

**REPLY SUBMISSION OF
THE ALBERTA PROVINCIAL
JUDGES' ASSOCIATION**

to the

**2017 JUDICIAL COMPENSATION
COMMISSION**

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Reply Submission of
The Alberta Provincial Judges' Association
to the
2017 Judicial Compensation Commission
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1. Set out below is the Association's Reply to the "Submission of the Minister of Justice and Solicitor General in and for the Province of Alberta" dated October 17, 2018. It is referred to throughout as the "Government's Submission" and the page or paragraph numbers from the Government's Submission are used for ease of reference.

2. The Government proposes that the salaries of judges should be frozen throughout the four years within this 2017 JCC's mandate. It also proposes a reduction in the age of eligibility for the part-time program, on the basis that it will generate a cost-saving for the Government. Finally, it proposes an increase of \$750 per year to the professional allowance against which judges may claim for reimbursement of certain types of expenses they have incurred. For the reasons set out below, the Government's proposal does not amount to appropriate compensation based on a fair consideration of the objective criteria that are relevant to the setting of judicial compensation. Further, as the Government itself acknowledges, the proposal is not consistent with the reasoning of past JCCs.

3. At paragraph 7, the Government correctly refers to one purpose of the JCC process, which is to protect judicial independence. It ignores the other key purpose, however, which is to depoliticize the setting of judicial remuneration. As discussed below, the Government's proposal, not to mention its earlier proposed joint submission, makes it clear that the Government's primary concern is not an application of the unique considerations that go into the determination of appropriate compensation for judges, but rather protecting its position in collective bargaining with the public sector and the upcoming provincial election. This is discussed in detail below.

Bodner, supra, Joint Book of Authorities, **Tab 2**, para 31

4. At paragraphs 7-9, the Government quite properly sets out that any decision to depart from the JCC's recommendations must be justified in a court of law. However, it downplays, if not ignores, the requirements articulated by the Supreme Court of Canada in the *Bodner* case which are discussed in the Association's Submission at paragraph 23 and following. The *Bodner* test requires that the Government not only provide legitimate reasons with a reasonable factual foundation, but also calls for a global review of the

process as a whole, in order to examine whether the JCC process has been respected and whether the purposes of the commission – preserving judicial independence and depoliticizing the setting of judicial remuneration – have been achieved.

Bodner, supra, Joint Book of Authorities, **Tab 2**, para 31

BACKGROUND AND CONTEXT

5. The Association does not take specific issue with the Government’s discussion of past Commissions (para 16 and following), although it relies on the more comprehensive discussion set out in Part I of the Association’s Submission. The significance of the timing of the 2013 JCC hearing relative to the date of issuance of the 2013 JCC’s Report, and the Government’s Response thereto is discussed further below.

GOVERNMENT’S REVIEW OF CRITERIA

6. At paragraph 49, the Government asserts that the Commission itself “meets the constitutional standard” and goes on to assert, *inter alia*, that “[i]t is effective – the Commission was convened within the timeframe prescribed in the *Judicature Act...*”. To be clear, while this is not an issue for the Commission, the Association disagrees with this statement and considers that the very significant delay in appointing the Commission members has compromised the effectiveness of the process. The regular, predictable and timely conduct of JCC processes is essential if judges are to have confidence in the process and its ability to protect financial security. Further, even in the absence of delay, the effectiveness of the process can only be properly assessed at its conclusion.

Judicature Act, Joint Book of Authorities, **Tab 7**, section 42

Unique Role of Judges

7. At paragraph 53, the Government acknowledges that public servants and private sector decision-makers are “not suitable comparators”. This is an effective acknowledgement that other judges are the best comparators for the appropriate level of compensation of Alberta Provincial Court judges.

The Need to Maintain a Strong Provincial Court by Attracting Highly Qualified Applicants

8. At paragraph 55 and following, the Government refers to certain attributes of the current judicial complement as support for its bare assertions that:

- the Government's proposed four year freeze in compensation will "fully meet" the need to maintain a strong Provincial Court by attracting highly qualified applicants (para 55-56); and that
- there is "no reason" to believe that the number of highly recommended candidates will change over the next four years (para 58).

9. The Government's proposed freeze would result in significant erosion of judicial remuneration against the forecasted increases in the cost of living. The Government provides no explanation of how an effective rollback of judicial remuneration will allow the Court to continue to attract highly qualified applicants, particularly given the need to compete with the s.96 Courts for applicants.

10. The Government's assertions fail to address that its proposed freeze in judicial compensation would mean that the gap with compensation paid to federally appointed judges would widen significantly, something which the Government itself has warned against in past submissions. The Government's assertion about the number of highly qualified applicants also ignores that the number of "approved applicants" has fallen significantly over the years, and that the proportion of applicants from private practice is also falling over time. The Association submits that the Minister's proposed freeze in judicial salaries, an effective reduction given the rising cost of living, is likely to result in even fewer applicants from the private bar and, indeed, the self-selection by many applicants of the federally appointed Courts over the Provincial Court.

Judicial Applicants, Joint Book of Agreed Facts and Exhibits, **Tab 2**

11. Table 1 on pages 24-29 of the Government's Submission accords with the chart provided at Tab 9 in the Association's Documents.⁴ The Association's chart uses the same approach as the data provided by the Government about the practice backgrounds of applicants to the Court: it only references where the judge was practicing at the time of his or her appointment. The applicant statistics can be found at Tab 2 in the Joint Book of Agreed Facts and Exhibits. The origin of applicants and/or recent appointees immediately prior to their appointment is the most relevant consideration in considering the ability of the Court to attract applicants. This is because, while a judicial appointment will represent a significant increase in compensation for a lawyer employed by Government, the same is not generally true of a highly qualified applicant from the private sector.

Remuneration and Benefits Other Judges in Canada Receive

12. At paragraph 66 and following, the Government's discussion of both the 2009 JCC and the 2013 JCC Reports ignores the important backdrop of its own submissions thereto. When considered in that context, the comments highlighted by the Minister in its current submission can be properly understood.

13. The Government argued before the 2009 JCC that the salaries of Alberta judges should be set at 95% of the salaries of Ontario judges. This submission was rejected by the 2009 JCC, which determined that this proposal was inconsistent with the reasoning of the past several JCCs and with the fact that the Alberta economy had surpassed that of Ontario over the last decade. The 2009 JCC explained:

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

⁴ The one exception is that in the Association's Documents, Judge Collinson was said to have come from Legal Aid, but she was in fact appointed from the Crown's office.

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

2009 JCC Report, Joint Book of Authorities, **Tab 20**, page 34-35

14. The Government's current submission is also inconsistent with the Government's implementation of the 2000, 2003, 2006, 2009 and 2013 JCCs' recommendations.

15. The 2009 JCC made it clear that its recommendations were tempered in light of the impact on Alberta of the global recession of 2008/09. However, even in that difficult economic context, the 2009 JCC saw fit to maintain approximate parity with Ontario salaries in the first year because of the "strong linkage" between the pay levels of these two courts. It balanced that with "modest increases" in the later years (including through increases tied to inflation in the third and fourth year).

2009 JCC Report, Joint Book of Authorities, **Tab 20**, pages 34, 36

16. In accepting the recommendations of the 2009 JCC the Government specifically noted that Alberta judges' salaries would rank first or second among Provincial Court judges' salaries in Canada and second in overall remuneration.

Government Response to 2009 JCC, Joint Book of Authorities, **Tab 21**, pages 3-4

17. When it came to the 2013 JCC, the Government proposed that judges' salaries should be increased in each of the four years by the percentage change in the Alberta Consumer Price Index ("Alberta CPI") over the preceding calendar year. The Association proposed that the salary for 2013 be set at \$275,000 based on all of the relevant criteria and then adjusted in each of the second, third and fourth years based on the percentage change in Alberta's Average Weekly Earnings.

18. The 2013 JCC rejected the Government's proposal of only a CPI-based adjustment in 2013, recommending instead a salary that it explained was based on all of the relevant criteria. For 2014 and following, it rejected both of the parties' proposals, recommending instead fixed increases of 2.5% per annum. The 2013 JCC explained:

We have done so deliberately considering all of the above factors set out in the Regulation, and more particularly the certainty it provides to both the Government and the judges of the Provincial Court of Alberta through to 2017.

2013 JCC Report, Joint Book of Authorities, **Tab 22**, page 47

19. The four year freeze proposed by the Government would mean that Ontario judges' salaries would exceed those of Alberta judges by a margin that is unprecedented in recent times, and which does not accord with the continuing relative strength of Alberta's economy and fiscal position as compared with that of Ontario.

