

**In the Matter of Order in Council 1788/2006
and in the Matter of the Fourth Deputy Judges Remuneration Commission for the period
January 1, 2016 to December 31, 2018**

Between:

**Her Majesty the Queen in Right of the Province of Ontario
("the Government")**

and

**The Ontario Deputy Judges Association
("the Association")**

Report of the Fourth Deputy Judges Remuneration Commission

Before: William Kaplan, Commissioner

On Behalf of the Government: Sunil Kapur
Kate McNeil-Keller
Sean Porter
McCarthy Tetrault LLP
Barristers & Solicitors

On Behalf of the Association: Linda Rothstein
Andrew Lokan
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A hearing in this matter was held in Toronto on October 14, 2017.

Introduction

This is the Report of the Fourth Deputy Judges Remuneration Commission (hereafter “the Fourth Commission”). The Fourth Commission was established pursuant to Order in Council 1788/2006. The Commissioner is selected by the Association and the Government.

Without doubt, Deputy Judges occupy an important and full judicial role in the Superior Court of Justice of Ontario. Order in Council 1788/2006 sets out a framework and process for making recommendations about Deputy Judges’ compensation that is independent, effective and objective. Recognition of judicial independence is paramount although financial independence is not the primary issue as all Deputy Judges, with exceptions of no legal or factual significance, sit on a part-time basis: As outlined further below, judicial remuneration is not the primary source of income for Deputy Judges. The absolute need for financial independence of full-time judicial officers is axiomatic. The same cannot be said, at least not in the same way, about these part-time judicial officers – their work is critical, but from a financial independence perspective, it cannot be considered equivalent to any other judicial officer. Put somewhat differently, financial security for the work of Deputy Judges is critical, indeed essential to judicial independence, but it is different from that afforded to full-time judicial officers because of the part-time nature of the enterprise. Institutional independence is reflected in the establishment of this Commission process.

In developing remuneration recommendations, the Commissioner is directed to 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.

Following the conference anticipated in the Order in Council, the issues in dispute proceeded to a hearing held in Toronto on October 14, 2017. Both parties filed detailed briefs, reply briefs and other extensive documentation.

Some Background

There are approximately 360 Deputy Judges. They work part-time. There are no specific restrictions on other work. In 2016, about 37% of the Deputy Judges sat between 0 and 5 days a year. On the other side of the ledger, less than 3% sat between 26 and 30 days a year. Most Deputy Judges appear to sit approximately once per month. Most Deputy Judges work as full-time lawyers – others are retired from the practice of law. Their median length of tenure is approximately twelve years. They perform a wide range of functions ranging from settlement

conferences, hearing motions, and conducting trials. They often review files in advance of long hearing days, and may be called upon to travel to, and preside in, multiple jurisdictions. It is clear that the role and responsibility of Deputy Judges has evolved considerably over time, including with respect to jurisdiction. Deputy Judges, within their \$25,000 jurisdiction (with a defendant's claim, \$50,000 can be in issue), are often called upon to resolve complex cases with multiple parties in addition to determining more straightforward matters. The Compendium of Small Claims Court Jurisprudence, filed in these proceedings, clearly documents the range and sophistication of matters that can come before this court. Deputy Judges serve at the front lines of the judicial system – almost half of all civil proceedings commenced in the province are heard in the Small Claims Court.

Previous Commissions

As previously noted, this is the Fourth Commission. The first reported in 2007. The *per diem* – that is how Deputy Judges are paid – was then \$232. At the time of the First Commission, Deputy Judges had not received an increase to their *per diem* rate for 25 years. Among other things, Commissioner Louisa Davie recommended an increase in the *per diem* increments – setting out a proposed schedule beginning on January 1, 2005 with \$475 and concluding on January 1, 2009 with \$750. The Government accepted and implemented the first of the five proposed increments: an increase of 105%. Normative across the board increases followed in the remaining years.

The Second Commission reported in 2010. After considering the various factors and the earlier Commission report, Commissioner Marilyn Nairn concluded that while a *per diem* rate of \$765 was justified, because of extremely difficult economic conditions, and the Province's deficit reduction goals, fair and reasonable compensation should be set at \$635 (effective January 1, 2010 with normative Ontario IAI increases to follow, a 20.27% increase). Commissioner Nairn's recommendation was rejected – the *per diem* was frozen and then adjusted in the third year by 1.75% (reflecting the average increase in the Ontario Public Service). As of December 31, 2012, the *per diem* was \$537. The Third Commission reported in July 2014. Commissioner Nairn analyzed the previous Commission Reports. In a long, careful and thoughtful Report, Commissioner Nairn observed that that there was, in 2013, no justification for a *per diem* that was effectively equivalent to that in place in 1982. The work and responsibility of the Deputy Judges, and their important role within Ontario's civil justice system, had increased significantly and so too, the Commissioner reasoned, should remuneration. Commissioner Nairn rejected the Association's proposal - \$950 – as unrealistic but declined in an era of compensation restraint to make a specific recommendation to redress the shortfall she identified. While only recommending IAI, the Commissioner made clear that the *per diem* then in effect did not reflect fair and reasonable remuneration. The Commissioner's limited recommendation was accepted. The current *per diem* is \$563.

