

IN THE MATTER OF ORDER-IN-COUNCIL 1788/2006, AND
IN THE MATTER OF THE FIFTH DEPUTY JUDGES REMUNERATION COMMISSION
FOR THE PERIOD OF JANUARY 1, 2019 TO DECEMBER 31, 2021

Between:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

(the “Government of Ontario”)

- and -

THE ONTARIO DEPUTY JUDGES ASSOCIATION

(the “ODJA”)

Before:

The Honourable Warren K. Winkler, Q.C., Commissioner

Appearances:

Ben Ratelband and Margaret Gavins for the Government of Ontario

Linda Rothstein and Andrew Lokan for the ODJA

Heard: February 20, 2020 in Toronto, Ontario

Report of the Fifth Deputy Judges Remuneration Commission

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INTRODUCTION and OVERVIEW

1. This is the Report of the Fifth Deputy Judges Remuneration Commission (hereafter “the Fifth Commission”). The Fifth Commission and its composition and functions are established under Order-in-Council 1788/2006 (the “Order-in-Council”). The purpose of the Fifth Commission is to conduct an inquiry into the remuneration of Deputy Judges and make recommendations for the remuneration of Deputy Judges for the three-year period from January 1, 2019 to December 31, 2021.

2. Deputy Judges, who hear and decide cases in the Small Claims Court, are paid on a per diem basis. Their current per diem is \$728. It is the Government’s position that this per diem is fair and reasonable and should not be changed. The ODJA submits that a per diem of \$975 as of January 1, 2019, increased annually in accordance with the Industrial Average Income for Ontario (“IAI Ontario”), plus a \$25 basic non-taxable allowance for expenses (\$50 if taxable), is fair and reasonable. The ODJA makes further requests with respect to payment of per diems for reserved judgments and interest on any retroactive amounts.

3. Below are the results of the Fifth Commission’s inquiry and recommendations.

I. Background

A. The Commission

4. For 25 years, from 1982 until 2007, Deputy Judges did not receive an increase in their per diem, which was frozen at \$232. In 2006, the Court of Appeal for Ontario required the Province to establish an independent, effective, and objective process for establishing the remuneration of Deputy Judges. As a result, the Province established this Commission process.

5. Pursuant to *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 and *Provincial Court Judges’ Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] 2 S.C.R. 286 (“*Bodner*”), the Commission process must be (a) independent, objective, and effective; (b) have meaningful input into the process of establishing the remuneration for Deputy Judges; and (c) achieve the objective of depoliticizing the process of determining their remuneration. The primary function of the Commission is to recommend an

appropriate level of remuneration, weighing all of the factors, and making an objective recommendation based on the submissions and evidence.

6. This Commission has jurisdiction to make recommendations on “remuneration”, which is defined in the Order-in-Council and includes the per diem rate to be paid to Deputy Judges for sitting as a Deputy Judge, writing reserve judgments where necessary, the performance of required administrative functions, and attendance at educational seminars and judicial forums. The Order-in-Council sets out the criteria to be considered by the Commission in making its recommendation on remuneration.

B. Small Claims Court

7. The Ontario Small Claims Court (“OSCC”), a branch of the Superior Court of Justice, is intended to assist private citizens in securing access to civil justice in an understandable, timely and affordable manner. As the Honourable Coulter A. Osborne wrote in his Civil Justice Reform Project Report, the OSCC “is frequently referred to as the people’s court. Measured by unit volume of business, it is the busiest civil court in Ontario.” The OSCC “is geared to, and does, dispense justice quickly.” It offers a “simpler and cheaper process”.

8. The OSCC does not require legal representation and the vast majority of litigants are self-represented. Proceedings in the OSCC are governed by the Rules of the Small Claims Court, which provide for simple procedures and forms. The OSCC provides an economically efficient judicial service.

9. Beginning January 1, 2020, the amount of the maximum claim that can be made in the OSCC increased from \$25,000 to \$35,000. Also effective January 1, 2020, the minimum amount of a claim that can be appealed to Divisional Court increased from \$2,500 to \$3,500. The OSCC may determine any question of law or fact that arises in a case within its monetary jurisdiction. Since 2018, this includes construction lien cases. The OSCC applies rules of equity and common law, and has jurisdiction to grant equitable relief where such relief is a monetary payment or order for the return of personal property with a value of less than \$35,000. The OSCC does not hear criminal, quasi-criminal or family matters, nor does it hear civil claims that exceed its monetary jurisdiction.

10. The OSCC hears almost half of the civil proceedings in Ontario. It is the court that Ontarians deal with more than any other.

C. Role of Deputy Judge

11. The OSCC is not staffed by full-time judges, but rather, is presided over by members of the legal community. These Deputy Judges are appointed to the OSCC by a Regional Senior Judge (“RSJ”) of the Superior Court pursuant to s. 32 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. Their initial appointments are made with the approval of the Attorney General for a three-year term. Subsequent renewals are made by the RSJ for one or more three-year terms. It is common for Deputy Judges to be appointed to successive terms. The number of Deputy Judges who resign or are not renewed when they are eligible for re-appointment is very low. They have security of tenure for the period of their appointment and can only be removed for cause by the RSJ.

