree with the submission of the Association on this point. However, we do not concur with the suggestion that the appropriate way to account for increases in the cost of living is to tie judges' compensation levels to changes in Average Weekly Earnings.

Fundamentally, this is because the Average Weekly Earnings statistics (or, as they are referred to in the federal and Ontario jurisdictions, the Industrial Aggregate Index statistics) do not measure changes in the cost of living. Instead, they reflect changes in total earnings received by workers. Changes in earnings are influenced by various factors, including pay adjustments, fluctuations in hours worked, variations in overtime compensation, commissions and bonuses earned, and changes in the levels of other monetary entitlements that make up the whole bundle of "earnings" of employees. The AWE (or IAI) indicator does not, in any direct sense, capture changes in the cost of purchasing consumer goods and services.

The more obvious way to have salaries track changes in the cost of living is to tie future pay adjustments to the rate of inflation of consumer prices. This is why we recommend using the rate of change to the Alberta All-Items Consumer Price Index as a mechanism to establish future salary increases for judges and masters. This statistic truly measures the incremental cost of living over time.

By this recommendation, we do not mean to suggest that the only appropriate benchmark to use to set future compensation adjustments for judges is changes to the CPI (as opposed to tracking rates of change to ARPIPC, AWE, IAI or other indices of economic activity). Rather, our conclusion on this point is informed by, and intended to be limited to, present circumstances.

Information supplied to us in the course of our proceedings (in the form of Statistics Canada data cited in the Alberta Finance publication, "Economic Spotlight – Alberta Wage Update", March 4, 2011 (AFE Tab 18 at page 3), indicated that for the year 2010 the Alberta (All Items) Consumer Price Index increased by 1.0% on a year-over-year basis. If our salary recommendation is implemented this will result in an increase in the annual salaries of the judges, effective April 1, 2011 of \$2,550, bringing their total pay to \$257,550 per annum.

For the remainder of our mandate, we recommend no salary decreases in the event of any repeat of deflation for 2011. We do not consider deflation likely to re-occur in this year based on the experience to date and the forecasts supplied to us, but even if it did, we do not consider a retreat in levels of pay to be warranted.

Assuming there is inflation of the Alberta (All Items) CPI over the course of this full year, we believe a salary increase matching the annual price index percentage increase will be appropriate to ensure that judicial compensation keeps pace with relevant economic circumstances. We see this to be a better approach than fixing salaries at the same level for a four year stretch, as occurred with the 2006 Commission recommendations that the parties had jointly endorsed.

In sum, our view is that a significant, retrospective increase in pay for provincial judges is warranted to account for the absence of any increase since 2005. We balance this with our recommendation for more modest increases in the second and third year of our mandate, and what we anticipate will be a similarly modest increase to pay, tied to inflation, for the final year that our recommendations address.

## **B. PER DIEM RATES FOR SUPERNUMERARY JUDGES**

The 1998 JCC was advised that supernumerary judges were currently receiving 1/200 of the annual salary of full time judges for a full day of sitting and ½ of that amount for ½ day of sitting. No change was sought nor recommended. Subsequently, it turned out that the

information was in error and in fact supernumerary judges were receiving 1/224 of the annual salary of a full time judge. No change was requested in submissions to the 2000 JCC but an individual judge asked the 2000 JCC to reconsider the per diem rate. The 2000 JCC declined to recommend a change acknowledging the error made by the 1998 JCC but noting that the rates were higher compared to Saskatchewan and Nova Scotia per diems of 1/238 and 1/248 respectively.

The issue was considered by the 2003 JCC recommending per diem rates in fixed dollar amounts of \$1,000, \$1,030, and \$1,060 for the three years of the 2003 JCC mandate. The recommendation for 2003-4 amounted to a per diem rate of 1/200 but declined over the three year mandate to 1/207.5 of the full time salary in 2005.

The Association argues that the 1998 and 2003 JCC's effectively recommended a per diem rate of 1/200 of full time salary. The Association submits that that should be the recommendation of this Commission, bearing in mind that supernumerary judges are only paid for court time, whereas full time judges salaries are not based on 365 days of sittings, include statutory and general holidays, sick leave, mandatory education programs and non-sitting judicial duties. In other words, 1/200 of full time salary is a fair and reasonable compensation.

The 2000 JCC refused to recommend an increase from 1/224 of annual salary to 1/200, and the 2006 JCC was not asked to recommend a change to what had effectively become 1/207 of annual salary level. We were referred to a table entitled Determination of Per Diem Rates across Canada, April 4, 2011 (AFE No. 7, reproduced below).

Determination of Per Diem Rates Across Canada

Jurisdiction	Amount
Federal and Tax Courts	(Annual judge's salary - Annual pension payments) / 231
British Columbia	No Judges paid on a per diem basis.
Alberta	Set at \$1,060 for the period 2005/06 to 2008/09
Saskatchewan	1/220 of full time salary



Manitoba	No judges paid on a per diem basis
Ontario	1/209 of full time salary
Quebec	1/248 of full time salary
New Brunswick	1/251 of full time salary
Nova Scotia	1/219 of full time salary
Prince Edward Island	1/220 of full time salary
Newfoundland & Labrador	1/248 of full time salary
Northwest Territories	1/210 of full time salary
Yukon	Increased by same % as full time salary

The per diem rates in Saskatchewan, Quebec, New Brunswick, Nova Scotia, PEI, Newfoundland and Labrador and NW Territories range from a high of 1/210 to a low of 1/251. Ontario is 1/209 of full time salary.

Considering the criteria that we must consider, we are of the view that the existing per diem of 1/207.5 is fair and reasonable compensation and provides Alberta supernumerary judges with per diem rates that exceed the per diem rates in all other provinces in Canada, including the Province of Ontario.

It is accordingly our recommendation that:

- **For the period April 1, 2009 - March 31, 2013, the per diem for supernumerary judges should be maintained at the current ratio to the salary of a full time puisne judge, 1/207.5.**

## **C. PENSIONS**

### **1. The Provincial Court Judges Pension Arrangements**

Provincial Court Judges and Masters in Chambers have a pension plan. While their plan has many features in common with ordinary private and public sector plans, there are some significant differences mostly because, in contrast to many employees, Judges and Masters are

customarily appointed later in life and retire at a later age. Their pensions, on average, thus accrue over a shorter period but are usually paid out over a shorter period.

The plan is well established. The Government of Alberta is of the view that the pension arrangements should remain unchanged, and are appropriate in light of the criteria in the Regulations, both on a standalone basis and when considered as part of the overall remuneration judges receive. It conceded that the total value of Alberta's pension arrangements currently stands at only seventh place in comparison to other plans. It reminded us that any increase in basic judicial compensation itself involves an increase in pension benefits because salary is a component of the pension formula. Remuneration increases therefore already come with increased pension costs.

The Association's submission is that the plan benefits are demonstrably inferior to most of the comparable judicial plans in Canada. In particular, Alberta's plan is inadequately indexed, leaving judges insufficiently protected from the risks of inflation and a rising cost of living once they retire. Accordingly, it seeks to have the post-retirement indexing increased from 60% of the Consumer Price Index ("CPI") to 100% of CPI. This indexing change, as proposed, would only apply to judges who have retired since April 1, 2009 and those who retire in the future. Judges who retired before April 1, 2009 would not be affected.

The second proposal comes by way of a submission from Her Honour Judge Cheryl L. Daniel. Judge Daniel's submission, put forward on behalf of the longer serving members of the bench, is that each judge's years of service (past and current) should, henceforth, count equally for pension purposes. The history and impact of this is reviewed in detail below. Suffice to say for now this accrual rate affects the number of years a sitting judge must serve before being eligible for a full pension. Judge Daniel urges the Commission to recommend that the accrual rates for existing judges be harmonized, on the basis of 3% per year rather than 2.00% for pre-1998 service, 2.67% for service between 1998 and 2000, and 3% thereafter, as is currently the case.

## **2. The Current Pension Arrangements**

The existing pension arrangements for Provincial Court Judges and Masters in Chambers are an amalgam of a Registered Pension Plan plus a secondary or supplementary arrangement called an

unregistered RCA plan.<sup>2</sup> There are *Income Tax Act* and other reasons for this primary and secondary plan arrangement, but for now it is sufficient to describe, in total, the benefits these combined plans provide.

Three factors go into the calculation of a judge's pension; their years of service, the rate at which their pension accumulated in each of those years, and their income just prior to retirement. This income figure is based on their best three years of service, ordinarily their last three years.

The accrual rates (significant particularly for Judge Daniel's submission) are

2% for service up to March 31, 1998

2.67% for service from April 1, 1998 to March 31, 2000

3% for service after March 31, 2000

The maximum pension a judge will receive (a "full pension") is 70% of their best three years average income. An unreduced pension is available to judges with at least 5 years of service at the later of age 60 or once the Judge's age plus their years of service total 80. If all service were at the 3% per year accrual rate, a judge would need to serve on the bench for 23 years and four months to obtain a full 70% pension.

Provincial Court Judges and Masters in Chambers do not receive healthcare benefits of any form (Blue Cross etc.) once they retire. There are provisions for Judges serving part-time, performing one half of a full judicial caseload. There are also "Supernumerary appointments." These allow judges to be assigned to sit on an ad hoc basis, and to be paid a per diem allowance when they do so.

Judges contribute 7% of their income towards the cost of their pensions. As their remuneration rises, so does the dollar amount they pay. The pension funds are held, owned, and invested by the Province of Alberta, subject to the obligation to pay individual pensions as they become due.

The Association, in its submission, indicated that it had not chosen to advance the harmonized accrual rate put forward by Judge Daniel on behalf of the longer serving judges. It was not

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<sup>2</sup> The details of this arrangement are set out in the Provincial Judges and Masters in Chambers Registered and Unregistered Pension Plans Regulation (AR 196/2001)

opposed in principle; indeed the Association sees merit to this submission. Rather, it has opted to put forward its 100% indexing proposal because it would benefit all members of the Court. It recognizes that public funds are limited and that the fiscal situation of the Province is one of the important criteria. It is concerned therefore that consideration of the harmonized accrual rate proposal not jeopardize its salary and indexing proposals. Judge Daniel, in turn, indicated her full support for the entirety of the Association's proposals.

### 3. Indexing

The Association asks the Commission to recommend that:

Effective April 1, 2009 and applying to any judge who retires on or after that date, 100% indexing of the judicial pension based on the annual percentage change in the CPI for Alberta.

Under the existing plans the amount of a retired Judge's monthly pension cheque is adjusted, each year, to keep pace with 60% of the increased cost of living. The Association urges us to change this to 100% of CPI.