	2017	2018	2019	2020
Minister's proposal for Alberta	\$293,991	\$293,991	\$293,991	\$293,991
Ontario	\$292,829	\$300,600	\$308,580 (based on estimate of 2% increase in IAI for Canada)	\$316,759 (based on estimate of 2% increase in IAI for Canada)
% relationship	100.4%	97.8%	95.27%	92.8%
\$ difference	\$1,162	\$6,609	\$14,589	\$22,768

Also see Salary Comparison with Ontario Judges, Association's Documents, **Tab 15**

20. The Government's proposal ignores the reasoning of past JCCs, the Government's own past emphasis on the strong linkage with Ontario, and its own reasoning for accepting the recommendations of past JCCs. Further, as discussed below, the relevant criteria do not support the Government's proposal of an effective reduction in compensation.

GOVERNMENT’S CONCLUSIONS

Historical Linkage with Federally Appointed Judges Should be Maintained

21. As the Government itself acknowledges, past Commissions have considered that, next to Ontario, federally appointed judges are the most significant comparator for Alberta judges. The reasons for this are detailed in the Association’s Submission beginning at page 84 and will not be repeated here.

22. The Government’s proposed freeze of Alberta judges’ salaries over the four years within this Commission’s mandate would significantly widen the gap with the salaries paid to federally appointed judges. The chart below does not take into account that the gap is further compounded by the significantly more valuable judicial annuity afforded to federally appointed judges. That is explained in the Sauvé Report and discussed in the Association’s Submission at page 91.

	2017	2018	2019	2020
Minister’s proposal for Alberta	\$293,991	\$293,991	\$293,991	\$293,991
Federally appointed judges	\$315,300	321,600	IAI for Canada \$328,032 (assuming a 2% increase in IAI)	IAI for Canada \$334,593 (assuming a 2% increase in the IAI)
% relationship	93.2%	91.4%	89.6%	87.9%

23. At paragraphs 94 to 103, the Government argues against parity with federally appointed judges and also against the idea that Alberta judges’ salaries should be set at a fixed percentage of federal judges’ salaries. However, the Association’s proposal to this 2017 JCC is not for a salary equal to that paid to federally appointed judges. Further, the Association does not propose to set salaries for Alberta judges at a fixed percentage of that of federally appointed judges on a go-forward basis. Rather, Association’s proposals for each of the four years at issue balance all of the criteria identified in the *Commission Regulation*. The proposals follow the reasoning of past JCCs in respect of each factor that is to be considered including, but by no means limited to, the

compensation paid to judges of the s.96 courts, with which the Provincial Court competes for applicants from the same pool of Alberta lawyers.

24. At paragraph 98, the Government refers to the 2003 decision of the New Brunswick Court of Appeal, which was appealed further to the Supreme Court of Canada as one of the cases heard together in *Bodner*. To be clear, the New Brunswick Court of Appeal was not tasked with evaluating the parity argument made by the New Brunswick judges to their Judicial Remuneration Commission (“JRC”). Rather, the role of the reviewing court was to consider whether the Government’s reasons for rejecting the recommendations of the 2001 JRC met the test in *PEI Reference*.

Provincial Court Judges’ Assn (New Brunswick) v. New Brunswick (Minister of Justice, 2003 NBCA 54, Joint Book of Authorities, **Tab 4**

25. The Court of Appeal recognized that the salaries of federally appointed judges were set with a view to attracting candidates from the private bar in the major metropolitan areas in Canada, not Moncton or Fredericton. In light of the different considerations that went into the setting of federal salaries, the Court of Appeal upheld the Government’s rejection of the recommendations which it found had focused on the federal salaries to the exclusion of other relevant factors.

Provincial Court Judges’ Assn (New Brunswick) v. New Brunswick (Minister of Justice, 2003 NBCA 54, Joint Book of Authorities, **Tab 4**, para 163

26. Notably, and not surprisingly, both Edmonton and Calgary were (and still are) among the metropolitan areas specifically considered in the determination of salaries for federally appointed judges. This is undoubtedly one of the reasons that past JCCs in Alberta have long accepted – as has the Government itself – the importance of the federally appointed judges as a comparator in Alberta.

Provincial Court Judges’ Assn (New Brunswick) v. New Brunswick (Minister of Justice, 2003 NBCA 54, Joint Book of Authorities, **Tab 4**, para 160

27. In the specific circumstances of that case, the New Brunswick Court of Appeal concluded that the Government had advanced legitimate reasons to reject the JRC’s

salary recommendations. As noted, this decision was ultimately upheld by the Supreme Court of Canada in *Bodner*, which also noted many flaws in the JRC's analysis which it determined justified the Government's rejection of the recommendations.

Provincial Court Judges' Assn (New Brunswick) v. New Brunswick (Minister of Justice), 2003 NBCA 54, Joint Book of Authorities, **Tab 4**, para 165

Bodner, supra, Joint Book of Authorities, **Tab 2**, para 81-82

28. Since the decision in *Bodner*, the situation in New Brunswick has, to some extent, come full circle. In 2009, the New Brunswick Court of Appeal quashed that government's decision to reject the majority recommendations of the 2004-2008 JRC in favour of adopting those of its own nominee. As the Court of Appeal pointed out, had the Government properly considered new information that was available about judges' salaries in other jurisdictions at the time it was considering the JRC's report, it would have realized that the 7th place ranking (among judges across Canada) favoured by the government itself was actually achieved by the majority's recommendations, not those of the minority member.

Provincial Court Judges' Association et al. v. The Province of New Brunswick, 2009 NBCA 56, Association's Documents, **Tab 30**

29. The subsequent JRC, which reported for the period 2008-2012 proposed increases in each of the years within its mandate. The Government rejected those, implementing instead a freeze for the first three years followed by an increase to a salary equal to 80% of the federally appointed judges. When it came time for the next Commission, the same 80% percentage relationship was the subject of a joint submission by the New Brunswick Government and the judges' association, and was then adopted by the 2012-2016 JRC. In its February 2018 Report, the NB JRC analyzed each of the factors that are identified in New Brunswick's *Provincial Court Act*, in finding that the joint submission provided appropriate compensation for the years at issue. The salary recommendations were later accepted by the New Brunswick Government.

2012-2016 New Brunswick JRC Report, Association's Documents, **Tab 31**

Government's Criticism of the Most Recent Ontario Report is Misguided

30. At paragraph 105 and following, the Government notes that the 9th and 10th Ontario Provincial Judges Remuneration Commission does not present its own analysis of how the salaries identified in the joint submission by the Government of Ontario and the Ontario judges' association were appropriate based on the criteria identified in the governing regulation. The recommendations on salary (among other aspects of compensation) are binding in Ontario and were the product of a joint submission.

Report of the 9th and 10th Ontario Provincial Judges Remuneration Commission, Joint Book of Authorities, **Tab 26**

31. For good reason, the rationale presented by Ontario JCCs for their recommendations has never been the basis for Alberta's focus on Ontario as a comparator. Given the unique factors that have always been relevant to the setting of judicial compensation in Ontario, the focus has always been on the actual salaries (or other aspects of compensation) and not the reasons that led to their implementation.

32. Past Alberta JCCs have considered Ontario judges' compensation to be the main comparator for Alberta judges because they are best compared with other judges, and Ontario is Alberta's closest economic comparator. As detailed in the Association's Submission (see page 84 and following), Alberta's economy surpassed that of Ontario a decade ago. Although the recent economic downturn reduced the extent to which Alberta's economy supersedes that of Ontario, Alberta continues to be well ahead of Ontario economically and that is expected to continue throughout the mandate of this 2017 JCC. For these reasons, a sudden departure from the linkage is not justified.

33. The Government's argument about the most recent Ontario Commission Report is addressed in further detail below, beginning at page 25 in this Reply Submission.

Maintain Historical Percentage Gap with Federally Appointed Judges

34. At paragraph 113-119, the Government provides a superficial review of how past Alberta JCCs considered the salaries of Alberta Provincial Court judges should compare

with those of their federal counterparts. The Association relies on its more detailed discussion, which begins at page 79 in its Submission, as well as the Salary Comparison which forms Tab 6 in the Association's Documents.

Specific Judicial Salary Comparisons

35. The Government refers to the charts and graphs at Tab 12 in its Book of Attachments. At paragraph 128, one of its "notable observations" is to the effect that Alberta judges' salaries have ranked first or second in the overall Provincial Judicial Salary Rankings from 2009/10 to 2016/17 (i.e. the years within the mandates of the past two commissions). Yet, by its proposal, the Government would depart from this pattern. Based on the figures that are presently known, a four year freeze would mean Alberta's judicial salaries would fall to at least third place (and well behind both Ontario and Saskatchewan), if not fourth or fifth place (i.e. behind the NWT and Yukon as well). The disparity is even greater given the relative value of the Alberta judicial pension as discussed in the Sauvé Report. This comparison is not supported by the criteria set out in the *Commission Regulation*.