12. There are currently 334 active Deputy Judge appointments in Ontario. Their median tenure is approximately twelve years. The majority of Deputy Judges are in their 50’s, 60’s, or 70’s. They are part-time appointees. While there is a full-time administrative judge, there are no full-time Deputy Judges. All Deputy Judges serve on an irregular per diem basis.

13. Deputy Judges can opt to sit as frequently or infrequently as they choose. There is no minimum number of days that a Deputy Judge must sit in order to maintain his or her appointment. The majority of Deputy Judges were scheduled to sit 25 or fewer days each year since 2016. In 2018, for example, according to statistics provided by the Government, 75.24% of Deputy Judges were scheduled to sit 25 days or fewer and 61.38% were paid for 25 days or fewer (the difference between scheduled and paid days is not material and, whatever the exact percentage of days sat, it is clear that a large percentage of Deputy Judges sit less than 25 days per year). A small percentage – around 15% – sit more than 40 days per year. Around 30% sit no more than five days per year.

14. Deputy Judges must be lawyers. The majority of Deputy Judges either maintain their own private legal practice or are partially retired lawyers. As of December 2019, approximately 79.7% were currently engaged in private practice or other employment and approximately 15.1% were retired from practice. There are no restrictions on the outside work Deputy Judges may continue

to perform after, and while, they are appointed. As acknowledged by previous Commissions, judicial remuneration is not the primary source of income for Deputy Judges.

15. Deputy Judges perform a wide range of functions, including not only hearing motions and conducting trials but also acting as mediators in settlement conferences and presiding over judgment debtor examinations. Deputy Judges may have to travel large distances within their region. As set out in the Affidavit of Janice Kriger, filed on behalf of the ODJA, a Deputy Judge's day can be very long, varied, and challenging.

16. In contrast to other judges who receive judicial benefits ranging from 20% to 50% over salary, Deputy Judges do not receive any pension or other benefits.

17. The office of Deputy Judge attracts the guarantee of judicial independence under the Constitution. The position of Deputy Judge comes with public distinction and prestige. It is a valuable public service.

II. Previous Commissions

18. There have been four previous Commissions. The Fifth Commission is not bound by the analysis or conclusions of previous Commissions, nor by the responses of the Government to earlier recommendations. However, the work of previous Commissions represents the starting point in the analysis of the Fifth Commission.

19. The recommendations of each of the previous Commissions is discussed briefly below.

20. Prior to the First Commission, the Deputy Judges' per diem had not been increased since 1982. The First Commission (Louisa Davie) recommended remuneration for the period January 1, 2005 to December 31, 2009. Commissioner Davie found that the then-current per diem paid to Deputy Judges fell below the constitutionally-acceptable minimum. She recommended that the Deputy Judges' per diem be increased immediately to \$475 retroactive to January 1, 2005, and thereafter increase in increments to \$750 as of January 1, 2009. She further recommended that Deputy Judges be paid one per diem for writing time for every full day of trial, in cases where judgment was reserved, subject to the approval of the RSJ. The Province agreed to the initial increase to \$475 but declined to implement further increases other than yearly adjustments for

inflation of 2.25% to 3% and declined to follow Commissioner Davie's recommendation with respect to additional per diems for writing time. The ODJA applied for judicial review, which was dismissed.

21. The Second Commission (Marilyn Nairn), recommending remuneration for the period of January 1, 2010 to December 31, 2012, recommended that a "fair and reasonable" per diem would be \$765, but after considering factors such as the "extremely difficult economic conditions" and the Province's deficit reduction goals, recommended a per diem of \$635 as of January 1, 2010 with yearly adjustments for inflation. The Province declined to implement any increases other than yearly adjustments for inflation. The Province froze the per diem at the level implemented in the last year of the First Commission's mandate (\$528 as of January 1, 2009) for a further two years (to December 31, 2011), and then increased the per diem in accordance with the IAI Ontario for the last year of the Second Commission's mandate. As of December 31, 2012, the per diem stood at \$537.

22. The Third Commission (Marilyn Nairn), which covered January 1, 2013 to December 31, 2015, found that, after accounting for inflation, the 2012 per diem was virtually unchanged from the 1982 per diem. In light of the changes to the role of Deputy Judge since 1982, including the increase in jurisdiction, work, responsibility, skills and qualifications of Deputy Judges, the 2005 per diem of \$475 was not fair and reasonable. Commissioner Nairn found that the then per diem of \$537 was well below what would be fair and reasonable, but in weighing the criteria that it would not be feasible over the period of the Commission's mandate to achieve fair and reasonable remuneration. Commissioner Nairn recommended only yearly adjustments by the IAI Ontario in light of general compensation restraints. The Province implemented the recommended yearly adjustments for inflation.

23. The Fourth Commission Report will be addressed in more detail as it is of particular relevance to the recommendations made below.