### 4. Comparison to other Judicial and Annuity Plans

The indexing provisions in the other judicial pension plans across Canada show that 100% indexing is the most common, although there are some exceptions and limits as shown by the following table:

Jurisdiction	Rate of Indexation
Federal Jurisdiction (s. 96 judges)	100% of Canada CPI
Yukon	100% of Canada CPI
Northwest Territories	100% of Canada CPI
British Columbia	Discretionary by Trustees but 100% indexing has always been provided
Alberta	60% of Alberta CPI
Saskatchewan	75% of Saskatchewan CPI up to 5%, and 50% of Saskatchewan CPI over 5%
Manitoba	66.7% of Canada CPI
Ontario	100% of Canada CPI

Quebec	100% of CPI for the Province of Quebec
Nova Scotia	100% of Canada CPI up to 6%
New Brunswick	100% of Canada CPI up to 5%
Prince Edward Island	100% of Canada CPI up to 6%
Newfoundland & Labrador	60% of CPI to max. indexing of 1.2%

As can be seen from this table, the clear majority of provincial plans, as well as the federal plan provides for 100% indexing. In particular, the larger provinces, and the provinces usually used as appropriate comparators for compensation purposes, all provide for 100% indexing. We heard no convincing argument as to why what is considered appropriate in these other jurisdictions should not be appropriate in Alberta beyond the argument that a change in indexing is “a big ticket item”.

We recognize that one cannot look at any one aspect of a pension plan in isolation. A pension scheme is a complex scheme that offers a variety of benefits, for example spousal or early retirement options. The level of indexing is only one such item. What is important is to compare the overall benefits of the plan to similar overall benefits offered elsewhere.

The Association commissioned an actuary, Mr. André Sauvé, to review the Alberta pension arrangements, in all aspects, and to compare it to parallel plans in place federally and in other provinces. Mr. Sauvé’s report deliberately followed the basic methodology used in a 2010 report prepared by Mercer (Canada) for the Government of Quebec and filed in the Quebec 2010 Judicial Compensation Commission proceedings. Mercer’s report is before us as Agreed Exhibits 16 and 17.

The Mercer Report took 5 characteristics of judges, representative of those enrolled in the plan, and calculated the various aspects of the provincial plans in place to determine what it called the value of the plan for each of the profiles, expressed as a percentage of a judge’s base salary. It then subtracted from this total value, the judge’s contribution to the cost of the pension (7% in Alberta’s case), to arrive at a net or “residual value” for each provincial plan. It charted these residual values for judges in each profile, by Province, so that provincial plans could be

compared, on a value basis, using common assumptions, the one to the other. It then averaged these five profiles, yielding the following provincial plan value rankings:

Federal	45.9%
Saskatchewan	40.1%
Quebec	39.5%
Ontario	39.5%
PEI	35.1%
Nova Scotia	34.6%
British Columbia	32.3%
Manitoba	31.8%
Alberta	30.2%
New Brunswick	29.9%
Newfoundland	27.5%

Alberta thus ranked 9<sup>th</sup> out of 11, with a benefit significantly below the average net value of 34.7% and only about 2/3 of the value of the plan in place for federal judges.

Mr. Sauvé, both in the Quebec proceedings where he testified, and in giving evidence before this Commission, questioned some of the assumptions Mercer's made in the Quebec Report. He felt it unrealistic to assume that judges would retire at the first opportunity once they became eligible for a full pension. Further he questioned the assumption that all judges would have a spouse at the time of retirement. For Alberta, he also viewed age 68.8 as the proper average retirement age given Alberta's own experience. We accept the validity of these observations and find that his assessment of the relative value of the plans, based as it is primarily on the very thorough Mercer report, a reliable indicator of the relative value of the Alberta pension benefit.

The Mercer figures compare the total value of all aspects of these plans. The Mercer Report provides a useful summary of the various plan provisions from which their benefits were calculated. Since the same assumptions were used for each plan, the relative data remains accurate even if certain of the assumptions were to be changed. However, Mr. Sauvé noted, this method is appropriate for comparison between plans but it is not appropriate for estimating the cost of improvements to a plan for funding or accounting purposes.

The Sauvé report presented to us adjusted some of the assumptions in the Mercer Report. The profiles were altered to better reflect Alberta's demographics and its judicial population. The conclusions, also provided to us in chart form, read as follows:

On the basis of the five identified profiles and the above retirement age assumption, the value of the judicial pension in Alberta ranks 9th out of 11. Its value is 26.7% of salary compared to 30.6% of salary on average for judges in other jurisdictions for a negative spread of 3.9% of salary (26.7% versus the 30.6% average) representing a 12.7% shortfall (1-26.7%/30.6%).

With costs of living increases set at 100% of CPI, the value of the judicial pension in Alberta would rank 5th out of 11. Its value would still be slightly lower than the average of the other pension arrangements (negative spread of approximately 1% of salary) representing a 3% shortfall.

Compared with the pension arrangements of Ontario, BC, Saskatchewan and the federal government, the value of the judicial pension in Alberta ranks 5th out of 5. Its value is 8.2% of salary lower than the average of the other pension arrangements (26.7% versus the 34.9% average) which represents a 23.5% lower value (1-26.7%/34.9%).

With 100% indexing, it would still rank 4th out of 5 and its value would still be 5.2% of pay lower than the average of the other pension arrangements (29.7% versus the 34.9% average) which represents a 15% lower value (1-29.7%/34.9%).

Relative to other provincial pension arrangements then, even with the 100% proposal the Association advances, Alberta remains significantly below comparable provinces and significantly below the federal arrangements in terms of the net value of its overall pension scheme. Again, other than the cost of change, we heard no convincing arguments as to why Alberta's pension benefits should not be comparable. In contrast, the Association provided a number of convincing reasons that support granting improved protection against the erosion that can come with inflation. Unlike persons who have followed other careers, the post retirement options for former judges are significantly limited.

In summary, we find that virtually all the significant comparable plans in Canada provide this 100% index provision. Introducing this benefit for Alberta judges will still leave the overall benefit of the pension arrangements somewhat behind those in place elsewhere. As discussed below, the Commission recognizes that there is a significant cost to this change, some immediate and some long term, but finds that cost justified in all the circumstances.

We therefore recommend:

- **Effective April 1, 2009 and applying to any judge who retires on or after that date, 100% indexing of the judicial pension based on the annual percentage change in the CPI for Alberta.**

## **5. Pension Costs**

Predicting pension costs involves uncertainty about the future. A current fund grows with prudent investment, but actuaries can only estimate the degree that fund will grow, or will be sufficient to meet future pension payments. Indexed pensions depend on the level of growth in the cost of living, itself uncertain. The years over which any given pension will have to be paid out depends on the age at which those covered can and will retire, on their longevity, and on their marital status. All this makes projecting the cost of pension benefits uncertain.

Significant portions of the Association's submission, Judge Daniel's submission, and the Government's reply were devoted to two distinct but related issues.

The first relates to how, over time, the Government has on occasion taken money from the pension fund and diverted it to the general revenue and also how it has put funds back into the fund to maintain its solvency. Various submissions were made as to what might have been done if these withdrawals had not been made. The fund would have contained a greater corpus, or a smaller deficit, than might otherwise have been the case. Enhancements to benefits could have been made before, or would be less costly now, based on one's view of the appropriateness or wisdom of such transactions.

The second relates to when and how the Government may be liable to inject funds into the plan to cover the additional cost of plan enhancements, particularly the added costs associated with a change to the indexing rate. Submissions were made and evidence introduced on the various options open to Government to cover these additional costs, either immediately or into the future. Options exist for longer or shorter term amortization, although those options differ somewhat for the two components of the plan due to the differences in the regulations applicable to each.

The Commission recognizes that pension enhancements come at a cost and that, under several of the criteria we must consider, that cost is a factor to be weighed in coming to our recommendations. That said, it is our considered view that, for this plan, in terms of its overall impact on the Province's fiscal situation, it matters little just what amortization options the



Government chooses to adopt. This plan covers only a few hundred judges and retired judges. While significant, it is dwarfed in comparison to the plans that cover provincial employees and managers, local authority employees or teachers. The particular choices to be made whether to fund now, to amortize over a shorter or longer term, or to inject funds as liabilities become due is something best left to the Government to decide, subject always to the applicable pension and tax regulations.

We see little point in our assessing the merits of proposed plan design changes on the basis of the options put forward for what are essentially financing arrangements. Similarly, we do not see it as appropriate to judge the Government's ability to pay, or the impact on its fiscal position, by assuming it will opt for one financing option over another. We view the arguments made about past fund withdrawals and injections in much the same light. Ultimately, this is a defined benefit plan. What judges are entitled to over time is fixed by a formula based on service and by their salaries just prior to retirement. The judges contribute a fixed rate to this benefit through their contributions, but they acquire thereby no additional benefits beyond their defined pensions. The Government, as the plan sponsor and administrator, carries the ultimate responsibility to guarantee that those pensions are paid as and when due.

We have thus been more influenced by the absolute costs of the benefit enhancements and the increased costs of pension benefits due to increasing salaries. We have been less influenced by the choices available to or made by Government in the past, now, and in the future as to when and how to allocate funds to the plan to cover these outgoings as they become due.

The plan's actuaries are John Crouse and Lucian Schulte of Johnson Inc. They were retained to provide their expert opinion on the costs that might arise from sought after improvements to the Alberta Provincial Judges Pension Plan. Their opinion went through several iterations, with their final opinion letter and estimates arriving on May 27, 2011, after the Commission's public hearings were concluded. The parties provided supplementary comments on these opinions.

A pension is based, in part, on a judge's best three year's income. Since the Commission's recommendations were at that time uncertain, the actuaries ran calculations assuming a series of possible outcomes based on existing figures and the proposals for change. Originally, the actuaries worked from the base of the last plan actuarial evaluation, but later adjusted their

calculations to reflect the fact that increases in compensation customarily date from the Province's fiscal new year, April 1<sup>st</sup>, not the plan's year end of December 31<sup>st</sup>, necessitating a three month shift.

The estimates ultimately provided around the current base salary of \$220,000 and possible increases to that base ranging from \$235,654 (as advocated by the Minister), \$240,000, \$245,000, \$250,000 (as advocated by the Association) and \$255,000.

The actuaries then considered how the base salary set for April 1, 2009 might be increased over the term of the Commission's mandate using three scenarios:

Projection #1 – Base increases effective April 1, 2009, with AWE on April 1, 2010, 2011 and 2012, followed by 3.75% per annum thereafter

Projection #2 - Base increases effective April 1, 2009, with 2% on April 1, 2010, 2011, and 2012, followed by 3.75% per annum thereafter

Projection #3 - Base increases effective April 1, 2009, with 3.75% on April 1 of each year thereafter beginning April 1, 2010

The actuaries predicted that, if Average Alberta Weekly Earnings are used to index the base, the figures will be 2.9% for 2010, 4.6% for 2011 and 4.2% for 2012. The actuaries report also predicted the increased costs associated with a change to the indexing levels of the pension benefit from the current 60% of CPI to 80%, 90%, and 100%, in each of the various base salary plus annual adjustment scenarios.

