IN THE MATTER OF ORDER-IN-COUNCIL #1788/2006
AND
IN THE MATTER OF AN INQUIRY BY THE THIRD
DEPUTY JUDGES REMUNERATION COMMISSION
(July 1, 2012 to June 30, 2015)

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 THIRD DEPUTY JUDGES REMUNERATION COMMISSION

BEFORE: Marilyn A. Nairn, Commissioner

FOR THE PERIOD: January 1, 2013 to December 31, 2015

APPEARANCES:

On Behalf of the Government of Ontario:

Sunil Kapur
Kate McNeill-Keller
Matt Siple
Matt Hopkins

On Behalf of the Association:

David McCutcheon
Kathleen Burke
Marcel Mongeon

Hearings were held in the City of Toronto on January 23 and January 31, 2014. Further information requested by the Commission and representations with respect to that material were received on March 18, April 16, 17, May 20, May 23, June 18 and June 23, 2014.

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INTRODUCTION

1. This report is filed by the Third Deputy Judges Remuneration Commission (the "Commission"), constituted pursuant to *Order-in-Council 1788/2006* (the "O.I.C.") and my appointment as Commissioner pursuant to the Schedule attached to the O.I.C) (the "Schedule"). 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, 2013 to December 31, 2015.

2. 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 contemplated by the Schedule to *Order-in-Council 1788/2006* as the appointment of Commissioner was beyond the time frame contemplated by that Schedule.

THE MANDATE OF THE COMMISSION AND THE CONDUCT OF THIS INQUIRY

3. Deputy Judges comprise the bench of the Small Claims Court in Ontario. 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. Pre-hearing conference calls were held on July 2, July 23, and October 25, 2013 to discuss scheduling and other procedural matters. These were held without prejudice to any position of the parties as to the proper interpretation of sub-sections 7(2) and 7(5) of the Schedule. Notice of the hearing dated September 16, 2013 was forwarded to all Deputy Judges in Ontario, using, on the agreement of the parties, the auspices of the Government of Ontario (the "Government"). I received no individual representations from Deputy Judges. The Commission convened on January 23 and 31, 2014. The parties had filed written submissions and extensive documentary materials, supplemented at the hearing by oral submissions and further documentary filings. In response to inquiries from the Commission, further information and representations were received from the parties on March 18, April 16, 17, May 20, May 23, June 18, and June 23, 2014.

THE PARTIES' POSITIONS WITH RESPECT TO REMUNERATION

6. As of December 31, 2012 (having taken effect on January 1, 2012) the *per diem* rate of remuneration for Deputy Judges was $537.00. This Commission is mandated to make recommendations with respect to the *per diem* rate effective January 1, 2013 through to December 31, 2015. In its submissions, the Ontario Deputy Judges Association (the "Association") proposed changes to remuneration for Deputy Judges as follows:

(a) that the *per diem* be increased to $950.00;

(b) that interest be paid on all back payments;

(c) that Deputy Judges be paid an hourly wage of $150 for time spent preparing for sitting days and for time spent traveling (if over 2 hours); and

(d) that Deputy Judges receive $125/month, in each month that they sit at least one day, for disbursements.

7. The Government proposed that there be no increase to the *per diem* 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.

CONSTITUTIONAL FRAMEWORK

8. The constitutional considerations underlying these Commission proceedings were set out in the report of the Second Deputy Judges Remuneration Commission (the "Second Commission") as follows:

> 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 <u>depoliticized</u> …[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 <u>depoliticized</u>"…

…

[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.

CONSIDERATION OF THE PRESCRIBED CRITERIA

9. In accordance with section 8 of the Schedule to the O.I.C., in making its recommendations under subsection 5(4), 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.

10. The Schedule requires consideration of each criterion and then a weighing of those considerations to reach appropriate recommendations. Although there is some overlap, the criteria raise different issues. For example, the language of the second criterion speaks to an objective, the 'need to provide' fair and reasonable remuneration to Deputy Judges. That requires a comparative exercise, conducted without regard to current economic conditions (a separate criterion) or any necessary corollary to a constitutionally acceptable minimum. Compare for example, the different statement of the 'fair and reasonable' criterion in the Alberta Justices of the Peace Commission process, at *Alberta Reg. 111/2012* where the assessment of 'fair and reasonable' remuneration is expressly dependent on consideration of 'existing economic conditions'.

11. Consideration of the criteria necessarily involves an understanding of the history of the role of Deputy Judge and the court's place in the administration of justice in Ontario. Prior remuneration commission reports are also relevant. The Commission process for Deputy Judges was mandated as a result of the Ontario Court of Appeal's decision in *Ontario Deputy Judges Association v. Ontario (Attorney General).*[1] The First Deputy Judges Remuneration Commission (the "Davie Commission") dealt with a period of five years from 2005 to 2009 inclusive. The Second Commission covered the three-year period January 2010 - December 2012. It is the case that I was appointed Commissioner of the Second Commission and issued a report in that regard

[1] (2005), 80 O.R. (3d) 481; 18 C.P.C. (6th) 324 (C.A.); allowing an appeal in part from Dambrot, J. (2005), 78 O.R. (3d) 504; 2005 CanLII 42263 (ON SC)

dated September 23, 2010. I have also had the privilege of chairing the Sixth and Seventh Provincial Judges Remuneration Commissions, as well as the Fifth Justices of the Peace Remuneration Commission.

12. The changes to the Deputy Judge *per diem* following the Government's responses to the prior Commissions' recommendations are as follows:

1982	-	$232	
January 2005	-	$475	(Davie Commission)
January 2006	-	$486	(")
January 2007	-	$498	(")
January 2008	-	$513	(")
January 2009	-	$528	(")
January 2010	-	$528	(Second Commission)
January 2011	-	$528	(")
January 2012	-	$537	(")

13. The year 1982 was the last year in which an increase in remuneration was provided to Deputy Judges prior to the mandating of a remuneration commission process. As noted earlier, this Commission is to make recommendations for calendar years 2013, 2014, and 2015.

14. The Association's submissions regarding many of the criteria were, as in the Second Commission process, subsumed within its primary focus on the second criterion; the need to provide fair and reasonable remuneration to Deputy Judges. Various of the criteria require a factual assessment of 'what is'. Other criteria require an assessment of government policies and priorities and 'what should be', a distinction that must be kept in mind in order not to distort the weighting of the criteria. For example, the discussion of economic conditions in the province (criterion #3) requires a factual review. The discussion under criterion #6 is primarily one of what the Government seeks to achieve; it's goals, objectives, and priorities, and the means to achieve them. I turn then to a consideration of each of the criteria.

1. THE LAWS OF ONTARIO

15. The laws of Ontario are relevant both for the purpose of providing the basis and direction of this Commission's work and for reflecting the role of the Small Claims Court within the broader administration of justice in Ontario. Public policy as reflected in legislation also overlaps with the sixth criterion.

16. The *Courts of Justice Act*[2] 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 were reviewed in the Second Commission Report at paragraphs 22-35. The Government took the position, as it did before the Second Commission, that critical to the appropriate level of remuneration for Deputy Judges, is the limited legislated role that Deputy Judges play in the judicial system in that it has no inherent jurisdiction and hears civil actions not exceeding amounts or values of $25,000. That role is also 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 this aspect of the Court later in this report in the context of that second criterion.

17. The *Public Sector Compensation Restraint to Protect Public Services Act, 2010*[3] imposed a two-year wage and compensation freeze on provincial non-unionized public sector and broader public sector employees and office holders for the period March 24, 2010 to March 31, 2012. Sub-section 7(3) of that legislation provided exemptions from the freeze 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, exemptions that had the effect of increasing wages to that group. Deputy Judges were exempt from the legislation's provisions by virtue of their express exclusion in sub-section 5 (2) of that Act. However, the increase to the Deputy Judge *per diem* effected on January 1, 2009 remained unchanged to December 31, 2011, freezing the *per diem* for the corresponding two-year period between January 1, 2010 and December 31, 2011. The policy objective of that legislation has been fully

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[2] R.S.O. 1990. c. C.43 as amended

[3] S.O. 2010, c. 1, Sched. 24, as amended

applied to Deputy Judges.

18. The *Broader Public Sector Accountability Act, 2010*[4] was initially designed to set rules and accountability standards for broader public sector organizations. It was subsequently amended effective March 31, 2012 by the *Strong Action for Ontario Act, 2012 (Budget Measures) 2012*[5]. The new Part II.1 freezes wages and compensation of executives and office holders of designated broader public sector employers. Those persons are defined, essentially, as those earning $100,000 annually or more. This freeze on wages and compensation continues indefinitely. Exemptions are restricted to specific and limited pay-for performance measures. In addition, performance pay for non-unionized employees of these designated employers was limited.

19. *Ont. Reg. 407/93*, promulgated pursuant to the *Courts of Justice Act*[6], sets out the Framework Agreement for the Provincial Judges Remuneration Commission process. Sections 45 and 46 of that Regulation stipulate that the remuneration for judges of the Ontario Court of Justice shall be adjusted each April by an amount equal to the Industrial Aggregate Index (Canada). Similarly, sub-sections 2(2) and 2(3) of *Ont. Reg. 247/94* (Salaries and Benefits of Justices of the Peace), made under the *Justices of the Peace Act*[7], stipulate that remuneration for Justices of the Peace shall be adjusted each April by an amount equal to the Industrial Aggregate Index (Ontario).

20. The Schedule to Order-in-Council 1788/2006 mandates criteria to be considered by this Commission and it is the consideration of those criteria that is the fundamental task before me within the constitutional framework outlined above.