24. In the Fourth Commission Report (William Kaplan), addressing remuneration for the period of January 1, 2016 to December 31, 2018, Commissioner Kaplan found that "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.” Commissioner Kaplan recommended an increase to parity with the per diem for professional and labour tribunals (such as the Grievance Settlement Board (“GSB”)) as of January 1, 2016, with yearly adjustments for inflation thereafter. Commissioner Kaplan recommended that fair and reasonable compensation for Deputy Judges be a per diem of \$706 effective January 1, 2016 and that it should be annually adjusted for the remaining two years of the Commission’s mandate by the IAI Ontario. The Province implemented the recommended increases. As a result, the Deputy Judges’ per diem increased from \$563 in 2015 to \$706 effective January 1, 2016, \$714 effective January 1, 2017 and \$728 effective January 1, 2018.

25. After the Fourth Commission Report was released on November 10, 2017, but before the Government issued its response to the Report, certain changes were made to the compensation structure of the adjudicative agencies that Commissioner Kaplan had found to be the most compelling comparator to Deputy Judges. One change was that the GSB per diem was increased to \$2400. This will be addressed in more detail below. It is mentioned here only to say that the ODJA and Government each made submissions as to the effect of these changes on the Fourth Commission Report. Commissioner Kaplan declined to change his recommendation, finding “there is no need or justification to revisit the earlier conclusion reached, or the recommendation made, one, it is worth noting, that provided for a substantial and definitely non-normative increase in compensation.” He noted, “subsequent Commissions will make their own determinations of what is relevant in reaching their own conclusions about fair and reasonable compensation.”

26. It is worth observing that, while the reasons and rationale of each Commission may have been different, each of the previous four Commissions concluded that the per diem was not fair and reasonable and that the per diem paid to Deputy Judges required a significant upward adjustment. To repeat Commissioner Kaplan’s characterization, the Government did not meaningfully accept the recommendations of the first three Commissions. The recommendations of the Fourth Commission and the Government’s response to those recommendations are addressed in the recommendation below.

III. Positions of the Parties

27. The issues in dispute proceeded to a hearing held in Toronto on February 20, 2020. Both parties filed detailed briefs, reply briefs and other extensive documentation. Below is a brief, non-exhaustive summary of some of the parties' arguments.

A. ODJA

28. The ODJA seeks an increase in the per diem to \$975 as of January 1, 2019, with annual adjustments thereafter tied to the average increase in the IAI Ontario. The ODJA also asks this Commission to recommend that the practice of paying one per diem for each reserved judgment following a trial of two days or more be restored, and that they be given a basic non-taxable expense allowance of \$25 per sitting day (\$50 if taxable), in addition to their per diem and the expenses that they can claim through existing procedures. Lastly, the ODJA asks that this Commission recommend the payment of interest on any retroactive amounts owed.

29. The ODJA submits that the current per diem of \$728 does not reflect the difficult and complex work of Deputy Judges, nor their high qualifications and experience. They are paid far less than any relevant comparator.

30. The ODJA offers a number of comparators. The ODJA argues that judicial comparators (including judges, case management masters, and prothonotaries) are relevant because judges are a distinct category who are subject to guarantees of judicial independence, have their compensation set by an objective process, and must have expertise in all areas of law within the broad scope of their jurisdiction. The ODJA submits that the salaries and benefits paid to other judges, whether on a full-time or per diem basis, provide guidance on the value of the work performed by Deputy Judges. The ODJA argues further that adjudicative tribunals may be examined as a reference point, but they are less relevant than judicial comparators because their per diems are set unilaterally by the Province, adjudicative tribunals are fundamentally different than courts, and they exercise a much more limited jurisdiction. The ODJA also submits that lawyers with at least ten years at the bar have some relevance because they comprise the labour pool from which Deputy Judges are primarily drawn. It shows what lawyers who accept appointments are asked to give up when they dedicate part of their time to adjudicating small claims. If the disparity between private practice

income and Deputy Judge remuneration grows too wide, the ODJA cautions, this will adversely affect the ability of the Government to attract quality candidates. The ODJA argues, further, that what the Government is willing to pay its own lawyers – lawyer working in the public service – is indicative of what the Province pays for legal excellence to represent the public interest in the administration of justice.

31. The ODJA submits that the OSCC has evolved in scope and complexity to keep up with increasing pressures on Ontario's justice system. The need for time to work on reserved judgments has increased, with the greater complexity of cases, intensified involvement of lawyers in OSCC matters, and the larger monetary jurisdiction. Deputy Judges need the approval of their local administrative judge for all per diems for reserved judgments. Moreover, Deputy Judges should be given an allowance for expenses, as other judges are; they cannot claim for computer equipment or use, online research, printing costs, phone plans, standard legal texts, robes and sash, or mileage within their assigned districts and they can no longer deduct such expenses for tax purposes.

B. The Government

32. The Government submits that, having regard to all of the criteria set out in the Order-in-Council, the per diem should not be increased during the Fifth Commission mandate.