36. Also "notable", according to the Government at paragraph 128, is that Alberta judges' salaries have been between 92% and 94% of the federal salaries over the last eight years. As discussed in the Association's Submission, the 2009 and 2013 JCCs tempered their recommendations considering Alberta's economic and fiscal circumstances, and found that, in the circumstances before them, that relationship was appropriate. The Government's four year freeze would cause Alberta judges' salaries to drop to about 87.9% of the federal salaries by 2020. This departure from the strong linkage that has existed over many years cannot be justified by consideration of the relevant factors.

37. It should not be overlooked that, in 2013, before the JCC even made its recommendations, the Association, having regard to the 2009 JCC's observation that it was not fiscally timely to increase vacation to the eight weeks that Ontario judges are entitled to, made no such request in 2013. The Association continues to temper its

requests for more appropriate compensation by continuing to refrain from making that request at this time. The same applies to the lower pension value.

38. At paragraph 129 on page 49, the Government examines the increases in judicial salaries in the western provinces between the fiscal years 2012 and 2016, which salaries were established by previous JCCs. Alberta’s judicial salaries increased less than those in both Saskatchewan and Manitoba, which is not surprising given the tempered nature of the recommendations made by both the 2009 and 2013 Alberta JCCs.

Economic and Fiscal Criteria

Real Primary Household Income *per capita*

39. At paragraph 137, the Government emphasizes that the criterion set out in s.13(f) of the *Commission Regulation* makes specific reference to “in Alberta” and not to comparisons with the data for other jurisdictions. The Commission is by no means precluded from considering comparisons with other jurisdictions as necessary context for the data under any of the criteria or, quite obviously, under s.13(k), “any other factors considered by the Commission to be relevant to the matters in issue”.

40. At paragraph 138, the Government correctly observes that the real primary household income *per capita* will average about 1.2% per annum between 2018 and 2022, although it is noteworthy that the years within this 2017 JCC’s mandate are in fact 2017 to 2020.

41. The data provided in the Association’s Submission, at page 64 at paragraph 211 did not account for the increase in population. The more relevant figures are set out in the chart below, which replaces that on page 64 of the Association’s Submission.

Fiscal Year	2017	2018	2019	2020
% change in <u>real</u> primary household income per capita (adjusted for CPI)	1.6	0.8	1.3	1.2
% change in primary household income per capita (<u>not</u> adjusted for CPI)	3.2	3.1	3.2	3.2

Minister's % salary proposal (<u>not</u> adjusted for CPI increases)	0	0	0	0
APJA's % salary proposal (<u>not</u> adjusted for CPI increases)	0.8	2.0	2.5 (estimate)	2.5 (estimate)

42. Because the Minister's and the Association's proposals are not adjusted for the impact of inflation, a comparison of the proposals with the unadjusted percentage change in the Primary Household Income Per Capita provides a clearer picture. Under the Association's proposal, judges' salaries would increase less than the actual and forecasted primary household income per capita of the Alberta population generally in each of the four years. This is notwithstanding any increase in the cost of living. This demonstrates the modesty of the Association's proposal.

43. When the Association's proposal is considered in light of the forecasted increases in the Alberta CPI detailed below, the Association's proposal would put judges' salaries less than 1% ahead of the increases required simply to maintain the purchasing power of the 2016 salary. See page 20 below. In the meantime, in 2017 alone, Albertans generally are expected to have seen increases in their *real* primary household income per capita rise 1.6% beyond the increase in the CPI, and then an average of 1.2% per annum thereafter.

44. The chart above also underscores the unfairness of the Government's proposal. While the primary household incomes *per capita* of Albertans generally has and is expected to rise more than 3% in each of the years, the Government proposes that judges' salaries should be frozen with 0% adjustments. As discussed below, the four year salary freeze would also mean a very significant erosion of purchasing power given the expected increases in the Alberta CPI over the same period.

The Need for Fair and Reasonable Compensation in Light of Prevailing Economic Conditions

45. At paragraphs 149-150, the Government maintains that the focus on the conditions "in Alberta" in the wording of s.13(g) of the Commission Regulation means that

comparative considerations are not relevant. The only relevance of the comparisons, asserts the Government, is for the purposes of comparing with other judges.

46. This is an unduly narrow reading of s.13(g) of the *Commission Regulation*. Moreover, the Commission is entitled to consider a wider context under s. 13(k). In understanding how Alberta is faring from an economic and fiscal perspective, it is critical to consider Alberta's economic and fiscal position within the greater Canadian context. This approach was adopted by past JCCs and there is no basis to depart from it.

Prevailing Economic Conditions in Alberta

47. By its paragraphs 151-170, the Government suggests that judges were overpaid by the recommendations of the 2013 JCC. While it is absolutely true that the economic forecasts that were made available to the 2013 JCC in the parties' submissions were not borne out by actual events, this is of no consequence for the reasons that follow.

48. The Government's argument fails to mention that it declined the Association's invitation to go back to the 2013 JCC if it wished to alter its proposals in light of the new economic circumstances, that the dramatic shift in economic circumstances was clearly considered by the 2013 JCC, and that the recommendations were then accepted by Government well into the third year of the four year period in question. This chronology is explained below.

49. The 2013 JCC held its hearings on October 7-8, 2014. As noted in the Report, Dr. McMillan provided evidence and was cross-examined about his economic report which had been earlier filed, as did Mr. Mark Parsons, an economist employed by the Government of Alberta. Shortly after the hearing, the price of oil dropped significantly, and it became apparent that many of the forecasts that had been made available to the 2013 JCC would be accordingly, significantly revised.

50. On December 18, 2014, counsel for the Association wrote to Government counsel inquiring whether the Government considered it necessary to make further submissions

to the 2013 JCC in light of the ongoing decline in the price of oil. In particular, counsel for the Association wrote:

In light of the on-going decline in the price of oil, I write to inquire whether the Government considers it necessary to make further submissions to the 2013 JCC. The Association wants to ensure that the Government has every opportunity to put forward its position, and particularly any change in its position which the Government considers to be necessary as a result of declining oil revenues. For that reason, the Association would support the Government should it take the view that it is appropriate to request that the JCC hear further submissions from the parties.

As you will recall, the evidence presented by both the Association and the Government spoke to the volatility of oil prices and the potential impact of that volatility on Government finances. Since the JCC hearing in October 2014, oil prices have descended very rapidly and precipitously. While that possibility was certainly contemplated in the evidence before the JCC, it is fair to say that no one expected that this would occur within the few months that have followed the hearing.

We are aware of the Government's recent statements in the news media about the impact of the declining oil price on government revenues in the current fiscal year as well as for the development of next year's budget. To the extent that the Government may take the view that its reduced revenue affects the position it took before the 2013 JCC about what is appropriate compensation for judges for any of the years at issue, the Association urges the Government to advise the JCC immediately of the need to make further submissions so that the JCC can take any change in the Government's position into account in its Report. This will ensure that 2013 JCC process can be effective. [underlining added]

Letter from S. Dawes to W. Olthuis, dated December 18, 2014, Association's Documents, **Tab 32**, pages 1-2

51. Government counsel responded by letter dated January 16, 2015, indicating that it did not feel it was necessary to seek to make further submissions to the JCC. That letter reads in part:

Firstly, I would confirm that the GoA is fully in agreement with the stated contents of the second paragraph of your letter but we have some further specific comments in respect of the significance of same as follows.

In regard specifically to the first sentence of that paragraph, we note that the GoA submissions to the JCC, in particular, emphasized the inherent volatility of the GOA's fiscal position precisely because of its considerable reliance on resource revenue. Those submissions included specific reference to the great sensitivity of such revenue to changes in oil prices. We are confident that the JCC was thereby made very aware of those points in general.

In regard specifically to the contents of the last two sentences of that paragraph, we acknowledge that such accurately describes some significant post-hearing developments but would add that we don't believe such developments by themselves necessitate the making of further submissions to the JCC, for the following reasons.

As noted above, the GoA's submissions at the hearing emphasized the inherent volatility of the GOA's fiscal position based on changes in resource revenue. The recent rapid and precipitous fall in oil prices (to use your terminology) is indeed an illustration of such volatility and of the resultant negative effect on the GoA's fiscal position. However, we are of the view that the JCC can and will take into account these significant relevant post-hearing developments. These specific developments have of course been very well publicized, perhaps even to the point of "media saturation". So we are confident that the JCC is very aware of and should thus consider the impact of these post-hearing developments in making its recommendations.