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[4] S.O. 2010, c. 2
[5] S.O. 2012, c. 8
[6] *supra*, fn 2
[7] R.S.O. 1990, c. J.4, as amended

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

21. The Government takes the position that the $537 *per diem* in effect at December 31, 2012 reflects fair and reasonable remuneration for Deputy Judges and seeks a freeze of that amount over the three-year mandate of this Commission. The Association seeks a *per diem* of $950.

22. At page 40 of its submissions the Government characterizes the Commission's primary consideration as "whether the Deputy Judges' compensation is fair and reasonable *given* the prevailing economic conditions and overall state of the provincial economy" (emphasis added). However, the Schedule identifies "the need to provide fair and reasonable compensation to Deputy Judges" as a distinct and independent criterion from consideration of the "prevailing economic conditions". This reinforces the view that the second criterion is a comparative exercise. It is one fraught with tension between our civil society's general desire to treat all fairly and the difficulties in assessing what is 'fair and reasonable' in any particular case. The Second Commission noted:

> 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.

23. While a laudable goal, the need to provide fair and reasonable remuneration is not the same as a requirement that remuneration not fall below a constitutionally protected minimum. If that distinction was accepted, it might be easier to acknowledge that decisions regarding remuneration do not necessarily reflect a rate that is fair and reasonable (comparatively), however unpalatable such an acknowledgement might be. It might however give greater acknowledgement of the value of the work being performed, even though that value was not fully reflected financially.

24. The second criterion engages a relative or comparative assessment. I agree with the Government at paragraph 127 of its main submissions that "fair and reasonable" does not equate to "absolute highest" or "beyond the average". Nor however do those words mean the "least possible". The cited term, "passably good", for example, is different from mere "passable", the former contemplating a point higher along a spectrum. The Government argued that these definitions are reinforced by the Report of the Ontario Provincial Courts Committee (the "Henderson Report") where that Committee stated, "to be attractive, the salary need not – and ought not to be excessive".[8] That is the case, but it begs the necessary and larger question of, in relation to what? The comment in the Henderson Report was made specifically in relation to the Committee's comparison of an appropriate level of remuneration compared to the earnings of lawyers in private practice. No Commission dealing with Deputy Judges has suggested that the *per diem* be comparable to an amount that would typically be earned in the private practice of law. Reference has been made to judicial comparators, quasi-judicial comparators, and the public service, and to the changing role of the Deputy Judge as a historical comparison.

a. The historical or internal comparison

i). The history of the Small Claims Court

25. The Government's submission, at paragraph 36, that the mandate and scope of the Small Claims Court has not increased significantly since the Court of Requests in 1792 is not accurate. That court was a collection vehicle for debts up to 2 pounds. Dissatisfaction with the quality and consistency of service provided by the Court of Requests resulted in its elimination in 1841. The precursor to the Small Claims Court was the Division Court established in 1850. The Division Court was, for the first time, given limited jurisdiction over certain tort claims not exceeding 10 pounds. Claims in contract were increased to 25 pounds. Commissioners (who had presided in the Court of Requests) were abolished and replaced by District or County Court Judges who were required (as of 1841) to be lawyers.[9] The position of Deputy Judge dates from 1857, when District and County Court Judges were given authority to appoint barristers as deputy judges for

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[8] *Report of the Ontario Provincial Courts Committee*, 1988, at page 71; chaired by Gordon Henderson

[9] *Report of the Ontario Courts Inquiry*, 1987, The Honourable T.G. Zuber, at page 17

one month terms to preside over the Division Court in cases of judicial absence.[10]

26. Until 1990, the work of the Division Court, re-named the Small Claims Court (1970-1985) and then the Provincial Court (Civil Division) (1985-1990), was performed in practice by either District and County Court judges or Provincial Court judges.[11] Deputy Judges continued to have limited appointments and were used primarily in larger centres on an *ad hoc* basis to fill in for County Court Judges unable to fulfill their duties. The use of Deputy Judges became the norm in 1990 when the Provincial Court (Civil Division) was abolished, the authority to appoint judges to that court was repealed, and the Small Claims Court was reconstituted as a division of the Superior Court.[12]

27. In 1994 a Deputy Judges Council was established by section 33 of the *Courts of Justice Act*. Meetings of that Council are chaired by the Chief Justice of the Superior Court of Justice or her designate. Its primary function is with respect to standards of conduct and continuing education for Deputy Judges.

28. In 1970 the monetary jurisdiction of the Small Claims Court increased to $1000. In 1985 the monetary jurisdiction of the then Provincial Court (Civil Division) continued at $1000 except in Toronto where it increased to $3000. Deputy Judges, unlike Provincial Court judges, were limited to hearing only those cases where the claim did not exceed $1000. A claim for $1000 in 1985, adjusted for inflation, represented a claim of approximately $1950 in 2012[13].

29. The increase to the current $25,000 monetary jurisdiction of the Small Claims Court (excluding costs and interest) represents over a tenfold increase over the inflation-adjusted limit from 1982. It cannot reasonably be argued that this kind of increase in the monetary jurisdiction of the Small Claims Court has not also brought with it an increase in the scope of claims that the court sees and a corresponding increase in the complexity of the work performed by those

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[10] *A Review of the Small Claims Court of Ontario*, Professor and Dean Ian Holloway, December 8, 2006, (the "Holloway Report") at page 6

[11] *Report on the Administration of Ontario Courts*, Ontario Law Reform Commission, 1973, Part II: Ministry of the Attorney General, at page 347

[12] See, *supra,* fn. 12, at page 338; *supra*, fn. 10, at page 14; and *supra*, fn. 11, at page 6

[13] Bank of Canada, Inflation Calculator

presiding in that court. The 2012-2013 Annual Court Services Report, prepared by the Ministry of the Attorney General, recognized that this change "allowed cases that would have been commenced in the Superior Court of Justice prior to 2010 to be brought in the Small Claims Court"[14].

30. The cite from the Holloway Report at paragraph 36 of the Government's submissions fails to note that report's further comment that, "with the various increases in monetary jurisdiction…the work of the Court has acquitted a degree of legal and factual complexity that would surprise many…as diverse as its caseload has become, one can only assume that…the work of the Small Claims Court will…become even more complex still."[15]

31. Concerning the more recent structure of the court, Justice Marvin Zuker and J. Sebastian Winny, in *Ontario Small Claims Court Practice, 2014,*[16] note in the Preface:

> One of the most prominent features of the current monetary jurisdiction is an increase in the duration and complexity of trials. The time when three or more short trials could be heard in one day is largely in the past, as are the days when simple debt claims dominated the court's docket. Today the court regularly hears such matters as wrongful dismissal, real estate disputes, negligence including professional malpractice cases, and a variety of other types of cases. Many and perhaps most trials now require a half day, and cases requiring a full day or more are significantly more common.

ii) Relative value of the work compared to the relative value of the *per diem*

32. The adjusted *per diem* rate of $537 in effect at December 31, 2012 is 0.3% higher than it was in 1982 (see paragraph 75). There has been no real change in the value of the *per diem* between 1982 and 2012. The *per diem* has essentially kept pace with inflation.

33. If the characteristics and requirements of the office of Deputy Judge remained the same between 1982 and 2012, compensation theory would suggest that a *per diem* that kept pace with inflation was one that continued to reflect a fair and reasonable rate (acknowledging that this

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[14] at page 36
[15] *supra*, fn. 10, at page 9
[16] published by Carswell, 2014

assumes that the rate in 1982 was fair and reasonable, and I note Dambrot, J.'s decision that records, "from 1971 to 1982 the remuneration of deputy judges was regularly reviewed and revised"[17]) However, if changes either decreased or enhanced the value of the office, maintaining the same real rate would not typically be seen as representative of a 'fair and reasonable' rate, as those changes in value would not be reflected in the remuneration. A comparative analysis assumes that greater value is reflected by greater remuneration and vice-versa.

34. Since 1982 there have been significant changes to both the structure of the Small Claims Court and the role of Deputy Judge in that court. In 1982 the work of the court was being performed by District or County Court Judges (and later Provincial Court judges), remunerated at levels higher than the *per diem*. Deputy Judges were an *ad hoc*, 'fill-in' resource and were considered to be essentially volunteering their time to assist the court.[18] Deputy Judges now comprise the bench of the Small Claims Court. In 1982 the jurisdictional limit of the Court was $1000 (inflation-adjusted to 2012, an amount of $2300[19]). That jurisdiction has increased to $25,000 and all of the writers assessing the court over the period have indicated that with the increase to monetary jurisdiction has come a corresponding increase in the complexity of both the issues before the court and the demands placed on Deputy Judges. The Small Claims Court now hears almost half of all civil claims in the province[20] and serves the stated policy objective of providing greater access to justice. The qualifications required of Deputy Judges have also increased. Deputy Judges are required to be lawyers[21], and, although not formalized, in practice Deputy Judges have 10 or more years of experience in the practice of law prior to their first appointment, the same basic legal qualification required of judges for both the Ontario Court of Justice and Superior Court. Deputy Judges now also mediate as a matter of regular court processes and require the additional skills associated with that role. Deputy Judges receive some mandatory training for the judicial role. The work of the Deputy Judge continues to be flexible in terms of scheduling and retains the same intangible benefits flowing from the fact of public

[17] (2005), 78 O.R. (3d) 504; 2005 CanLII 42263 (ON SC), at paragraph 22
[18] Civil Justice Review, First Report, Ontario Court of Justice and Ministry of the Attorney General, March 1995, at page 292
[19] *supra*, fn. 13
[20] In 2012-2013, the Small Claims Court received approximately 45% of all civil claims brought in Ontario - see pages B7 and B51 of the *Ministry of the Attorney General, Court Services Division, Annual Report 2012-2013*
[21] *supra,* fn. 2, sub-section 32(1)

service and appointment to the court.