33. The Government points to a number of statistics and criteria, such as the laws of Ontario, the economic conditions in the province, recent Ontario public sector compensation trends, and the financial policies and priorities of the Government of Ontario, that support its position that the per diem should not be changed. For example, the Government notes that the Province has a \$15 billion deficit and the largest subnational debt in the world at \$343 billion. Taxpayers of Ontario pay \$13.3 billion interest annually to service this debt. The Government's economic strategy for Ontario is predicated on controlled spending and management of this debt burden. As well, the Ontario public service and broader public service employee communities face ongoing salary moderation measures, both in the unionized and non-unionized context.

34. With respect to legislation, the Government submits that the Commission should have regard to: the *Courts of Justice Act* and the limited parameters with respect to the authority, jurisdiction and appointment of Deputy Judges; the *Broader Public Sector Executive*

Compensation Act, 2014, SO 2014, c 13, Sch 1 and Regulation (under which designated employers must cap the salary and performance-related payments to designated individuals at no more than the 50th percentile of appropriate comparators); and the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* (Bill 124), which came into force on November 6, 2019. This last piece of legislation limits general wage increases to a maximum of 1% per year, with exceptions. This legislation, on its terms, does not apply to Deputy Judges. It is, however, an important indicator of the Government's priorities and instructive as to the considerations that should be taken into account during a time of moderation in determining the remuneration of other members of the community who are paid from the public purse.

35. It is the Government's position that there is no perfect comparator to Deputy Judges, but part-time appointees to adjudicative agencies such as the Ontario Human Rights Tribunal, Ontario Social Benefits Tribunal, and Ontario Parole Board, who are quasi-judicial adjudicators and share a number of the characteristics of the position of Deputy Judge, fall within the range of comparable positions to that of Deputy Judges. (This group is to be distinguished from the professional and labour tribunals that this Commission finds to be the best comparator for purposes of the recommendation.) Although some adjudicators in this group earn higher per diems than the present per diem for Deputy Judges, the Government asserts that **no increase is due to Deputy Judges because the jurisdiction for these adjudicative agencies exceeds the jurisdiction of Deputy Judges.**

36. The Government notes that Deputy Judges received significant increases to their per diem during the Fourth Commission period. From 2006 to 2018, the total cumulative (compounded) percent increase for Deputy Judges far exceeds the total cumulative average of the daily earnings of Ontarians and Canadians.

37. The Government submits that, despite the **recent modest increase** to the monetary jurisdiction of the OSCC, there have been no material changes in the functions, duties, responsibilities or workload of Deputy Judges since the Fourth Commission. **There is no evidence that there has been any change in the recruitment or retention of Deputy Judges.** Given the very significant increases Deputy Judges received during the Fourth Commission Period, and taking into account the current fiscal condition of the Province, the current per diem rate of \$728 being paid to Deputy Judges is fair, reasonable and appropriate.

IV. Recommendation on Per Diem

A. Summary of Recommendation

38. Pursuant to section 8 of the Order-in-Council, the criteria to be considered by the Fifth Commission in assessing issues of remuneration include the following:

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; and
7. the principles of compensation theory and practice in Canada.

39. In an effort to depoliticize the relationship between the Government and ODJA in the remuneration process, the Commission is required to determine whether the per diem is objectively fair and reasonable in light of the most applicable comparators. Section 8 of the Order-in-Council does not ascribe the weight to given to each criterion. Accordingly, the Commission is entitled to assign weight to the various criteria that reflects the submissions and evidence received. The Government and ODJA made written and oral submissions with respect to these criteria, which have been considered by the Fifth Commission in making this recommendation.

40. Having carefully considered the governing criteria under the Order-in-Council and the submissions of the parties, the Fifth Commission recommends, on an all-inclusive basis, that the per diem should, as of January 1, 2019, be set at \$748. The Commission recommends that as of January 1, 2020 the per diem should be increased to \$768 and, as of January 1, 2021, increased further to \$788. This is an average annual increase of 2.68%.

41. The reasons for this recommendation are set out in more detail below. In brief, the Fifth Commission finds that the Fourth Commission conducted a thorough evaluation of compensation and provided compelling reasons for its recommendation. There have been some notable changes since the Fourth Commission Report, however, that support the Fifth Commission's recommendation for further adjustments to Deputy Judges' remuneration. The comparator put forward by the Government during the Fourth Commission (professional and labour tribunals), adopted by the Fourth Commission and which this Commission agrees is the best comparator, is now well ahead of Deputy Judges. Moreover, the monetary jurisdiction of the OSCC has increased by \$10,000 since the previous Commission, which this Commission accepts adds to the scope and complexity of the Deputy Judge's role. The Fourth Commission's recommendations only partially addressed the legacy of the 25 consecutive years in which Deputy Judges received no increase, followed by the Province's failure to implement successive Commission recommendations, and the Fourth Commission did not purport to provide a complete catch-up to the relevant comparators.