So in response to the specific inquiry stated in the first paragraph of your letter, and for the reasons stated above, the GoA does not feel it is necessary to seek to make further submissions to the JCC in respect of these noted and significant post-hearing developments. [underlining added]

Letter from W. Olthuis to S. Dawes, dated January 16, 2015, Association's Documents, **Tab 32**, pages 3-4

52. Counsel for the Association responded by e-mail on January 17, 2015, thanking counsel for confirming that the Government did not see a need to make further submissions and indicating that the Association shared the Government's confidence that the JCC would take the developments into account in making its recommendations.

E-mail from S. Dawes to W. Olthuis, dated January 17, 2015, Association's Documents, **Tab 32**, page 5

53. The 2013 JCC released its Report on March 30, 2015, on the eve of the third fiscal year of that Commission's mandate. The Report clearly took into account the economic

and fiscal circumstances which prevailed throughout its mandate up to the date of its Report, including the economic events that post-dated the October 2014 hearing, and the ensuing uncertainty that prevailed at the time of the Report.

2013 JCC Report, Joint Book of Authorities, **Tab 22**, see pages 31-34, 40-47, and 48

54. On July 8, 2015, the Government accepted the recommendations of the 2013 JCC. No reasons were provided. Had the Government considered that the 2013 JCC failed to properly consider the economic and fiscal circumstances of Government that existed up until March 30, 2015 or, indeed, considered that the circumstances had changed so significantly in the months after the Report was issued as to justify a change in the appropriate compensation for any of the relevant years, it may well have presented a basis to reject the recommendations. (See for example, the decision of the Federal Court of Appeal in *Aalto v. Canada*, 2010 FCA 195, Association's Documents, **Tab 33**). However, as noted, the recommendations were accepted without comment, well into the third year of the 2013 JCC's four year mandate.

Government's Response to the 2013 JCC Report, Joint Book of Authorities, **Tab 23**

55. In specific reply to the Government's paragraph 156, the 2013 JCC was well aware at the time of its Report that the Alberta economy and the fiscal situation of the Government would underperform against the economic projections which had been made available to the 2013 Commission. As the Government counsel advised in January 2015, "[t]hese specific developments have of course been very well publicized, perhaps even to the point of "media saturation"."

Letter from W. Olthuis to S. Dawes, dated January 16, 2015, Association's Documents, **Tab 32**, pages 3-4

56. The 2013 JCC was also necessarily aware that Alberta would not perform as well as predicted in comparison to the other provinces. In any event, Dr. McMillan confirms in his 2018 McMillan Report that while the extent to which Alberta's economy and fiscal

position exceeds that of its comparator provinces was reduced by the events of 2015 and 2016, it continues to exceed the other provinces by a considerable margin in many of the economic indicators. This is discussed in detail in the Association's Submission at page 68 and following.

2018 McMillan Report, Association's Documents, **Tab 14**

57. At paragraph 163, the Government asserts that Dr. McMillan has "downplayed the relative severity and lasting impact of the Alberta recession of the last few years". A fair reading of his report confirms that Dr. McMillan acknowledges the difficulties of the recent years, and their on-going nature but puts these into the important Canadian context. Not surprisingly, the Government's discussion entirely ignores another significant point made by Dr. McMillan: that the Government is in a position to address its fiscal challenges and still maintain a fiscal advantage over all other provinces.

2018 McMillan Report, Association's Documents, **Tab 14**

58. The key point for the 2017 JCC is that Alberta's fiscal capacity is such that the Government of Alberta continues to have much latitude in making policy choices about how to improve the current fiscal position. The 2017 JCC is not bound by the Government's current strategy of targeted investments and constrained expenditures. In any event though, the Association's proposal for modest increases takes that into account.

59. At paragraph 186, the Government suggests that the Commission should use "overall caution" in assessing the longer-term state of the economy given the significant risks inherent in a volatile economy. The 2013 JCC took the right approach in considering volatility:

"[g]iven the 'waxing and waning' effect of world oil prices on the Alberta economy, it would not be appropriate to focus on the recent drop in the price of oil as the deciding factor which outweighs all others in our recommendations".

Indeed, volatility works both ways: if the oil price were to increase significantly, this alone would not justify an increase for judges.

2013 JCC Report, Joint Book of Authorities, **Tab 22**, page 42

60. Like past JCCs, this 2017 JCC must assess the need to provide fair and reasonable compensation to judges in light of the best information available about the economic and fiscal situation in Alberta, and take that into account along with each of the other criteria identified in the Commission Regulation.

Alberta Consumer Price Index

61. At paragraph 191, the Government highlights the comments of Chief Justice Lamer, in *PEI Reference*, regarding the effects of inflation on judicial salaries. The 2009 JCC noted that Lamer C.J. made specific reference to the effects of inflation and the need to “guard against the erosion of judicial salaries because of inflation”.

2009 JCC Report, Joint Book of Authorities, **Tab 20**, page 25

PEI Reference, Joint Book of Authorities, **Tab 1**, para 173-174

62. The CPI prediction for 2018 contained in the Finance Economic Outlook Table provided in Ms. Rathrock’s report at Tab 17 in the Government’s Book of Attachments is slightly higher than the forecast by the Government in Budget 2018 (See Joint Book of Authorities, Tab 13, page 2). Since these are more recent figures, and presumably more accurate, the chart below corrects and replaces that at page 95 in the Association’s Submission, as it now reflects the updated forecast and the Government’s proposed salary freeze:

	2016	2017	2018	2019	2020
Established Salary	\$293,991				
Alberta CPI (fiscal year)	1.1%	1.6% (estimate)	2.3% (forecast)	1.9% (forecast)	2.0% (forecast)
Salaries if adjusted <u>only</u> for CPI		\$297,225	\$301,981	\$308,926	\$314,796
APJA proposal	n/a	\$296,382	\$302,304	309,990 (assuming IAI for Canada is 2%)	\$317,863 (assuming IAI for Canada is 2%)
Government's proposal		\$293,991	\$293,991 (total erosion of \$11,224 over past 2 years)	\$293,991	\$293,991
Running tally of amount by which salaries will have eroded against cost of living under Government's proposal		\$3,234	\$11,224 (\$7,990 + \$3,234)	\$26,159 (\$14,935 + \$7,990 + \$3,234)	\$46,964 (\$20,805 + \$14,935 + \$7,990 + \$3,234)

63. The Government's proposed four year freeze in the judicial salary would mean that judges' purchasing power would be reduced by a total of \$46,964 over the four years within this Commission's mandate. This represents a very serious erosion, due to the forecasted increases in the cost of living.

64. By contrast, while the Association's proposal takes into account all of the criteria identified in the *Commission Regulation*, the proposed salary for each of 2017, 2018 and 2019 is within roughly \$1000 (up or down) of the amount required simply to account for CPI and, by 2020, is less than 1% more than the salary that would simply protect against erosion. This demonstrates the modesty of the Association's proposal, which respects the Government's fiscal challenges.

The 2013 JCC's Recommendation for Fixed Indexing in 2014, 2015 and 2016

65. The Government's paragraphs 197-202 are misleading at best. The Government correctly states that the 2013 JCC rejected the Association's proposal for indexing based on the percentage change in the Average Weekly Earnings for Alberta. It does not mention that the Government's own proposal to the 2013 JCC was that compensation should be adjusted in each of the four years at issue by the percentage change in the Alberta CPI. Once that is understood, it is apparent that the statement of the 2013 JCC that it would not rely "strictly on the CPI increases" is clearly a response to the Minister's proposal that it should do just that, as well as a contrast to the approach of the 2009 JCC. The 2013 JCC summarized as follows its reasons for recommending fixed adjustments of 2.5% in each of the fiscal years 2014, 2015 and 2016.

In any event, our Commission has elected, after consideration of all the criteria, including today's economic climate, to fix the salaries based on regular increases of 2.5% starting in 2014/2015 rather than relying strictly on the CPI increases for Alberta, as occurred in the 2009 Commission.

2013 JCC Report, Joint Book of Authorities, **Tab 22**, page 46-47

66. With respect, there is nothing at all to support the claim that the CPI predictions that were provided by the parties to the 2013 JCC in October 2014 were – as the Government claims at paragraph 201 – an "important, and likely a key, factor" in its recommendations for the later years of its mandate. To the contrary, the 2013 JCC expressly said otherwise in the passage quoted above, was well aware that the forecasts it had been provided would change significantly, and specifically rejected the Government's proposal that it make adjustments based on CPI.