35. The Government acknowledged that there have been changes to the Small Claims Court since 1982 and referred to page 41 of the Davie Commission report. In 2005, Dambrot J. noted that Deputy Judges "have not received a pay increase since [1982] despite an increase in workload, jurisdiction, responsibility and cost of living"[22]. The Government submits that these changes have been taken into account by a "fair and reasonable" $475 *per diem* effected in 2005. However, as reflective of this second criterion, that assertion fails to explain why there has been no increase in the value of the *per diem* between 1982 and 2012 in response to and recognition of that significant increase in the value of the office of Deputy Judge flowing from these changes.

36. There has been no increase in the value of the *per diem* since 1982. The 2012 *per diem* tracks the 1982 *per diem*, adjusted for inflation. However, the complexity and scope of matters before the Small Claims Court have increased significantly and the qualifications, skills, and responsibilities of those sitting as Deputy Judges have also increased. In addition, Deputy Judges now constitute the bench of that court, whereas in 1982 the position provided 'back-up' to the County/District Court Judges comprising that court.

37. In its oral submissions, the Government queried, for how long will there continue to be reference to 1982? That year is relevant to the application of this criterion as it was the last year in which the *per diem* was increased prior to the implementation of the Commission process and it is similarly the last year for which there is reliable information as to the 'fair and reasonableness' of that rate. There was no adjustment of the *per diem* in 1990 when the Court was restructured and no assessment of what constituted a 'fair and reasonable' rate at that time. Had there been such an assessment, those changes would have warranted an increase on this comparative ground and, if implemented, a higher rate would have formed the basis available for any subsequent statistical analysis. It is inappropriate to rely on the 1990 rate as indicative of a 'fair and reasonable' rate as we are aware that it does not take those 1990 changes to the role of Deputy Judges into account. (Prior to 1982, the rate was reviewed and adjusted regularly and it can reasonably be assumed that the *per diem* represented a 'fair and reasonable' rate for the work

[22] *supra*, fn. 17, at paragraph 21

then being performed.) Similarly, given that the $428 *per diem* effected in 2005 reflects the same value as the 1982 *per diem* adjusted for inflation, it can also be reasonably concluded that the 2005 *per diem* did not recognize any increase in the value of the role of Deputy Judge following the changes in 1990, and is therefore also not a measure of a 'fair and reasonable' rate based on an internal comparative assessment (and see paragraphs 47 and following).

iii) Differentiating a 'volunteer' position

38. The Civil Justice Review, established in 1995 as a joint initiative of the Chief Justice of the Ontario Court of Justice and the Attorney General for Ontario at the time, reported[23]:

> [Deputy Judges] are dedicated members of the Bar who virtually volunteer their time to perform these duties. They now form the principal adjudicators in Small Claims Court matters…
> …they are 'volunteers' in essence, [139] leaving their practices for the day…
>
> [139] Deputy Small Claims Court judges are paid a nominal rate of $235 [sic] per day, an amount which is less than the hourly rate of many at their level of experience.

39. In 1995 the $232 *per diem* was described as "nominal", assigning a characterization to Deputy Judges as 'volunteers'. In its final report, the Civil Justice Review again referred to "what is essentially a volunteer position"[24], a characterization that the parties reject, for to confirm this bench as comprised of "essentially volunteers" would be, at a minimum, to undermine those "objective …guarantees that are necessary to ensure a reasonable perception of independence"[25].

40. In order to maintain judicial independence, the role of Deputy Judge must be seen and perceived to be significantly more than an 'essentially volunteer' position, a characterization not limited to the provision of free services. The $232 *per diem* in 1995 reflects an inflation-adjusted

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[23] *supra*, fn. 18, at page 292

[24] Civil Justice Review, Supplemental and Final Report, Ontario Court of Justice and Ministry of the Attorney General, November 1996, at page 104

[25] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)* ("*PEI Reference")*, [1997] 3 S.C.R. 3, at para. 112

amount in 2012 of $323.00[26]. That inflation-adjusted amount can reasonably be seen to reflect a characterization of "nominal value" or "volunteering" within the context of this work.

41. The Government noted that Deputy Judges receive substantially more by way of the *per diem* than the average daily earnings of an employed Canadian, the latter amount described as reflective of "individual security for others".[27] I reject that comparison. That difference is a reflection of the fact that the concepts of individual and institutional security as applied to judicial office in order to maintain and protect that branch of our democracy is an issue of security entirely different from that faced by the average employed Canadian.[28]

b. External comparators

42. Discussion of external comparators necessarily leads to a ranking or hierarchy among and between relevant comparators. It is a form of job evaluation where assessments are based on a variety of factors, such as the skill and ability required to perform a task, the qualifications required, the level of complexity and responsibility associated with the task, and consideration of any relevant structures or characteristics of the work or enterprise.

i) The intangibles

43. The work of Deputy Judges is flexible in that they may sit as often or not as they wish. Further, Deputy Judges are not expected to rely on this remuneration as any significant source of income. There is also public prestige in holding the appointment and Deputy Judges occasion the personal satisfaction of providing a public service. The Government relies heavily on these intangibles to justify a lower *per diem* for Deputy Judges in relation to external comparators. However, all of the part-time judicial and quasi-judicial comparators enjoy these same attributes. It is not expected that any part-time judicial or quasi-judicial appointment will represent any significant source of income. The time commitment is flexible. The Justice of the Peace *per diem*

[26] *supra*, fn. 13
[27] Government exhibits, tab 32
[28] see generally, *PEI Reference, supra*, fn. 25

used in this report for comparative purposes does not reflect what full-time Justices receive, such that a difference between a full-time committed appointment and one that is part-time has already been taken into account in the various *per diem* rates. All public appointments also come with an element of public prestige and are able to satisfy any personal inclination to public service. As noted at paragraphs 92-93 of the Second Commission report:

> 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 market rates for practicing lawyers with a minimum of ten years of experience constituted an appropriate comparator.

44. That expectation of public service resulting in remuneration that is less than market rates is repeated in the May, 2011 update to that Government Appointees Directive applicable to "all government appointees who are accountable to a minister of the Government of Ontario", that is, all quasi-judicial administrative appointments. These intangible benefits apply to all part-time judicial and quasi-judicial appointments equally and create no distinctions between the various appointments. Distinctions if any must therefore be drawn from other factors.

45. The Government also relied on the fact that it has had no issues with recruitment or retention of Deputy Judges as indicative that the *per diem* is appropriate. Apart from historical concerns regarding the labour-related tribunals, there is no evidence that recruitment or retention is an issue with respect to any judicial office or quasi-judicial appointment. Therefore, distinctions between these various roles do not rest on this fact (and see paragraphs 94-95).

ii) Judicial comparators

46. The following *per diem* amounts were applicable to part-time provincially appointed

judicial offices subject to remuneration commission proceedings (the First Case Management Masters Remuneration Commission is due to release its report in 2014):

		Provincial Judge		Deputy Judge	Justice of the Peace	
1983	-	$328	(based on 210 days/yr)	$232	$152	(based on 220 days/yr)
2005	-	$1048	"	$475	$468	"
2009	-	$1187	(based on 209 days/yr)	$528	$521	(based on 219 days/yr)
2010	-	$1207	"	$528	$530	"
2011	-	$1254	"	$528	$551	"
2012	-	$1279	"	$537	$554	"
2013	-	$1314	"	TBD	$565	"

(1982 rates for the provincial bench and for Justices of the Peace were unavailable.)

47. In its statistical analyses of increases to the *per diem*, the Government relied on 1991 as an appropriate baseline (rather than 1982). It based this position on the fact that the last major restructuring of the Small Claims Court (excluding increases in monetary jurisdiction) occurred in September 1990. However, that position assumes that the *per diem* paid in 1991 was fair and reasonable, a position rejected by the Civil Justice Review.[29] It also fails to take into account the fact that there has been no increase in the value of the *per diem* between 1982 and 2012 (see paragraphs 36-37).

48. Between 1983 and 2012 provincially appointed judges have seen an increase in their *per diem* rate of 290%. During that same period, part-time Justices of the Peace have seen an increase of 272%. Inflation accounts for 130.8% of that value. The balance is attributable to an increase in the real value of each of those remuneration rates. The Deputy Judge *per diem* has increased by 131.5%, reflecting essentially the same real value it held in 1982. In 1983 Justices of the Peace earned 65.5% of what Deputy Judges earned. In 2012 part-time Justices of the Peace earned 103% of what Deputy Judges received. While the Government relies on the fact that the

[29] *supra*, fn. 18 and fn. 24

duties and responsibilities of both a Judge of the Ontario Court of Justice and a Justice of the Peace have increased since 1983, it fails to give weight to the fact that so have the duties and responsibilities of Deputy Judges. Provincial Court judges have taken on a greater role in the administration of criminal justice. Justices of the Peace also play an important role in issues involving security of the person. In 1983 Deputy Judges were but an adjunct *ad hoc* resource available to the Division Court, where Provincial Court judges exercised that court's limited monetary jurisdiction of $1000. Deputy Judges now comprise the bench of the court, hold the same legal qualifications as provincially appointed judges, and deal with almost half of all civil claims in the province.