The report separates out the cost of these changes to the registered plan and the supplementary RCA plan. This is not significant for an overall cost assessment, but is significant in that the costs to the registered plan have to be funded in a certain way while the province has other options for funding (or at the least the timing of the funding) for the unregistered RCA plan component.

Our recommendations on remuneration follow none of these projected approaches exactly. However, we found the May 27, 2011 report sufficient to allow us to extrapolate and assess the costs of our recommendations from the figures provided.

Projection 2 is the closest to the recommendations we have made, in that it provides for 2% per annum increases in the three years after the initial increase. Depending on the rate of inflation, the actual amount may be more or less than that figure but based on current estimates, the cost may be somewhat less. The actuarial figures using projection 2, for an initial remuneration of \$250,000 and a change to 100% indexing, are as follows. The total increase in liability for the Registered Plan is estimated at \$3,354,700 and for the unregistered plan at \$12,083,500.

The change in normal costs are estimated as follows:

Change in normal pension costs in dollars:	Reg: \$336,800	Unreg: \$1,387,200
Change in Employer Pension costs in dollars:	Reg: \$336,800	Unreg: \$1,124,700
Additional Employer percentage of total payroll:	Reg: 1.10%	Unreg: 3.58%

Leaving out the impact of the 100% indexing change; that is projecting only the additional costs due to the increase in the remuneration, under scenario 2, the anticipated increase in liability is projected at \$424,200 for the registered plan and \$6,524,600 for the unregistered plan. Again, this may be somewhat lower if the year-over-year CPI changes in the last two years prove to be less than 2.0% per annum. The change in normal costs due to the change in remuneration alone apply only to the unregistered plan and show a total change in normal pension costs of \$735,600 of which the employer's share is \$473,100 and the judge's contribution would be \$262,500. The employer's additional cost, as a percentage of payroll, is estimated at 1.51%.

The actuaries provided an estimate of the added costs of the proposed harmonization of past service at 3%. Our recommendation is for a change significantly less than that, leaving the accruals unharmonized but setting 25 years as the qualifying period for a full pension as opposed to the 23 years 4 months required for judges accruing entirely at 3%. Had we recommended harmonization, the actuaries predicted the increased normal cost to be \$473,100 (again subject to the vagaries of CPI). They estimated a total additional employer cost (including the amortized liability) at \$40,516 for the registered plan and \$1,358,963 for the unregistered plan.

The Commission recognizes that these costs are significant, both for the increased cost and liability due to bringing the remuneration up to the recommended level and for the change in the

indexing rate and the 25 year full pension provision. The latter is only a transitional cost to relieve Alberta's longest serving judges of the need to serve disproportionately longer than newer appointees. Persons appointed now need to serve somewhat less time for the same benefit.

In making these recommendations, both for basic remuneration and pensions, we have considered these projections and the considerable expert evidence upon which they are based. Increased remuneration inevitably increases pension costs in a defined benefit plan of this nature. We have found that the 100% indexing is justified based on the rationale for that protection for judges and the overwhelming use of that formula for judges throughout Canada. In assessing the justification of the additional cost of this benefit, we find it particularly significant that the overall value, and cost, of Alberta's judicial pension arrangements will still fall significantly below the value and costs of similar plans in the other major comparable jurisdictions.

In their replies to the May 27 actuarial report, the parties took somewhat different approaches to the figures. These differences related primarily to two aspects of the report; the annual costs associated with increased liabilities, depending on whether the costs were amortized or not, and to whether one should look at four year costs or year by year costs. Suffice to say we have reviewed these submissions and appreciate the distinctions, but refer to our comments above about the difference between how much a benefit costs and when that cost is paid.

## **6. Judge Daniel's Submission**

The submission advanced by Judge Daniel urges us to make the following recommendation:

That all Alberta Provincial Court Judges and Masters retiring on or after April 1, 2009, be entitled to receive a pension calculated at a harmonized accrual rate of 3% from September 1, 1988 to the date of retirement. The maximum pension benefit shall remain at 70% of the average of a judge's three best consecutive years of salary.

Judge Daniel's submission is that the current differentials in past pension accrual rates create an inequality in the pension treatment of currently sitting judges. This differential affects how long they must serve before they retire. It also affects, less directly, their spousal benefits. The Province of Alberta, in keeping with its submission that there should be no change in pension benefits, opposes this recommendation.

The submission in support of this change cites many of the arguments the Association makes in support of its submission, recognizing the importance of equitable pension arrangements in recruiting for and fostering an independent bench. With the exception of the recruitment aspect, these points are equally applicable.

There are 50 long serving judges and 2 Masters in Chambers appointed before April 1, 2000. Their service, prior to that date results in their having two tiered (for those appointed between April 1, 1998 and 2000) or three tiered (for those appointed before April 1, 1998) accrual rates. The result is that such appointees need to serve more years to attain a full pension than do judges appointed after 2000. The submission raises the prospect of judges staying on longer than they might otherwise do just to reach full pension. The submission cites an observation of a 1993 Saskatchewan Commission which observed:

... Judges are susceptible to the problem of “burn out” which occurs from the stress of many years of dealing with the wretchedness of the human condition, often seeing people at their worst, with the most vulnerable in our society exploited, and coping with the frustration of recognizing the law to be a very blunt instrument in resolving the ills of society.

The history of this plan (or more correctly the capped Registered Plan supplemented by the unregistered plan) has its roots in changes to the *Income Tax Act* in 1992. The 1998 Commission recommended that, for service after March 31, 1998 the accrual rate move up to 2.67%. It also recommended a change in the pension calculation formula from the best 5 years to the best 3 years for service, but only for service after that date. Alberta’s 2000 Commission recommended a further change to a 3% accrual rate, again only for future service. The 2006 Commission recommended that, in future, all judges’ pension calculations (for all service) be based on the best 3 years, but left the fragmented accrual rate in place, which this submission urges we correct.

The 1998 Commission said at p. 39:

... Judges who have served for a long period of time should be allowed to retire on a full pension. On this point we agree with Professor Friedland’s conclusion in his report to the Canadian Judicial Council that “25 years should surely qualify.”

Judge Daniel's submission makes the point that, with a 3% accrual rate, a judge can retire on a full pension after 23.33 years of service. However, the submission argues, at present this is mathematically impossible for some of the longer serving judges who may still be required to sit for up to a total of 29 years to achieve that 70% pension eligibility. As a consequence, they also pay more for their pension benefits than those appointed once the 3% accrual rate came into effect.

The submission points out that only one other jurisdiction has a similar fragmented pension arrangement.<sup>3</sup> Indeed, a 1984 Ontario Committee report observed:

... in order to avoid the creation of two classes of judges, the Committee emphasized that its proposal was to apply to all Judges, regardless of whether they were appointed, before or after implementation of the plan, and regardless of whether they were covered by the public service plan prior to their appointment to the bench.

In summary, the submission argues that different or unequal treatment of judges, based on their date of appointment, is not appropriate. All judges should be treated equally, with the same pension benefits, proportional to their length of judicial service.

In the Government's view, the differential rates are not a flaw in the plan. The increased accruals, when proposed in 1998 and 2000 were recommended on a go-forward only basis. The issue of differential rates was argued before the 2003 Commission. The Commission was of the view that it had the jurisdiction to make retroactive amendments to the plan but that "the current design and level of judges' pension benefits are appropriate." In coming to that conclusion the 2003 Commission noted particularly that the 2000 changes enhanced the plan considerably, based on a joint submission. They were of the view that:

... most lawyers going to the bench have had an opportunity to contribute to their RRSP over their working career in private practice. Those who have not chosen to do this, or have not been able to, will still be able to accrue a substantial pension through their years of service on the Provincial Court bench.

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<sup>3</sup> A recent New Brunswick Commission increased the accrual rate from 2.67% to 3.00%, but only for future service.

They made no specific comments touching the differential accrual rates and their impact on the years of service necessary before a judge can retire on full pension. The issue was not addressed at all in 2006. In the Government's view nothing has changed since 2003 to justify any different approach. In addition to the recent two tier adjustment in the New Brunswick plan, the Government notes that there are certain other benefit differences, depending on the years in which service accrued, such as the difference in the cost of living adjustment in the Saskatchewan plan.

Judge Daniel's submission argues that the 2006 Commission corrected one inequality when it moved to a universal best 3 years of service rule. The Government takes issue with this being seen as a correction, characterizing it only as an "enhancement."

The Government took issue with Judge Daniel's suggestion that the disparate treatment of judges with respect to the accrual rate was discriminatory. It is clear from the submissions and from oral argument that the term was not used in any human rights law context, but only as a synonym for unequal or unfair.

We agree with the government that differential treatment based on the historic progression of these pension arrangements is not discriminatory in any legal sense. However, we find persuasive the argument that there should not be too wide a gap in terms of the length of service necessary to justify a full judicial pension. We see no compelling reason to retroactively change the accumulation rate for all past service to 3% per year. However, we are heavily influenced by the 1998 Commission's acceptance of the opinion expressed in Professor Friedland's report to the Canadian Judicial Council that "25 years should surely qualify." It appears to us, in retrospect, that the 1998 Commission accepted this view in principle but introduced an accrual rate that was unable to actualize its goal for those longer serving judges carrying forward judicial service accruing at the 2% rate. We believe that those currently serving who have already served for 25 years should now be eligible to retire.

We recommend that:

- **For judges retiring after the date our recommendations become legally effective, a full pension should be provided to any judge who has served for a period of 25 years.**

#### **D. PROFESSIONAL ALLOWANCE**

Both the Association and the Minister submitted that the professional allowance for full time Alberta Judges be increased from \$3,000 per year to \$3,750 per year and for part time Alberta Judges to \$1,875 per year effective April 1, 2009. Where an expenditure for one of the specified purposes is incurred in one year and there is not a sufficient amount of allowance available in that year for payment of that expenditure, that expenditure of the remaining unreimbursed portion thereof may be carried forward one further year for payment.

As well, a fifth purpose is to be identified in the *Compensation Regulation* for the professional allowance, namely, for individual (i) fitness facility (including membership) fees; (ii) fitness, health and nutrition lessons, programs and courses; (iii) fitness equipment; and (iv) library memberships.