Nature of the Jurisdiction of Judges

67. At paragraph 203 and following, the Government presents a cursory examination of the jurisdiction exercised by judges of the Provincial Court of Alberta. The Association relies on the more comprehensive discussion presented in Part II of its Submission.

Level of Increases or Decreases, or Both, Provided to Other Programs and Persons Funded by Government

68. At paragraph 210, the Government makes the patently incorrect assertion that its proposal of a four year freeze for judges is “consistent with Alberta’s overall economic measures, ...including restraint on public sector salary spending, and, in the case of large public sector unions, reopening bargaining in 2019”. Given the discussion of the public sector settlements set out in the Association’s Submission beginning at page 96, it is readily apparent that the Government’s proposal would impose a greater burden on judges as compared with many in the public sector.

69. At paragraphs 211-213, the Government alludes to its policy decisions about how best to further Alberta’s economic recovery. The criterion in s.13(j) of the *Commission Regulation* focuses on the level of increases or decreases provided to other programs or persons funded by Government, not the policy thrust behind those decisions. As noted, the JCC is not bound by government’s choices about how to deal with the deficit or debt. The key point for the JCC is that the Government has choices and enviable fiscal capacity.

2018 McMillan Report, Association’s Documents, **Tab 14**

70. As to the Government’s paragraphs 214-215, the analysis of Chief Justice Lamer in *PEI Reference* did make it clear that judges’ salaries could be adjusted as part of an overall economic measure as long as the Government’s proposal was first put to a JCC. Lamer CJC also made it clear that the JCC was obliged to consider the Government’s proposal with respect to judicial compensation in light of objective criteria. In Alberta, that criteria is set out in the *Commission Regulation*. No such similar requirements exist for the determination of compensation for public servants. Accordingly, it is for Government to make the case for application of an “overall economic measure” to the judiciary, based on the unique considerations that are relevant to the setting of appropriate judicial compensation.

71. With those principles in mind, two points are apparent about the current circumstances:

- (a) in Alberta, there is no “overall economic measure” being applied in the public sector (in fact, quite the contrary); and
- (b) the Government has failed to justify its proposal for a four year salary freeze, in light of the criteria set out in the *Commission Regulation*.

Unionized Employees

72. At paragraph 216 to 218, the Government refers to the results of some recent collective bargaining. However, the focus is only on general wage adjustments and not the multitude of other aspects of compensation that were also dealt with in that bargaining. Those same agreements are discussed in much more detail beginning at page 96 in the Association’s Submission. As set out therein, while the Government’s focus in collective bargaining was clearly maintaining 0% general wage increases in the two years leading up to the next provincial election, the various unions were each able to achieve a number of their own unique priorities in exchange.

73. Further, even a “general wage freeze” does not mean an actual freeze in compensation for many members of a union’s bargaining unit. Employees who have not reached the top of the wage grid associated with their classification can still advance up the steps of that grid, which steps will generally involve increases of between one and three percent per annum.

Non-Unionized Employees

74. At paragraph 219-220, the Government points to the salary freezes it has imposed on non-unionized employees who do not engage in collective bargaining. Pay for this group of employees is highly political and is often used as a tool to assist the Government in its bargaining with unionized employees. Unlike for judges, there is no constitutional requirement that compensation for this group be determined based on objective criteria.

75. Non-unionized employees have the ability to increase their compensation in a variety of ways, whether by seeking re-classification or by applying for promotions to higher-paid positions. Alternatively, or in addition, subject to avoiding any conflict of

interest, government employees may engage in other business opportunities or employment to supplement their income. Finally, non-unionized employees who are dissatisfied with their compensation can opt to leave their positions for jobs outside the Government of Alberta, in another level of government or the private sector.

76. Judges, on the other hand, face significant barriers to supplementing their income, and those who have been on the Bench for any length of time would face a major challenge in returning to the practice of law. The Law Society of Alberta restricts former judges of the Provincial Court of Alberta from appearing in their former Court for a period of about 2 years, rendering the commencement of a law practice impractical, at least in the short term. For judges who practiced in other areas of the law prior to their appointments, a return to practice would involve the difficult task of rebuilding a client base, as all would have long-since moved on to other counsel.

Provincial Court Act, Joint Book of Authorities, **Tab 9**, section 9.41

Law Society of Alberta, Code of Conduct, Rule 5.1-3,
<https://dvbat5idxh7ib.cloudfront.net/wp-content/uploads/2017/01/14211909/Code.pdf> (not attached)

Government's Proposal to Abandon Approximate Parity with Ontario is ill-founded

77. By its title on page 81, the Government wrongly suggests that parity with Ontario judicial salaries is a "recent" development. As detailed in the Association's Submission beginning at page 84, the strong linkage with Ontario was first established by the 2000 JCC, which almost 20 years ago considered Ontario's economy to be the most comparable to that of Alberta.

78. Over the decade that followed, Alberta's economy surpassed that of Ontario by a considerable margin, but it nevertheless continued to be the most comparable of the other provincial jurisdictions. While Alberta was far ahead of Ontario economically, the 2009 JCC continued the approximate parity established by past JCCs because of the need to temper its recommendations in light of the economic situation. The 2013 JCC took essentially the same approach, again tempering its recommendations.

2009 JCC Report, Joint Book of Authorities, **Tab 20**, page 36

2013 JCC Report, Joint Book of Authorities, **Tab 22**, page 45

79. As is clear from the 2018 McMillan Report, Ontario continues to be the best comparator for Alberta among the other provinces, and Alberta's economy and fiscal situation continues to exceed that of Ontario. For these reasons, there is no basis to abandon – temporarily or otherwise- the strong linkage with Ontario that has been recognized and accepted for almost two decades. In any event, any determination by this JCC is necessarily time-limited, in the sense that the 2021 JCC will make its own assessment, about the continued appropriateness of the comparison with Ontario and all of the relevant criteria, when that Commission conducts its work.

80. At paragraphs 227-236, the Government again suggests that approximate parity with Ontario should be abandoned because Ontario's *Framework Agreement* includes an indexing provision and because the recent salary recommendations were not explained in the binding Commission Report. While these points were dealt with briefly above at page 10, they will now be addressed in turn.

81. The current version of Ontario's JCC process was established in 1995, when the Ontario Regulation referred to as the *Framework Agreement* was created to govern the Commission process. The scope of the inquiries conducted by the Ontario JCCs is set out in sections 13 and 14:

13. The parties agree that in 1995, and in every third year after 1995, the Commission shall conduct an inquiry respecting,
 - (a) the appropriate base level of salaries;
 - (b) the appropriate design and level of pension benefits; and
 - (c) the appropriate level of and kind of benefits and allowances of provincial judges.
14. The parties agree that in addition to the inquiry referred to in paragraph 13, the Commission may, in its discretion, conduct any further inquiries into any matter relating to salary levels, allowances and benefits of provincial judges that are mutually agreed by the judges and the Government of Ontario.

82. Just like in Alberta's *Commission Regulation*, the *Framework Agreement* sets out certain factors that must be considered by the Commission. Section 25 reads:

25. The parties agree that the Commission in making its recommendation on provincial judges' compensation shall give every consideration to, but not limited to, the following criteria, recognizing the purposes of this agreement as set out in paragraph 2:
- (a) the laws of Ontario;
 - (b) the need to provide fair and reasonable compensation for judges in light of prevailing economic conditions in the province and the overall state of the provincial economy;
 - (c) the growth or decline in real per capita income;
 - (d) the parameters set by any joint working committees established by the parties;
 - (e) that the Government may not reduce the salaries, pensions or benefits of Judges, individually or collectively, without infringing the principle of judicial independence;
 - (f) any other factor which it considers relevant to the matters in issue.

83. Not surprisingly, much like the Commission Regulation for this Alberta JCC, the focus of the Ontario factors is on the circumstances in Ontario. This has been the case throughout the almost 20 years during which past Alberta JCCs considered Ontario to be the best comparator for Alberta.

84. In addition, section 45 of the *Framework Agreement* provides for annual indexing based on the percentage change in the Industrial Aggregate Index ("IAI") for Canada over the preceding fiscal year (April 1 to March 31). This is the same indexing that is provided for federal judges, by section 25 of the *Judges Act*, although the federal calculation uses the percentage change over the previous calendar, not fiscal, year.

ON Framework Agreement, Joint Book of Authorities, **Tab 24**

Judges' Act, Joint Book of Authorities, **Tab 8**

85. The fact that the *Framework Agreement* provides for annual adjustments to the Ontario salary has had the effect of significantly modifying the adjustments, if any, that have been found to be appropriate by Ontario Commissions. For example, in the most recent process, the joint submission of the parties was that no further increases beyond those IAI-based adjustments were appropriate for the years 2014-2017.

86. At paragraph 231, the Government claims that the 2014-2022 Report “embarked on a radical new path” by adopting the parties’ joint submission that judges’ salaries in 2018, 2019, 2020 and 2021 should be set at specified percentages of the federal salaries in each of the years. It can be reasonably assumed that the joint submission was arrived at by knowledgeable, competent parties acting in good faith and what they perceive to be the best interests of the parties they represent, taking into account the purposes of the process.

87. As of 2017, Ontario judges’ salaries were \$292,829, which amounted to 92.8% of the federal salary. The Commission adopted the joint submission of the parties that the salaries should gradually rise to 95.27% of federal salaries by April 1, 2021. This contemplates an increase of only 2.49% over the four years, beyond the IAI. Considering that Ontario judges have received no increase beyond the IAI-based adjustments since 2010, this is properly viewed as a modest adjustment. In short, there has been no radical change.

2014-2022 Ontario JCC Report, Joint Book of Authorities, **Tab 26**, page 6

88. At paragraphs 232-233, the Government suggests that the recent Commission recommendation departs from the reasoning of the decades-old 2001 Commission in that a formulaic linkage has now been established. There is nothing to say that the salary for Ontario judges will continue to be 95.27% of the federal salary on and after April 1, 2022. That will be determined by the next Commission. No formulaic linkage has been established (or indeed, could be established as the current JCC could not bind a future

JCC). Rather, the Commission adopted the parties' joint submission for particular salaries for the years within its mandate.

89. As noted, the use of Ontario as a comparator has never been about *how* or *why* the Ontario JCCs had come to recommend the salary they did for Ontario judges. Rather, the focus has been on how much Ontario was actually paying its judges (in salary and the other aspects of compensation). As Ontario is most similar to Alberta in terms of its economic strength, albeit behind Alberta for some time now, successive Alberta JCCs have accepted that the compensation paid to Ontario judges provides an objective check on what is fair and reasonable for Alberta judges within the Canadian context.

90. Finally, contrary to the Government's paragraphs 235-236, the Association's proposal does not contemplate the blind adoption of the federal salary. As detailed in its Submission, the Association's salary proposal is solidly rooted in consideration of all of the criteria set out in the *Commission Regulation*, many of which are focused on Alberta. Just as the Government suggests it ought to be, the Association's proposal is "faithful to local conditions".

Economic Comparison with Ontario

91. Immediately after it suggests that the comparison with Ontario should be abandoned, the Government proceeds to urge consideration of how Ontario's economy has fared relative to that of Alberta in recent years.

92. At page 85 and following, the Government highlights the economic indicators most affected by the volatility of Alberta's economy, and compares those with the data for Ontario. There is no question that Alberta's economy is more volatile than that of Ontario. It has been for many years.

93. The 2018 McMillan Report provided the broader, longer term comparison with Ontario, which is of greater significance for this 2017 JCC. The main points were highlighted in the Association's Submission at paragraphs 282-283. It is clear that, while the scale of the differential has been reduced, Alberta is expected to remain well ahead

of Ontario, from an economic and fiscal capacity perspective, throughout this JCC's mandate.

2018 McMillan Report, Association's Documents, **Tab 14**

Maintaining a Linkage with the Federal Salaries

94. Despite its earlier assertion that the comparison with Ontario should be abandoned because of Ontario's decision to express the salaries for the next few years as different percentages of federal salaries, the Government asserts at page 88 that the "historically recognized salary `gap' with federally appointed judges should be maintained". This in itself is inconsistent. Even more problematic is that the Government's proposal for a four year freeze would significantly widen that gap from the current 93% to about 87.9%. As detailed in the Sauvé Report, this proposed salary gap is further compounded given the much greater value of the federal judicial annuity as compared with the pension available to Alberta judges.

95. The Government acknowledges at paragraph 246 that the gap between federal and Alberta judges' salaries has varied over time. The Association's Submission contains a detailed discussion of the decisions of past JCCs on the linkage with the federal salaries, which has been a significant consideration for JCCs dating back to at least the 2003 JCC. At **Tab 6** in the Association's Documents, is a Salary Comparison with Federal Judges dating back to 1998.

Government's Wrongly Asserts that the 2013 JCC was "Overly Optimistic"

96. The Government's argument (at paragraph 252 and following) about the 2013 JCC's supposed reliance on the CPI forecasts provided at the October 2014 hearing has been addressed above beginning at page 19. It is very clear from the Report that the 2013 JCC was well aware of the significant change in the economic circumstances which occurred after the hearing, which would of course affect the forecasts for CPI, among other indicators. The Government's focus on forecasts that were provided to the 2013 JCC at the October 2014 hearing is therefore misplaced. The 2013 JCC was clearly

aware that they would change, as the Government itself was confident it would be. So was the Government, when it accepted the 2013 JCC's recommendations in July 2015.

2013 JCC Report, Joint Book of Authorities, **Tab 22**

Letter from W. Olthuis to S. Dawes, December 18, 2014, Association's Documents, **Tab 32**, pages 3-4

Government's Response to 2013 JCC Report, Joint Book of Authorities, **Tab 23**

Justices of the Peace Compensation Commission Report

97. At page 92, the Government refers to the Report of the Justices of the Peace Compensation Commission ("2013 JPCC"). Following very substantial delay in the appointment of the Commission members, the 2013 JPCC conducted its hearings in early 2017 and its Report was finalized on July 20, 2017. Its recommendations dealt with the period April 1, 2013 to March 31, 2017 and were therefore entirely retroactive.

98. The relevance is far from clear. It is a different Commission, involving different judicial officers, with different relevant criteria, conducted at a different time.

99. Justices of the Peace ("JPs") have never been a comparator for judges. Although the converse is true, there is no established principle that the salaries of full-time JPs *must* be adjusted by the same percentage that is applied to judicial salaries. Each compensation commission will make its assessment of the relevant criteria, taking into account total compensation.

100. The 2013 JPCC made recommendations in respect of a multitude of different aspects of compensation for JPs, including, *inter alia*, increases in the significant shift differential paid to JPs who perform shift work, increases in the *per diem* amounts paid to part-time JPs, an increased professional allowance, payments for Christmas Closure Days, and the creation of a new 5% differential for Administrative JPs. By contrast, the main focus of the 2013 JCC was salary. In the circumstances, it is misleading to focus only on the adjustments to the salary of full-time JPs in comparing the approaches of the two Commissions.

101. The Association submits that each JCC, or JPCC for that matter, must take into account the “prevailing” conditions at the time it sits. To the extent recommendations are prospective, and it is necessary to rely on forecasts, the JCC must take into account the most reliable information that is available for the period of its mandate. To the extent recommendations are retroactive, the JCC can take into account the information that is available about the years already passed, as well as the conditions and forecasted conditions which prevail at the time of its Report.

102. Given the delay in its own appointment, this 2017 JCC is conducting its hearing well into the second year of its mandate. The prevailing conditions are known for the first 1.5 years of its four year mandate. Forecasts have been provided for the balance of the period and those can, and must be reasonably relied upon.

Government’s Proposed Re-Evaluation of the 2013 JCC’s Report Is Unjustified and Unworkable

103. Except in rare circumstances, JCCs must rely on the fact that the previous JCC has set an appropriate level of compensation. The Government’s proposed re-evaluation of the work of the 2013 JCC is not justified based on the circumstances of what occurred. Also, this approach would cause the work of this and each subsequent commission to be cumbersome and the process ultimately unworkable.

104. If the 2013 Alberta JCC had expressly stated that it intended to only account for inflation in the 2.5% annual increases it recommended for 2014, 2015 and 2016, it may well be reasonable to ask this 2017 JCC to take into account that inflation turned out to be less than the 2013 JCC had determined. However, quite the contrary, the 2013 Alberta JCC stated expressly that it was taking into account all of the criteria, including the changed economic conditions that arose after the hearing, in recommending the 2.5% annual adjustments. As such, the Government’s position that judges’ were overpaid as compared with inflation is without foundation.

105. As noted by the Government, the Supreme Court of Canada in *Bodner* wrote:

14 The *Reference* laid the groundwork to ensure that provincial court judges are independent from governments by precluding salary negotiations between them and avoiding any arbitrary interference with judges' remuneration. The commission process is an "institutional sieve" (*Reference*, at paras. 170, 185 and 189) - a structural separation between the government and the judiciary. The process is neither adjudicative interest arbitration nor judicial decision making. Its focus is on identifying the appropriate level of remuneration for the judicial office in question. All relevant issues may be addressed. 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.