B. Recommendation

42. As a starting point, this Commission is compelled to acknowledge the importance of Deputy Judges to Ontarians and the judicial system. Deputy Judges hear almost half of the civil proceedings in Ontario. By anyone's measure, the OSCC is a very busy court. Deputy Judges are providing affordable, timely, efficient, accessible adjudication to the people of Ontario. Their role in offering accessible justice is very important. It is a complex job that requires making factual findings, grappling with issues of mixed fact and law, and analyzing often-complex legal issues in a variety of legal areas. The decisions they make are subject to appeal. The days can be taxing. Self-represented litigants, who are often unfamiliar with the law or may require procedural assistance, make up the majority of litigants in the OSCC. Deputy Judges are often required to hear a large number of cases in a day, which range from straightforward to highly complex. In most instances, they are required to rule on these matters from the bench. As litigants in the OSCC are often individuals of modest means, a judgment of \$35,000 can have a significant impact on their lives. Their experience at the OSCC may be that litigant's only experience with the judicial system. Deputy Judges must respect the importance of each case before them to the litigants involved, within the constraints of a taxed judicial system and the priority of meting out efficient and fair justice.

43. Turning to the recommendation, previous Commissions represent the starting point of this Commission's analysis. As the Supreme Court wrote in *Bodner*:

The process is flexible and its purpose is not simply to "update" the previous commission's report. However, in the absence of reasons to the contrary, the starting point should be the date of the previous commission's report. 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 committee should consider. A new commission may very well decide that, in the circumstances, its predecessors conducted a thorough evaluation of compensation and that, in the absence of demonstrated change, only minor adjustments are necessary. If on the other hand, it considers that previous reports failed to set 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.

44. The predecessor of the present Commission, the Fourth Commission overseen by Commissioner Kaplan, conducted a thorough evaluation of Deputy Judges' compensation. Commissioner Kaplan found that, in the circumstances of the Fourth Commission, the most important criterion was that of providing fair and reasonable remuneration, given the "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." Commissioner Kaplan accepted the position of the Government before the Fourth Commission that professional and labour tribunals were the most applicable comparator to Deputy Judges and the GSB was the most relevant comparator within that group. Commissioner Kaplan was compelled by the facts that membership in the GSB was part-time, with the ability to earn income elsewhere, and the GSB dealt with issues of comparable importance and complexity to those addressed by Deputy Judges.

45. A word must be said about what has changed with respect to remuneration for the GSB and other adjudicative agencies, including professional and labour tribunals, since the Fourth Commission released its initial Report.

46. On November 29, 2017, 19 days after Commissioner Kaplan released his Report, Order-in-Council 2311/2017 (the Adjudicative Agency OIC) was approved. The Government determined that adjudicative and regulatory appointees would receive an 8% increase to remuneration rates, retroactive to July 1, 2017, and a further increase effective January 1, 2018 in line with the

provincial public sector wage trend. As a result of this, part-time appointees to adjudicative agencies (other than professional and labour adjudicative agencies) would receive a per diem rate of \$463 for Members, \$572 for Vice-Chairs, \$730 for Chairs or Associate Chairs, and \$842 for Executive Chairs; and part-time appointees to professional and labour adjudicative agencies (whether the appointee is a Chair, Associate Chair, Vice Chair or Member) would receive a per diem rate of \$773. As of January 1, 2018 these rates were increased and the current rates are as follows:

Position	Full-time appointees	Full-time appointees	Full-time appointees	Part-time appointees	Part-time appointees	Part-time appointees	Part-time appointees
	(Annual remuneration)	(Annual remuneration)	(Annual remuneration)	(Per diem remuneration)	(Per diem remuneration)	(Per diem remuneration)	(Per diem remuneration)
	Term 1 (first 2 years)	Term 2 (next 3 years)	Term 3 (final 5 years)	Term 1	Term 2	Term 3	Prof & Labour <small>Exempt AGI</small>
Executive Chairs	\$200,780	\$212,564	\$224,349	\$858	\$858	\$858	N/A
Chairs	\$174,184	\$186,621	\$199,059	\$744	\$744	\$744	\$788
Associate-Chairs	\$174,184	\$186,621	\$199,059	\$744	\$744	\$744	\$788
Vice-Chairs	\$136,545	\$146,311	\$156,077	\$583	\$583	\$583	\$788
Members	\$110,482	\$118,378	\$126,273	\$472	\$472	\$472	\$788

47. In other words, the per diem rates for part-time appointees to adjudicative agencies currently fall into two categories. The first category comprises a large majority of these agencies (42 out of 53), ranging from \$472 for Members to \$858 for Executive Chairs. (This is the group that the Government now argues is the best comparator to Deputy Judges.) The second category comprises a smaller number of agencies (10 out of 53), referred to as the professional and labour adjudicative agencies. This latter group includes the Ontario Labour Relations Board (“OLRB”), Ontario Workplace Safety and Insurance Appeals Tribunal (“WSIAT”), Tribunal Consent and Capacity Board, and the Licence Appeal Tribunal. Members, Chairs, Vice Chairs, and Associate Chairs of these agencies currently earn a per diem of \$788. It was this latter group – professional and labour tribunals – that Commissioner Kaplan adopted as the most appropriate comparator based upon the representations to this effect by the Government.

48. A further change to the comparators considered by the Fourth Commission is that, pursuant to Bill 127 and effective July 1, 2017, statutory and structural changes were made to the GSB. Bill 127 moved the GSB toward a private sector model and greatly affected its compensation structure.

As a result, GSB roster mediator-arbitrators are paid an amount determined by the Government and the trade unions representing Crown employees. They agreed to establish a block fee rate of \$2,400 for GSB roster mediator-arbitrators. Despite the change in the model and compensation structure, the duties of GSB mediator-arbitrators remain the same as during the Fourth Commission.

49. Though these changes were brought to Commissioner Kaplan's attention following the release of his Report, and he was invited to change his Report based on this information, he declined to do so, maintaining his recommendation that a fair and reasonable per diem would be \$706 effective January 1, 2016 (adjusted thereafter by IAI Ontario) and remarking that future Commissions would make their own determinations as to what was relevant in determining fair and reasonable compensation.

50. Before the present Commission, it is the Government's primary position in support of its contention that the per diem should not be changed that there is no entirely appropriate judicial or quasi-judicial comparator for Deputy Judges. However, the Government submits that part-time appointees to adjudicative agencies such as the Ontario Human Rights Tribunal, Ontario Social Benefits Tribunal, and Ontario Parole Board, who are quasi-judicial adjudicators and share a number of the characteristics of the position of Deputy Judge, fall within the range of comparable positions to that of Deputy Judges. Even though most quasi-judicial adjudicators are not judicial officers, the Government submits, the nature of their work is nevertheless the most appropriate (though still imperfect) comparator with the work of Deputy Judges. The Government points to the traits shared by these agency appointees with Deputy Judges, including the intangible benefits of public service and flexibility, **the wide scope of jurisdiction of a number of these tribunals**, and the duties, responsibilities, skill, and competency required. The rates earned by some in this group exceed the present Deputy Judge per diem, but the Government insists the Deputy Judge per diem should not be increased because it is an imperfect comparator and **the jurisdiction of adjudicative agencies exceeds that of Deputy Judges.**

51. In contrast to its argument before the Fourth Commission, the Government no longer takes the position that professional and labour tribunals are an appropriate comparator. In an attempt to justify this change in its position the Government submits, "one of the main reasons why there is

a special rate for part-time appointees to these agencies was to address recruitment and retention issues. Specifically, the Government had difficulty attracting and, in particular, retaining qualified candidates with specialized knowledge and a high level of expertise in the subject matters dealt with by these agencies.” The Government pointed to the OLRB as an example, relying on the OLRB’s business plan to demonstrate that the failure to increase per diem rates had seriously impaired the OLRB’s ability to retain qualified appointees who could earn far more money in private practice or as neutral arbitrators and mediators.

52. When pressed to provide further evidence of the recruitment and retention issues, the Government offered strategic plans for three other professional and labour tribunals: the Medical Eligibility Committee, Pay Equity Hearings Tribunal, and the Safety Licensing Appeals and Standards Tribunals (the last of which, “SLASTO”, encompasses five tribunals, only one of which – the Licence Appeal Tribunal – is a professional tribunal). The Medical Eligibility Committee business plan states in part, “It has been challenging to add to the membership of the MEC due to an inability to attract physicians to participate...”. The Pay Equity Hearings Tribunal business plan states, “The specialized area and low case load make it difficult to attract part-time members to the Tribunal, and even more difficult to secure a panel for the number of days required to hear a lengthy case.” The business plan for SLASTO states, “SLASTO will be challenged to strengthen succession planning and to attract and retain qualified staff and appointees.” The SLASTO business plan also notes, however, “2016 will be the first year in which many members may face non-renewal due to the ten-year limit starting to take effect.” Evidence of recruitment and retention issues was not provided for the remaining six professional and labour tribunals.

53. While Commissioner Kaplan focused on the GSB as the best comparator in the category of senior administrative tribunals, this does not mean that other tribunals in that category are invalid comparators. In fact, to the contrary. There are currently ten on the list of professional and labour tribunals; there used to be eleven, before the changes were made to the GSB. The GSB has been removed as a relevant comparator because of the substantial increase to \$2400 per diem.

54. This Commission rejects the Government’s position that this group (professional and labour tribunals) is no longer a useful comparator to Deputy Judges. The basis upon which the Government attempts to resile from its position before the Fourth Commission that professional

and labour tribunals were a suitable comparator – rates were increased for recruitment and retention reasons – is not demonstrated on the totality of the evidence. The Government was only able to support this argument for four of the ten tribunals (and even then it appears that term limits explains the loss of members for at least one of the tribunals). Based on the foregoing, this Commission draws the inference that recruitment and retention were not the rationales for the pay increase for the remaining six tribunals.

55. As Commissioner Kaplan found, while these tribunals do not attract constitutional guarantees of independence, some exercise significant jurisdiction, including *Charter* jurisdiction, require skills and knowledge comparable to that required of Deputy Judges, and in practice are staffed by experienced lawyers with more than ten years at the bar who work part-time and have the ability to earn income elsewhere. **The Commission recognizes the limitations of the comparator – including that these tribunals exercise a more limited jurisdiction reflective of their enabling statute and per diems for adjudicative tribunals are set unilaterally by the Province – but no comparator is perfect. These six remaining professional and labour tribunals, whose members earn a per diem of \$788, continue to be relevant and indeed the most compelling comparators for Deputy Judges.**

56. It is the ODJA's position, as it has been before previous Commissions, that other judicial officers (including judges, case management masters, prothonotaries) are more relevant comparators for Deputy Judges. **All judicial officers share the constitutional imperative for financial judicial independence, entitling them to an independent, objective review of their remuneration. However, as has been noted by previous Commissions, there are many factors that distinguish Deputy Judges from other judicial officers.** The methods by which Deputy Judges are recruited, selected and appointed, and the security of their tenure are different. Deputy Judges are appointed for a fixed term of short duration, sit on an irregular basis, maintaining both flexibility and control over their sitting schedule. **There is no minimum number of days that a Deputy Judge must sit in order to maintain his or her appointment.** Deputy Judges are not required to stop their engagement in other business opportunities or extra-judicial remunerative work. Deputy Judges do not need to restrict their personal, social and political relationships to the extent of other judges. In other words, Deputy Judges are not required to devote their time exclusively to the role of judge. Rather they are permitted to continue to be engaged in their other – frequently, primary –

employment. The per diem is not a salary and is not intended to be the sole or even a significant source of income for a Deputy Judge. While the OSCC is a branch of the Superior Court and all judges are required to have expertise in all areas of law within the broad scope of their jurisdiction, the OSCC has a much more limited jurisdiction and Deputy Judges generally do not decide matters that engage liberty interests. This Commission recognizes that similarities exist between the work done by Federal Court Prothonotaries or Provincial Court Judges, for example, and Deputy Judges, but considering all of the factors, this Commission finds that it is fair and reasonable to maintain a monetary distinction between the different judicial groups on the basis of the differing terms and conditions of their respective offices and in accordance with their respective obligations and societal demands.

57. Although professional and labour tribunals are not a perfect comparator to Deputy Judges, this is the most compelling and useful comparator based upon the part-time, fixed term, non-exclusive characteristics of the Deputy Judges. Deputy Judges are not comparable to other judges who are appointed until retirement and are exclusively committed to the judicial role. Like the Fourth Commission, this Commission accepts professional and labour tribunals as the best comparator to Deputy Judges.

58. The need to provide fair and reasonable remuneration to Deputy Judges is not the only criterion that must be considered pursuant to the Order-in-Council. 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 also be considered. The Commission must have regard to all of the criteria and consider whether the Deputy Judges' compensation is fair, reasonable and appropriate given the prevailing economic conditions and overall state of the provincial economy. As Justice Dubin noted in a 1976 interest award arbitration decision, *Teachers and School Boards of Metropolitan Toronto*, "Every award of an arbitrator must have regard for the economic climate of the day." Although this Commission has regard to these important economic factors, as it must do under the Order-in-Council, they do not alter this Commission's recommendation. Unemployment is low by historical standards – 5.6% as of November 2019. Inflation is close to 2% per year. According to Ontario's most recent budget, on average, private sector forecasters expect real GDP growth of 1.8% in 2019, 1.7% in 2020, 1.6% in 2021. Employment and Social Development Canada data show that average annual public sector pay

increases for 2019 (to the end of November) in Ontario were 1.8% for the initial year, and 1.9% for subsequent years. Ontario's per capita income has shown long-term growth.

59. While the Commission has regard to the financial policies and priorities of the Government and the constraints on the public purse, undue emphasis on this criterion does not serve to depoliticize the relationship between the government and the judiciary. It will always be a government priority to restrain increases in public sector compensation. This Commission does not find that consideration of this factor changes its recommendation.

60. The Government argues that there is no difficulty with retention or recruitment of Deputy Judges and, using a pure economic supply and demand argument, these facts indicate that the current level of compensation provided to Deputy Judges is appropriate. The Commission is of the view, however, that this Government argument does not fairly take into account the commitment of Deputy Judges to public service. The per diem amount is not the only factor that motivates them to stay on in the position. Nonetheless, compensation theory and practice suggest that a per diem that does not keep pace with relevant comparators will, over time, have an impact on the ability to continue to attract and retain excellent candidates for the office (even if there is no evidence that such a problem currently exists). This Commission is of the view that an increase in Deputy Judges' remuneration is necessary to keep it in the range of the most relevant comparators in order to ensure a steady supply of qualified candidates and contented Deputy Judges. The increase in jurisdiction of the OSCC, which has the potential to enhance the complexity of the cases it hears, supports an increase in remuneration. The Province receives substantial value from the work of Deputy Judges and the remuneration of Deputy Judges is one expression of that value.

61. It is not appropriate for this Commission to focus only on the increase to remuneration enjoyed by the Deputy Judges since the Fourth Commission, as the Government urges. For 25 years, from 1982 to 2007, Deputy Judges did not receive an increase to their per diem of \$232. After the Province implemented a single increase to \$475 retroactive to 2005, Deputy Judges received only increases pegged to inflation until 2016. While a further increase was implemented after the Fourth Commission, it did not fully address the historic unreasonableness of their remuneration.

62. In conclusion, this Commission finds that professional and labour tribunals are the best and only true comparator to Deputy Judges. Based on this comparator, this Commission adopts the number of \$788, which is the per diem currently earned by that group. This Commission accepts that number as fair and reasonable remuneration for Deputy Judges, implemented in three stages. Accordingly, the Fifth Commission recommends, on an all-inclusive basis, that the per diem should be set at \$748 as of January 1, 2019, \$768 as of January 1, 2020 and \$788 as of January 1, 2021. This recommendation is based on a consideration of all of the governing criteria under the Order-in-Council and the submissions of the parties, having particular regard to what is fair and reasonable remuneration.

V. Other ODJA Requests

A. Expense Allowance

63. The ODJA submits that Deputy Judges should be given an allowance for expenses, as other judges are. It is the ODJA's position that Deputy Judges should be entitled to a basic non-taxable allowance for expenses, set at \$25 for each per diem (or \$50 if taxable). Most Deputy Judges incur expenses for which they cannot claim reimbursement. They can claim travel expenses incurred in the performance of their work, including mileage, parking, meals and accommodation costs, but they cannot claim for computer equipment or use, online research, printing costs, phone plans, standard legal texts, robes and sash, or mileage within their assigned districts. Further, the tax treatment of Deputy Judges' income changed in 2016 with the effect that the scope of their permitted tax deductions has narrowed and their effective compensation has been further eroded. The ODJA argues that Deputy Judges should not have to subsidize the Government for the work they do.

64. **The conclusion of this Commission is that this is a management issue.** There is no basis on which to provide Deputy Judges expense allowances comparable to those received by those other judicial officers. Moreover, given the wide disparity of sitting days between various judges and the high proportion of Deputy Judges sitting very few days per year, there is no common basis upon which to provide a expense allowance which would be appropriate when applied across the entire group. The Commission recommends that the status quo be maintained with respect to this matter.

B. Per Diem for Reserved Judgments

65. From 2004 to 2019, Deputy Judges were entitled to claim one additional per diem for trials of two days or longer, to write reasons for reserved judgments. For trials shorter than two days, they could claim a per diem for reserves with the prior approval of their RSJ. However, Deputy Judges were recently advised that they need the approval of their local administrative judge for all per diems for reserved judgments. The ODJA seeks a recommendation to revert to the prior policy. It submits that the need for time to work on reserved judgments has increased, with the increased complexity of cases, increased involvement of lawyers in OSCC matters, and the increase in monetary jurisdiction. Approximately 500 per diems are paid per year for reserves, according to Government disclosure, which amounts to approximately 1.5 per Deputy Judge per year. The ODJA argues that the need to acquire approval for all reserved judgments will reduce this amount and the overall compensation of Deputy Judges.

66. Without concluding whether or not this Commission has the jurisdiction to recommend that the prior practice of paying one per diem for each reserved judgment following a trial of two days or more be restored, this Commission denies this request and recommends that the status quo as currently in effect be maintained. As stated, Deputy Judges require the prior approval of their RSJ (or her designate) for all per diems for reserved judgments, as this procedure is presently documented. For clarity, it is not appropriate for the Government to intervene in this process.

67. The Commission acknowledges the evidence that payments for preparation time and written decisions are made to chairs and vice-chairs of certain other boards and tribunals. Those tribunals do not share the same access to justice goals as the OSCC. This is an administrative matter and provides no basis upon which the Commission is prepared to alter its recommendation. As for the ODJA argument that the increased complexity, involvement of lawyers and increase in monetary jurisdiction add to the number of reserved judgments, the Commission cannot accede to that submission. A large part of the work of the OSCC is devoted to claims by members of the public for payment for goods and services. The acknowledged success of the OSCC in this regard turns upon its ability to provide a simple process which works quickly and efficiently in providing recourse on a cost-effective basis while avoiding unnecessary delays. If an increase in the Court's jurisdiction requires more reserve judgments, which diminishes rather than increases the Courts

effectiveness, this would run counter to the purpose and objectives of the Court. Surely this was not the intention behind increasing the jurisdiction of the OSCC. The issue of containing the incidence of reserve judgments is not about compensation. Rather it concerns controlling the Court process so as to maintain the focus on service to the public.

68. The statutory mandate of the OSCC is to “hear and determine in a summary way all questions of law and fact.” The OSCC is to provide access to justice, meaning timely and affordable justice, and an efficient judicial service. Reserve judgments, in contrast, cause delays and make the process more expensive. They are in most instances not “summary”. The goal should be to keep reserves to a minimum. Administrative controls that address this point are justified.

C. Interest

69. The ODJA has requested that the Commission recommend that interest be paid. This Commission does not have the jurisdiction to grant interest. In any event, the Commission declines to make such a recommendation.

70. At the request of the parties, I remain seized on the issue of representation costs and any matters of implementation.

Dated at Toronto this 9th day of March, 2020.



The Honourable Warren K. Winkler, Q.C., Commissioner