In addition, each Alberta judge shall have available a portion of the allowance for fiscal years 2009 and 2010 that represents an increase over what was actually available to judges in those years (based on the above proposal, \$750 per year for a total of \$1,500 for a full time Alberta judge and \$750 in total for a part time Alberta judge) until March 31, 2013.

This joint submission accords with the recommendations of a Joint Advisory Committee of the Provincial Court of Alberta Judicial Needs Assessment Project in a report of September 9, 2008.

We accordingly recommend that each Alberta Judge shall have available:

- **That for the period April 1, 2009 through March 31, 2013 the Alberta Provincial Court Judges should receive a professional allowance in the amount of \$3,750 per year and for part time Alberta Judges of \$1,875 per year. Where an expenditure for one of the specified purposes is incurred in one year and there is not sufficient amount of allowance available in that year for payment for that expenditure, that expenditure of the remaining unreimbursed portion thereof may be carried forward one further year for payment.**
- **A fifth purpose is to be identified in the Provincial Court Judges and Masters in Chambers Compensation Regulation, sections 4.1(1) and 4.1(2) for individual (i) fitness facility (including membership) fees; (ii) fitness, health and nutrition lessons, programs and courses; (iii) fitness equipment; (iv) library membership, and (v) purchase and**



**cleaning of court attire related to the carrying out of the duties and functions of Masters in Chambers, including business clothing and gowns for ceremonial proceedings.**

- **In addition, each Alberta Judge shall have available a portion of the allowance for fiscal years 2009 and 2010 that represents an increase over what was actually available to Judges in those years (based on the above proposal, \$750 per year for a total of \$1,500 for full time Alberta Judges and \$750 in total for a part time Alberta Judge (until March 31, 2013).**

#### **E. STIPENDS FOR ADMINISTRATIVE JUDGES**

The Minister and the Association jointly submitted that this Commission should recommend the following:

- The salary differentials for Provincial Court of Alberta Administrative Judges shall be increased for the fiscal 2009-2010 by \$5,000 in the case of the office of Chief Judge (from \$15,000 to \$20,000 per year);
- By \$3,750 in the case of the office of Deputy Chief Judge (from \$11,250 to \$15,000);
- By \$2,500 in the case of the office of Assistant Chief Judge (from \$7,500 to \$10,000);
- For the period April 1, 2010 to March 31, 2013, the Chief Judge, Deputy Chief Judge, and Assistant Chief Judges annually receive administrative stipends of an additional 10%, 7.5%, and 5% of a puisne judge's salary, respectively.

The Minister and the Association submitted that the amount payable to these judges performing administrative services in recognition of their additional duties, has eroded over the past eleven years and will continue to do so if not addressed. An increase in the stipend payable for 2009-2010 remedies the problem to date, while setting the stipend as a percentage of regular salary as opposed to a fixed sum beginning April 1, 2010, serves to prevent against further erosion on an ongoing basis. Finally the stipends are within the range of administrative stipends in other Canadian jurisdictions as shown in the table entitled "Judicial Administrative Stipends Across Canada 2010-11 (April 4, 2011) (AFE No. 6).

Accordingly it is our recommendation that:

- The salary differentials for Provincial Court of Alberta Administrative Judges shall be increased for the fiscal 2009-2010 year by \$5,000 in the case of the Office of Chief Judge (from \$15,000 to \$20,000);
- By \$3,750 in the case of the office of Deputy Chief Judge (from \$11,250 to \$15,000)
- By \$2,500 in the case of the office of Assistant Chief Judge (from \$7,500 to \$10,000)
- For the period April 1, 2010 to March 31, 2013 the Chief Judge, Deputy Chief Judge and Assistant Chief Judges annually receive administrative stipends of an additional 10%, 7.5%, and 5% of a puisne judge's salary, respectively.

## **IX. SUMMARY OF RECOMMENDATIONS**

### **A. Salaries**

- For the period April 1, 2009 through March 31, 2010, that the annual salaries of judges be fixed at \$250,000;
- For the period of April 1, 2010 through March 31, 2011, that the annual salaries of judges be fixed at \$255,000;
- For each of the periods April 1, 2011 through March 31, 2012, and April 1, 2012 through March 31, 2013, that the annual salaries of the judges be increased by the percentage amount of the year-over-year increase, if any, in the "Alberta (All Items) Consumer Price Index" for the preceding calendar year, as published by Statistics Canada.

### **B. Per Diem Rates for Supernumerary Judges**

- For the period April 1, 2009 - March 31, 2013, the per diem for supernumerary judges should be maintained at the current ratio to the salary of a full time puisne judge, 1/207.5.

### **C. Pensions**

- Effective April 1, 2009 and applying to any judge who retires on or after that date, 100% indexing of the judicial pension based on the annual percentage change in the CPI for Alberta.

- For judges retiring after the date our recommendations become legally effective, an unreduced judicial pension should be provided to any judge who has served for a period of 25 years.

#### **D. Professional Allowance**

- That for the period April 1, 2009 through March 31, 2013 the Alberta Provincial Court Judges should receive a professional allowance in the amount of \$3,750 per year and for part time Alberta Judges of \$1,875 per year. Where an expenditure for one of the specified purposes incurred in one year and there is not sufficient amount of allowance available in that year for payment for that expenditure, that expenditure of the remaining unreimbursed portion thereof may be carried forward one further year for payment.
- A fifth purpose is to be identified in the Provincial Court Judges and Masters in Chambers Compensation Regulation, sections 4.1(1) and 4.1(2) for individual (i) fitness facility (including membership) fees; (ii) fitness, health and nutrition lessons, programs and courses; (iii) fitness equipment; (iv) library membership; and (v) the purchase and cleaning of court attire related to the carrying out of the duties and functions of Masters in Chambers, including business clothing and gowns for ceremonial proceedings.
- In addition, each Alberta Judge shall have available a portion of the allowance for fiscal years 2009 and 2010 that represents an increase over what was actually available to Judges in those years (based on the above proposal, \$750 per year for a total of \$1,500 for full time Alberta Judges and \$750 in total for a part time Alberta Judge (until March 31, 2013).

#### **E. Stipends for Administrative Judges**

- The salary differentials for Provincial Court of Alberta Administrative Judges shall be increased for the fiscal 2009-2010 year by \$5,000 in the case of the Office of Chief Judge (from \$15,000 to \$20,000);
- By \$3,750 in the case of the office of Deputy Chief Judge (from \$11,250 to \$15,000)
- By \$2,500 in the case of the office of Assistant Chief Judge (from \$7,500 to \$10,000)
- For the period April 1, 2010 to March 31, 2013 the Chief Judge, Deputy Chief Judge and Assistant Chief Judges annually receive administrative stipends of an additional 10%, 7.5%, and 5% of a puisne judge's salary, respectively.

## X. COSTS

The Association asks The Commission to Recommend:

That the Government shall pay 100% of the Association's reasonable legal fees and disbursements, including 100% of the cost of any expert evidence.

The Minister's position is that the *Regulation* allows us no power to make such an order, and to do so would be to act beyond our statutory authority.

The *Regulation* states:

19(1) The Crown must pay two-thirds of the reasonable costs incurred by the Association in making its submissions to the Commission, up to a maximum of \$200,000.00.

19(2) If the Crown and the Association cannot agree on what constitutes reasonable costs for the purposes of subsection (1), these costs may be reviewed by a review officer in a manner similar to that provided under the Alberta Rules of Court (AR 124/2010).

The Association argues that this part of the *Regulation*, specific to the question, must be read along with the broader power granted to the Commission by Section 6(d) of the same Regulation to conduct an inquiry respecting "any other issues relevant to the financial security of the judges that the Commission agrees to resolve".

Prior Commissions in Alberta and other similar Commissions throughout Canada have indeed made significant recommendations for Association costs. These have included, in some cases, 100% of solicitor client costs and disbursements. Other statutory configurations, and some Commissions, have provided for, or made recommendations for, costs short of the 100% figure. Each Commission report has to be looked at in its own statutory and regulatory context, in the context of the number and complexity of issues in dispute, the respect by the parties for reasonable bounds to the submissions made, and so on.

The Association, in its initial brief and in its oral submissions, conceded that there is no constitutional rule requiring that all the Association's costs be paid. However, it argues, the case law establishes that the process established by the Province must meet the test of being fair,

equitable and reasonable in the circumstances. In addition, it suggests, that an unduly restrictive costs provision; for example that the Government would pay \$100 of the Association's costs, would impair the Commission's ability to be independent, objective and effective. What the Association asks us to do is make a recommendation for full costs and disbursements notwithstanding what the *Regulation* says the Government must pay.

The government argues that the *Regulation* is clear and unambiguous in its terms. The general power in section 6(d), it urges, cannot be read in a way that leaves some overriding or residual power to the commission to address costs beyond that provided for quite specifically in Section 19(1). The specific must be interpreted to override the general. The costs provisions must be seen in the context of the overall commission process and structure which, subject to constitutional constraints, is left to the government to design through its Regulation making power.

The Association makes the legitimate point that it is essential to an effective commission process that the Association be adequately represented and able to provide comprehensive submissions to the commission. There is no doubt in this case that the Association has worked diligently to provide such submissions, and in a way that has been exceedingly helpful to us in our deliberations. The Association and the Government have each seen fit to address economic issues by the tendering of experts with supporting reports. Both parties made extensive submissions on the costs and benefits of the pension issues in dispute. Those submissions also necessitated expert advice, reports and testimony. All these expenses are (subject to any issues that arise under 19(2)) appropriate given the issues in dispute for the years in question. The question is not whether all this has been appropriate. Rather, the question is whether the *Regulation*, or the law upon which it is based, leaves it to us to decide the proportion in which the expenses are to be paid and any maximum amount, or decides the issue itself.

There is force to the argument that, in placing its own position before the Commission, the government is basically unrestrained in its use of resources. It faces no percentage limit or cap. To some extent, the scope of the Association's submission is determined by what the Government decides to submit, to concede, or to dispute.

There is also force to the view that, if the Commission process is to be, and to be perceived to be, something other than ordinary labour relations collective bargaining, then it should be recognized, by the allocation of resources, that the Association is playing an important public role instead of simply a “judicial bargaining” role. Simply put, the more the members of the Association, who must fund the Association’s costs to the extent they are not covered by Government, have to pay for “their submissions”, the more they will perceive it to be bargaining with Government. This is the very appearance and attitude the unique Judicial Compensation Commission was designed to avoid.

We accept totally the utility and value of the Association’s submissions. The same is true of those from Government. We accept as well, that if the *Regulation’s* provision for costs was so parsimonious as to amount to a significant barrier to the process, then we might have to decide whether that provision could stand in light of the constitutional issues involved. However, in the context of these proceedings we cannot find section 19(1) constitutionally inadequate. Short of that, we find ourselves bound to respect the provisions of s. 19(1) as having established the formula for costs and as having removed from our scope of authority any capacity to make a recommendation that would, in effect, alter the result established by the *Regulation*.