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, is regarding 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 review of judicial 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.

Bodner, supra, Joint Book of Authorities, **Tab 2**, para 14-15

106. This direction by the Supreme Court of Canada was not an invitation for each successive Commission to re-evaluate the work of each previous Commission in order to evaluate whether the forecasts relied upon were borne out by actual events. This would mean a dual task for each Commission: first, examine whether the previous Commission's analysis holds up in light of what is now known about the actual results as compared with the forecasts that were available to the past Commission; and, second, examine the "prevailing economic conditions" as required by the *Commission Regulation*. Moreover, if the economic analysis by each previous Commission is to be re-evaluated in light of new information about the *actual* economic conditions over the period, the same should happen for each of the other criteria identified in the *Commission Regulation*.

107. Neither *Bodner* nor the *Commission Regulation* contemplates such a process.

108. It is clear from a fulsome reading of the Court's decision in *Bodner*, that the direction in paragraphs 14-15 emanated from the facts in the New Brunswick case that was before the Court. After earlier identifying significant flaws in the reasoning of the 2001 New Brunswick JRC which justified the Government rejecting its recommendations, the Court stated:

This being said, a reviewing court cannot substitute itself for the Commission and cannot proceed to determine the appropriate salary where the Commission has neglected to do so. However, deference should not undermine the process. Whereas a commission's report can normally be relied upon by a subsequent commission to have set an appropriate level of compensation, in certain circumstances, such as where the earlier commission neglected to consider all of the criteria enumerated in the *Provincial Court Act* or where it encountered constraints preventing it from giving full effect to one or more of the criteria, the subsequent commission may reconsider the earlier commission's findings or recommendations when conducting its own review. This may be one such case in which a future commission will have greater latitude than it would otherwise have had.

Bodner, supra, Joint Book of Authorities, **Tab 2**, para 82

109. In Alberta, the 2013 JCC carefully considered all of the criteria and encountered no constraints in giving effect to the criteria. Indeed, because of delays in its appointment, it had the benefit of actual information for the first two years of its four year mandate and was well aware that there would be a dramatic change from what had been forecasted for the last two years. This is surely why the Government accepted the recommendations some four months later, without reasons.

2013 JCC Report, Joint Book of Authorities, **Tab 22**

110. The Government claims that its position is supported by the 2015 decision of the BC Court of Appeal. It is critical to understand that each BC JCC makes prospective recommendations, in that it reports *in advance* of the period in question. The prospective

design of the BC process necessarily requires that the BC JCCs rely, entirely, on economic forecasts in making their recommendations.

Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General), 2015 BCCA 136, Association's Documents, **Tab 34** (A one-page extract was provided at Tab 1 in the Government's Attachment but the Association's Documents provides the entire decision)

111. The 2007 BC JCC made its recommendations in the fall of 2007, at a time when the economic forecasts for BC were extraordinarily favourable. The recommendations for the fiscal years commencing on April 1, in 2008, 2009, 2010 were accepted by the Government in the spring of 2008. At that time, no one predicted the global recession which commenced in the fall of 2008, which caused the BC economy to perform well short of the 2007 forecasts. In the circumstances, the 2010 JCC took into account that the BC economy in 2009 and 2010 had turned out quite differently than all had anticipated at the time of the 2007 Report. In so doing, it recommended no adjustment in judicial salaries for the first two years, followed by an increase in 2013. In addition, it recommended an increased accrual rate for the judicial pension, from 3.0% per annum to 3.5%, effective April 1, 2013.

2010 BC JCC Report, Association's Documents, **Tab 35**

112. Despite the modesty of its recommendations, the recommendations of the 2010 BC JCC were first rejected by the Government in March 2011. This first response was quashed by Macaulay J., who referred the 2010 JCC Report back to the Government for reconsideration. The recommendations were rejected a second time in March 2013, based in part on 2013 economic data that showed that the forecasts relied on by the 2010 JCC were not borne out. This response was quashed by the Court of Appeal in 2015 and the Government was ordered to implement the recommendations of the 2010 JCC.

Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General), 2012 BCSC 1022 (per Macaulay J.), Association's Documents, **Tab 36**

Provincial Court Judges' Assn. of British Columbia v. British Columbia (Attorney General), 2014 BCSC 336, [2014] B.C.J. No. 611 (per Savage J.), Association's Documents, **Tab 37**

Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General), 2015 BCCA 136, Association's Documents, **Tab 34**

113. When the prospective nature of that process and the timing of the Government's second response is understood, the Court of Appeal's direction that the economic conditions known in 2013 can be dealt with by the 2013 BC JCC makes eminent sense. In March 2013, when the BC Government responded a second time to the 2010 BC JCC Report, discussions were already underway concerning the appointment of the 2013 BC JCC, which was to sit in the fall of 2013.

Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General), 2015 BCCA 136, Association's Documents, **Tab 34**

114. Likewise, as set out in the quotation reproduced at paragraph 273 of the Government's Submission, the 2016 BC JCC made the point that it was making recommendations based on the economic information and forecasts available to it and that the subsequent Commission would do the same.

115. Routinely revisiting the work of past commissions based on actual results will defeat the process. Such a revisiting should occur only in the rarest of circumstances, such as when a dramatic change, considering the totality of all of the relevant criteria, occurs that was completely unforeseen by the earlier Commission. In the absence of something significant that was entirely unforeseen, subsequent JCCs must rely on the past JCC as having set appropriate compensation.

116. The BC Court of Appeal's comments may well have had relevance here if the 2013 Alberta JCC had been conducted in advance of the period under consideration. Had it sat in late 2012 or early 2013, the 2013 JCC would have had no knowledge of the significant downturn that commenced in mid-October 2014, and neither would the Government, at the time its response would have been required.

117. However, as noted, the 2013 Alberta JCC released its Report in March 2015 and its recommendations were accepted by the Government in July 2015. The 2013 JCC worked with actual data for part of its mandate and it was well known to the JCC that an economic downturn was underway before its Report was issued. Indeed, as the Government counsel put it to the Association in advising that the Government did not wish to make further submissions in light of the changes, the downturn in the price of oil and the attendant effects on the economy were being discussed in Alberta to the point of “media saturation”.

Letter from S. Dawes to W. Olthuis, dated December 18, 2014,
Association’s Documents, **Tab 32**, pages 3-4

118. In the circumstances, there is no basis for this 2017 JCC to “re-evaluate the stated rationale for the 2013 JCC’s recommendations”, as the Government contends at page 94. This 2017 JCC should follow the direction in the *Commission Regulation* and consider, as one of the criteria relevant to determining appropriate compensation, the need to provide fair and reasonable compensation in light of the “prevailing economic conditions in Alberta and the overall state of the economy, including the financial position of Government”.

119. Most significantly, the Government responded formally in July 2015, to those recommendations. That would have been the time to advance its current position.

120. At paragraph 274, the Government misrepresents the findings of the 2016 Quebec Commission. It did not consider that “prior commissions had undercompensated in relation to inflation”. Rather, it considered that judges had been undercompensated because the *Government* had declined to fully implement the recommendations of a previous commission. The history is explained in on page 53 of the Report (excerpt at Tab 10 in the Government’s Book of Attachments), lines 5-15. The Association requested an English translation of the excerpt at Tab 10 and understands that the Government will provide one as soon as possible. In the meantime, while the excerpt is in French, the gist is as follows.

- (a) The Clair Commission made two recommendations:
 - (i) a 1.7% adjustment effective July 1, 2013, which was designed to compensate judges for more than 70% of the loss of their purchasing power which was due to under-indexation over the years 2011 and 2012; and
 - (ii) a further 1.6% adjustment effective July 1, 2013, which corresponded to the inflation over the 12 months preceding the month of May 2013.
- (b) The Quebec Government accepted the latter recommendation but limited the first adjustment to 1% instead of 1.7%.
- (c) The 2016 Commission considered that there was a resulting erosion in purchasing power that was not justified. Given the modest but positive economic outlook, an adjustment was justified.

121. The Government also refers to the 2017 Saskatchewan Commission, which rejected the approach that the Alberta Government argues for in this proceeding. The following reasoning of the Saskatchewan Commission is sound and should be adopted by this 2017 Alberta JCC:

We do not see the function of this Commission as attempting to predict with certainty what economic conditions may exist in the future, but rather to judiciously consider the evidence presented to us by the parties and make reasoned recommendations to the best of our ability taking into account the evidence.

2017 Saskatchewan Commission, Government's Attachments, Tab 4, page 47

122. The 2017 Saskatchewan Commission went on to do just as the Association is proposing should be done by this 2017 JCC: it conducted a "fresh analysis" based on all of the relevant factors, "against the backdrop of building upon the work, rationale and recommendations of previous commissions".

123. In its Submission, the Association has explained in detail how its proposals accord with the reasoning of past JCCs and a fair consideration of the objective criteria identified in the *Commission Regulation*. By contrast, the Government has failed to justify its proposed freeze in light of the objective criteria and urges the abandonment, or effective abandonment, of historical, well-established comparators.

124. As to the Government's argument repeated in paragraphs 281 - 283, once again, the 2013 JCC was clear that its recommendations for 2014, 2015 and 2016 were based on a consideration of all the criteria identified in the *Commission Regulation*, including the economic climate in March 2015. Further, as detailed above, the circumstances are different from those faced by the 2010 BC JCC. For its part, as noted above at paragraph 114, the 2016 BC JCC took the same approach that is proposed here, which approach was also taken by the 2017 Saskatchewan Commission.

125. At paragraphs 283-285, the Government once again suggests that this 2017 JCC should consider that the 2013 JCC was "overly optimistic". This repeated argument has been addressed above.

126. At paragraphs 286 to 297, the Government argues that "overall caution" is called for because of the "significant risks inherent to the volatile Alberta economy". Volatility has long been a feature of the Alberta economy. To deal with this reality in a manner that conforms to their task, past JCCs have declined to make their recommendations based on where Alberta happens to fall at the given point on the trajectory, preferring instead a broader perspective. As the 2013 JCC put it:

Given the "*waxing and waning*" effect of world oil prices on the Alberta economy, it would not be appropriate to focus on the recent drop in the price of oil as the deciding factor which outweighs all others in our recommendations. That would be a disservice to this process. It would also amount to an abdication of our mandate set out in the *PEI Reference* to be "independent, objective and effective".

127. As to the Government's paragraphs 298-299, judges share in the broad spending restraints together with all citizens of Alberta. The JCC is not bound by the choices made by Government about how to pay public sector employees. Judges are the only group for which compensation must be determined based on objective criteria, not political expediencies.

Actuarial Evidence

128. The actuarial evidence is discussed at page 106 in the Government's Submission. Most notable about the Moore Report is that Mr. Moore took no issue whatsoever with Mr. Sauvé's methodology, assumptions or analysis.

129. The Government refers to the Aon Hewitt Report, provided a copy at Tab 23 in its Attachments. A number of the assumptions used in this Report differ from those which are used by Mr. Sauvé in the Sauvé Report, which have been agreed upon by Mr. Moore. Significant caution is therefore required in the use of the Aon Hewitt Report or the Nova Scotia Report for anything other than a general indication that other judges also receive pensions and that the relative value of Alberta's pension ranks somewhere in the middle of the pack of pensions afforded to judges across Canada.

130. The Sauvé Report focused on comparing Alberta's judicial pension with the pension arrangements available to judges in the federal jurisdiction and Ontario, both of which have long been considered the best comparators for Alberta judges. It also included Saskatchewan, a neighbouring province which, in 2016, paid judges the next highest salaries after Alberta and Ontario. The Association asked Mr. Sauvé to focus only on these jurisdictions partly in an effort to reduce the cost of his analysis, but also because of the comments of the 2013 JCC. When it came to examining judicial salaries across Canada, the 2013 JCC wrote that while the national context was "helpful in the sense of being apprised of the national picture, we are more focussed on Ontario as the main comparable jurisdiction".

131. As to the Nova Scotia Pension Corporation survey provided at Tab 22 in the Government's Attachments, it is misleading to compare each feature of a pension plan individually. It is a survey only, and does not measure the comparative value of the pension, let alone the value of any pension. This is because, while a plan may be more advantageous in one particular feature, all of the features must be weighed together to compare the relative value of the plans for a particular group of judges. This is the very purpose of the methodology used by Mr. Sauvé, that Mr. Moore agreed is appropriate in the circumstances.

Alberta's "Tax Advantage"

132. At paragraph 309 and following, the Government revives once again the same flawed argument that it made to both the 2009 and 2013 JCCs. The Government argues that when comparing with other jurisdictions, the Commission should take into account the effect of taxes in each of the other jurisdictions, on take home pay.

133. At paragraphs 312-313, the Government refers to the 2018 McMillan Report and its discussion of Alberta's tax advantage. Dr. McMillan makes the point that Alberta could raise taxes to entirely eliminate the deficit and still have a tax advantage as compared with other jurisdictions. The tax advantage is simply another way to illustrate the exceptional fiscal capacity of Alberta.

134. As the Association argued before the 2009 and 2013 JCCs when a similar argument was advanced by Government, the idea that Alberta citizens enjoy a 'tax advantage' as compared with citizens in other provinces and territories across Canada is far from new. Albertans have enjoyed relatively low rates of taxation for many years.

135. None of the previous JCCs in Alberta (or elsewhere) have made their inter-jurisdictional comparisons based on "after tax" rather than gross income. Despite that an 'Alberta advantage' has existed for many years, successive Alberta JCCs have determined that Alberta judges should be paid a salary that is at the top (2013, 2009,

2006 JCCs) or near the top (2013, 2009, 2003, 2000 and 1998 JCCs) of judicial salaries across the country (excluding federally-appointed judges). As one can see from reviewing the past JCC Reports, these recommendations were supported by consideration of all the relevant criteria, including the differences between Alberta and these other jurisdictions.

136. This is true not only of past JCCs in Alberta but also of JCCs in other jurisdictions. To the Association's knowledge, not a single JCC across the country has compared judges' salaries on an after-tax basis. Further, to the Association's knowledge, no other government (or judges' association) has argued that judicial salaries in a particular jurisdiction should be more or less because of differences in the tax structures of the various jurisdictions.

137. The Association is also unaware of this approach being taken by interest arbitrators tasked with making inter-provincial comparisons in order to determine appropriate wages for government employees generally. While economic circumstances and the financial position of government are a focus in those types of proceedings, and while interest arbitrators regularly consider differences in the cost of living as part of their analysis, the Association is not aware of any instance where after tax income has been compared in the absence of a much broader multi-dimensional analysis.

138. Were the JCC to remove the "Alberta advantage" for judges by recommending a lower salary for Alberta judges as compared with their counterparts in other jurisdictions in light of the comparatively lower taxes they pay, Alberta judges would be disadvantaged vis-à-vis other Albertans who would continue to enjoy the "advantage". Singling out judges, or indeed any other group, and applying that approach would penalize them as compared with other citizens. All citizens of Alberta contribute to (and pay the costs associated with) the Alberta economic environment and all should derive the benefits.

139. As noted, just like all Albertans who enjoy the "Alberta advantage", judges also pay the higher costs associated with living in Alberta as compared with certain other jurisdictions. If one is going to consider the tax differences among the jurisdictions, one needs to also consider the other differences. Conducting a comparison at such a detailed

level is not only unduly complicated and unworkable, but it is ultimately unnecessary. This is because the goal (as the Government itself acknowledges) is to take a “made in Alberta” approach in light of the criteria in the Commission Regulation. The task of this 2017 JCC is not to recommend a salary that gives judges in Alberta the same or some proportion of the “take home pay” as judges in Ontario, or any other jurisdiction.

140. As the Association also pointed out to the 2009 and 2013 JCCs, another consideration against taking such an approach is that it effectively ties the salary level to the provincial tax structure or vice versa. If judges are to be paid relatively less for 2017 because their taxes are lower than they would be elsewhere (despite that taxes have been lower, and perhaps even lower, in Alberta for many years), to the extent that Government has increased or were to increase taxes in the future, judges would need to be compensated for the tax increase through a higher salary, or the applicability of the tax increase to judges would need to be reviewed by a JCC. The notion of tying salary to taxes is ridiculous, of course, and illustrates one of the many problems with the approach suggested by the Government.

MINISTER’S COMPENSATION PROPOSAL

141. The Association concurs with the Government that all relevant criteria should be considered by the 2017 JCC, as required by the *Commission Regulation*. However, contrary to the Government’s assertion at paragraph 324, the economic factors do not have “special significance”.

142. At paragraph 325 and following, the Government sets out that it proposed to the Association that judges should accept a salary freeze for 2017 and 2018, and agree that a Commission would be convened again in fall 2019 or later to make recommendations for the 2019 and 2020 fiscal years.

143. Through section 42 of the *Judicature Act*, the Government chose to establish a process with a four year cycle (distinct from many other jurisdictions which revisit judicial compensation every three years). By requiring the Commission to be convened on or before April 1, 2006 and every four years thereafter, the Act contemplates a prospective

process which necessarily involves the use of forecasts for all, or a portion, of the relevant period.

Judicature Act, