

IN THE MATTER OF ORDER-IN-COUNCIL #1788/2006
AND
IN THE MATTER OF AN INQUIRY BY THE SECOND
DEPUTY JUDGES REMUNERATION COMMISSION
(July 1, 2009 to June 30, 2012)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO
(the "Government of Ontario")

- and -

ONTARIO DEPUTY JUDGES ASSOCIATION
(the "Association")

**REPORT of the SECOND
DEPUTY JUDGES REMUNERATION COMMISSION**

BEFORE: Marilyn A. Nairn, Commissioner

FOR THE PERIOD: January 1, 2010 to December 31, 2012

APPEARANCES:

On Behalf of the Government of Ontario:

Brian O'Byrne
Hadiya Roderique
David Brook
Karen Golden
Kierstyn Spratt

On Behalf of the Association:

David McCutcheon
Reena Goyal
Donald G. Kidd

Hearings were held in the City of Toronto on April 21 and April 22, 2010. Further information requested by the Commission was received on July 23, August 13, and September 20, 2010.

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INTRODUCTION

1. This report is filed by the Second Deputy Judges Remuneration Commission (the “Commission”), constituted pursuant to *Order-in-Council 1788/2006* (the “O.I.C.”) and my appointment by letter dated December 15, 2009 as Commissioner pursuant to the Schedule attached to the O.I.C. It is being filed with the Minister of Government Services in accordance with sub-section 5(4) of the Schedule. Also in accordance with sub-sections 5(1) and 5(4) of the Schedule, this report contains the recommendations of the Commission regarding the remuneration of Deputy Judges in Ontario for the period January 1, 2010 to December 31, 2012.

2. I note at the outset that the parties to the Commission process agree that the Minister responsible has agreed that there is no impediment to my issuing this report beyond the time frame contemplated by the Schedule to *Order-in-Council 1788/2006* as my appointment as Commissioner was delayed beyond the time frame contemplated by that Schedule.

THE MANDATE OF THE COMMISSION AND THE CONDUCT OF THIS INQUIRY

3. Pursuant to sub-sections 5 (1) and (4) of the Schedule to the O.I.C. the Commission:

...shall conduct an inquiry into the remuneration of Deputy Judges and shall make recommendations for the remuneration of Deputy Judges for [a] three-year period [and]

...shall thereafter submit a report containing its recommendations for the remuneration of Deputy Judges....

4. Relevant definitions from the Schedule to *Order-in-Council 1788/2006* provide:

1. (1) In this Schedule

...

“remuneration” means

(a) the per diem rate to be paid to Deputy Judges for

- (i) sitting as a deputy judge;
- (ii) writing reserved judgments where necessary;
- (iii) the performance of any administrative function that a deputy judge may be directed to perform from time to time by his or her Regional Senior Judge;
- (iv) attendance at educational seminars and judicial forums approved in accordance with 33(6)(b) of the *Courts of Justice Act*;

- (b) reasonable expenses incurred in carrying out their duties;

“sitting as a deputy judge” includes:

- (a) presiding as a trial judge;
- (b) presiding as a judge in motions court;
- (c) presiding over the examination of judgment debtors and at contempt hearings;
- (d) presiding over pre-trial hearings or settlement conferences; and
- (e) the performance of any other judicial function that may, from time to time, be within the jurisdiction of a deputy judge and that a deputy judge may be directed to perform by his or her Regional Senior Judge.

5. A pre-hearing conference was held with the parties on March 30, 2010 to discuss procedural matters. The Commission convened a hearing on April 21 and April 22, 2010. With the consent of the parties, notice of the proceeding had been forwarded on January 20, 2010 to all Deputy Judges in Ontario through the auspices of the Government of Ontario (the “Government”). A copy of the Notice is attached as Appendix ‘A’ to this report. I received and have reviewed three individual written representations from Deputy Judges Chauhan, Girard, and Priddle. The parties filed written submissions and extensive documentary materials, supplemented at the hearing by oral submissions and further documentary filings. In response to requests from the Commission, further material and representations were received on July 23, August 13, and September 20, 2010.

THE PARTIES’ POSITIONS WITH RESPECT TO REMUNERATION

6. Effective January 1, 2009 the *per diem* rate of remuneration for Deputy Judges is \$528.00. This Commission is mandated to make recommendations with respect to the *per diem* rate effective January 1, 2010 to December 31, 2012. In its submissions, the Ontario Deputy Judges Association (the “Association”) proposed changes to remuneration for Deputy Judges as follows:

- (a) a *per diem* of \$1200.00 for each sitting day, and for each sitting day cancelled with less than 24 hours’ notice, for the period of this Commission’s mandate.
- (b) payment at the *per diem* rate of \$1200.00 for each full day spent preparing written reasons for decision, and payment pro rata for each part day;
- (c) clerical and research services, including access to computer research facilities, provided to full-time judges for the preparation of written reasons for decision;

- (d) provision of judgment books, robes and sashes for sitting days;
- (e) reimbursement of up to \$2500.00 per year for attending judicial training and related continuing education seminars and conferences; and
- (f) \$200.00 per hour or part thereof for travel time in excess of 1.5 hours per one-way commute.

7. The individual representations supported a *per diem* rate of between \$1000.00 and \$1200.00.

8. The Government proposed that there be no increase to remuneration for the term of this Commission's mandate. It also took the position that, with the exception of setting a *per diem* rate, the remaining items proposed by the Association were outside the Commission's jurisdiction, having regard to the definition of remuneration in the Schedule to the O.I.C. The Association did not agree.

THE CONSTITUTIONAL BACKDROP

9. In *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3 (the "*P.E.I. Reference*"), the Supreme Court of Canada gave the following direction with respect to the establishment and maintenance of judicial independence, and more particularly, the issue of financial security for the judiciary:

106 ... In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.

107 ... Section 11(d) [of the *Charter*], far from indicating that judicial independence is constitutionally enshrined for provincial courts only when those courts exercise jurisdiction over offenses, is proof of the existence of a general principle of judicial independence that applies to all courts no matter what kind of cases they hear.

...

140 What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized ... [emphasis in original]

141 ...However, to my mind, the depoliticization of these relationships is so

fundamental to the separation of powers, and hence to the Canadian Constitution, that the provisions of the Constitution, such as section 11(d) of the *Charter*, must be interpreted in such a manner as to protect this principle.

142 The depoliticized relationships I have been describing create difficult problems when it comes to judicial remuneration. On the one hand, remuneration from the public purse is an inherently political concern, in the sense that it implicates general public policy.

143 On the other hand, the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive.

...

190 At the end of the day, however, any disadvantage which may flow from the prohibition of negotiations is a concern which the Constitution cannot accommodate. The purpose of the collective or institutional dimension of financial security is not to guarantee a mechanism for the setting of judicial salaries which is fair to the economic interests of judges. Its purpose is to protect an organ of the Constitution which in turn is charged with the responsibility of protecting that document and the fundamental values contained therein. If judges do not receive the level of remuneration that they would otherwise receive under a regime of salary negotiations, then this is a price that must be paid.

193 ... I have no doubt that the Constitution protects judicial salaries from falling below an acceptable minimum level. The reason it does is for financial security to protect the judiciary from political interference through economic manipulation, and to thereby ensure public confidence in the administration of justice.... I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public.

10. In *Ontario Deputy Judges Association v. Ontario*, 2005 Can LII 42263 (ON S.C.), Dambrot, J. found that the then existing process for setting judicial remuneration for Deputy Judges in Ontario did not satisfy the constitutional requirements of independence, effectiveness and objectivity set out by the Supreme Court of Canada in the *P.E.I. Reference*. That finding was affirmed by the Ontario Court of Appeal (*Ontario Deputy Judges Association v. Ontario*, 2006 Can LII 17250).

11. Dambrot, J. found that these constitutional principles applied equally to the Deputy Judges of the Small Claims Court:

[55] ... While it cannot be doubted that the principle of judicial independence must be applied flexibly to different types of decision-makers, I see no warrant in the pronouncements of the Supreme Court for the idea that recourse to an independent commission to consider judicial remuneration is an exceptional, Cadillac protection available only to “important” judges. When the Supreme Court says that it is an essential

component of judicial independence that any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective and objective, I take it at its word. Wherever the Deputy Judges are situated on the “spectrum of judicial officers,” they are judges and must be treated as judges.

12. Those comments were affirmed by the Court of Appeal:

[18] Financial security is at issue in this case. As the Supreme Court said about financial security in *Valente* [at [1985] 2 S.C.R. 673] at para. 40:

The essence of [financial] security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence.

[19] Both the individual and the institutional dimensions of judicial independence apply to financial security. The Supreme Court explained the nature of the two dimensions. Regarding the individual dimension, it was stated in *Valente* and reiterated in the *P.E.I. Reference*, that judicial salaries must be established so that they do not “affect the independence of the individual judge”... Individual independence refers to the liberty of the individual judge to decide discrete cases free from external interference or influence...

[20] In this case, individual independence is not the primary issue, given that most Deputy Judges sit on a part-time basis. Their judicial remuneration is not their primary source of income, except for those few who agreed to sit on a more frequent basis. The institutional dimension, however is critical to this case.

[21] The institutional or collective dimension of judicial independence, which attaches to the court as an institution, is a natural outgrowth of the commitment to the separation of powers between and among the legislative, executive, and judicial branches of government. Fundamental to this separation of powers is the depoliticization of the relationship between the legislative and executive branches on the one hand and the judicial branch on the other: see *P.E.I. Reference*...

[22] The Supreme Court in the *P.E.I. Reference* identified three components of the institutional dimension of financial security: (1) any changes to or freezes in judicial remuneration require prior recourse to a process that is independent, effective, and objective to “avoid the possibility of, or the appearance of, political interference through economic manipulation”...; (2) the judiciary is not to negotiate remuneration with the executive or legislature...; and (3) reductions to salary, including erosion by inflation, cannot take judicial compensation below a basic minimum level...

[23] The AG argues that the Deputy Judges are entitled only to a low level of protection for their financial security and that the present Order-in-Council regime meets the applicable constitutional standard. The AG contends that the protections relating to financial security are directed “at avoiding the possibility that judges may adjudicate disputes in the government's favour in order to advance their personal positions.”

[24] The AG's argument, however, overlooks the institutional dimension of financial security, which flows from the “constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be

depoliticized”...