49. The Court of Appeal at para. 26 of its decision in *Ontario Deputy Judges Association v. Ontario (Attorney General)*[30] relied on the finding made by the lower court wherein Dambrot, J. noted:

> [18] Deputy Judges can hear a wide range of cases and have broad jurisdiction over proceedings involving the Canadian Charter of Rights and Freedoms, defamation, creditors' rights, intellectual property claims, estate litigation, and medical malpractice, among others. Deputy judges also exercise a form of equitable jurisdiction, which adds to their role and responsibilities as judicial officers…

50. Although judges of the Provincial Court bench historically exercised the jurisdiction of the Small Claims Court, both prior Commissions have rejected parity with the remuneration paid to the two remaining provincially appointed judges who continue to sit on the Small Claims Court. That continues to be appropriate although the history remains instructive in terms of the relative position of judicial officers. Both prior Commissions also concluded that, in the judicial hierarchy, the office of Deputy Judge ranks ahead of Justices of the Peace. The Davie Commission stated at page 43:

> …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.

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[30] *supra*, fn. 1

51. To imply that there is a lesser public interest in a civil dispute resolution mechanism is to ignore the court's role in maintaining a civil society by providing for the appropriate resolution of civil disputes.

52. The Second Commission found at paragraph 96 that "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" warranted a *per diem* higher than that paid to part-time Vice-Chairs of the professional specialized tribunals, an amount higher than that then paid to part-time Justices of the Peace.

53. *Per diem* Justices of the Peace are limited to supernumerary appointments. Their $565 *per diem* in 2013 does not include the value of health and welfare benefits and pension paid to full-time Justices of the Peace. If that value were included, the *per diem* for Justices of the Peace for 2013 would be $633. The *per diem* also excludes other benefits payable to full-time Justices of the Peace including judicial attire and an annual tax-free allowance of $950.[31] However it is the lower part-time *per diem* that has been utilized in the comparison as it similarly reflects the expectations and intangible benefits associated with a part-time appointment.

54. Justices of the Peace are not required to be lawyers. They are also not judges. Nor was there any suggestion that mediation skills are regularly required in the exercise of their role. The material before the Second Commission indicated that 80% of the work of Justices of the Peace fell under the *Highway Traffic Act*[32]. Once the part-time nature of the appointment is taken into account, the Government relied exclusively on the jurisdiction of Justices of the Peace with respect to issues of security of the person to justify a lower relative placement for Deputy Judges.

55. Earlier commissions were not persuaded that that factor alone warranted a higher *per diem* for Justices of the Peace relative to Deputy Judges. It does not overcome the role and work of Deputy Judges (that also includes jurisdiction with respect to Charter issues), the Small Claims Court's place in the overall administration of justice in Ontario, and the qualifications

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[31] *O. Reg. 247/94, Salaries and Benefits of Justices of the Peace,* sections 7 and 9

[32] Second Commission report, paragraph 78

and skills required of the office. Of all institutions, the judiciary is by necessity a hierarchy. Within that judicial hierarchy, the office of Deputy Judge, requiring an oath of judicial office in the same manner and effect as a judge of the Provincial or Superior Courts, must be seen and treated as situated above the office of a part-time supernumerary Justice of the Peace.

56. That relative relationship is reinforced by the fact that, for the most part, Provincial Court judges continue to perform the work of Deputy Judges in other Canadian jurisdictions.

57. The *per diem* of $475 effected by the Government in 2005 was slightly higher than the *per diem* then paid to part-time Justices of the Peace. That was consistent with the Government's position before the Second Commission that Deputy Judges fell "in the vicinity of" Justices of the Peace and was in keeping with the findings of the Davie Commission. Over the period covered by the Second Commission, the Deputy Judge *per diem* has fallen below the *per diem* of a part-time Justice of the Peace. It is also the case that the *per diem*s for both Judges of the Ontario Court of Justice and Justices of the Peace have and will increase over the period of this Commission's mandate by an amount equal to the applicable Industrial Aggregate Index.

iii) Quasi-judicial comparators

58. The Government has relatively recently conducted a review of its administrative agencies leading to the passage of the *Adjudicative Tribunals Accountability, Governance and Appointments Act*[33]. Thirty-seven "adjudicative tribunals" are identified; thirty-six by Schedule 1 of *Ont. Reg. 126/10* and further including the Ontario Police Arbitration Commission. *Per diem* rates for part-time appointees to these adjudicative tribunals fall into two categories.

59. The *per diem* for the first category of adjudicative tribunal is as follows:

Member	$398
Vice Chair	$491
Vice Chair - operational management responsibilities (Associate Chair)	$627
Chairs	$627

[33] S.O. 2009 c.33

60. The second category includes fifteen adjudicative tribunals identified as "Professional & Labour". This distinction is not necessarily applied to the tribunal but to individual appointees in recognition of the duties they are performing. So, for example, part-time appointees to the Ontario Labour Relations Board, whether Vice-Chairs or Members, receive a *per diem* of $664. Similarly, medical practitioners appointed to the Consent and Capacity Board (sitting in their professional capacity as required by statute) also receive a *per diem* of $664. The Government Appointees Directive identifies this group as "persons appointed in their professional capacity as required by statute or on a labour-related Board".[34]

61. By *Ontario Regulation 126/10*, the Government has further "clustered" seventeen of these adjudicative tribunals into three administrative groupings, in part to achieve administrative efficiencies and savings. The *per diem* for Executive Chairs of those clustered agencies, who are responsible for ensuring compliance with the *Adjudicative Tribunals Accountability, Governance and Appointments Act,* is set at $723. However, all Executive Chairs are currently full-time appointments and receive salary and other benefits in accordance with the public service SMG4 classification.[35]

62. With the exception of 'Professional & Labour' appointments, adjudicative tribunal *per diems* are calculated by dividing the minimum salary rate paid to the corresponding full-time appointee by 234 working days. Those full-time rates are adjusted in accordance with changes to compensation paid to Ontario public service executives, amounts set unilaterally by the Government. While it is reasonable to assume that those rates will generally reflect the higher relative position of those executive positions, it is the case that this model results in *per diems* payable to part-time adjudicative appointees that are set unilaterally by the Government.

63. The rates above have remained unchanged since 2009. While not calculated pursuant to the same formula, the 'Professional and Labour' *per diem* is also set unilaterally and has similarly remained the same since 2009.[36]

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[34] *Government Appointees Directive*, prepared by Management Board of Cabinet, May 1, 2011, at page 14
[35] The Ontario Government website, "Public Appointments Secretariat" maintains appointee listings for each tribunal
[36] See generally, *supra*, fn. 34

64. Before both the Davie and the Second Commissions the Government took the position that the higher rate for "Professional and Labour" appointees was a result of recruitment and retention issues and that the Government had had difficulty attracting qualified candidates with specialized knowledge and a sufficient level of expertise in the subject matters dealt with by these agencies. There is no evidence that recruitment or retention has been an issue for some time and the Government's submission identifies this as a historical concern. The Government's submissions confirm that this *per diem* is applied "to individuals in recognition of the duties they are performing…only someone sitting…in their professional capacity…would receive the distinction"[37] Thus, physicians appointed as Members of the Physician Payment Review Board or to the Medical Eligibility Committee receive a *per diem* of $664, whereas a Member of the Physician Payment Review Board who is not a physician receives a *per diem* of $398. Similarly, lawyers appointed to the Board of Negotiation established under subsection 172 (5) of the *Environmental Protection Act*, receive a *per diem* of $664.[38] The *Courts of Justice Act* requires that a Deputy Judge be a lawyer,[39] that is, they are appointed in their professional capacity as required by statute. The Deputy Judge *per diem* is currently $537.

65. While the Government has sought and generated greater transparency, accountability, and consistency among its varied administrative agencies through the passage of the *Adjudicative Tribunals Accountability, Governance and Appointments Act* and its regulations, there remain anomalies that highlight that different variables or factors affect the remuneration for those appointees. For example, part-time Members appointed to the Ontario Labour Relations Board (appointments representative of the tripartite nature of that tribunal) receive the same *per diem* as part-time Vice-Chairs of that Board, notwithstanding that these are different positions with different levels of responsibility. Members receive the higher *per diem* apparently due to their labour relations expertise and regardless of their specific other qualifications or adjudicative duties. Conversely, with respect to the Ontario Human Rights Tribunal, the Government confirmed that the duties and responsibilities of part-time Members of the Ontario Human Rights Tribunal are the same as full-time Vice-Chair appointees to that tribunal and that individuals in

[37] Government's supplementary submissions dated May 23, 2014
[38] *supra*, fn. 35
[39] *supra*, fn. 21

both positions perform the same functions. Yet the part-time appointment is characterized as a Member, not as a Vice-Chair, and is paid the $398 *per diem*, rather than the part-time Vice-Chair *per diem* of $491 set out in the Government Appointees Directive. There was no suggestion that the qualifications or skills of those performing the roles were different. No explanation was provided regarding this different characterization for the same work or the difference in remuneration.

66. Before the Second Commission the Government argued that, within the judicial/quasi-judicial spectrum of roles and responsibilities, Deputy Judges fell in the "general vicinity" of Justices of the Peace. Before this Commission the Government took the position that the closest comparator to Deputy Judges was that of a part-time Member appointed to the Ontario Human Rights Tribunal, essentially because of the quasi-constitutional nature of that tribunal's enabling legislation. It is frankly difficult to see this change in perspective as anything but a race to the bottom (or one condoning 'volunteering' for this role – see paragraphs 38-40), given that the Justice of the Peace *per diem* is higher than the *per diems* for all of the adjudicative tribunals with the exception of the 'Professional and Labour' appointees (and Executive Chairs of clustered agencies), whereas Members of the Ontario Human Rights Tribunal receive the lowest *per diem* of the adjudicative tribunal appointees and lower remuneration than the Vice-Chair *per diem*, notwithstanding their work and qualifications are otherwise indistinguishable from their Vice-Chair counterparts.

67. Hearings Officer was also put forward by the Government as an appropriate comparator, relying on an extensive job evaluation performed in connection with that position. Hearings Officer is a full-time position in the OPS within the AMAPCEO bargaining unit. Their primary functions include conducting costs assessments and other accountings, including related procedural issues under the direction of a Superior Court justice. They report to the Manager of Court Operations. The Government argued that Hearings Officers conduct civil proceedings in a similar fashion and with a similarly limited set of responsibilities to that of Deputy Judges. It also argued that the duties and responsibilities of a part-time Member of the Ontario Human Rights Tribunal were similar to those of Deputy Judges. The same may be said in a general way about Deputy Judges, all appointees to adjudicative tribunals, Judges of the Ontario Court of

Justice and Justices of the Peace. They all have some level and kind of adjudicative function complemented now, in some cases, by a mediation role.

68. While it might be instructive to have an independently conducted full job evaluation for the office of Deputy Judge, the comments of the Davie Commission at pages 42-43 are apposite:

> 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 Hearings Officers and quasi judicial adjudicators. The jurisdiction and scope of the positions, responsibility, required knowledge and skills, which are the types of factors traditionally use to assess comparability and relative ranking are simply not the same for the two positions.

69. Other factors must also weigh in the relative comparison. Persons appointed to these adjudicative tribunals (with the exception of lawyers appointed in their professional capacity) are not required to have legal training. (This includes appointees to labour-related tribunals who may or may not be lawyers.) Although both are term appointments, an appointment to an adjudicative tribunal is made by the Lieutenant Governor in Council and reappointments may be limited to a total of ten years. Deputy Judges are appointed by the Regional Senior Judge of the Superior Court with the approval of the Attorney General, and may be re-appointed indefinitely by the Regional Senior Judge. Adjudicative agencies, including the Ontario Human Rights Tribunal, are creatures of their enabling statute and have no constitutional protection. They typically deal only with disputes arising under that statute. While the Small Claims Court is established under the *Courts of Justice Act* in the same manner as, for example, the Family Court, its jurisdiction originates within the Superior Court and is constitutionally protected. While the work of adjudicative agencies is broad and varied, that statement appropriately describes their activity as a group, not individually. They report to the executive branch of government. They are not independent of the executive in the same manner or degree as a court. Ultimately they form part of the executive branch, not the judicial branch. Their remuneration is set unilaterally by the Government and is not subject to any constitutionally mandated independent review. At the same time, part-time appointees to these adjudicative tribunals also all enjoy the same intangible benefits of flexibility and public service and, as well, are not expected to rely on the *per diem* as a significant source of income, are not intended to be financially dependent on government, and

are not restricted in their ability to engage in other remunerative work.

70. Deputy Judges are required to be lawyers. They have, in practice, ten or more years of experience practicing law, the same level of qualification and experience as provincially appointed judges. They comprise the bench of the Small Claims Court. The work of the court is extremely varied and now captures almost half of all civil claims in the province. Its importance to the overall administration of justice in Ontario cannot and should not be underestimated.

iv) The *per diem* calculation

71. Unlike Deputy Judges, the judicial and quasi-judicial comparators have full-time equivalent positions. *Per diems* are calculated as a portion of the corresponding full-time salary rate (excluding benefits and pensions). However, the denominators used in the calculation are different between these groups. The full-time salary rate is divided by a number of working days per year. The number of working days per year is determined by deducting certain time-off entitlements, including weekends, vacation, and holidays. In the judicial sector, these entitlements are higher, and therefore the denominator in the calculation is lower. That is, the Justices of the Peace *per diem* is calculated using a denominator of 219 days per year; the provincial judge *per diem* is calculated using 209 days per year, and the *per diem* for adjudicative tribunals is calculated using a denominator of 234 working days per year. So, for example, in 2010, a full-time first term Vice-Chair of an adjudicative tribunal was paid $115,000. In 2010 the salary for a full-time presiding Justice of the Peace salary was essentially the same at $116,000. However, the *per diem* for a Vice-Chair in 2010 was $491 ($115,000 divided by 234), while the *per diem* for a Justice of the Peace was $530 ($116,000 divided by 219). This differential reflects the different full-time entitlements between judicial office and adjudicative appointees, arguably reflecting the greater value of those judicial offices, but in any event, is a calculation that need be borne in mind as it affects the various part-time *per diems*.

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

72. This Commission's mandate is to make recommendations with respect to calendar years 2013, 2014, and 2015. Exhibits 43 and 44 to the Government's submissions and paragraph 128 of the Association's submissions (citing the Ontario Economic Outlook and Fiscal Review 2013 released November, 2013) provide relevant statistical information concerning economic conditions in the province as follows:

Period	CPI Ontario	IAI Ontario	GDP (real) Ontario
2013 Apr-Oct	1.0%		
2013 Apr-Sept		0.9%	
2013 (forecast - Nov/13)			1.3%
2014 (forecast - Nov/13)	1.8 - 2.0%	2.8%	2.1%
2015 (forecast - Nov/13)	2.0 - 2.1%	2.8%	2.5%

73. Certain of the statistical comparisons put forward by the Government are unhelpful. Fundamentally they fail to account for a single large increase in the *per diem* rate in 2005 attributable to the fact that there had been no increase for 24 years. That increase essentially continued the 1982 *per diem* in inflation-adjusted dollars. The data at page 42 of the Government's submissions (and accompanying exhibits) distorts the effect of the increase in 2005 by limiting the analysis to periods beginning in 1991 or 2005 and ignoring the statistical anomaly of 24 years without an increase.

74. For example, paragraph 222 of the Government's submissions note that for the period 2005 to 2013, the cumulative, compounded increases to the *per diem* rate totaled 131.5%, while the Ontario CPI increased by only 49.3%. This is accurate as far as it goes. For the period 1982 to 2013, the cumulative, compounded increases to the *per diem* rate also totaled 131.5%. However, the Ontario CPI increased by 130.8%, reflecting the fact that over that longer period, the *per diem* rate surpassed inflation in Ontario by only 0.7%. During that same period the IAI (Ontario) increased by 141.4% reflecting productivity gains in the province not reflected in the *per diem*.

75. The 2012 *per diem* of $537 represents the same value as the $232 *per diem* in 1982. Adjusted for inflation, the *per diem* rate of $537 as of December 31, 2012 is 0.3% higher than it was in 1982.[40] The *per diem* rate in effect as of December 31, 2012 effectively tracks this key provincial economic indicator over the period 1982 to December 31, 2012.

76. Inflation in Ontario in 2013 was 1.0%.[41] The IAI (Ontario) in 2013 rose 1.5%.[42] Forecasts for 2014 and 2015 suggest mild inflationary pressures increasing over the remainder of the period in issue, with similarly moderate increases in productivity.

77. The Government of Ontario faces a budget deficit over the period of this Commission arising and continuing largely as a result of the effects of the recession beginning in 2008 and the measures taken by the Government in an attempt to mitigate the impact of that recession. The affidavit of David Dodge, submitted by the Government in support of litigation involving its legislation, *Putting Students First Act, 2012* speaks to compensation restraint as one means to manage labour costs. He discusses at paragraphs 66 and following why "debt matters" and concludes at paragraph 97:

> …eliminating the annual budgetary deficit over the next five years is a prudent and responsible plan to return Ontario to a sustainable fiscal position; and …restraining compensation in the public sector is an essential element of any strategy that is likely to achieve that goal.

4. RECENT ONTARIO PUBLIC SECTOR COMPENSATION TRENDS

a) Non-union Ontario Public Sector ("OPS") and broader public sector ("BPS")

78. As noted at paragraph 18, Part II.1 of the *Broader Public Sector Accountability Act, 2010* freezes designated executive and office holder compensation at designated BPS employers beginning March 31, 2012 and continuing through the period under consideration. It also limits

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[40] Exhibit A to the Government's reply submissions dated June 23, 2014; "Deputy Judge *per diem* Rate vs. Ontario CPI and IAI

[41] Ibid

[42] Ibid

performance pay enhancements for both executives (as defined therein) and non-unionized employees of the designated BPS employers.

79. In September 2012 the Government of Ontario proposed a cap on executive compensation. That cap appears to have been implemented with respect to executives within the OPS and within agencies, while legislation required to deal with executive pay in the BPS has not as yet been enacted. Exhibit 17 of the Government's submissions indicates that a two-year freeze on performance pay was instituted with respect to OPS managers eligible for that pay. The Government of Ontario also implemented a three-year freeze on compensation for mid-level managers across the OPS.

b) The Unionized OPS and BPS

80. The *Broader Public Sector Accountability Act, 2010* had no impact on public servants who were subject to collective bargaining. While in March 2010 the Government called for a voluntary two-year wage freeze for unionized workers, during that period, additional wage payments and/or wage increases were received by unionized employees in both the OPS and BPS. So, for example, hospital nurses and allied health and technical workers received lump sum payments for each of 2011 and 2012 and a 2.75% base wage increase in 2013. In each of the years 2010-2012 OPSEU represented employees received a 2% wage increase.

81. In its most recent negotiations with OPSEU and with AMAPCEO the Government has achieved changes in areas such as sick leave entitlements, severance entitlements, and pension, resulting in significant overall and ongoing savings from those bargaining units within the OPS. Wage rates have also been frozen; in the case of AMAPCEO, for the two-year period ending March 31, 2014 and for OPSEU, the two-year period ending December 31, 2014. Merit, performance pay, and salary grid provisions continue to apply.