Association Proposal

The Association sought a *per diem* increase to \$1027, effective January 1, 2016. In support of this request, the Association pointed to a number of factors relating to the applicable criteria: the increases to remuneration of other judicial officers – in particular, the growth in their

salaries over time – not to mention the incomes of lawyers in private practice and the public service. In addition, previous recommendations had, largely, not been given effect and the remuneration currently being paid was, in the result, far from fair and reasonable. Moreover, economic circumstances that may have precluded adjustments in the past were no longer applicable, while recent public sector compensation trends were consistent with the adjustment being sought: incomes were rising, an increase was consistent with the fiscal policies and priorities of the government and was more than justified by the principles of Canadian compensation theory and practice. The reasons why these criteria, and the laws of Ontario, supported the proposed increase were elaborated at length in the Association’s written filings.

Government Proposal

In the Government’s submission, the current *per diem* paid to the Deputy Judges was already fair and reasonable and, accordingly, should only be increased during the term of this Commission by the IAI. The Government openly acknowledged the important contribution of the Deputy Judges to the administration of justice in the province, but took the position that when the applicable criteria were addressed – as it did in its written materials – the conclusion was inescapable that the *status quo* with IAI adjustments should constitute the Commission recommendation. The Government noted that the Association recommendation was for an increase to \$1027 – some 82.4% over the current rate – an extraordinary result in a process mandated to consider factors such as the need to provide fair and reasonable remuneration, the economic conditions in the province, recent Ontario public sector compensation trends and the financial policies and priorities of the Government. Details were provided in the written materials.

Recommendation

Having carefully considered the submissions of the parties, and paying detailed attention to the governing criteria, I am of the view that the *per diem* should, as of January 1, 2016, be set at \$706 – equivalent to that paid effective April 1, 2016 to part-time Vice-Chairs of the Grievance Settlement Board (GSB). For the remaining two years of this Commission’s mandate, the *per diem* should be adjusted by the Ontario IAI. This recommended increase constitutes a significant rise in compensation, justified by the reasons that follow. But first, some preliminary observations.

Remuneration of other judicial officials – the comparison most heavily relied on by the Association – has limitations. The Deputy Judges work part-time. It is anticipated that they will continue to work elsewhere or are semi-retired. Their work is important, but their service, the evidence indicates, is generally significantly less than more for most of them. By institutional design, Deputy Judges are not intended to be financially dependent on government. Deputy Judges are independent judicial officers and entitled to an independent and objective review of their compensation, and fair and reasonable remuneration, but this does not mean that infrequent, irregular work must be equal to salary. Neither legacy appointments, nor the appointment of a full-time administrative Deputy Judge, are relevant for determining the remuneration of these part-time personnel. This is not a case where it would be appropriate to

arrive at a notional full-time salary and divide it by the number of working days in the year to arrive at a per diem. There is no reason to conclude that the per diem of Deputy Judges who sit on a part-time irregular basis should be in any way equivalent to salary. There is nothing in the approach of creating a notional annual salary and dividing it by working days to create a per diem that commends itself to me. It is entirely artificial and inappropriate given how this court is staffed. Proposed legislation providing that part-time employees be paid the same rates as full-time employees has absolutely no applicability to the matters before me. As earlier noted, this is a part-time cohort – that is how this court is designed. Moreover, no precarity issue arises in these proceedings.

Needless to say, no Commissioner is bound by either the analysis or conclusions of previous Commissions, nor by the responses of the Government to earlier recommendations. Obviously, however, the work, finding, and recommendations of the previous Commissions are important and instructive. The task of every Commissioner, working in an independent, objective and effective process, is to apply the criteria in context and make a recommendation for an appropriate level of remuneration. Both parties acknowledge that the Commissioner should assign weight to the criteria based on the evidence and submissions received. Notably, past Commissions have given different weight to different factors according to the circumstances. This is amply established in the Reports of these earlier Commissions.

Accordingly, all of the criteria are important, and have been analyzed and assessed, but, arguably, the most important in these proceedings – and this is the position of the Association that I accept – is the need to provide fair and reasonable remuneration especially given the history outlined above. I am persuaded that while all the factors must be considered, and have been most carefully considered, at this time the most important criterion is the need to provide fair and reasonable remuneration given the evident failure of the per diem to keep up over time made manifest by the failure of the Government to meaningfully accept the recommendations of the three previous Commissions. This is not a review of the rationality or legitimacy of earlier Commission work; simply a recognition that earlier Commissions performed the same work in the same system addressing the same criteria and concluded, as do I, that the status quo does not represent fair and reasonable remuneration. The reasons and rationale in this Report are, of course, different.

The need to secure financial independence for part-time appointees – most of whom work approximately one day a month – is much less than is the case for any other independent judicial officer. Fair and reasonable remuneration must still be recommended, and in my view, the best comparator are the senior administrative tribunals which deal with matters of equal moment and importance, to individuals and to the community: The GSB has already been identified as an appropriate comparator; and its membership is also part-time with its members free to earn income elsewhere. The evidence before this Commission – illustrated in the compendia of GSB jurisprudence – amply establishes comparable importance in weight and complexity of the issues that proceed before the GSB and the work of the Deputy Judges. There are differences to be sure, and the identification of any comparator is always inexact.

While other Commissioners have shied away from using administrative tribunals as a reference point, this is not an approach that I can endorse. To be sure, administrative tribunals do not attract constitutional guarantees of independence, but tribunals members, like those who work at the GSB, exercise significant jurisdiction – including with respect to the **Charter of Rights and Freedoms** – and require skills and knowledge that is self-evidently comparable to that required of a Deputy Judge. They are, therefore, an appropriate reference point, as is conceded by the Government.

The fact that adjudicators at administrative tribunals may have been ruled out in other proceedings as a comparator for other judicial officers, for example, Prothonotaries, does not mean that they are not appropriately identified as a comparator for Deputy Judges. The fact that Deputy Judges may require ten years at the bar for appointment and no such formal requirement exists for appointment to the GSB is also of no moment. As a practical matter, only individuals with extensive experience, invariably senior lawyers, are appointed to the GSB following a consultative process reflecting the absolute independence expected in the exercise of the adjudicative function. The case for referring to the compensation of these Vice-Chairs as an extremely relevant comparator is self-evident. In marked contrast, and for example, it is hard to see what relevance compensation of lawyers in private practice or the public service could have in determining fair and reasonable compensation for part-time Deputy Judges. Likewise, there is no difficulty in recruitment and retention: a component of the principles of compensation theory and practice, a criterion to be considered.

Having paid careful regard to the evidence, including the detailed submissions about the work of the Deputy Judges, and after a careful review of the extensive written record including affidavits, it is my view that Deputy Judges are most appropriately compared with these senior GSB adjudicators. Obviously, an increase over the *status quo* has been recommended. However, bearing in mind the work that is being performed, the identification and application of the appropriate comparator, and consideration of all of the other factors, this increase is justified. From the payor's perspective, the time is never right for "catch up," but sometimes are better than others. The *per diem* amount being recommended accords fully with the criteria and indeed arises out of their application; in contrast, there is no reasonable application of the criteria that could justify the \$1027 – 84% increase sought by the Association.

On the fiscal front, the economic conditions in the province, recent Ontario public sector compensation trends, per capita incomes and the financial policies and priorities of the Government must be considered. It is worth noting recent settlements in the Ontario Public Service and the broader public service. There appears to be economic growth, decreasing unemployment, a declining deficit, and a balanced budget. All of this is set out in granular detail in the written submissions and directly address the criteria to be considered. In these circumstances, the specific recommended increase, in my view, constitutes fair and reasonable compensation. It must also be pointed out that all previous Commissioners have concluded that the *per diem* was not fair and reasonable. The recommended increase is substantial but must be considered in context: coming in the wake of all three previous commissions where the recommendations were effectively rejected, in the case of Commissioner Davie partially

accepted and in the case of Commissioner Nairn, rejected in the main. There have now been specific findings by three Commissions; three Commissions that have concluded that current remuneration was not fair and reasonable. This is the fourth. While *stare decisis* does not apply, and each Commission begins fresh, this is relevant, material, compelling and should be carefully considered in the assessment of this Commission's recommendation.

Accordingly, and for the foregoing reasons, this Commission recommends that the per diem be set at \$706 effective January 1, 2016 and then annually adjusted by the Ontario IAI.

Conclusion

At the request of the parties, I remain seized on the issue of representation costs.

DATED at Toronto this 10th day of August 2017.

"William Kaplan"

William Kaplan, Commissioner