...

[26] The force of the rationale behind the institutional dimension of financial security is not diminished by the fact, emphasized by the AG, that Deputy Judges sit on a part-time basis and have limited jurisdiction. Deputy Judges, who preside in the busiest court in Ontario, are an integral part of the justice system. We recognize, of course, that the court’s caseload does not include criminal matters, the court possesses only a limited jurisdiction for committal, and it rarely hears *Charter* issues. Nevertheless, although the role of the Small Claims Court is more limited in the Canadian constitutional structure than that of the superior and provincial courts, that role is important in protecting the rule of law, preserving the democratic process, protecting the values of the Constitution and maintaining public confidence in the administration of justice....

[27] The caseload assumed by Deputy Judges is extensive both in quantum of cases and in jurisdiction of subject matter. Even though Deputy Judges sit part-time, when sitting, they fully assume the judicial role. They are perceived as judges by the many litigants who turn to the Small Claims Court for the resolution of their disputes. To those litigants, there is no apparent reason to distinguish between the Deputy Judge presiding over their case and a judge of the former Provincial Court (Civil Division). The protection of the independence of both types of judges is equally important in order to preserve public confidence in the system.

(emphasis in original)

13. As a result of the Court of Appeal’s finding, *Order-in-Council 1788/2006* was promulgated, establishing this Commission process. Section 2 of the Schedule attached to the O.I.C. states, in part:

It is intended that both the process of making the report and the report made by the Commission shall contribute to securing and maintaining the judicial independence of the Deputy Judges.

14. The fact of criteria established in the Schedule reinforces the Supreme Court’s admonition in the *P.E.I. Reference, supra*, that the Commission process be independent, effective, and objective:

173 In addition to being independent, the salary commissions must be objective. They must make recommendations on judges’ remuneration by reference to objective criteria, not political expediencies. The goal is to present “an objective and fair set of recommendations dictated by the public interest” (Canada, Department of Justice, *Report and Recommendations of the 1995 Commission on Judges’ Salaries and Benefits* (1996), at page 7)

(emphasis in original)

15. The Government submitted that, with the establishment of a Commission process, the issue of judicial independence was irrelevant to the Commission's consideration of remuneration. I would characterize the matter differently. It is insufficient to say, as the Government did, that "the establishment and functioning" of this Commission satisfies the constitutional requirements for judicial independence addressed by the Court of Appeal in *Ontario Deputy Judges Association v. the Attorney General of Ontario, supra*. As noted by the Government in enacting section 2 to the Schedule of *Order-in-Council 1788/2006*, it is intended that both the process (the "establishment and functioning") and the report made by the Commission shall contribute to securing and maintaining the judicial independence of the Deputy Judges. In order for the Commission process to be *effective* (a necessary constitutional feature), the Commission must consider, and make recommendations having regard to the constitutional requirement for financial security, within the broader constitutional requirement of ensuring and maintaining judicial independence. The constitutional requirement for financial security was stipulated in the *PEI Reference* as requiring that remuneration not fall below a constitutionally acceptable limit.

THE HISTORY OF THE SMALL CLAIMS COURT

16. In its written submissions, the Government described the history of the last forty years of the Small Claims Court and the role of Deputy Judges as follows (beginning at page 8):

In 1970, the Division Court was renamed the Small Claims Court and the monetary jurisdiction was increased to \$1000.00. Appeals from the Small Claims Court were moved from the Court of Appeal to the newly-created Divisional Court.

Under the 1970 *Small Claims Court Act*, the province maintained the authority to appoint Small Claims Court Judges. Barristers could continue to serve as Deputy Judges for two-month renewable terms.

In 1973, the Ontario Law Reform Commission's inquiry into the Ontario Court system [Report on Administration of Ontario Courts, Ontario Law Reform Commission 1973, Part II; Ministry of the Attorney General] reiterated the McRuer Report's finding that judicial functions within the Court should not be exercised by Deputy Judges.

In 1979, an experimental Small Claims Court was set up in Toronto and the regular Small Claims Court in Toronto became a local division of the Provincial Court. The experimental court was called the Provincial Court (Civil Division) and had a monetary jurisdiction of \$3000. This Court had an increased number of full-time Small Claims Court judges appointed to it, as well as the Deputy Judges from the regular Small Claims Court.

In 1982, the experimental court became permanent and in 1985, all Small Claims Courts became known as the Provincial Court (Civil Division). Outside of Toronto, the monetary jurisdiction remained at \$1,000. In Toronto, Deputy Judges could only hear cases up to \$1,000 and full-time Provincial or County Court judges heard the cases between \$1,000 and \$3,000.

The Report of the Ontario Courts Inquiry in 1987 [The Honourable T.G. Zuber] again expressed concern about the number of part-time judges and recommended the elimination of the use of Deputy Judges.

In 1990, the *Courts of Justice Act* was amended to abolish the Provincial Court (Civil Division) and reconstitute the Small Claims Court as a branch of the Superior Court (at the time called the Ontario Court (General Division)). This amendment gave all Superior Court judges the power to adjudicate Small Claims cases and established three-year terms for Deputy Judges. In practice, no Judges of the Superior Court of Justice sit in the Small Claims Court.

In 1993, the monetary jurisdiction of the Small Claims Court was increased to \$6,000 across the province.

The 1996 Ontario Civil Justice Review [Supplemental and Final Report, November 1996, Ministry of the Attorney General] concluded that subject to certain modifications, such as training, Deputy Judges should continue to adjudicate in the Small Claims Court. The Review described the Deputy Judges as: “volunteers’ in essence, leaving their practices for the day when they are sitting as Small Claims Judges”.

In 2001, the monetary jurisdiction of the Small Claims Court was increased to \$10,000. On January 1, 2010, the monetary jurisdiction of the Small Claims Court was increased to \$25,000.

17. Essentially, since the 1990 restructuring, wherein the Provincial Court (Civil Division) was abolished and reconstituted as the Small Claims Court, becoming a branch of the Superior Court of Ontario, the statutory authority to appoint full-time judges of the Provincial Court (Civil Division) to hear Small Claims Court cases was repealed. As a result, no new full-time provincially appointed judges have been or can be appointed to sit in the Small Claims Court.

18. The work of the Small Claims Court has since been conducted by part-time Deputy Judges sitting on a *per diem* basis. As of March 25, 2010, there were 415 Deputy Judges appointed in Ontario, all appointed for a three-year term by a Regional Senior Judge of the Superior Court of Justice with the approval of the Attorney General. That term may be, and often is, renewed.

19. (There are three part-time supernumerary judges who continue to sit pursuant to

appointments to the previous Provincial Court (Civil Division). It would appear that since the report of the First Deputy Judges Remuneration Commission (the “Davie Commission”), a full-time judge is no longer adjudicating and a second full-time judge has moved to part-time supernumerary work. These positions were ‘grandfathered’ and will not be replaced when these remaining supernumerary judges fully retire. They are consequently not reflective of the Small Claims Court’s structure.)

20. Whereas historically Deputy Judges assisted a permanent judiciary on an infrequent basis, the structure of the Small Claims Court has changed and the role and duties of the Deputy Judge have evolved to the point where the current Deputy Judges are the face of civil justice in the over 90 sitting locations of the Small Claims Court throughout Ontario.

21. For a more in-depth recounting of the history of the Ontario Small Claims Court, see the *Report of the Ontario Courts Inquiry*, 1987, The Honourable T.G. Zuber, and to a lesser extent, Dean Holloway’s *Review of the Small Claims Court of Ontario*, 2006.

THE ROLE OF THE DEPUTY JUDGE

22. The Small Claims Court is a branch of the Superior Court of Justice of Ontario. While every Superior Court Justice is also a judge of the Small Claims Court, in practice, they do not hear Small Claims Court cases. Like judges of the provincially appointed Ontario Court of Justice, Deputy Judges are creatures of statute. Both courts obtain their primary jurisdiction from the *Courts of Justice Act*, R.S.O. 1990 c. 43, as amended. The Small Claims Court hears civil actions for the payment of money not exceeding \$25,000 and for the recovery of personal property where the value does not exceed \$25,000. (There is also the opportunity for counter-claims to the same maximum amount.)

23. Deputy Judges of the Small Claims Court cannot grant remedies affecting real property or provide certain equitable remedies such as imposing a trust, granting an injunction, or making a declaration. Deputy Judges can grant equitable relief in the form of orders for the payment of money and orders for recovery of possession of personal property. The Small Claims Court does not hear criminal, quasi-criminal or family law matters. Deputy Judges bear the same

responsibility for providing adequate and sufficient reasons as any court. (See generally, *Patrella v. Westwood Chev Olds* (1993) Ltd., [2004] O.J. No. 491; *936464 Ontario Limited c.o.b. as Plumhouse Plumbing & Heating v. Mungo Bear Limited*, (2003) 74 O.R. (3d) 45 (Div. Ct.); and *Michael Agrette and Ilana Agrette v. Pieterse c.o.b. as Niagara Home Inspection*, (2009) Sup. Ct. #8069/07, decision of Matheson, J. dated June 25, 2009.)

24. The role of Deputy Judges was summarized in the report of the Davie Commission beginning at page 16:

For the most part Deputy Judges serving in the Small Claims Court perform the same duties as their full-time and supernumerary counterparts. Those duties are fully adjudicative judicial functions. Deputy Judges preside over legal actions between party litigants which cover a broad spectrum of statutory and common law issues including tort and contract law. The only restriction on the jurisdiction of the Deputy Judge relates to contempt hearings where a debtor or other person to be examined fails to attend an examination hearing. Contempt hearings...must be before a Superior Court Judge. In all other aspects however Deputy Judges of the Small Claims Court function as judges in the true sense of that word.

Although the Small Claims Court functions primarily as a civil court, Deputy Judges do have some jurisdiction which impacts upon the liberty of citizens in that they have the power to have a witness arrested and detained, and have power also to have a default debtor arrested and incarcerated [for a limited period]... and may [although rarely] preside over matters which involve the Canadian Charter of Rights and Freedoms...

It is apparent from even a cursory review of the statistics of the number of cases...and the judgments rendered... that the Small Claims Court is the busiest Court of civil jurisdiction in Ontario, hearing a wide range of cases which deal with diverse legal and factual complexities which go far beyond the collection of debts, or the settling of what some may perceive as inconsequential personal disputes. This was acknowledged by the Court of Appeal which stated that “the caseload assumed by Deputy Judges is extensive both in quantum of cases and in jurisdiction of subject matter.”

25. Deputy Judges also preside at mandatory pre-hearing settlement conferences.

26. That the Small Claims Court is the busiest civil court in Ontario was confirmed in the *2007-08 Annual Report of the Superior Court of Justice, Ontario* and in the *Civil Justice Reform Project Report*, November 2007, prepared by The Honourable Coulter A. Osborne Q.C.

27. In his 2006 *Review of the Small Claims Court of Ontario*, Dean Holloway stated (page 9):

To many, the Small Claims Court remains largely a venue for the unsophisticated litigant, and chiefly a forum for the collection of debts. But this is a woefully outdated view...to be sure, much of the work of the Court remains as it has always been – acting as a *de facto* court of common pleas. But at the same time, with the various increases in monetary jurisdiction that have taken place since the 1970's, the work of the Court has acquitted a degree of legal and factual complexity that would surprise many.

Yet, as diverse as its caseload has become, one can only assume that in the years to come, the work of the Small Claims Court will, as a function of broader changes taking place in society, become even more complex still.

28. I note too the opening reference in the November 1996, *Supplemental and Final Report of the Ontario Civil Justice Review*, Ministry of the Attorney-General, quoting from an article by Adams, “The Small Claims Court and the Adversary System” (1973) 51 Can Bar Review 585, at page 587:

The civil justice available in Small Claims Courts has important implications for the integrity of law in general, given the pervasive “touch” of this court.

29. Deputy Judges must be lawyers. Although not required, in practice Deputy Judges have ten or more years of experience in the practice of law prior to their first appointment. Approximately one-third of the current Deputy Judges are lawyers who have retired from practice. Neither the *Courts of Justice Act* nor the Attorney-General (whether through policy or in the letter of judicial appointment) imposes any restriction on a Deputy Judge in respect of any work performed outside the judicial capacity. According to the Association, Deputy Judges must agree that, during the term of their appointment as a Deputy Judge, they cannot appear in Small Claims Court. Also according to the Association, although the practice is not consistent across the province, in some regions the lawyer's firm must also agree to so restrict its practice. It is the case that Deputy Judges swear the same oath and have been advised by the Regional Senior Justices Council that they are subject to the same ethical principles as established for justices of the Superior Court. One would expect that those principles, at a minimum, would act to prohibit a Deputy Judge from appearing on behalf of a party litigant in Small Claims Court.

30. Complaints regarding Deputy Judges are reviewed through a committee process; with the Regional Senior Judge also having a wide range of disciplinary options at his/her disposal, including the removal of the Deputy Judge from office.

31. Deputy Judges receive one day of training in connection with their appointment. (Mandatory training was an important recommendation in both the First (page 292) and Supplemental (pages 104-05) Reports of the *Ontario Civil Justice Review* in 1995 and 1996 and this amount of training was found to be unsatisfactory by Dean Holloway in his 2006 review (page 18)). It appears that Deputy Judges who wish to undertake judicial training beyond this program do so on their own time and at their own expense. Reserved decisions are prepared by the Deputy Judges using their own administrative resources and are then distributed to the parties by the Court. A Court Services Directive issued in 2004 provides that where judgment is reserved following a trial of two or more days in length, the Deputy Judge will be paid one *per diem* for every two days of trial. Where judgment is reserved in a trial of less than two days, the amount of remuneration to be paid is subject to the approval of the Regional Senior Justice and approval is required prior to submitting an invoice.

32. Most recently, in 2009, 47% of Deputy Judges sat for a total of 10 days or less. Another approximately 22% sat between 10 and 20 days per year. A further 20% sat between 20 and 45 days in the year. The remaining approximately 11% sat between 45 and 120 days in that year. In the twenty-two month period between January 2005 and October 2006 (the most recent information available) Deputy Judges claimed 347 reserved judgment writing days. The average number of sitting days in 2009 was 1.6 days per month. The appointment creates or contains no formal expectation of any commitment to sitting days, an expectation presumably within the control of the overseeing Superior Court rather than the Government. According to the Association, the Toronto region of the Small Claims Court expects that Deputy Judges sit 2 to 3 days per month. However, some Deputy Judges in the province have been reappointed even though they have not sat during the course of their previous term.

33. The Government filed a list of the 20 most commonly cited statutes in the Small Claims Court. (I also reviewed written decisions released by the Small Claims Court in the first quarter of 2010.) The scope of those statutes is significant, indicating that Deputy Judges may be faced with determining disputes covering a vast array of legal issues. They are also often called upon to adjudicate these disputes with little advance preparation. According to the Association, in many court locations, files are only organized the day before trial. To the limited extent that Deputy Judges may spend time on file review in advance of the sitting date, such time does not

attract compensation.

34. Effective January 1, 2010 the monetary limit of claims in the Small Claims Court increased to \$25,000. That increase was prompted mainly to ensure greater access to civil justice for the citizens of Ontario.

35. Whether the increase in monetary jurisdiction will see an increase in the number of Deputy Judges required to deal with an increased caseload, more days of hearing to deal with more complex matters, additional required writing time for reserved decisions, and/or higher numbers of legally represented litigants, are largely matters of speculation at this stage. I do note this Commission's concern (which has been conveyed to the parties in conjunction with certain supplementary inquiries) that appropriate systems do not appear to be in place to capture and record basic statistical information in order that the parties and future Commissions may have appropriate information available to be able to identify and assess any changes to the full scope of the work of the Small Claims Court and the Deputy Judges.

CONSIDERATION OF THE PRESCRIBED CRITERIA

36. In accordance with section 8 of the Schedule to the O.I.C., in making its recommendations under subsections 5 (1), the Commission shall consider the following criteria:

1. The laws of Ontario.
2. The need to provide fair and reasonable remuneration to Deputy Judges.
3. The economic conditions in the province, as demonstrated by indicators such as the provincial inflation rate.
4. Recent Ontario public sector compensation trends.
5. The growth or decline in per capita income.
6. The financial policies and priorities of the Government of Ontario.
7. The principles of compensation theory and practice in Canada.

37. The Association's submissions on many of the criteria were subsumed within its primary focus on the second criterion; the need to provide fair and reasonable remuneration to Deputy Judges. The Government's submissions addressed the economic factors in greater detail. I turn then to a consideration of each of the criterion.

1. THE LAWS OF ONTARIO

38. With respect to this criterion, the Government referred to the *Courts of Justice Act, supra*, which defines and limits the authority, jurisdiction, and appointment of Deputy Judges. The characteristics of the Small Claims Court and the role of the Deputy Judge within that Court have been reviewed above. The Government took the position that, critical to the appropriate level of remuneration for Deputy Judges, is the limited legislated role that Deputy Judges play in the judicial system. That more limited role is a key factor in the Government's position with respect to the second criterion; the assessment of the need to provide fair and reasonable remuneration. I therefore discuss the structural aspects of the Court as established by the legislation later in this report in the context of that second criterion.

39. The Government also referred to *Bill 16*. Schedule 25 of that Bill, entitled the *Public Sector Compensation Restraint to Protect Public Services Act, 2010* received Royal Assent on May 18, 2010 and is deemed to have come into force on March 25, 2010. That legislation establishes restraint measures with respect to the compensation plans of non-unionized public sector employees and office holders retroactively to March 24, 2010. The parties agreed that the *Public Sector Compensation Restraint to Protect Public Services Act, 2010* exempts Deputy Judges from its provisions by virtue of their express exclusion in sub-section 5 (2) of the Act.

40. However, the Government took the position that the legislation is instructive of the provincial fiscal reality in that restraint for those engaged in public service is the order of the day over the period of the mandate of this Commission. It noted that, in addition to the provincial civil service, this legislation applies to the broader public sector, including hospitals, school boards, and other publicly funded services. This legislation forms part of the Government's 2010 Budget strategy in which deficit reduction is a major priority.

41. Section 7 of *Public Sector Compensation Restraint to Protect Public Services Act, 2010* prohibits increases to compensation, including rates of pay, pay ranges, benefits, prerequisites and other payments for non-unionized employees and office holders during the restraint period which ends March 31, 2012. Sub-section 7(3) of that legislation provides limited exemptions from that freeze to pay rates within an existing pay range, in recognition of additional time in

office or employment, an assessment of performance, and/or successful completion of a program or course of professional or technical education.

42. Remuneration for appointees to quasi-judicial/administrative agencies and tribunals is increased (or not) on the basis of parity with compensation paid to Ontario public service executives in accordance with the Government's *Addendum to the Government Appointees Directive* as revised dated September 2009. It is the case that certain tribunals (for example, the Ontario Labour Relations Board) increase remuneration to full-time appointees based on experience, so movement 'up the grid' will continue, at current rates, under the statutory exemption noted. Apart from these measures, appointees to quasi-judicial/administrative agencies and tribunals will see no increase to their compensation over this restraint period as a result of this legislation.

43. The Framework Agreement (set out as a Schedule to section 51.13 of the *Courts of Justice Act*) establishing the Provincial Judges Remuneration Commission includes provision for annual automatic increases in remuneration in the amount of the IAI (Canada). In other respects, remuneration for judges of the Ontario Court of Justice will be determined for this period once the Eighth Triennial Provincial Judges Remuneration Commission makes its recommendations. The joint submission made to the Fifth Triennial Justices of the Peace Remuneration Commission (and further to regulatory implementation) provides for an annual increase in remuneration to Justices of the Peace in the amount of the IAI (Ontario) effective April 1, 2008 and thereafter. Therefore, (and regardless of the Ontario Court of Justice Commission process), over this period of fiscal restraint, both Justices of the Peace and judges of the Ontario Court of Justice may see increases in remuneration depending on these statistical measures of growth.

44. (At page 33 of its submissions, the Government stated that the April 1, 2010 rate for Justices of the Peace will be the existing rate "as modified by the increase/decrease in the Ontario IAI". The Government agrees that, should that calculation reflect negative growth, subsection 2(2), 5 of *Ontario Regulation 247/94* (as amended by *O. Reg. 233/09* filed on June 19, 2009) stipulates that the salaries shall remain unchanged.)

45. In addition to considering these specific legislative references, I have also taken into account *Order-in-Council 1788/2006* and the constitutional framework that provides the foundation for this Commission.

2. THE NEED TO PROVIDE FAIR AND REASONABLE REMUNERATION TO DEPUTY JUDGES

46. The Government submitted that the increase to the *per diem* effective January 1, 2005, following the Davie Commission's report, achieved the purpose of providing fair and reasonable remuneration. In any event, submitted the Government, the *per diem* remains fair and reasonable in light of economic restraint measures affecting others; the nature, scope and structure of the work of the Deputy Judges; the intangible benefits associated with the work; and in comparison to other judicial and quasi-judicial roles. It also submitted that a remuneration freeze for the term of this Commission's mandate would not place the remuneration of Deputy Judges below a minimally acceptable level of remuneration. The Association strenuously disagreed and submitted that a *per diem* of \$1200 was an amount reflective of fair and reasonable remuneration.

(a) The First Deputy Judges Remuneration Commission and its Aftermath

47. The Davie Commission was charged with making remuneration recommendations for Deputy Judges for the period January 1, 2005 to December 31, 2009. At the time of that inquiry in 2007, Deputy Judges were receiving a *per diem* of \$232.00, an amount that had not changed since 1982; a period of 25 years. In its report, the Davie Commission stated that more weight was accorded the "fair and reasonable remuneration" criterion in light of its finding that the then current *per diem* paid to Deputy Judges had fallen:

...well below a 'minimum acceptable level' and compromises the financial security characteristic essential to the collective, institutional independence of the Small Claims Court, and, to a lesser degree, the individual independence of the Deputy Judges...
(at pages 8-9).

48. At page 46 of its report, the Davie Commission concluded:

For all of these reasons it is the recommendation of this first Deputy Judges Remuneration Commission that the per diem for the period beginning January 1, 2005 and ending December 31, 2009 be as follows:

Effective January 1, 2005	\$475.00
Effective January 1, 2006	\$525.00
Effective January 1, 2007	\$600.00
Effective January 1, 2008	\$675.00
Effective January 1, 2009	\$750.00

49. In its formal response to the Davie Commission dated May 23, 2008, the Government accepted that Commission's recommendation that the Deputy Judge's *per diem* rate should increase to \$475 as of January 1, 2005. The Government noted that that increase represented a 105% increase over the then *per diem* rate of \$232. The Government stated that it “accepts the Commission's finding that this recommended increase results in a fair and reasonable level of compensation for Deputy Judges as of January 1, 2005...”.

50. For the remaining years, the Government rejected the further recommended increases. The Government concluded:

... in particular, once Deputy Judge per diem rates have been more than doubled to \$475 in 2005, additional 10% to 15% year-over-year increases from 2006 to 2009 are not warranted to provide Deputy Judges with a fair and reasonable level of compensation, and do not sufficiently take into account the other criteria that the Commission is required to consider in developing its recommendations.

51. The Government determined that an average wage increase of 2.69% in each of the years 2006 to 2009 was fair and reasonable, as being consistent with recent public-sector compensation trends as demonstrated by percentage increases received by a broad range of other groups in the broader public sector, including other members of the judiciary, as well as being consistent with economic conditions in Ontario and the growth or decline in per capita income, as demonstrated by indicators of economic growth including rates of inflation.

52. The application of that average annual 2.69% increase led to the current \$528 *per diem*, which took effect January 1, 2009.

53. The Government's response to the Davie Commission was challenged by the Association in Divisional Court. The Association took the position that the Government had not articulated a legitimate reason for departing from the Commission's recommendations on the basis that the Government ignored the Commission's conclusion that the rate of \$750 effective January 1, 2009 would provide a fair and reasonable rate.

54. In reviewing this issue the Divisional Court stated:

[37] There is a major dispute between the parties as to the content of the Commission's recommendations. The applicant concludes that a fair and reasonable rate of compensation will be reached only after the 2009 rate comes into effect, relying on the Commissioner's recommendation of the "increases" as fair and reasonable and her statement (at page 47), "these recommended increases *will* result in a per diem commensurate with the office of a judge and the duties and responsibilities of the Deputy Judge..." (emphasis in original)

[38] The government takes the position that the Commission found the January 1, 2005 rate of \$475 to be a fair and reasonable rate,...

...

[40] In my view, the government has given legitimate reasons for varying the Commission's recommendations. There is a basis in the Commission report for the government's conclusion that \$475 is a fair and reasonable rate as of 2005, even if the Commission's recommendation appeared to present the increases over five years as "fair and reasonable". The Commissioner was to recommend rates for each of the years in question and \$475 was the per diem she had recommended effective January 1, 2005. The government accepted that figure, noting that it reflected the criteria that the Commission was required to consider.

55. Before me the Government has also taken the position that the Davie Commission recommended that, effective January 1, 2005, a *per diem* of \$475 constituted fair and reasonable remuneration for Deputy Judges. As well, at page 17 of its written submissions, the Government stated that the Divisional Court "unanimously approved the Government's response to the First Deputy Judges Remuneration Commission. As a result, the current per diem of \$528... is a fair and reasonable remuneration." This position underlies the Government's assertion that a freeze in remuneration will not adversely affect Deputy Judges' remuneration even having regard to this second criterion.

56. Firstly, I note that the Divisional Court made no determination that the \$475 *per diem* constituted "fair and reasonable" remuneration. Rather, that Court concluded that the

Government's response to the Davie Commission recommendations met the threshold test of "simple rationality" as set out by the Supreme Court of Canada in *Provincial Court Judges Assn. of New Brunswick; Ontario Judges' Assn. v. Ontario (Management Board)*; *Bodner v. Alberta*; *Conference des juges du Quebec v. Quebec (Attorney General)*; *Minc v. Quebec (Attorney General)* (2005), 255 D.L.R. (4th) 523 ("Bodner").

57. If, as it appears, the Government's first position is that in recommending the \$475 *per diem* effective January 1, 2005, that amount reflected the Davie Commission's view of the appropriate application of the second criterion and the appropriate relative placement of Deputy Judges' remuneration, I must disagree. Reading the Davie Commission report as a whole leads to a different conclusion.

58. The Davie Commission considered at length the submissions of the parties with respect to appropriate comparators, including a comparison of the work and the levels of remuneration for Judges of the Ontario Court of Justice, Justices of the Peace, Vice-Chairs and members of various quasi-judicial/administrative agencies and tribunals, and Hearing Officers who are members of the civil service. It appears that many of the same submissions have been made here.

59. The Davie Commission considered the remuneration history of Deputy Judges and its relative decline compared to Provincial Court Judges. At page 12 of that report it states:

By 1982 the former Division Court had been renamed the Small Claims Court and had a monetary jurisdiction of \$1000.00. The province appointed judges to that court. Deputy Judges also served in the court. At that time the annual salary of a Provincial Judge was approximately \$65,700.00 and the \$232.00 per diem paid to Deputy Judges represented slightly more than 75% of that annual salary on a per diem basis.

By 1985 the Small Claims Court had become known as the Provincial Court (Civil Division). It had a monetary jurisdiction of \$3000.00 in Toronto, and \$1000.00 elsewhere in the province. Deputy Judges appointed to the Court continued to serve and continued to be remunerated on a per diem basis. At the time, unlike their full-time counterparts sitting in the court, Deputy Judges could not hear cases where the claim was for more than \$1000.00. In 1985 the salary of a provincial judge was \$75,000.00 and the \$232.00 per diem represented approximately 68% of that annual salary on a per diem basis.

...In 1988 the \$232.00 the Deputy Judges were then receiving as a per diem represented approximately 65% of the annual salary of the full time Provincial Judges also serving in that Court.

60. And at pages 15-16 of its report, that Commission continued:

In 1997...the annual salary of a Provincial Judge was \$128,623.00 Deputy Judges however continued to receive only the \$232.00 per diem which had been set 15 years prior. By this time the per diem reflected approximately 40% of the base annual salary of a Provincial Judge....

The recommendations of the Fourth and Fifth Triennial Provincial Judges Remuneration Commission further increased the salaries of Provincial Judges, including those full-time judges sitting in the Small Claims Court. ...by 2007, the annual salary of the two remaining full-time judges of the Small Claims Court is \$218,655.38, the two supernumerary judges receive a per diem rate of \$995.39, while the Deputy Judges who hear the bulk of the cases in the Small Claims Court continued to receive only \$232.00. *Whereas in 1982 the \$232.00 paid to Deputy Judges represented, on a per diem basis, more than 75% of the annual salary of a full-time Provincial Court Judge, today that same per diem represents less than 25%. (emphasis added)*

61. In considering, but ultimately rejecting parity with provincial judges of the Ontario Court of Justice, the Davie Commission wrote (at pages 37–42):

I accept that, on the whole, the work of Deputy Judges is equivalent in terms of responsibility, volume and complexity to the work of the two full-time and supernumerary judges sitting in the Small Claims Court. That is why their salary is a relevant comparator even if an automatic, formulaic link to that salary is not appropriate. Assuming that the duties are equivalent it does not necessarily follow that the per diem remuneration should be equivalent because there are other, significant, relevant distinctions which impact upon the office of the full-time judge and the appropriateness of that comparator to determine the per diem for Deputy Judges.

A full-time judge is precluded from other remunerative work and must devote his/her whole time to the performance of his/her duties as a judge. Full-time judges must make sacrifices not required of Deputy Judges. Full-time judges must significantly restrict, if not absolutely terminate the business and financial connections which they had prior to their appointment. Certainly, at a personal level, full-time appointees to the bench may be required to distance themselves from previous political affiliations and other personal, social and economic relationships can be viewed as impeding the required impartiality of the full-time judiciary. Undoubtedly these required restrictions lead to a certain isolation not shared by the per diem Deputy Judge who may continue to practice law.

... From the financial perspective which is most significant to this remuneration Commission, Deputy Judges are simply not restricted in their ability to engage in other business opportunities or remunerative work as are full-time judges.

It must be remembered that the per diem is not a salary and is not intended to be a significant source of the income of the lawyer who accepts appointment as a Deputy Judge. By reason of the institutional design of the Small Claims Court, the Deputy Judge is not intended to be financially dependent on government. That is a factor and circumstance which impacts on both the constitutional requirement for judicial independence and the Order-in-Council directive for “fair and reasonable remuneration.” From the constitutional

perspective, although the constitutional imperative for financial judicial independence entitles Deputy Judges to an independent, objective review of their remuneration, the constitutional requirement does not go so far as to compel that a per diem paid for work or services provided on an irregular and infrequent basis must be equal to a salary. Conversely, just because it's not a salary doesn't mean that the per diem need not meet an "acceptable minimum level for the office of the judge" or provide "fair and reasonable remuneration."

There are other relevant differences between the full-time judge and the per diem judge of the Small Claims Court. The manner in which the work of each is structured is different. Deputy Judges sit on an irregular basis, maintaining both flexibility and control over their sitting schedule. There is no minimum number of days which a Deputy Judge must set. The same is not true for full-time judges.

The methods by which Deputy Judges are recruited, selected and appointed, and the security of their tenure, are also different from the full-time judge. Deputy Judges are appointed for three-year terms...A full-time judge is secure in tenure...Section 33.1 of the Courts of Justice Act has different, less stringent provisions relating to the removal of a Deputy Judge following a complaint of misconduct.

In addition to these differences I find merit to the government's submission that it makes little sense to compare more than 420 similarly situated Deputy Judges to two other differently situated judges sitting in the same court. Even if the two groups... deserve equal compensation, one need not inevitably conclude that the compensation deserved is the compensation received by the higher paid but numerically much smaller group.

It is significant that, since 1990 when the Small Claims Court was restructured, full-time judges in that court have become anomalous. ... That state of affairs renders a formulaic link of the per diem to the remaining full-time judiciary inapt....

...

Notwithstanding the aforementioned considerations which negate parity with, or a formulaic link to, salaries paid to the full-time provincially appointed judiciary, I do consider that salary, and its history of salary increases, to be a relevant matter when considering the need to provide fair and reasonable compensation to Deputy Judges.

I do not accept the government's submission that the work of Deputy Judges has not changed substantially since 1982. Beyond the monetary increase in their jurisdiction, a sample of cases indicates an increased complexity and a qualitative change in the type of cases and proceedings now being conducted in the Small Claims Court. The increased monetary jurisdiction, an increasingly litigious public, our continuously evolving notion of the rule of law in the development of new types of claims has meant that the Small Claims Court is no longer simply a court for the collection of debts. Again, it must be emphasized that the Deputy Judge of the Small Claims Court presents the face of our civil law system. It is the judiciary which Ontarians are most likely to encounter. Deputy Judges function in the busiest court in Ontario.

Another significant change to the position of the Deputy Judge... is their role within the Small Claims Court. While in 1982 Deputy Judges could be viewed, perhaps, as performing a "fill in" [role] to the permanent judiciary of the court, this is no longer the case....

Yet, in the years since 1982, the full-time judges whose ever declining numbers has necessarily meant a declining presence on the Small Claims Court have seen their salaries more than tripled...

In the result, although I do not recommend either parity with, or formulaic link to, the salaries of the provincially appointed judiciary serving in either the Small Claims Court or the Court of Justice, *the current salary paid to that judiciary, and the history of increases to that salary has informed my recommendation.*

(emphasis added)

62. The Davie Commission, at pages 42–44 of its report, also considered the other comparators to which this Commission was referred:

I accept that remuneration paid to persons such as Hearings Officer and quasi-judicial adjudicators of various boards and agencies could be a source of comparison. Some legally trained Members, Vice Chairs and Chairs of government agencies, boards and tribunals function in a manner similar to Deputy Judges. They may conduct hearings at which documentary and oral evidence is adduced, and render oral and written adjudicative decisions regarding the rights of parties appearing before them. In that sense there is a ground for comparison. However, the salary of persons in these positions is unilaterally set by the government. There is therefore some concern about judicial independence and the separation of the executive and the judiciary in relying upon those salaries when determining judicial remuneration such as the per diem for Deputy Judges.

More significantly, the Hearings Officer or other quasi judicial adjudicator is not a Judge of a court and it is difficult, if not impossible, to compare judges to non judges. Certainly the basic qualifications required to be a judge are much more stringent than those for Hearing Officers and quasi judicial adjudicators. The jurisdiction and scope of the positions, responsibility, required knowledge and skills, which are the type of factors traditionally used to assess comparability and relative ranking are simply not the same for the two positions.

The same holds true, albeit with less force, to the Justice of the Peace comparator. Although the compensation of Justices of the Peace is established having regard to the recommendations of an independent commission, Justices of the Peace are also not judges, need not be lawyers, have different qualifications and exercise different jurisdiction. As was the case when comparing Deputy Judges to Provincial Judges, when it comes to the Justices of the Peace, the differences in the types of matters within the scope of each position and the complexity and impact of decisions made by the Deputy Judge and the Justice of the Peace make traditional ranking relative to each other easier said than done. I reject however the notion that, in the judicial hierarchy, Justices of the Peace rank ahead of Deputy Judges. To accept that position endorses and perpetuates the view that the busiest court of civil justice in Ontario is a second class, inferior institution simply because it does not deal with criminal matters.

Ultimately I found the remuneration paid to [persons] in these positions to be useful but not determinative of what constitutes a fair and reasonable per diem for Deputy Judges. I also find that if the salaries of Hearing Officers, quasi judicial adjudicators and Justices of the Peace are used as comparators, then how the government has dealt with increases in the

remuneration paid to persons in these positions is also relevant.

63. The Davie Commission then recommended (at page 46, emphasis added) “that the per diem *for the period beginning January 1, 2005 and ending December 31, 2009* be as follows”. As noted earlier, the Davie Commission recommended a *per diem* rate of \$425 effective January 1, 2005 and effective January 1, 2009, a *per diem* rate of \$750, and further commented (at pages 46-47):

Viewed strictly as a percentage differential increase from the current paltry \$232.00 these per diem increases may appear to be extreme. These increases however must be viewed in a historical context in which there has not been an increase in 25 years. To some extent these per [diems] will restore the relative relationship of the per diem to the salary of a full time judge which existed for many years prior to the last increase in 1982.

... These recommended increases will result in a per diem commensurate with the office of a judge and the duties and responsibilities of the Deputy Judge, and from a financial perspective affords to Deputy Judges the respect and trust which a government should provide to the bench of a court which is integral to the administration of justice in Ontario.

64. The recommendation to increase the *per diem* to \$750 effective January 1, 2009 would have resulted in a *per diem* reflecting 63% ($\$750 / \1187) of the then provincially appointed Court of Justice *per diem* rate. The \$475 amount represented a 105% increase, an increase of slightly more than inflation over the period 1982 to 2007. (Over the same period, the provincial court judges’ remuneration rate increased by more than 230%.) Although I recognize that the \$475 amount was made effective in 2005, that rate presupposes that the 1982 rate, adjusted for inflation, reflected appropriate placement of the Deputy Judges in relation to other comparators. That conclusion was rejected by the Davie Commission and its report extensively reviewed how the *relative* position of Deputy Judges to those various comparators had fallen over the 25-year period that Deputy Judges had received no increase.

65. A full reading of the Davie Commission report leads to the conclusion that it was not the intention of, nor the conclusion of that Commission that a \$475 *per diem* was fair and reasonable remuneration for the position of Deputy Judge in relation to the comparators discussed. That Commission sought to “restore the relative relationship of the per diem to the salary of a full time judge” and made clear that it rejected a conclusion that Deputy Judges ranked below Justices of the Peace. Relative to Justices of the Peace and the various appointees to quasi-judicial/administrative agencies and tribunals, the Davie Commission concluded (at page 45) that

those rates, from a *constitutional standpoint*, set a “minimum benchmark below which the per diem of Deputy Judges should not fall”. From the full commentary in its comparative analysis, I conclude that the Davie Commission intended that “fair and reasonable” remuneration for Deputy Judges would be achieved in 2009 at the \$750 *per diem* rate.

(b) Continuing the Discussion of Comparators

66. The adoption of this second criterion into a process that, according to the Supreme Court of Canada in the *P.E.I. Reference*, does not *guarantee* judges remuneration beyond a minimally acceptable level may, at first blush, seem inconsistent with the Court’s constitutional requirement. It is necessary however, for absent some comparative analysis, which this criterion demands, there would exist no meaningful parameters within which to assess the level of remuneration as meeting even a minimally acceptable level. Moreover, in the context of the mandate of our judicial system, achieving fair and reasonable judicial remuneration is, in its own right, an appropriate goal.

67. The Government submitted that, within the judicial spectrum of roles and responsibilities, Deputy Judges fall far below judges of the Ontario Court of Justice and in the “general vicinity” of Justices of the Peace. It further submitted that there are other public service positions with characteristics comparable to Deputy Judges, including various quasi-judicial adjudicators and Hearings Officers (see generally pages 26–38 of the Government’s brief).

68. The Association, in its submissions, argued that as part of the Superior Court of Ontario, the remuneration of Superior Court justices, Federal Court justices, judges of the Ontario Court of Justice, Masters of the Superior Court and Justices of the Peace were all relevant and appropriate comparators (see pages 15–20 and pages 27–28 of the Association’s brief). The Association also made submissions comparing the Ontario Small Claims Court *per diem* with remuneration received by judicial officers in jurisdictions across Canada who exercise the same civil jurisdiction.

69. The Association urged me to consider other Canadian jurisdictions whose Small Claims Court monetary jurisdiction was \$25,000; Alberta, British Columbia, Nova Scotia, and the

Yukon, as well as Saskatchewan where that Small Claims Court monetary jurisdiction is currently \$20,000 but is apparently soon to increase to \$25,000. In most, if not all of these jurisdictions, provincial court judges retain jurisdiction to deal with Small Claims Court civil matters. However it also appears that they continue to exercise jurisdiction in both criminal and family law as well.

70. In certain jurisdictions, a part-time judicial role exists. In Nova Scotia, both provincial court judges and *per diem* judges known as “Adjudicators” exercise the Small Claims Court jurisdiction. Effective as of 2005, Adjudicators receive \$145 per hour or part thereof for each sitting (or an equivalent *per diem* of \$725 based on an estimated 5-hour sitting day). In Saskatchewan, the Small Claims Court jurisdiction is exercised by provincial court judges and temporary judges. Temporary judges include retired judges, and retired or non-practicing lawyers who sit on a *per diem* basis. Effective April 1, 2011 the remuneration to temporary judges in Saskatchewan will be \$1086 for each full day and \$543 for a half-day. These amounts are also payable in respect of time spent preparing written reasons for decision. In the Yukon, territorial judges and deputy judges preside over the Small Claims Court jurisdiction. Effective April 1, 2009 the *per diem* paid for each sitting day to these deputy judges is \$915.97. These *per diem* amounts appear to be calculated using the base rates payable to the respective full-time provincial court judge, exercising the full range of that provincial court’s jurisdiction.

71. No model is equivalent to, or sufficiently similar to that of Ontario to be able to draw exact parallels regarding remuneration. The Government of Ontario has made a decision to use exclusively part-time *per diem* judges to exercise this specific civil jurisdiction; a structure unlike other jurisdictions. However, the fact that in these other jurisdictions, provincial court judges exercise the civil jurisdiction of the Small Claims Court remains instructive of the complexity of and value associated with that work.

72. I refer to the quotes from the Davie Commission report at paragraphs 61 and 62 herein, wherein the same Ontario judicial and quasi-judicial comparators as urged upon me were reviewed and considered. I accept and adopt as appropriate the Davie Commission’s conclusions as to the relative placement of Deputy Judges in that comparative scheme with the following additional remarks.

73. The current *per diem*, or equivalent, of the various asserted comparators follows:

Judges of the Ontario Court of Justice (April 1, 2009 - subject to any increase [at a minimum] by the amount of the IAI Canada effective April 1, 2010 and annually)	\$ 1187
Vice-Chairs (professional and labour adjudicative agencies)	\$ 664
Vice-Chairs (other adjudicative agencies but with operational management responsibilities)	\$ 627
Justices of the Peace (presiding) (April 1, 2010 - subject to any annual increase by the amount of the IAI Ontario)	\$ 521
Vice-Chairs (other adjudicative agencies)	\$ 491
Hearings Officer (maximum annual rate)	\$ 86,706

74. I have listed Vice-Chairs of the two levels of adjudicative agency, as they are more likely to require both legal training and subject matter expertise than Members appointed to those boards and agencies. Members may bring subject-matter expertise to their work, but I am not persuaded that they represent an appropriate comparator to the work of the Deputy Judges. Typically, they are not required to be lawyers and often play a more limited role in the hearing process and in decision writing.

75. I also reiterate the concern noted by the Davie Commission that the amounts paid to appointees of these various administrative agencies are set unilaterally by the Government; a factor to keep in mind in assessing what is fair and reasonable remuneration.

76. Contrary to the submissions of the Association, I agree with the Davie Commission that the role of Deputy Judge does not warrant remunerative parity with judges of the Ontario Court of Justice for the reasons expressed in that report. I also reject the submissions of the Association that a comparison to federally appointed judges is helpful. The mere fact that the Small Claims Court resides as a branch of the Superior Court of Justice does not take into account the differing extent and nature of that Court's jurisdiction. However there exists a relative relationship with the provincial court both historically as set out in paragraph 61 herein, and in terms of the value of the work, as can be evidenced by the fact that in other jurisdictions the work of the Small

Claims Court is performed, in the main, by provincial court judges.

77. Justices of the Peace are not required to be lawyers. Although Justices of the Peace must give up their livelihood upon appointment, full-time remuneration includes pension, paid vacation, and benefits not reflected in that *per diem* rate. The *per diem* amount is therefore not an accurate reflection of actual compensation for the vast majority of presiding Justices of the Peace (or similarly the Ontario Court of Justice bench). Part-time Justices of the Peace are limited to essentially supernumerary appointments. Although entitled to constitutional protection, Justices of the Peace are not judges.

78. With respect to the provincial offences aspect of the work of Justices of the Peace, although there are over 250 provincial statutes and many municipal by-laws under which charges may be laid, 80% of this component of the workload of Justices of the Peace consistently deals with charges under the *Highway Traffic Act*.

79. The Government submitted that a critical distinction between Deputy Judges and Justices of the Peace is that the jurisdiction of Justices of the Peace includes the impact on liberty – a reference primarily to the role they play in bail hearings (and to a much lesser extent provincial offences) in Ontario. This work of Justices of the Peace is significant as it has constitutional ramifications. However it is but one factor bearing weight in the comparison. The fact that the state is not a party before the Small Claims Court (or any other court of civil jurisdiction) to the extent that it is a party in criminal proceedings does not diminish the need for judicial independence (including the consideration of financial security), as noted by the Court of Appeal at paragraph 26 of its decision in *Ontario Deputy Judges Association and The Attorney General of Ontario, supra*.

80. It is the case that the work of quasi-judicial/administrative agencies and tribunals is broad and varied. However, for the most part, that is to be said about those institutions as a whole. Taken individually, they more often exercise a significantly more limited jurisdiction reflective of their enabling statute. Moreover, they are not courts.

81. The Government submitted that appointees to the higher paying professional and labour adjudicative agencies receive more because of a specialist requirement and submitted that those persons are restricted from carrying on a law practice; both factors suggesting a rationale for a higher *per diem* rate. It also identified recruitment and retention as issues affecting that *per diem* rate. No material was submitted in support of a practice limitation on these part-time appointees. I can only assume that the parties are aware (given at a minimum the professional history of this Commissioner and the expertise of Government counsel to this Commission in the area of labour and employment law) that many part-time Vice-Chair appointees to specialized labour tribunals in Ontario carry on full-time practices as independent private adjudicators and/or mediators in labour arbitration and/or employment law, and may carry on the practice of law in unrelated areas; earning amounts comparable to lawyers in private practice across the Province. Their *per diem* work for these various tribunals can be as flexible as that of the Deputy Judge, depending on the particular scheduling practices of each institution.

c). The Structure of the Ontario Small Claims Court

82. At page 21 of its submissions, the Government submitted that the structure of the Deputy Judges' work as irregular, flexible and controlled by the Deputy Judge is also critical in the consideration of the appropriate level of remuneration. Although it acknowledged that Deputy Judges should not be considered equivalent to traditional "employees", it submitted that this structure suggested that the Deputy Judge was being paid a fee for a service infrequently rendered.

83. I digress to comment on what might seem to be an example of an underlying devaluation of the Small Claims Court. I refer to the quote at paragraph 16 of this report, wherein there is reference to a history that suggests that Deputy Judges traditionally "volunteered" their services. This notion, in my respectful opinion, must be laid to rest. The description of Deputy Judges as "volunteers" is found in the 1996 *Ontario Civil Justice Review, supra*. However, the remark was not an endorsement of that status. To the contrary. It was a comment recording concern about the Court's structure. The report noted that there was criticism of the use of part-time judges as contributing to an inconsistency in judgments. The report went on to comment that this "may be partly explained by the fact that [Deputy Judges] are 'volunteers' in essence, leaving their

practices for the day...”. A footnote annotating the expression states, “Deputy Small Claims Court judges are paid a nominal rate of \$235 per day, an amount which is less than the hourly rate of many at their level of experience in the profession.”

84. Deputy Judges were first appointed in order to supplement what was an insufficient number of full-time County Court Judges who were thereby unable to fulfill their duties as Division Court judges. (See pages 625-26 and 643 of the *Royal Commission Inquiry into Civil Rights, Report Number One, Volume 2*, The Honourable James McRuer, 1968.) McRuer, J. disapproved of the use of a system that allowed for *ad hoc* adjudication by practicing lawyers as being inconsistent with the tradition of judicial independence. He recommended the appointment of full-time Division Court judges (that same recommendation was made again in 1973 by the *Ontario Law Reform Commission Report on Administration of Ontario Courts* (see page 361) and in the *Report of the Ontario Courts Inquiry*, The Honourable T.G. Zuber, 1987 (see pages 90-91).

85. The Small Claims Court has however been restructured such that Deputy Judges comprise the judiciary of that Court. In the context of the Small Claims Court’s current structure, any historical notion of ‘volunteerism’ (to be distinguished from the notion of public service) is inappropriate and irrelevant to the question of appropriate remuneration for Deputy Judges.

86. It is also clear that by virtue of restructuring the Small Claims Court to make use of a part-time judiciary, the Government significantly reduced the economic cost of administering the Court, both in terms of judicial remuneration and support services. (See page 103 of the November 1996 *Supplemental and Final Report of the Ontario Civil Justice Review*.) As noted at page 12 of Dean Holloway’s 2006 *Review of the Small Claims Court of Ontario*, “..establishing a full-time bench would be tremendously expensive, and perhaps not even administratively feasible outside of the metropolitan areas”. He therefore recommended that the Small Claims Court continue to be comprised in the main of part-time judges, and went on to make recommendations with respect to their selection and training. This means that Deputy Judges are subject to term appointments, have little administrative support, do not receive benefits, have no judicial pension, and are largely responsible for maintaining their own training and qualifications. In addition, by increasing the monetary jurisdiction of the Small Claims Court, the

opportunity exists to shift some workload from the more expensive Superior Court, thereby increasing economic efficiencies in the administration and resolution of those disputes.

87. It is the structure of the Small Claims Court that creates a certain dilemma. The Government submitted that, within the spectrum of judicial officers, each possesses different constitutionally mandated independence requirements, and that the Small Claims Court lay at the lower end of that spectrum. However, by virtue of its legislated structure, there exists the potential for a perception of a lack of judicial independence in that Court. The Court's reliance on a part-time, non-tenured judiciary, limited administrative support, minimal judicial training, the requirement for approval in order to be compensated for preparing reserved decisions, and its simplified procedure, can all contribute to a view that the Court, and by extension, the issues before it, are of lesser importance. Yet the studies and reviews of the Small Claims Court provided all emphasize the importance of that Court as the face of civil justice in Ontario (see footnotes at 'Appendix B').

88. The fact that the work of Deputy Judges may be irregular as a result of this structure should not and does not provide a basis for degrading the work in terms of its remunerative value. To do so reflects a disregard for the institution of the Small Claims Court; suggesting that the Court itself is casual. The structure of the Small Claims Court places a greater burden on its individual part-time judges to ensure that the Court functions effectively and judicially. One way of maintaining institutional independence in the context of this structure is to recognize that additional burden through the provision of fair and reasonable remuneration to this part-time judiciary.

89. The Government noted the Deputy Judge's ability to cite their judicial appointment in the course of an ongoing legal practice as a benefit to that practice; identifying this as an intangible benefit to be taken into account in limiting the *per diem* remuneration. In so doing, the Government effectively recognizes and encourages the use of the judicial appointment as a marketing tool. In refraining to discuss whether the structure of the Small Claims Court may encourage a practice that might otherwise seem inconsistent with judicial functioning, I merely note that part-time term appointees to administrative agencies/tribunals would also have the same opportunity.

90. It is the case that Deputy Judges are not expected to rely on the *per diem* for their income. There has also been no difficulty in recruiting and/or retaining Deputy Judges at the current remuneration. That may come as no surprise if there is no requirement that a Deputy Judge actually sit. The fact that Deputy Judges are not expected to make a reasonable, if any time commitment was the subject of some criticism in maintaining an appropriate judicial standard (see Dean Holloway's recommendation, at page 12 of his report, *supra*, that Deputy Judges be expected to make a minimum commitment to a hearing load of three days per month). There is nothing before me to suggest that, with the exception of the professional and labour-related quasi-judicial tribunals, the Government has had any difficulty in recruiting and/or retaining candidates for any judicial and/or quasi-judicial/administrative role.

91. However, the corollary to the comments at paragraph 88 herein was noted at page 19 of the Davie Commission report:

I do not think one should lose sight of the fact that, as is the case with the judiciary of the other courts, there is a continuing need to attract and retain candidates of the highest quality. Nothing in the material before the Commission suggests those sitting as Deputy Judges are not capable or professional. *The per diem paid to those Deputy Judges should be sufficient to signify to them, and to potential candidates, that the Government respects, values and trusts the professionalism and dedication of the judiciary sitting in the Small Claims Court.* (emphasis added)

92. The appointment as Deputy Judge is one that comes with public distinction and prestige and constitutes a public service. The same may be said of any judicial or quasi-judicial appointment. The Ontario Government's *Corporate Management Directive in respect of Government Appointees*, issued by Management Board Secretariat and dated November 1994 (as amended) states:

An element of public service is implied in any appointment by the Government of Ontario and therefore, any remuneration that may be paid is not expected to be competitive with the marketplace.

93. These intangibles are already factored into any comparative analysis of existing public sector remuneration. No one suggested to this Commission that private sector market rates for practicing lawyers with a minimum of ten years of experience constituted an appropriate comparator.

d) Other Considerations

94. The Association submitted that Deputy Judges, particularly those serving in the northern and more remote regions in the Province were required to spend significant time travelling to and from court sittings, outside those sitting days, while receiving no compensation for that time. The payment of travel time (at reduced rates) to appointees of administrative agencies/tribunals is within the individual agency's discretion. I am advised that practices vary. Full-time and *per diem* Judges and Justices of the Peace are not paid for travel time. However I have no information as to how often *per diem* Judges and Justices of the Peace travel outside the day of hearing, whether travel required by full-time Judges or Justices is accommodated within their full-time work schedule, or whether such travel is expected to occur beyond the normal work day.

95. The Association took issue with the Government's position that the fact of unrepresented litigants in the Small Claims Court was irrelevant to issues of compensation. It is the case that, apart from the courts, other adjudicators and Justices of the Peace may also have to deal with unrepresented litigants. The fact of unrepresented litigants is not however irrelevant to compensation. Mr. Justice Marvin Zuker in his handbook, *Ontario Small Claims Court Practice* (2010), Carswell, notes that the Small Claims Court's informality and lack of rigid trial procedures as compared to the higher courts, requires a more active role in the proceedings by the Deputy Judge. That role requires an additional judicial skill set including significant patience, active listening skills, and sensitivity to issues that may affect the conduct of a fair proceeding, such as issues of language and literacy. Nor, where there are unrepresented litigants, will Deputy Judges likely have the benefit of legal submissions. As the Divisional Court noted at paragraph 45 of its decision in *Mungo Bear, supra*, litigants in Small Claims Court essentially present a set of facts to the Deputy Judge, and it is left to the Deputy Judge to determine the legal issues that emerge from those facts and bring his or her legal expertise to bear in resolving those issues.

e) Conclusion

96. Fair and reasonable remuneration for Deputy Judges based on a consideration of the role and responsibilities of the Small Claims Court in the overall judicial structure in Ontario

warrants a *per diem* above that paid to part-time Vice-Chairs of the professional specialized tribunals. The rate should also reflect an appropriate and relative relationship to the provincial court, given the jurisdiction of the Small Claims Court historically within the Ontario judicial structure and the fact that in most other Canadian jurisdictions the work of the Small Claims Court is conducted by the judiciary of those provincial courts. Having regard to all of the above discussion of the second criterion, I find that a *per diem* of \$765 effective January 1, 2010 at the outset of the mandate of this Commission would constitute fair and reasonable remuneration to Deputy Judges.

3. THE ECONOMIC CONDITIONS IN THE PROVINCE, AS DEMONSTRATED BY INDICATORS SUCH AS THE PROVINCIAL INFLATION RATE.

97. Due to the recession, the Province of Ontario expects to run an annual deficit over the next eight years. Over the period of the mandate of this Commission that deficit is expected to begin to decline from approximately \$19.7 billion to approximately \$16 billion. The unemployment rate for 2009 was 9.1%, although that has declined slightly in 2010. The manufacturing sector in Ontario had been particularly hard hit by the strength of the Canadian dollar in relation to the U.S. dollar, reducing export demand.

98. Inflation has been relatively stable. The Conference Board of Canada forecasts increases to the Consumer Price Index in 2010 at 2.5%, 2011 at 2.9%, and 2012 at 2.0%. Although GDP in Ontario lagged behind western provinces between 2007-2009, of more interest is real GDP growth in the province. That figure was -3.6% in 2009.

99. The Conference Board of Canada is predicting that Ontario GDP will increase by 3.8% in 2010. The Ontario Budget 2010 is predicting real GDP growth at 2.7% for 2010 and 3.2% for 2011. The Government is projecting the creation of 504,000 net new jobs in the period 2010-13. Ontario tax revenues are not projected to reach pre-recession levels until 2011-12.

100. At page 63 of the 2010 Ontario Budget, the Government states:

There are now clear signs that the Ontario economy has stabilized and that recovery is taking shape. Growth is expected to strengthen due to improving global demand,

significant government actions to support jobs and the economy, and government policies to promote long-term competitiveness and growth.

Ontario has established a strong foundation for future prosperity through its tax plan for jobs and growth and by making major investments in key public services and infrastructure. As the government's stimulus is wound down and economic growth takes hold, Ontario will continue to build on that foundation with its five-year Open Ontario plan and by modernizing government operations. These measures will allow it to hold program expense growth to a rate less than the growth in revenue and cut the deficit in half within five years. As a result, the Province is projecting diminishing deficits... with a balanced budget by 2017-18.

101. And at page 65:

Jobs, gross domestic product (GDP), merchandise exports and manufacturing sales have all improved from lows posted during the recession. However, the pace of recovery has been moderate and these key indicators remain below pre-recession levels.

102. The current Deputy Judge *per diem* of \$528 reflects an increase of 128% since 1982. Inflation in Ontario over that same period (1982 - 2009) was 113%. Thus, the Deputy Judges' *per diem* rate has recouped the ground lost over the years relative to inflation (although only on a go-forward basis from 2005 - it lost value to inflation year-over-year for 25 years).

4. RECENT ONTARIO PUBLIC SECTOR COMPENSATION TRENDS

103. In 2008 public sector wages increased by 3.1% as compared to private sector increases of 2.0%. In 2009, public sector wages increased by 2.4% compared with private sector increases of 1.3%. The size of negotiated wage increases with unionized employees has declined into 2009. The Ontario Public Service Employees' Union (OPSEU), the largest of the Ontario provincial public sector unions, negotiated with the Government an average annual increase of 1.9% across the board over the period 2009-2012, as did the Association of Management, Administrative and Professional Crown Employees of Ontario (AMAPCEO). The Government submitted that the total compensation package was less than this percentage as the settlements contained various cost avoidance measures and concessions. I was not provided with details.

104. Over the period of this Commission's mandate, remuneration for judges of the Ontario Court of Justice will automatically increase should the amount of the IAI (Canada) reflect growth (and regardless of any findings made by the Eighth Triennial Provincial Judges Remuneration

Commission). Remuneration for Justices of the Peace may also increase by the amount of the IAI (Ontario). These increases will occur as a result of *Ontario Regulation 233/09* made under the *Justices of the Peace Act* and the Framework Agreement constituting the Commission process for judges of the Ontario Court of Justice. The Davie Commission's recommendation to introduce an automatic IAI adjustment to the *per diem* payable to Deputy Judges (within the Schedule to *Order-in-Council 1788/2006*) was not accepted by the Government.

5. THE GROWTH OR DECLINE IN PER CAPITA INCOME

105. Average real wage increases in Ontario, calculated by adjusting the average weekly wage (IAI Ontario) for inflation (Ontario CPI) were:

2005	-	1.5%
2006	-	-0.2%
2007	-	2.1%
2008	-	-0.1%
2009	-	1.0%

106. The period captured by the mandate of this Commission begins in 2010 for which no figures were available. The IAI Ontario is one measure of growth or decline in per capita income.

6. THE FINANCIAL POLICIES AND PRIORITIES OF THE GOVERNMENT OF ONTARIO

107. A major priority identified in the 2010 Government of Ontario Budget was the elimination of the existing deficit by 2017-18. At page 65 of that Budget document, the Government notes:

Going forward, the Province will continue implementing expenditure management measures to support its commitment to return to fiscal balance.

108. The passage of the *Public Sector Compensation Restraint to Protect Public Services Act, 2010*, reinforces that priority and policy of the Government over the period of the mandate of

this Commission by prohibiting, except in specified circumstances, increases to non-unionized public sector remuneration.

109. For employees who bargain collectively, the Government has indicated that it expects transfer payment partners and bargaining agents to seek collective agreements of at least two years' duration that provide no net increase in compensation. It has further stated that it expects all employee groups, both within the civil service and those in the broader public service, to do their part in ensuring focus on the Government's priorities of sustaining public services while reducing the deficit.

110. Over the period under consideration, the Government seeks to limit program expense growth to an average of 1.7% annually as compared to an average of 7.6% over recent prior years. Other key priorities identified in the Budget include expenditures in health care and education. Therefore, higher expenditures in health care and education are anticipated, and the Government seeks to further limit other spending in order to achieve its stated average goal.

111. Thus, current key Government priorities include deficit reduction with an attendant significant emphasis on expense management and restraint. In its submissions the Government made it very clear that paying Deputy Judges greater remuneration has not been identified by it as a public need, priority, or initiative.

7. THE PRINCIPLES OF COMPENSATION THEORY AND PRACTICE IN CANADA

112. To the extent that reference was made to this criterion, principles of compensation theory and practice in Canada are generally consistent with the considerations reviewed in relation to the second prescribed criterion. Appropriate consideration needs to be given to ensuring that the remunerative value attributed to the work bears an appropriate relationship to the value and difficulty of the work in its own right, and in relation to relevant comparators. Market forces are a consideration in the recruitment and/or retention of Deputy Judges, although it is apparent that, with the limited exceptions discussed earlier, the Government has had no difficulty in the recruitment and retention of persons for numerous judicial and other appointments. Separate

consideration of market forces is of limited assistance in assessing appropriate remuneration as it is effectively captured by the comparative analysis and must be weighed against competing factors including, for example, the element of public service.

TRAVEL EXPENSES

113. Currently, actual travel expenses incurred by Deputy Judges are reimbursed according to the rates set out in the Government's travel expense policy. The Government advised that it intended to formalize that practice and submitted that the Commission ought to make a recommendation that travel expenses be reimbursed in accordance with the OPS Travel, Meals and Hospitality Directive most recently amended in April 2010 (the "Directive"). The kilometre rates for travel for Ontario Court of Justice judges and Justices of the Peace correspond to the rates in this Directive. All other travel and meal expenses for these judicial officers are administered by the Office of the Chief Justice.

114. The April 2010 amendments to the Directive made certain changes and appear to have eliminated certain discretion previously available to deal with various circumstances. The stated concerns in the Directive of transparency and accountability are entirely appropriate, although I have no indication that these were, or are issues in respect of Deputy Judges. I am unable to conclude that the formal application of the Directive to Deputy Judges is either appropriate to the judicial office and/or is at least comparable to current practice. Neither the Government nor the Association made other than cursory representations in respect of this issue. Having raised certain questions with the parties after the hearing, and being unable to determine whether the application of this Directive would impose requirements or limitations on the reimbursement of actual and appropriate expenses to Deputy Judges that are not currently imposed, I am disinclined to make any recommendation concerning the application of the April 2010 Directive based on the information before me. This is a matter that I defer to the next Commission for review in appropriately greater detail.

SUMMARY AND RECOMMENDATIONS

115. The Association sought recommendations over and above a recommendation with respect to the *per diem* rate. Certain of those are in respect of matters that I have referred to in this report as contributing to an onus on Deputy Judges to counteract the structural aspects of the Court that may be perceived as having an impact on judicial independence. Its proposals included access to research services, the provision of judgment books, robes and sashes, reimbursement for judicial training and related continuing legal education, payment for travel time, and enhanced payment of the *per diem* for time spent writing decisions. It is the Government's position that these matters are beyond the jurisdiction of the Commission. It is arguable that travel time reasonably required to occur outside the day of hearing constitutes a necessary component of "sitting as a deputy judge". However, given my comments in paragraphs 87-88 above that the *per diem* is one way to address any adverse consideration that the structure of the Small Claims Court may have on judicial independence, the Commission's report is limited to providing its recommendations with respect to that rate.

116. Were this Commission mandated to apply only the second criterion, the need to provide fair and reasonable remuneration to Deputy Judges, without regard to the other criteria, I would recommend a *per diem* effective January 1, 2010 of \$765 and I refer to the commentary in this report at pages 17-34.

117. However the Commission must also take into account the remaining criteria in making its recommendations. Recent economic conditions in Ontario, public sector compensation trends, and the recent slowdown in growth of real per capita income, although not exclusively negative, do reflect extremely difficult economic conditions and a reduction in the size of compensation increases over the period affected by this Commission's mandate. The Government's 2010 Budget and its passage of the *Public Sector Compensation Restraint to Protect Public Services Act, 2010* make it abundantly clear that an increase in remuneration for Deputy Judges is not a Government priority, and further, would run counter to its efforts to address deficit reduction and spending restraint on a broader basis.

118. It is the case that there is a constitutional requirement that judicial remuneration not fall below a minimal acceptable level. However, as stated by the Supreme Court of Canada in the *P.E.I. Reference* at para. 196:

...the guarantee of a minimum acceptable level of judicial remuneration is not a device to shield the courts from the effects of deficit reduction. Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times.

119. Thus there are competing considerations with respect to any recommendation as to an appropriate *per diem* rate.

120. Fundamentally, I reject the Government's position that the \$475 *per diem* effective January 1, 2005 reflected an amount representative of "fair and reasonable remuneration" for Deputy Judges. While the Government's decision not to implement the Davie Commission recommendations satisfied the Divisional Court under the test in *Bodner*, that is a different test. The further increases implemented by the Government in the *per diem* rectified somewhat more than the loss attributable to inflation between 1982 and 2009, but do not restore or reflect an appropriate relative position of Deputy Judges in the Ontario judicial framework. Nor does the current *per diem*, in my view, reflect an appropriate level of remuneration for the value of this public service. Thus, the current *per diem* continues to fall short of an amount representative of "fair and reasonable remuneration". Finally, to the extent that certain structural features are absent that would otherwise assist in maintaining the Court's institutional independence, remuneration becomes an important feature in recognizing the additional burden placed on individual Deputy Judges to ensure that the Small Claims Court continues to function effectively and judicially.

121. The following recommended *per diem* effective January 1, 2010 also does not, in my view, reflect fair and reasonable remuneration for Deputy Judges. However, recommending an initial *per diem* at a significantly lower level than that found to be a fair and reasonable amount, in combination with subsequent restraint where further increases are dependent on provincial economic growth over the period of this Commission's mandate, takes into account and applies the remaining economic criteria, including and particularly the Government's current fiscal

priorities. It also does not fall below a constitutional minimum standard. However, in circumstances where the fair and reasonable level of remuneration remains significantly higher than the current *per diem* rate, a significant adjustment remains warranted in conjunction with the implementation of restraint measures as a means of balancing currently competing considerations. To rely on a comparison of percentage-based increases would fail to give proper consideration to the second criterion.

122. For the subsequent two years of the Commission's mandate, and notwithstanding the Government's position, it is not appropriate to freeze Deputy Judges' remuneration. Increases to appointees of quasi-judicial/administrative agencies and tribunals will be limited as the Government has unilateral control over those rates. However, appropriate judicial comparators of the Ontario Court of Justice and Justices of the Peace will not have their rates frozen but will see increases should appropriate economic indicators dictate an increase. The bulk of the Ontario unionized civil service will see a 1.9% annual increase over the period of the mandate of this Commission. In limiting the recommended *per diem* in the first year to an amount significantly less than what this Commission concludes constitutes fair and reasonable remuneration, it would be inappropriate for Deputy Judges' remuneration to then lose further ground to known increases in other comparators.

123. Therefore, having regard to all of the criteria, and to all of the above, I hereby recommend that:

-Effective **January 1, 2010** the *per diem* rate be increased to \$635.00;

-Effective **January 1, 2011** the *per diem* rate be increased by the IAI Ontario, provided that the *per diem* rate remain unchanged should the applicable year-over-year IAI Ontario percentage calculation be less than 100%;

-Effective **January 1, 2012** the *per diem* rate be increased by the IAI Ontario, provided that the *per diem* rate remain unchanged should the applicable year-over-year IAI Ontario percentage calculation be less than 100%.

-Reimbursement for travel expenses continue in accordance with current practice.

(Should there be any issue concerning the Commission's intention with respect to the maintenance of the *per diem* rate in the face of negative growth should such be reflected by the IAI Ontario, I would expect the parties to contact the Commission and it will remain seized in that regard.)

124. The parties agreed, and I hereby confirm that the Commission will remain seized with respect to any issue of the Association's representation costs. The Government also confirmed that it agrees that any change to the *per diem* rate is retroactive to January 1, 2010 and payable accordingly.

Dated at Toronto, Ontario this 23rd day of September, 2010.

A handwritten signature in cursive script, reading "Marilyn A. Nairn".

Marilyn A. Nairn, Commissioner.

APPENDIX 'A'

NOTICE TO ALL DEPUTY JUDGES IN ONTARIO

Marilyn A. Nairn B.A. LL.B.
184 Macdonell Avenue, Toronto, Ontario M6R 2A7

ARBITRATION AND MEDIATION SERVICES

NOTICE TO ALL DEPUTY JUDGES IN ONTARIO

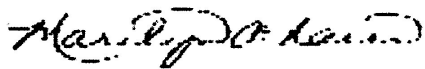
FROM: The Second Deputy Judges Remuneration Commission

Further to Order-in-Council O.C. 1788/2006 dated September 20, 2006 and my appointment as Commissioner of the Second Deputy Judges Remuneration Commission, this notice is being forwarded at the Commission's request and is to advise that hearings will convene for the purpose of receiving representations; following which, recommendations will be made to the Minister of Government Services with respect to the remuneration of Deputy Judges in the Province of Ontario for the period January 1, 2010 to December 31, 2012.

The parties before the Commission are the Crown in Right of Ontario and the Ontario Deputy Judges Association. Hearings have been scheduled for Wednesday, April 21 and Thursday, April 22, 2010. Those hearings will be held at JPR Arbitration Centre, Suite 400, 390 Bay Street, Toronto, Ontario commencing each day at 10:00 a.m.

Deputy Judges who are not members of the Ontario Deputy Judges Association may, as interested persons, make representations for consideration by the Commission. Any such representations must be in writing and received by the Commission **no later than Friday, March 26, 2010**. Any such written representations may be forwarded either by regular or electronic mail to the Commissioner's addresses provided below. A copy of any written representation sent to the Commission must also be forwarded at the same time to counsel for each of the parties at the addresses noted below. Please ensure to include appropriate contact information, including the region in which you serve as a Deputy Judge.

Dated at Toronto, Ontario this 20th day of January, 2010.



Marilyn A. Nairn, Commissioner.

Contact information for the Commission is as follows:

Marilyn A. Nairn
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APPENDIX 'B'

References:

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Report on Administration of Ontario Courts, Ontario Law Reform Commission, 1973, Part II, Ministry of the Attorney General

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