82. In other cases, rather than increasing base wage rates, agreements have been reached to make lump sum payments to employees while maintaining base wage rates. So, for example, the LCBO and OPSEU signed a four-year collective agreement that provided a lump sum payment

in both 2013 and 2014 and a 2% wage increase in each of 2015 and 2016. Hospital nurses received lump sum payments in 2011 and 2012 rather than wage increases. Paramedical employees in hospitals received similar payments. Service workers employed in the nursing home sector received no wage increase for 2012 and 2013. Lump sum payments in each of those years were received instead. A wage reopener was ordered for the final year of that collective agreement. In December 2012 doctors agreed to a 0.5% payment discount as of April 2013, subject to reductions to that discount as of October 2013 should savings be realized as a result of other initiatives referred to in that agreement. In October 2013 the Government approved a $7 million bonus package for Pan Am Games executives who reportedly earn between $190,000 and $250,000.

83. Ontario Ministry of Labour statistics indicate that over the period February to July 2013 public sector (including the BPS) and private sector collective agreements were ratified providing average annual base wage increases as follows:

	Public Sector average	Private Sector Average
February	1.1%	2.8
March	1.9%	2.3
April	1.9%	2.4
May	1.9%	2.4
June	1.0%	2.5
July	2.0%	1.9

c) Judicial Office

84. As noted at paragraph 19, Judges of the Ontario Court of Justice receive annual adjustments to their rate of remuneration based on the IAI Canada rate. Justices of the Peace remuneration rates increase annually in accordance with IAI Ontario rates. The part-time *per diem* rates are adjusted accordingly. For the period under consideration, Judges of the Ontario Court of Justice received no further increase in base remuneration but did receive certain benefit

improvements. I have no information regarding any other outcome arising from the most recent Justice of the Peace Commission process.

5. THE GROWTH OR DECLINE IN PER CAPITA INCOME

85. This criterion looks at changes in productivity within an economy, as reflected by the growth or decline in actual per capita income derived from consideration of Gross Domestic Product ("GDP"). The Industrial Aggregate Index (the "IAI") is a measurement used both provincially (the Ontario IAI) and federally (the IAI Canada). There is no doubt that Ontario has recently fared more poorly than its provincial counterparts as a result of the recession and structural changes within the Ontario economy.

86. In its submissions the Government considered this criterion over the period 1991 to 2013. The resulting statistical analysis suffers the same weakness as described at paragraphs 73-74 above. The analysis is distorted as it ignores the fact that the large percentage increase to the Deputy Judge *per diem* in 2005 reflected the fact that there had been no increase to that *per diem* for 24 years. The Government notes at paragraph 276 of its submissions that over the period 2005 to 2013 the Deputy Judges' real *per diem* increased by 55.8% whereas real daily wages increased by only 7.2%. However, over the period 1982 to 2013, the adjusted *per diem* increased by 0.3% while real daily wages increased by 4.6%. For the 24-year period prior to the 2005 increase, the *per diem* reflected none of the economic gains made in the province, and the value of that *per diem* declined significantly in real dollar terms. As noted at paragraph 75, the adjustment of the *per diem* in 2012 to $537 effectively restored the inflation-adjusted value of the 1982 *per diem*, although fell short of recognizing the growth in per capita income over that period.

87. Over the period captured by the Second Commission (2010-2012), the *per diem* lost ground to both inflation and productivity. The $528 *per diem* in effect at January 1, 2010 would have required a *per diem* of $565.79 in 2012 to maintain its real value, as inflation in Ontario

measured 2.5% in 2010, 3.1% in 2011, and 1.4% in 2012.[43] The IAI Ontario increased by 6.8% over that period, whereas the *per diem* increased by only 1.7%. According to Exhibit 31 of the Government's exhibits, using values adjusted from 1991, even though the *per diem* increased from $528 to $537 between 2010 and 2012, it declined in real value by $11.00, an adjusted decline of 2.9%. Over the same period, the real wage daily rate declined from $125. to $123. ($2.00), an adjusted decline of only 1.6%.

88. As noted at paragraph 72, productivity growth in Ontario is forecast as a real increase to GDP of 2.1% for 2014 and 2.5% for 2015. The IAI (Ontario) is forecast to increase by 2.8% in each of 2014 and 2015.

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

89. The current policy of the Government of Ontario, as reflected in the Part II.1 amendments to the *Broader Public Sector Accountability Act, 2010*, implicitly recognizes that increases in the cost of living are felt most by those who earn less and that the same percentage increase to both high and low wage earners distorts the benefit of that increase, in that the higher earner receives more. It is a measure that exacerbates disparity in income even in the face of no change in job duties. As the non-union sector of the public service is generally at the higher end of the income ladder and the Government has greater latitude in the absence of collective bargaining, it has implemented restraint measures with respect to those wages.

90. The 2013 Ontario Budget refers to "no funding for incremental compensation increases for new collective agreements", a term referable to increases to base wage amounts, rather than the lump sum compensation payments that have been made. Policies and priorities set out in the fall 2013 budget reflect a focus on job creation, building a stronger economy, and eliminating the deficit by 2017-2018.

[43] *supra*, fn. 40

91. The Ontario Economic Outlook and Fiscal Review, released November 2013, identifies a number of programs targeted for investment by the Government, including some obvious and large areas such as energy, education, and transportation. While not part of the materials provided, I take notice of the fact that, since these hearings convened, there has been a provincial election and the tabling of a new budget. I tabke note of the public record that the Government's policy objective regarding eliminating the deficit remains similar to, if not the same as expressed in the fall 2013 budget, and that, subject to certain specific spending initiatives, placing priority on certain major infrastructure issues and the introduction of a new pension plan system, the Government's policy remains one of restraint with respect to compensation.

92. As is always the case, it is clear that Government expenditures cover a vast array of areas and the question is one of priorities. As noted at paragraph 111 of the report of the Second Commission, and it continues to be the case, increasing Deputy Judges' remuneration is not a government priority, and, if history is instructive, consideration of this *per diem* 'makes the radar' only because of this constitutionally mandated commission process.

8. THE PRINCIPLES OF COMPENSATION THEORY AND PRACTICE IN CANADA

93. The Government relies on a straightforward economic principle of supply and demand to argue that, as Deputy Judges are not 'voting with their feet", the current *per diem*, taken with the role's intangible benefits, is appropriate.[44] However, this fact cannot be determinative as recruitment and retention of Deputy Judges has never been an issue even when the *per diem* was at a level that fell below a constitutionally acceptable minimum.[45]

94. The fact that the Small Claims Court functioned using exclusively Deputy Judges between 1990 and 2005, with those Deputy Judges receiving no increase in remuneration, reflects the commitment of those Deputy Judges. One would be hard-pressed to find a work setting where workers received no increase in pay for 24 years, yet that workplace not only

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[44] Government's main submissions, paragraphs 289-293

[45] see the Davie Commission report at pages 31-32 and 45, and the discussion at paragraphs 38-39 herein

continued to function but grew in value. So the Government is correct in saying that certain intangibles are extremely important to the role. As importantly, it speaks to the professionalism of that bench. However, the fact that the *per diem* went for 24 years without an increase also shows the vulnerability of that judicial office, with the attendant constitutional concerns, a matter leading directly to the establishment of this commission process for Deputy Judges.[46]

95. It is also the case that Deputy Judges are drawn, broadly speaking, from the same pool of legal talent as both provincially and federally appointed judges and the *per diem* must be sufficient so as to continue to attract the best candidates for the office.

96. Principles of compensation theory recognize other considerations, including various measures of value associated with the work being performed, assessments of the skills and qualifications required, consideration of 'total compensation' including intangible benefits, and economic conditions, including relevant costs associated with increasing remuneration. Much of that theory is subsumed within the discussion of the preceding criteria and see paragraph 116, *infra*.

<u>THE SCOPE OF THE COMMISSION'S MANDATE</u>

97. This report is properly read in light of the earlier Commissions' reports and the Government's responses to those reports so as to understand the historical context. At the same time, each Commission must conduct its own assessment of the criteria for the period captured by that mandate. In *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice) et al.,* ("*Bodner")*, the Supreme Court of Canada stated:[47]

> 15 Each commission must make its assessment in its own context. However, this rule does not mean that each new compensation commission operates in a void, disregarding the work and recommendations of its predecessors. The reports of previous commissions and their outcomes form part of the background and context that a new compensation commission should consider. A new commission may very well decide that, in the circumstances, its predecessors conducted a thorough review of judicial compensation and that, in the absence of demonstrated change, only minor adjustments

[46] see *Ontario Deputy Judges Association v. Ontario,* decision of Dambrot, J., *supra*, fn. 17

[47] [2005], 2 S.C.R. 286

> are necessary. If, on the other hand, it considers that previous reports failed to set out compensation and benefits at the appropriate level due to particular circumstances, the new commission may legitimately go beyond the findings of the previous commission, and after a careful review, make its own recommendations on that basis.

98. In rejecting the Second Commission's recommendations, the Government criticized that report for revisiting the Davie Commission report and "reinterpreting [its] intention, [and reviewing] the rationality or legitimacy of the LGIC's response to the [Davie] Commission's recommendations"[48] The Government stated[49]:

> "…the Divisional Court held that the LGIC had legitimate reasons for implementing the current *per diem* rates based on the [Davie] Commission's own determination of fair and reasonable rates from 2005 to 2009. The Second Commission's approach therefore does not give due regard to the decision of the Divisional Court, and does not accord with the respective roles of Commissions, the government, and the Court in the determination of judicial compensation. This approach created an unsound foundation for the Second Commission's recommendations.

99. The Second Commission did not take issue with the finding of the Divisional Court that "there is a basis in the [Davie] Commission's 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'.[50] However, the latter part of that comment by the Divisional Court makes clear that there may be more than one 'rational' (viz. *Bodner*) response to a report and would appear to confirm that the 'simple rationality' test in *Bodner* is a low threshold. The Second Commission was of the view that the Government took an inappropriately narrow reading of the Davie Commission report for reasons set out in its report. A narrow reading is not the same as an 'irrational' reading (viz. *Bodner*).

100. This Commission does take issue with any suggestion that the Divisional Court concluded that the $475 *per diem* in 2005 was a fair and reasonable rate. In promulgating the test for a reviewing court in the *Bodner* decision, the Supreme Court of Canada specifically noted

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[48] Government Response to the Second Ontario Deputy Judges Remuneration Commission Report, February 10, 2011, at page 7

[49] *Ibid*

[50] *Ontario Deputy Judges Association v. Ontario*, (2009) 98 O.R. (3d) 89, at paragraph 40

that the "reviewing court is not asked to determine the adequacy of judicial remuneration"[51] The Divisional Court's job was to review the government's response to the Commission's report, not to assess the mandated criteria. This distinction is not unimportant. While the Government was found to have had a rational basis for accepting the first, and rejecting the balance of the Davie Commission recommendations, subsequent commissions are not bound by either that earlier commission report or that government response in assessing and applying the mandated criteria. Nor is a Commission bound by a government's interpretation of a prior Commission's report if that Commission has reason to disagree. To conclude otherwise would be to inappropriately fetter successive Commission's deliberations. These Commission processes must be independent, objective, and effective.[52] If this foundation is unsound, it stands to be corrected not by the government, but by the courts.

101. Furthermore, if the Davie Commission determined that $475 was a "fair and reasonable" *per diem* having regard to the application of the second criterion, and thereby also sought to establish an appropriate base rate, with the greatest of respect, this Commission disagrees with that assessment for the reasons set out in this report under consideration of the second criterion.

WEIGHING THE CRITERIA

102. There is nothing in the Schedule to Order-in-Council 1788/2006 to suggest that any one of the stipulated criterion is necessarily to be given greater weight than another. The Commission is mandated to consider all of the criteria. The Davie Commission placed greater weight on the second criterion in light of the fact that the *per diem* had not changed since 1982. The recommendations of the Second Commission gave weight to each and all of the criteria. Taken individually, the criteria directed that Commission to quite different results. For the first year of its mandate, the Second Commission gave relatively equal weight to the competing criteria and for the remaining two years it gave greater weight to the government's fiscal priorities and policies in light of economic conditions at the time.[53]

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[51] *supra*, fn. 47, at paragraph 30
[52] *PEI Reference, supra*, fn. 25, at paragraph 16
[53] Second Commission Report, see paragraphs 116-119

103. I agree with the Government that a Commission should make no decision as to the weight to be accorded each criterion until all of the submissions have been considered. Each of the criterion must be assessed individually and then weighed as against the others. The goal is also not to recommend a *per diem* that is "fair and reasonable". While often a compelling criterion, it is but one of the criterion. Similarly, this is not an exercise to recommend a *per diem* that is fair and reasonable "given" the prevailing economic conditions. Prevailing economic conditions, the growth or decline in per capita income, and consideration of recent Ontario public sector compensation trends are each relevant as they speak to the need for Deputy Judges to share in the conditions affecting the general population they serve and those with whom they serve. But prevailing economic conditions, as demonstrated by the various indicators, do not necessarily create a compensation envelope beyond which recommendations may not be made, as other criteria may weigh more heavily (as was seen in the Davie Commission report). It is the case that a government also takes these economic indicators into account, as well as a multitude of other factors, in formulating its policies and priorities. The Government's financial policies and priorities remain, however, one criterion for consideration, and to automatically accord greater weight to that criterion would necessarily result in a failure of decision-making on the part of a Commission, in direct contradiction of the constitutional requirement that a remuneration commission process be independent, objective, and effective.

104. As noted, the objective of an inquiry under the Schedule is not to produce recommendations that are necessarily "fair and reasonable". The *need* to provide fair and reasonable remuneration is but one of the criteria mandated for consideration in an exercise designed to ensure that remuneration not fall below a constitutionally protected minimum. Following the Davie Commission report, had the Government acknowledged that the $475 *per diem* in 2005 reflected the restoration of the 1982 *per diem* as adjusted for inflation, and further concluded that, notwithstanding enhancements to the role, qualifications, and responsibilities of the Deputy Judge since 1982, only limited further increases in the *per diem* were warranted in the remaining years of that mandate due to fiscal limitations, this discussion would be different. Before this Commission, the Government asserts that the 2012 *per diem* is an appropriate reflection of a "fair and reasonable" rate. Having regard to its review, the Commission cannot agree with that proposition, as it necessarily requires a conclusion that the rate is appropriate

relative to appropriate comparators (both internal and external), when it is not.

105. A weighing of the criteria necessarily incorporates all of this discussion, and occurs in the full context of this report. The Government's policies and priorities with respect to compensation are of restraint. The Deputy Judge *per diem* is not a Government priority. The relevant laws of Ontario reflect the different areas where Government may act to intervene to advance those policies. Where possible, Government has legislated compensation limits over the period in question. Similarly, where the Government is otherwise able to unilaterally control wage rates, it has implemented a freeze to wage rates during the period of the Commission's mandate. The *per diems* for adjudicative tribunals have been frozen since 2009.

106. The laws of Ontario also confirm that the Government has agreed to implement certain automatic increases to Judges of the Ontario Court of Justice and to Justices of the Peace, a means to further remove judicial remuneration from political interference through use of an objective and independent measure. Over the period of the mandate of the Second Commission (2010-12) increases were implemented in the *per diems* of these other judicial offices. The Ontario Court of Justice *per diem* increased by 6%. The Justice of the Peace *per diem* increased by 4.5%. The Deputy Judge *per diem* was frozen in line with legislative policy in 2010 and 2011 and increased by 1.7% in 2012. Consequently, the relative position of the Deputy Judge *per diem* has fallen below that of the Justice of the Peace *per diem*, in circumstances where the $475 *per diem* accepted in 2005 was above the Justice of the Peace *per diem* and was consistent with the Davie Commission finding that Deputy Judges stood in a relatively higher position than part-time Justices of the Peace. During that period leading up to the mandate of this Commission, the unionized sector also continued to receive wage increases. The bulk of the unionized public service received an average 1.9% increase in each of those years.[54]

107. Over the period of this Commission's mandate, economic indicators show modest increases in inflation and productivity growth. However modest, they are not zero or declining. Private sector wages have increased. Where unilateral Government control does not exist over compensation, there have been a variety of responses. The Government has achieved significant

[54] Second Commission Report, paragraph 103.

savings with respect to its unionized public service in areas including sick leave, severance, and pension entitlements. Those savings were achieved in the Small Claims Court in 1990, as those entitlements are not applicable to Deputy Judges. Base wage rates for a large portion of unionized public servants are frozen at least into 2014, although, as noted, not during the period immediately prior when the Deputy Judge *per diem* was frozen. Other public servants and members of the broader public service have received lump sum payments rather than increases to base wage rates, a form of remuneration not available to Deputy Judges. Judges of Ontario Court of Justice and Justices of the Peace will see further modest adjustments in accordance with productivity measures, which increases will be reflected in the applicable part-time *per diem* rate. Judges of the Ontario Court of Justice will also receive improvements in pension and benefit entitlements.

108. The Government relies on the fact that Deputy Judges are part-time and do not rely on the *per diem* as a significant source of income. It asserts therefore that individual independence is not a factor in considering appropriate remuneration. One need be cautious in that argument, given the Court of Appeal's finding that Deputy Judges warrant the same constitutional protection regarding judicial independence as other courts and given the Supreme Court of Canada's comments in the *PEI Reference* that judicial independence incorporates both individual and institutional independence. However, it is fair to say that Deputy Judges are not expected to rely on the *per diem* as a significant source of income. That same expectation applies to any judicial or quasi-judicial appointee being paid a *per diem* by the Government.

109. The intangible benefits associated with the office of Deputy Judge apply equally with respect to any part-time judicial or quasi-judicial appointment. Both prior Commissions held that, within the judicial hierarchy, Deputy Judges ranked ahead of part-time supernumerary Justices of the Peace, who received a *per diem* of $554 in 2012, compared to the $537 received by Deputy Judges. The Justice of the Peace *per diem* is higher than that of any of the quasi-judicial adjudicative roles with the exception of the 'Professional and Labour' appointments and Executive Chairs of the clustered tribunals. As a comparative exercise, there is no reasonable basis for concluding that the Deputy Judge *per diem* ought to fall below the 'Professional and Labour' appointee *per diem* of $664. That is the closest quasi-judicial comparator to Deputy

Judges in terms of all of the typically measured variables relating to the nature of the work performed, the conditions of that work, and the skills and qualifications required of the work. There continue to be important distinctions between the roles relating to the judicial office that remain relevant in the context of maintaining institutional independence.

110. As a further comparative exercise, there is no justification for a *per diem* in 2013 that reflects the same real value of the *per diem* as it existed in 1982 in circumstances where the work, responsibility, skills and qualifications of, and reliance on Deputy Judges have all increased substantially from that time. Applying the most basic compensation theory, those changes would warrant a higher level of remuneration in real value, as has occurred with respect to other judicial offices.

111. Given the focus on seeking to eliminate the deficit, it is the case that compensation restraint as reflected in Government policy and priorities bears significant weight in this Commission's deliberations. The Association's position of a $950 *per diem* is unrealistic. However, is a freeze on any increase to the *per diem* over the mandate of this Commission an appropriate recommendation? The Government seeks to treat the Deputy Judge *per diem* in the same manner as compensation over which it has unilateral control. And it seeks to rely on unionized results when it has been successful in achieving its priorities, but not otherwise. However, public sector compensation trends do show that the Government has had success in achieving compensation restraint in the OPS, more so over the mandate of this Commission than previously. The statistics also show however, that within the broader public sector, a freeze in compensation has not been the norm. Within provincial judicial offices, modest increases apply.

112. The Commission must take into account and fashion recommendations that have a clear regard for current economic conditions. Yet those measures that go beyond the Government's focus on deficit reduction through compensation restraint or public sector compensation trends, would not suggest that a freeze is appropriate. Inflation and productivity measures are increasing, however modestly. There has been modest growth in per capita income, also reflected in the fact that private sector wages have increased. Compensation theory acknowledges that in order to retain real value, wages need to increase in response to inflation and/or productivity measures.

113. For reasons expressed at length in this report, the $537 *per diem* in effect at December 31, 2012 does not reflect fair and reasonable remuneration to Deputy Judges. Both for reasons of maintaining judicial independence and as a matter of simple fairness, the second criterion provides a compelling objective. However, in weighing the criteria, this Commission does not view achieving a fair and reasonable rate as feasible over the period of this Commission's mandate.

114. However the Commission is also not persuaded that an appropriate weighing of the criteria results in a freeze of the Deputy Judge *per diem* over the three-year period of its mandate. Some small weight need be given to ensuring that the relative position of the office of Deputy Judge does not fall even further behind its judicial counterparts. Judges of the Ontario Court of Justice and Justices of the Peace have and will receive increases in accordance with the applicable Industrial Aggregate Index. These are appropriately modest increases in line with current economic conditions and per capita income growth. Increases limited to an IAI measurement also reflect significant weight being placed on the financial policies and priorities of the Government regarding compensation restraint. Compensation trends also reflect lower increases, however, Deputy Judges have already borne a share of that decline when others have not. The *per diem* will remain well below that of the closest quasi-judicial comparator and will continue to lag behind the Justice of the Peace *per diem*, notwithstanding the relative ranking of those offices, matters of continuing concern.

115. The Government estimated that in 2013, 11,110 *per diems* were paid to Deputy Judges. This number is based on total fees paid, which, in addition to presiding in court includes writing reserve decisions, educational programs, and travel time required outside a sitting day.

116. In 2013 the total expenditure on Deputy Judge *per diems* was approximately $5.97 million. The cost of implementing these recommendations may be estimated using an average IAI index of 2.4% in each of the three years[55]. Compounded, those increases would cost the Government approximately $440,000 over the mandate of this Commission, an amount wholly

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[55] 1.5% for 2013 and 2.8% forecast for each of 2014 and 2015 = 2.4% average

insignificant by any measure of government expenditures.[56] As a measure of productivity, the Small Claims Court deals with 45% of all civil claims in the province and the 'labour' cost is less than $6 million per year. As a broad comparison, the work of the Ontario Court of Justice required a 'labour' cost in 2013 in excess of $80 million (284 full-time judges receiving a minimum of $274,574, not including pension or benefit costs). By any measure, the Small Claims Court, presided over by Deputy Judges, provides an economically efficient judicial service.

117. Implementing the recommendations at paragraph 125 of this report will not result in a *per diem* that is fair and reasonable as that assessment is contemplated by the application of the second criterion in section 8 of the Schedule. However, a failure to implement these increases to the Deputy Judge *per diem* as of January 2013 would, in the view of this Commission, result in a *per diem* that falls below a constitutionally protected minimum, while also taking egregious advantage of the commitment and professionalism of Deputy Judges.

OTHER ISSUES – TRAVEL AND REASONABLE EXPENSES

118. Deputy Judges are not currently compensated for time spent on file review done outside a day scheduled for mediation or trial. That matter is complicated by the fact that Deputy Judges are not generally allowed to remove files from the courthouse. This work however, while necessary to both the mediation and judicial functions of the court, does not fall within any proper definition of "expense" under the terms of the Schedule. If time spent on preparation falls within the definition of "sitting" and/or "presiding" as alternatively asserted by the Association, I am not persuaded based on the submissions before me that it is within the Commission's purview to determine whether the Government is interpreting and applying those terms appropriately.

[56] Overall savings for the Province in respect of OPS bargaining agents between 2012-2014 was approximately $130 million. The two-year settlement with AMAPCEO will result in cost avoidance of $24.6 million in the first year and $30.4 million in the second year. The OPSEU settlement was described as avoiding costs of $34.1 million in 2013 and $37.4 million in 2014. Ongoing estimated future savings of the OPSEU agreement were estimated at $55.9 million. In 2012 and 2013 the Government reached collective agreements in the education sector that resulted in $1.1 billion in one-time savings to the Government. See page 51, Government main submissions.

119. Deputy Judges are compensated for travel time if they are required to travel outside a sitting day. However, they receive no compensation for travel time on a sitting day. The Schedule does not set out the length of a "sitting day" and when Deputy Judges are required to travel on a sitting day, they may face work days that exceed any usual understanding. That also gives rise to regional inequities as between Deputy Judges, where some are required to travel significant distances to court where in other areas, travel is not required. However, travel time is not an expense. Government appointees are remunerated for this time in accordance with the Government Appointees Directive[57] wherein it provides:

> Travel time beyond that undertaken as part of the normal day's work may be remunerated, at an average hourly rate (1) based on the appointee's *per diem* rate, but the total payment made for travel time is not to exceed 60 percent of the approved *per diem* rate.
> (1) The average hourly rate is to be calculated on the basis of a 7.5 hour work day.

120. I have no information whether this is an issue in the Ontario Court of Justice, and if so, the nature of any response. However it is beyond the scope of this Commission's mandate to direct when a *per diem*, or part thereof, is to be paid.

121. Deputy Judges are reimbursed for expenses associated with travel in accordance with the current expense claims policy. Deputy Judges, however, supply their own resources to support the performance of their role. That may include computers, legal textbooks, or hard copies of relevant statutes, regulations, and rules. The Association noted that not all court locations provide internet access and that even where internet is available, no computer is provided in chambers for Deputy Judges' use. Thus, although Deputy Judges are provided with a basic legal database subscription they cannot utilize it at court without bringing their own hardware. They are required to robe for court proceedings but receive no cleaning allowance. They receive no administrative support, office supplies, or research support from Court Services. Apart from one day of mandatory training, other judicial training is undertaken at their own expense. However, there is no evidence that a request for reimbursement for office supplies, for example, that can be attributed to the work of the court has been refused. Such an entitlement already exists under the terms of the Schedule.

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[57] *supra*, fn. 34, at page 5

122. At the same time, as the *per diem* is not a salary, payment of the *per diem* is generally treated as business income for tax purposes, and supplies and materials would constitute appropriate deductible business expenses. Training may also prove to be of value in other areas of the Deputy Judge's legal practice. I make no recommendations with respect to the payment of expenses.

RECOMMENDATIONS PURSUANT TO SUB-SECTION 5(5) OF THE SCHEDULE TO ORDER-IN-COUNCIL 1788/2006

123. Deputy Judge remuneration proceedings have to date been conducted without utilizing expert witnesses and without notice to the court's broader legal or user community, although some representations from interested persons have been received by prior commissions. Both options are available to a commission under the terms of the Schedule. Future commissions may wish to consider extending the scope of notice of the proceeding to other interested persons or groups in order to seek to enhance the intended purpose of the process as an effective and objective inquiry. No independent, objective evaluation of the judicial or quasi-judicial roles has been conducted and some of the material filed with this Commission was, at best, subjective and/or selective. For example, tab 42 of the Government's exhibits purports to be a comparison of skills and responsibilities required of the three judicial offices discussed. There is no indication of authorship, method of assessment, or any attribute that would warrant placing any weight on its contents. And it is clearly subjective. For example, while both Justices of the Peace and Judges of the Ontario Court of Justice are cited as requiring "intimate knowledge" of certain listed statutes, a Deputy Judge need only "be knowledgeable about the judicial system", a characterization that ignores the breadth and scope of both statutory and common law knowledge that a Deputy Judge brings to bear in the adjudication of disputes. Similarly, the document is silent with respect to written skills utilized by Deputy Judges, yet written decisions of the Small Claims Court are now reported and form part of the available civil caselaw.

124. It is also the case that for reasons of transparency and accountability, Commission reports and any Government response should be readily and publicly available, through the appropriate ministry website as is the case in other jurisdictions in Canada.

RECOMMENDATIONS REGARDING REMUNERATION

125. Therefore, having regard to all of the criteria and to the appropriate weighing of those criteria in the circumstances before this Commission, I hereby recommend that:

- Effective **January 1, 2013** the *per diem* rate be increased by the IAI Ontario, calculated based on the 12-month period immediately preceding January 1, 2013, and 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, 2014** the *per diem* rate be increased by the IAI Ontario, calculated based on the 12-month period immediately preceding January 1, 2014, and 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, 2015** the *per diem* rate be increased by the IAI Ontario, calculated based on the 12-month period immediately preceding January 1, 2015, and provided that the *per diem* rate remain unchanged should the applicable year-over-year IAI Ontario percentage calculation be less than 100%;

For these purposes, the Industrial Aggregate (Ontario) for a 12-month period is the average for the period of the average weekly earnings in Ontario for all industries excluding unclassified enterprises, as published by Statistics Canada under the *Statistics Act* (Canada).

126. Effecting these recommendations would require a retroactive payment, and such retroactive payment is contemplated by these recommendations.

Dated at Toronto, Ontario this 31st day of July, 2014.

Marilyn A. Nairn, Commissioner.