Judge Daniel asks the Commission to make a recommendation that the government provide compensation on account of her written submissions and the oral presentations by her Counsel, Mr. James. Submissions by interveners (i.e. persons other than the Association) are dealt with less directly in the *Regulations*. Section 9(1) which governs costs for the Association does not address the topic. However, Section 13(12) reads:

13(12) The Commission may not award costs for written submissions but may award the reasonable travel, accommodation and meal expenses of anyone required by the Commission to attend.

Judge Daniel raised an important issue before the commission; an issue which we have at least partially accepted. She did so expressly on behalf of the long serving judges of the Court. Nothing in her submissions, whether written or oral, undermined the positions taken by the Association or the Government. The submissions were entirely helpful and substantive. We are, as a result, entirely sympathetic to the claim for some costs. However, it appears to us on a plain

reading of the *Regulation* that it does not include our recommending costs beyond that specifically provided for in Sections 9(1) or 13(2).

Judge Daniel took the position before us that a regulation containing such restrictions is objectionable on constitutional grounds. In her view, it should be up to the commission, with the independence it is required to have under the process established by the Supreme Court of Canada, to make its own determination as to intervener costs. No legal authority for that proposition was put before us beyond the cases referred to at the outset of this Report. We are not inclined on this limited basis to read down the *Regulation* or to assume a power apparently deliberately withheld from the Commission when the *Regulation* was established. Any policy shortcomings in the *Regulation* appear to be based on policy choices with which we may disagree, given the importance of public participation in this process, but which, in these circumstances fall short of unconstitutionality.

It was our position that Judge Daniel, having made a written submission, needed to support that submission with an appearance. While we have no power to make a formal order in this area we informally urge the Government to consider an ex gratia payment to Judge Daniel on account of the expense involved in submitting her brief and having Counsel attend to address that brief.

We have decided to exercise our authority under Section 13(2).

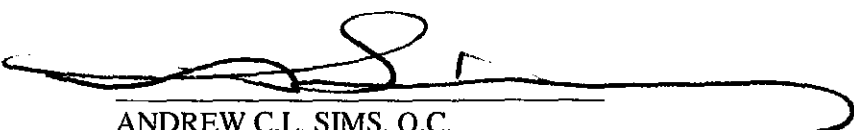
- **We award reasonable travel, accommodation and meal expenses for Judge Daniel and her Counsel Mr. James for attendance at one day of the Commission's hearings.**

**XI. CONCLUSION**

We wish to express our gratitude to Mr. Bill Olthuis and Kate Bridgett of Alberta Justice, counsel for the Minister of Justice and Attorney General in and for the Province of Alberta, and Susan Dawes, Myers Weinberg LLP, counsel for the Alberta Provincial Judges Association for their skill and professionalism in producing volumes of material and for their helpful participation at the Hearing on May 16, 17 and 18, 2011. We are also thankful to Judge Cheryl Daniel and her counsel John James for their contribution to the proceedings and to the Canadian Bar Association, Alberta Branch and the Law Society of Alberta for their support of the process.

Finally, we would like to express our gratitude to Rick Leech, Senior Manager, Judicial Compensation at Alberta Justice for his coordination of, and administrative assistance in the performance of our duties.

RESPECTFULLY SUBMITTED

  
\_\_\_\_\_  
J. PATRICK PEACOCK, Q.C.  
\_\_\_\_\_  
ANDREW C.L. SIMS, Q.C.  
\_\_\_\_\_  
CRAIG W. NEUMAN, Q.C.

September 6, 2011



## **XII. APPENDICES**

- (i) Alberta Provincial Judges and Masters in Chambers Compensation Commission Regulation
- (ii) Provincial Court Judges and Masters in Chambers Compensation Regulation

**ALBERTA REGULATION 205/2010**

**Judicature Act**

**ALBERTA PROVINCIAL JUDGES AND MASTERS IN CHAMBERS COMPENSATION  
COMMISSION REGULATION**

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**Definitions**

**1** In this Regulation,

- (a) "Association" means the Alberta Provincial Judges' Association;
- (b) "Commission" means the 2009 Alberta Judicial Compensation Commission continued under section 3;
- (c) "compensation" means the salary, pension, including the contributions of the Government of Alberta and a judge, benefits and allowances provided to the judges;
- (d) "court" means The Provincial Court of Alberta;
- (e) "judges" means, except in section 14(e), the judges of The Provincial Court of Alberta and the masters in chambers appointed under the *Court of Queen's Bench Act*;

- (f) "minister" means any minister of the Crown;
- (g) "reasons" means an explanation in writing that meets the justification standard under the Constitution of Canada used to evaluate decisions of a government to depart from a recommendation of an independent body regarding judicial compensation;
- (h) "report" means the report of the Commission presented to the Minister and the Association under section 7 and any amended report presented to the Minister and the Association under section 15;
- (i) "the Minister" means the Minister of Justice and Attorney General.

#### **Role of the Commission**

- 2(1)** The Commission must make recommendations respecting the compensation of judges.
- (2)** The Commission must determine issues relating to compensation independently, effectively and objectively.
- (3)** The Commission is to contribute to maintaining and enhancing the independence of the court and the judges through the inquiry process and its report.

#### **Establishment of the Commission**

**3(1)** The 2009 Alberta Judicial Compensation Commission established under the *Alberta Provincial Judges and Masters in Chambers Compensation Commission Establishment Regulation* (AR 73/2009) is continued and consists of 3 members appointed as follows:

- (a) one person appointed by the Minister;
  - (b) one person nominated by the Association and appointed by the Minister;
  - (c) one person nominated by the members referred to in clauses (a) and (b) and appointed by the Minister.
- (2)** The member of the Commission referred to in subsection (1)(c) is the chair of the Commission.
- (3)** If a member resigns or is unable for any reason to discharge the responsibilities of a member, the Minister must
- (a) if the member was appointed under subsection (1)(a), appoint a person to replace the member, and
  - (b) if the member was appointed under subsection (1)(b) or (c), after receiving a nomination in accordance with subsection (1)(b) or (c), as the case may be, appoint a person to replace the member.

#### **Commission membership**

**4(1)** Active judges, justices of the peace, members of the Legislative Assembly, members of other boards and commissions appointed by the Lieutenant Governor in Council or by a minister, persons who hold office by way of an appointment by the Lieutenant Governor in Council or by a minister and employees, as defined in the *Public Service Act*, may not be members of the Commission.

(2) Notwithstanding subsection (1), the member of the Commission referred to in section 3(1)(b) or (c) may be a member of another board or commission appointed by the Lieutenant Governor in Council or a minister, a person who holds office by way of an appointment by the Lieutenant Governor in Council or by a minister or an employee as defined in the *Public Service Act*.

#### **Commission expenses**

**5(1)** The Crown must pay the Commission all reasonable expenses incurred by the Commission in conducting an inquiry and preparing a report.

(2) The members of the Commission are entitled to compensation and reimbursement for expenses as determined by the Minister.

#### **Scope of the inquiry**

**6** The Commission must conduct an inquiry respecting

- (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.

#### **Presentation of the report**

**7** The Commission must present a report to the Minister and the Association at a time determined by the Minister.

#### **Presentation of the report to the Lieutenant Governor in Council**

**8** Within 120 days of the presentation of a report under section 7 or an amended report under section 15, whichever is the later, the Minister must place the report before the Lieutenant Governor in Council, obtain the Lieutenant Governor in Council's decision and, if any of the recommendations in the report are not accepted, ensure that reasons are provided.

#### **Effective date**

**9** The effective date of any recommendations in a report is April 1, 2009 and is for the period April 1, 2009 to March 31, 2013.

#### **Effect of recommendations**

**10(1)** Subject to subsection (2), a recommendation in a report is binding on the Crown.

(2) A recommendation that is not accepted in whole or in part in reasons issued by the Lieutenant Governor in Council and delivered to the Association within 120 days of the date of the report under section 7 or an amended report under section 15, whichever is later, is not binding on the Crown.

**Public notice of inquiry**

**11** The Commission must give public notice of the commencement of its inquiry as the Commission considers necessary and the notice must advise of the closing date for written submissions.

**Pre-inquiry procedure**

**12** At the earliest opportunity, prior to the commencement of the inquiry, the Minister and the Association must meet with the Commission to address any preliminary matters that may arise and any other matters that the Commission considers advisable.

**Inquiry procedure**

**13(1)** Subject to this section, the Commission may determine its own inquiry procedure.

**(2)** The Minister and the Association must provide the Commission with an agreed statement of facts and an agreed list of exhibits to be filed, to the extent that they have been able to agree on them.

**(3)** The Commission may record any inquiry proceedings and must provide transcripts to those who request them and pay the required fee.

**(4)** The Commission may accept such evidence as is relevant to the determination of the issues and is not required to adhere to the rules of evidence applicable to courts of civil or criminal jurisdiction.

**(5)** Any member of the public is entitled to attend the inquiry and to make written submissions to the Commission.

**(6)** The Commission may, after hearing from the Minister and the Association, choose to limit to written submissions any submission from an individual judge.

**(7)** The Commission may, after hearing from either the Minister or the Association, grant leave to any member of the public to make oral submissions.

**(8)** The Commission may require the attendance of any person who has filed a written submission and may require that person to respond to any questions from either the Minister or the Association, as well as from the Commission.

**(9)** If any person fails to appear when required to do so or to respond to questions as directed, the Commission may ignore the written submissions of the person who fails to appear or respond to a question as directed.

**(10)** The Commission may, on application, direct the Minister and the Association to produce documents not subject to privilege.

**(11)** The testimony of witnesses must be under oath or affirmation.

**(12)** The Commission may not award costs for written submissions but may award the reasonable travel, accommodation and meal expenses of anyone required by the Commission to attend.

**(13)** Any one requesting copies of any written submissions to the Commission is entitled to receive a copy of the submissions on payment of a reasonable fee.

**(14)** The recommendations in a report must be based solely on the evidence submitted to the Commission.

**Criteria**

**14** The Commission, in making recommendations in its report, must consider the following criteria:

- (a) the constitutional law of Canada;
- (b) the need to maintain the independence of the court and the judges;
- (c) the unique nature of the judges' role;
- (d) the need to maintain a strong court by attracting highly qualified applicants;
- (e) the compensation of other judges in Canada;
- (f) the growth and decline in real per capita income;
- (g) the need to provide fair and reasonable compensation for judges in light of prevailing economic conditions in Alberta and the overall state of the economy, including the financial position of the government;
- (h) the cost of living index and the position of the judges relative to its increases;
- (i) the nature of the jurisdiction of the court and masters in chambers;
- (j) the level of increases provided to other programs and persons funded by the government;
- (k) any other factors considered by the Commission to be relevant to the matters at issue.

**Amended report**

**15(1)** The Commission may amend its report presented under section 7 after reviewing the submissions of the Minister and the Association if

- (a) the Commission is satisfied that its report
  - (i) failed to deal with an issue raised during the inquiry, or
  - (ii) contains an obvious error,and
- (b) the Minister or the Association requests that the Commission amend its report within 30 days of receipt of the report under section 7.

**(2)** Within 30 days of receipt of a request under subsection (1), the Commission must either present an amended report to the Minister and the Association or inform the Minister and the Association that no amended report will be presented.

**(3)** An amended report under subsection (2) may differ from the report presented under section 7 only so far as is necessary to deal with the matters under subsection (1).

**Minister not required to request amendment**

**16** Nothing requires the Minister, either before or after the report is placed before the Lieutenant Governor in Council, to request that the Commission amend its report under section 15(1).

#### **Review**

**17** The Minister and the Association may meet at any time to discuss improvements to the Commission inquiry process.

#### **Communication**

**18(1)** The Minister must advise the Association of any changes made to the judges' compensation after the presentation of a report under section 7 or an amended report under section 15 within 14 days of the Lieutenant Governor in Council's decision to change the judges' compensation and the Association must inform the judges of any such change.

**(2)** The Minister must provide the Association with one updated copy of the legislation, regulations or schedules related to changes described in subsection (1).

**(3)** The Association must provide the judges with updated copies of legislation, regulations or schedules as necessary.

#### **Costs**

**19(1)** The Crown must pay two-thirds of the reasonable costs incurred by the Association in making its submissions to the Commission, up to a maximum of \$200 000.

**(2)** If the Crown and the Association cannot agree on what constitutes reasonable costs for the purposes of subsection (1), these costs may be reviewed by a review officer in a manner similar to that provided under the *Alberta Rules of Court* (AR 124/2010).

#### **Judicial review**

**20(1)** If the Lieutenant Governor in Council makes a decision not to accept one or more of the recommendations in whole or in part contained in the report, the Association may bring an application for judicial review of that decision.

**(2)** If an application for judicial review is successful, the Court may not make the report binding on the Crown, but may refer the report back to the Lieutenant Governor in Council or to the Commission for reconsideration, and where the Court does so, the Lieutenant Governor in Council or the Commission, as the case may be, has 120 days from the day that the application was granted to reconsider the report's recommendations in accordance with the directions, if any, of the Court.

#### **Notice**

**21(1)** If

- (a)** notice is required to be given to the Crown or the Minister, it must be given by leaving a written copy of the notice at the legislative office of the Minister, or
- (b)** the Crown or the Minister gives notice in writing of the appointment of counsel, it may be given by service on counsel as provided for in the *Alberta Rules of Court*.

**(2)** If notice is required to be given to the Association, it must be given by leaving a written copy at the registered office of the Association.

#### **Effect of regulation**

**22** This Regulation only has effect for the Commission continued under section 3.

**Repeal**

**23** The *Alberta Provincial Judges and Masters in Chambers Compensation Commission Establishment Regulation* (AR 73/2009) is repealed.

**Expiry**

**24** This Regulation expires on March 31, 2015.



(Consolidated up to 43/2009)

**ALBERTA REGULATION 176/98**

**Provincial Court Act  
Court of Queen's Bench Act**

**PROVINCIAL COURT JUDGES AND MASTERS IN  
CHAMBERS COMPENSATION REGULATION**

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**Definitions**

**0.1** In this Regulation,

- (a) "judge" does not include a supernumerary judge;
- (b) "master" means a master in chambers appointed under the *Court of Queen's Bench Act* but does not include an ad hoc master in chambers.

AR 211/99 s3;12/2009

**Salaries for judges**

**1(1)** For the period April 1, 1998 to March 31, 1999,

- (a) the salary to be paid to the Chief Judge is \$157 000 per year,

- (b) the salary to be paid to an assistant chief judge is \$149 500 per year, and
  - (c) the salary to be paid to other full-time judges is \$142 000 per year.
- (2) Effective April 1, 1999,
  - (a) the salary to be paid to the Chief Judge is \$167 000 per year,
  - (b) the salary to be paid to an assistant chief judge is \$159 500 per year, and
  - (c) the salary to be paid to other full-time judges is \$152 000 per year.
- (3) For the period April 1, 2000 to March 31, 2003,
  - (a) the salary to be paid to the Chief Judge is \$185 000 per year,
  - (b) the salary to be paid to an assistant chief judge is \$177 500 per year, and
  - (c) the salary to be paid to other full-time judges is \$170 000 per year.
- (3.1) For the period April 1, 2003 to March 31, 2004,
  - (a) the salary to be paid to the Chief Judge is \$215 000 per year,
  - (b) the salary to be paid to an assistant chief judge is \$207 500 per year, and
  - (c) the salary to be paid to the other full-time judges is \$200 000 per year.
- (3.2) For the period April 1, 2004 to March 31, 2005,
  - (a) the salary to be paid to the Chief Judge is \$225 000 per year,
  - (b) the salary to be paid to an assistant chief judge is \$217 500 per year, and
  - (c) the salary to be paid to the other full-time judges is \$210 000 per year.
- (3.3) For the period April 1, 2005 to March 31, 2006,

- (a) the salary to be paid to the Chief Judge is \$235 000 per year,
- (b) the salary to be paid to an assistant chief judge is \$227 500 per year, and
- (c) the salary to be paid to the other full-time judges is \$220 000 per year.

(3.4) For the period April 1, 2006 to March 31, 2009,

- (a) the salary to be paid to the Chief Judge is \$235 000 per year,
- (b) the salary to be paid to an assistant chief judge is \$227 500 per year, and
- (c) the salary to be paid to the other full-time judges is \$220 000 per year.

(3.5) For the period February 4, 2008 to March 31, 2009, the salary to be paid to the Deputy Chief Judge is \$231 250 per year.

(4) The annual salary to be paid to a part-time judge is 50% of the amount payable to a full-time judge unless subsection (4.1) applies.

(4.1) The salary to be paid to a part-time judge for a term of appointment that commences on the 183rd day after the judge's birthday is 25% of the amount payable to a full-time judge.

(5) 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.

(5.1) Where

- (a) the part-time judge's initial term of appointment commences on the 183rd day after the judge's birthday, and
- (b) the aggregate of the part-time judge's salary and pension benefits payable during the initial term exceeds 50% of the annual salary of a full-time judge for that period,

the salary payable to the part-time judge for the initial term shall be reduced by the amount exceeded.

(6) For the purpose of subsections (5) and (5.1),

- (a) "pension benefit" means a pension benefit payable pursuant to regulations made under section 9.52 of the *Provincial Court Act*;
- (b) "12-month term of appointment" means the 12-month period immediately following the appointment of a part-time judge and any subsequent 12-month period of appointment.

AR 176/98 s1;104/99;211/99;216/2000;117/2005;266/2006;170/2007;61/2008

#### **Salary on expiry of appointment**

**1.1(1)** Where the appointment of a judge as Chief Judge, Deputy Chief Judge or Assistant Chief Judge expires after April 1, 2003, the salary of that judge is to remain unchanged until the salary of a judge of The Provincial Court of Alberta who does not hold either appointment exceeds that judge's salary.

**(2)** Subsection (1) ceases to apply if the judge who held the appointment as Chief Judge, Deputy Chief Judge or Assistant Chief Judge is appointed as a part-time judge.

AR 239/2004 s2;117/2005;61/2008;43/2009

#### **Salaries and benefits for supernumeraries**

**2(1)** For the period April 1, 1998 to March 31, 1999, the remuneration to be paid to a supernumerary judge for holding a sitting or otherwise acting as a supernumerary judge is,

- (a) for a full day, \$634, and
- (b) for only 1/2 a day, \$317.

**(2)** Effective April 1, 1999, the remuneration to be paid to a supernumerary judge is for holding a sitting or otherwise acting as a supernumerary judge is,

- (a) for a full day, \$678, and
- (b) for only 1/2 a day, \$339.

**(2.1)** Effective April 1, 2000, the remuneration to be paid to a supernumerary judge for holding a sitting or otherwise acting as a supernumerary judge is,

- (a) for a full day, \$760, and
- (b) for only 1/2 a day, \$380.

**(2.2)** For the period April 1, 2003 to March 31, 2004, the remuneration to be paid to a supernumerary judge for holding a

sitting or otherwise acting as a supernumerary judge is \$1000 for each day or partial day.

(2.3) For the period April 1, 2004 to March 31, 2005, the remuneration to be paid to a supernumerary judge for holding a sitting or otherwise acting as a supernumerary judge is \$1030 for each day or partial day.

(2.4) For the period April 1, 2005 to March 31, 2006, the remuneration to be paid to a supernumerary judge for holding a sitting or otherwise acting as a supernumerary judge is \$1060 for each day or partial day.

(2.5) For the period April 1, 2006 to March 31, 2009, the remuneration to be paid to a supernumerary judge for holding a sitting or otherwise acting as a supernumerary judge is \$1060 for each day or partial day.

(3) In addition to the remuneration referred to in this section, a supernumerary judge is entitled to the remuneration and benefits referred to in sections 4 and 5.

(4) 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.

AR 176/98 s2;104/99;211/99;216/2000;239/2004;266/2006

### **3 Repealed AR 117/2005 s4.**

#### **Subsistence and travelling allowances**

**4(1)** A judge shall be paid subsistence and travelling allowances in accordance with the *Public Service Subsistence, Travel and Moving Expenses Regulation* made under the *Public Service Act*.

(2) Notwithstanding the *Public Service Subsistence, Travel and Moving Expenses Regulation*, a judge who is authorized to use the judge's own motor vehicle on official business shall be reimbursed the entire cost of any additional insurance premium payable by the judge as a result of using the judge's own motor vehicle for official business.

AR 176/98 s4;54/2001;131/2003;239/2004;66/2005

#### **Professional allowance**

**4.1(1)** A judge other than a supernumerary judge is entitled to a professional allowance each year to be used for the following purposes as authorized by the Chief Judge:

- (a) the attendance at relevant conferences and seminars that are related to the carrying out of the duties and functions of a Provincial Court Judge;
- (b) the buying of books and journals that are related to the carrying out of the duties and functions of a Provincial Court Judge;
- (c) the maintenance of memberships in judicial and professional organizations;
- (d) the purchase of security systems for a Provincial Court Judge's home and the monthly service charges for those systems.

(2) A Master in Chambers other than an ad hoc Master in Chambers or a Master in Chambers who performs the duties of a master in chambers on a part-time basis is entitled to a professional allowance each year to be used for the following purposes as authorized by the Chief Justice of the Court of Queen's Bench of Alberta:

- (a) the attendance at relevant conferences and seminars that are related to the carrying out of the duties and functions of a Master in Chambers;
- (b) the buying of books and journals that are related to the carrying out of the duties and functions of a Master in Chambers;
- (c) the maintenance of memberships in judicial and professional organizations;
- (d) the purchase of security systems for the home of a Master in Chambers and the monthly service charges for those systems.

(3) The amount of the allowance referred to in subsections (1) and (2) is as follows:

- (a) for the period April 1, 2003 to March 31, 2004, up to a maximum of \$3000 where those expenses have been incurred before the coming into force of this Regulation;
- (b) for the period April 1, 2004 to March 31, 2005,
  - (i) up to a maximum of \$3000 if an allowance of \$3000 is taken in the previous year under clause (a), or
  - (ii) up to a maximum of \$3500 if an allowance of less than \$3000 is taken in the previous year under clause (a);

- (c) for the period commencing April 1, 2005, up to a maximum of \$3000.
  - (4) The allowances that may be claimed under subsection (3)(a) and (b) by one individual must not exceed a total of \$6000.
  - (5) Notwithstanding subsection (3)(c), a part-time judge may only claim a maximum allowance of \$1500.
- AR 216/2000 s4;239/2004;117/2005;104/2007;12/2009

**Northern allowances**

**5** A judge shall be paid Northern Allowance in accordance with the *Public Service Employment Regulation* made under the *Public Service Act*.

**Automobile for Chief Judge**

**6** An automobile and replacement automobiles shall be provided to the Chief Judge and Deputy Chief Judge in the same manner as automobiles are provided under Treasury Board Directive (4/79), as amended.

AR 176/98 s6;221/2004;61/2008

**7** Repealed AR 211/99 s5.

**Benefits**

**8(1)** A judge is entitled to the benefits set out in Schedule 1.

**(2)** A judge is entitled to receive benefits under the Long Term Disability Income Continuance Plan as set out in Schedule 2.

AR 176/98 s8;211/99

**Pensions**

**8.1** The Provincial Judges and Masters in Chambers Registered and Unregistered Pension Plans applies with respect to judges and full-time masters.

AR 197/2001 s2

**Payment for prior pensionable judicial service**

**9(1)** In this section,

- (a) "judge" means a person who, immediately before September 1, 1988, held office as a judge of the Provincial Court of Alberta, other than as a supernumerary judge, and had accumulated prior pensionable judicial service;

- (b) "long service amount" means an amount equal to \$2000 for each completed year, and a prorated portion of \$2000 for each additional portion of a year, of a judge's or master's prior pensionable judicial service;
  - (c) "master" means a person who, immediately before September 1, 1988, held office as a master in chambers and had accumulated prior pensionable judicial service;
  - (d) "Minister" means the Minister of Justice and Attorney General;
  - (e) "pension plan" means the *Provincial Judges and Masters in Chambers Pension Plan Regulation* (AR 265/88) or the pension plan thereunder;
  - (f) "prior pensionable judicial service" means pensionable service standing to a judge's or master's credit in the Public Service Management Pension Plan in the form of service under that Plan as a judge of the Provincial Court of Alberta or a master in chambers;
  - (g) "retire" means, in respect of a judge or master, a judge or master who ceases to be a participant of the pension plan under the circumstances referred to in section 14(1), 16, 17(1), or (2) or 24 of the pension plan;
  - (h) "spouse" has the meaning assigned to it by the pension plan;
  - (i) "surviving spouse" means the surviving spouse of a deceased judge or master who becomes entitled to receive a pension under section 20(1) or (2) of the pension plan.
- (2) The long service amount in respect of a judge or master shall be paid in a lump sum payment to
- (a) the judge or master after the judge or master retires,
  - (b) the surviving spouse of the judge or master if the judge or master dies before retiring, or
  - (c) the judge's or master's estate if the judge or master dies before retiring and leaves no surviving spouse.
- (3) A judge or master may, before retiring, submit to the Minister a request that the payment of the long service amount be made in annual payments for a period specified by the judge or master of up to 10 years.
- (4) When a judge or master makes a request under subsection (3) and it is received by the Minister at least 30 days before the judge



or master retires, the long service amount in respect of the judge or master shall be paid, notwithstanding subsection (2), in annual payments to the judge or master after the judge or master retires and

- (a) if the judge or master dies before all of the annual payments are made and the judge or master leaves a surviving spouse, the remaining annual payments shall be paid to the surviving spouse and if the surviving spouse dies before all of the remaining annual payments are made, the remaining annual payments shall be paid in a lump sum to the spouse's estate, and
- (b) if the judge or master dies before all of the annual payments are made and the judge or master does not leave a surviving spouse, the remaining annual payments shall be paid in a lump sum to the judge's or master's estate.

(5) When a judge or master makes a request under subsection (3) and it is received by the Minister at least 30 days before the judge or master retires and the judge or master dies before retiring, the long service amount in respect of the judge or master shall be paid, notwithstanding subsection (2),

- (a) if the judge or master leaves a surviving spouse, in annual payments to the surviving spouse and if the surviving spouse dies before all of the annual payments are made, the remaining annual payments shall be paid in a lump sum to the spouse's estate, and
- (b) if the judge or master does not leave a surviving spouse, in a lump sum to the judge's or master's estate.

(6) When a judge or master dies before retiring without having made a request under subsection (3) and leaves a surviving spouse, the spouse may submit to the Minister a request that payment of the long service amount be made in annual payments for a period specified by the spouse of up to 10 years.

(7) When a surviving spouse makes a request under subsection (6) and it is received by the Minister within 90 days of the judge's or master's death, the long service amount in respect of the judge or master shall be paid, notwithstanding subsection (2), in annual payments to the surviving spouse and if the surviving spouse dies before all of the annual payments are made, the remaining annual payments shall be paid in a lump sum to the surviving spouse's estate.

(8) The amount of an annual payment under this section in respect of a judge or master is calculated by dividing the judge's or master's long service amount by the number of years specified in

the judge's or master's request under subsection (3) or the surviving spouse's request under subsection (6) and the number of years may not exceed 10.

AR 176/98 s9;14/99;211/99

#### **Masters remuneration**

**9.1(1)** A full-time master is to be paid the same salary as is paid to a full-time judge under section 1.

**(2)** A full-time master is entitled to the benefits provided to a judge under section 4 and to those benefits set out in Schedule 1.

**(3)** A full-time master is entitled to receive benefits under the Long Term Disability Income Continuance Plan as set out in Schedule 2.

**(4)** A part-time master is entitled to the same remuneration as provided to a supernumerary judge under section 2.

**(5)** An ad hoc master in chambers is entitled to the same remuneration as provided to a supernumerary judge under section 2.

AR 211/99 s7;12/2009

#### **Repeal**

**10** The *Payment to Provincial Judges Regulation* (AR 27/80) is repealed.

### **Schedule 1**

#### **Benefits for Judges and Full-Time Masters**

**1** In this Schedule, "master" means a full-time master.

**2(1)** Judges and masters are entitled to participate in the group benefit plans available to managers in the Public Service of the Province.

**(2), (3)** Repealed AR 12/2009 s5.

**3(1)** Judges and masters are entitled to vacation of 30 working days per year and part-time judges are entitled to vacation of 15 working days per year except where a part-time judge's initial term of appointment commences on the 183rd day after the judge's birthday, in which case the judge is entitled to vacation of only 7.5 working days for that term of appointment.

**(2)** The scheduling of vacation is subject to the prior approval

- (a) of the Chief Judge, in the case of a judge, and
  - (b) of the Chief Justice of the Court of Queen's Bench, in the case of a master.
- (3) If a judge's or master's appointment is terminated, the judge's or master's actual vacation entitlement will be calculated on the basis of 2 1/2 days vacation per completed month of service, and the judge or master must at such termination reimburse the Province for any vacation taken in excess of the judge's or master's actual entitlement.
- (4) Any actual vacation entitlement not taken by a judge or master must, at the termination of the appointment, be paid by the Province to the judge or master.

4 Judges and masters are entitled to all statutory holidays normally granted to employees in the Public Service of the Province and part-time judges are entitled to all statutory holidays normally granted to employees in the Public Service of the Province occurring during the periods they are required to serve.

5 The Province must pay 1/2 of the cost of the judge's and master's participation in the Alberta Health Care Insurance Plan.  
AR 211/99 s8;198/2002;221/2004;117/2005;170/2007;12/2009

## Schedule 2

### Long Term Disability Income Continuance Plan

The Long Term Disability Income Continuance Plan is established as follows:

#### Definitions

- 1 In this Plan,
- (a) "adjudicator" means the Judicial Council established under Part 6 of the *Judicature Act*;
  - (b) "benefit" means money provided to a participant under the Plan;
  - (c) "disability" means a medical condition that causes a participant to be unable to perform any combination of duties that, prior to the commencement of illness or injury, regularly took at least 60% of the participant's time at work to complete;

- (d) "elimination period" means 80 consecutive normal work days or the number of hours of work for a continuing illness equivalent to 80 normal work days, starting the day a participant stops work or partially stops work because of bodily injury or illness;
- (e) "month" means a period of time between the same dates in 2 successive calendar months;
- (f) "monthly earnings" means the participant's current regular monthly rate of pay;
- (g) "participant" means a person to whom the Plan applies under section 2;
- (h) "period of disability" means the period in which a participant is entitled to receive benefits from the Plan beginning after the last day of the elimination period;
- (i) "Plan" means the Plan established in this Schedule;
- (j) "Plan Administrator" means the Plan Administrator under the Public Service Long Term Disability Income Continuance Plan;
- (k) repealed AR 266/2006 s4;
- (l) "regular duties" means the regular duties or duties similar to the regular duties that the participant was performing immediately prior to the beginning of the elimination period;
- (m) "work day" means any day on which a participant is expected to be at work.

**Application**

**2** This Plan applies to judges and masters so entitled under section 8 and 9.1 of the *Provincial Court Judges and Masters in Chambers Compensation Regulation*.

**Coverage**

**3(1)** A participant is covered under the Plan beginning the first day after the participant completes 3 consecutive months of service without absence because of illness or disability, except for casual illness.

**(2)** A participant's coverage under the Plan terminates on the earliest of the following:

- (a) the date of the participant's 70th birthday;
- (b) the date the participant's appointment is terminated, if the participant is not receiving benefits under the Plan at that time;
- (c) the date the participant resigns from office.

**Eligibility for benefits**

**4(1)** When the adjudicator determines that a participant's bodily injury or illness results in a disability, and the disability continues during the entire elimination period, the participant is eligible for benefits beginning immediately after the elimination period.

**(2)** If a participant returns to work during the elimination period and then takes general illness leave for the same or a related illness within 10 days of returning to work, the time that the participant was at work is considered to be part of the elimination period.

**(3)** A participant is not eligible for benefits payable after the elimination period for

- (a) a disability suffered as a result of participation in the commission of crime,
- (b) a disability suffered as a result of an act of war,
- (c) an intentionally self-inflicted injury or illness,
- (d) any period during which the participant is not under the continuous care of a physician, or not following the treatment a physician prescribes, or
- (e) a period of incarceration in a prison or similar institution.

**(4)** Depending on the nature and severity of a participant's condition, the adjudicator may require a participant to be under a specialist's care.

**(5)** If substance abuse, including alcoholism and drug addiction, contributes to a participant's disability, the participant's treatment program must include participation in a recognized substance withdrawal program.

**(6)** As soon as possible after a participant is injured or becomes ill, the adjudicator is to determine whether the participant's condition is a disability.

**(7)** If a participant, who returns to work after an absence caused by a disability, is no longer receiving disability benefits, and is disabled as a result of the same or a related condition within 6

months after the date of return to work, the disability is considered continued and another elimination period is not required to be served.

(8) Any authorized benefits may continue up to the maximum benefit period described in section 9 during any one period of disability, but the benefits end when the adjudicator determines that the disability has ceased.

#### **Pre-existing condition**

**5(1)** Benefits are not payable for any medically documented injury or illness for which a participant received medical services, supplies, or any medication prescribed by a physician during the 90 days immediately preceding the effective date of appointment.

(2) Subsection (1) does not apply to a participant who has been covered by the Plan for 2 consecutive years and is not absent from work because of a pre-coverage injury or illness on the date the 2 years are completed.

(3) If the participant has been covered by the Plan for 2 consecutive years but is absent from work because of a pre-coverage injury or illness at the 2-year point, the participant is eligible for coverage under the Plan on the date the participant returns to work.

#### **Interim payment**

**6(1)** If the adjudicator does not decide on a participant's eligibility for benefits before the end of the elimination period, the Chief Judge, in the case of a judge, or the Chief Justice of the Court of Queen's Bench, in the case of a master, may order that the participant continue to be paid at the rate of 70% of the participant's normal salary for up to 2 months or until the date the decision is received, whichever comes first.

(2) The participant is not entitled to receive an interim payment and benefits under subsection (1).

(3) If the participant received an interim payment and is found eligible for benefits,

- (a) that payment is to be treated as a prepayment by the Province, on behalf of the Plan, of the benefits due for that period,
- (b) the Plan Administrator must not pay to the participant further benefits for the period covered by the payments, and

- (c) the Plan Administrator must repay the amount of the interim payment.

(4) If the participant received an interim payment and is found not eligible for benefits, the participant must repay the payment.

#### **Rehabilitation program**

**7(1)** A rehabilitation program approved by the adjudicator may be established by the Department of Justice and the Plan Administrator for a specified time period not exceeding 24 months.

(2) The program may require that the participant perform the participant's regular work on a part-time basis.

(3) At the end of the elimination period, if a participant suffers from a disability that prevents the performance of regular duties, but the participant is able to participate in a rehabilitation program, the participant is eligible for benefits.

(4) If a participant is receiving less income under a rehabilitation program than was being received prior to the disability, the monthly benefit amount to which the participant is entitled is to be reduced by 50% of the income received from that program.

(5) If the combination of reduced benefits and income equals an amount that exceeds the participant's pre-disability salary, benefits will be further reduced so that combined benefits and income do not exceed the pre-disability salary.

(6) If a participant refuses or wilfully fails to participate and co-operate in a rehabilitation program, the adjudicator may determine whether the participant is eligible to receive or continue to receive benefits.

#### **Amount of benefit**

**8(1)** Effective April 1, 2006, the benefit amount for a participant, which is effective on completion of the elimination period, is 70% of the monthly salary paid to a judge who is performing regular duties, based on the appropriate salary level set from time to time pursuant to section 1 of the *Provincial Court Judges and Masters in Chambers Compensation Regulation*.

(2) The monthly benefit amount to which a participant is entitled will be reduced as follows:

- (a) by the amount of disability benefit entitlement, excluding children's benefits and cost of living increases, under the *Canada Pension Plan* and the *Quebec Pension Plan*;

- (b) by the amount of benefits payable from any other group disability plan sponsored by the Province;
- (c) repealed AR 104/2007 s3;
- (d) by vacation leave pay.

(3) A participant must apply for *Canada Pension Plan* or *Quebec Pension Plan* disability benefits within 12 months of being placed on the Plan and provide proof of application to the Plan Administrator.

(4) A participant who does not apply for benefits pursuant to subsection (3) after reasonable notice to do so may have the maximum *Canada Pension Plan* or *Quebec Pension Plan* disability benefit deducted pursuant to subsection (2)(a).

(5) If any amount or benefit described in subsection (2) is received in the form of a lump sum payment instead of monthly instalments, the benefit under subsection (1) will be reduced by the equivalent commuted monthly instalments.

#### 8.1 Repealed AR 266/2006 s4.

#### Termination of benefits

9 The benefits payable under the Plan terminate on the earliest of the following:

- (a) the date determined by the adjudicator when the participant refuses or wilfully fails to participate and co-operate in a rehabilitative program;
- (b) the date of the participant's 70th birthday;
- (c) the date the participant resigns from office;
- (d) the date the adjudicator determines the participant is no longer disabled or the date the participant returns to the participant's regular duties, whichever comes first.

#### Coverage during leave of absence

10(1) A participant is covered under the Plan for a period not exceeding 12 consecutive months from the date the participant begins leave if the participant is on authorized development leave initiated and approved by the Chief Judge in the case of a judge and the Chief Justice in the case of a master.



- (2) Coverage under the Plan continues for a participant on a leave of absence without pay, but benefits are not payable during the leave and, if applicable, premiums are not paid.

#### Participation in group plans

**11(1)** If a participant is eligible for benefits, the participant continues to be covered under the plans referred to in Schedule 1 of the *Provincial Court Judges and Masters in Chambers Compensation Regulation*.

- (2) During the period that coverage continues, the Province and the participant must continue to pay their respective share of premium costs for each plan.

#### Adjudication Review

**12(1)** When the adjudicator has ruled that a participant is not eligible for benefits or that benefits are to cease,

- (a) the Chief Judge, in the case of a judge, and the Chief Justice of the Court of Queen's Bench, in the case of a master, may request that the adjudicator review the claim, or
- (b) the participant may request that the adjudicator review the claim and may, at the participant's expense, make representation to the adjudicator with the participant's representatives only once.

(2) A participant must submit a request for a review within 21 calendar days of receiving notice of the adjudicator's ruling.

(3) Within 60 calendar days of receiving notice of the adjudicator's ruling, the participant must submit any new or additional medical information and other written material that the participant intends to be part of the review.

(4) On receiving a request for a review, the adjudicator must review the participant's case, taking into account the representation by the participant or participant's representative and any new information, and make a decision.

AR 211/99 s8;251/2001;239/2004;266/2006;104/2007

## CORRIGENDA

To the Report and Recommendations of the 2009 Alberta Judicial Compensation Commission dated September 6<sup>th</sup>, 2011.

	PAGE / LOCATION	ERROR	AMENDMENT
1	2 / first paragraph	Allison Redford	Alison Redford
2	3 / first paragraph lines 2, 5-6	Andre Sauve William Olthuis, Q.C.	André Sauvé William Olthuis
3	14 / 5 <sup>th</sup> paragraph	Section 97 judges	Section <u>96</u> judges
4	29 / line 2	"but not often seen in public, since the courts process frequently takes place in camera"	delete
5	39 / line 6	It concede that the total value...	It <u>conceded</u> that the total value...
6	39 / 3 <sup>rd</sup> paragraph	on the basis of 3% per year rather than 2.25% for pre-1998 service, 2.75 for service between 1998 and 2000	... on the basis of 3% per year rather than <u>2.00%</u> for pre-1998 services, <u>2.67</u> for service between 1998 and 2000...
7	40 / footnote 2	(AR 196/201)	(AR 196/ <u>2001</u> )
8	41 / middle of page	... under the existing plans the amount of a retired Judge's monthly pension cheque adjusted, each year...	... under the existing plans the amount of a retired Judge's monthly pension cheque <u>is</u> adjusted, each year...
9	44 / 4 <sup>th</sup> paragraph of quote	...pension arrangements (29.7% versus the 349% average...)	...pension arrangements (29.7% versus the 34 <u>9</u> % average...)
10	45 / last sentence of 3 <sup>rd</sup> paragraph	...or would be less costly now, based on ones view of the appropriateness...	..or would be less costly now, based on one's view of the appropriateness...
11	46 / 2 <sup>nd</sup> paragraph, second last sentence	The judges contribute a fix rate to this benefit	The judges contribute a <u>fixed</u> rate to this benefit...
12	52 / bulleted recommendation	For judges retiring after the date our recommendations become legally effective, an unreduced judicial pension should be provided to any judge who has served for a period of 25 years.	For judges retiring after the date our recommendations become legally effective, a <u>full</u> pension should be provided to any judge who has served for a period of 25 years.

13	53 / second bullet last line and 56 / Professional Allowance 2 <sup>nd</sup> bullet	equipment: and (iv) library membership	equipment; (iv) library membership, and (v) purchase and cleaning of court attire related to the carrying out of the duties and functions of Masters in Chambers, including business clothing and gowns for ceremonial proceedings.
14	53 and 56 Professional Allowance / first bullet	Where an expenditure for one of the specified purposes incurred in one year and there is not sufficient amount of allowance available in that year for payment for that expenditure, that expenditure of the remaining reimbursed portion therefore may be carried forward one further year for payment	Where an expenditure for one of the specified purposes <u>is</u> incurred in one year and there is not <u>a</u> sufficient amount of allowance available in that year for payment for that expenditure, that expenditure of the remaining <u>unreimbursed</u> portion <u>thereof</u> may be carried forward one further year for payment.
15	55 / fourth bullet and 56 / last bullet	...annually receive administration stipends	...annually receive <u>administrative</u> stipends...
16	58 / first paragraph	the government would pay 100% of the Association's costs	The government would pay \$100 of the Association's costs.
17	58 / third paragraph 4 <sup>th</sup> sentence	Both parties	<u>Both</u> parties

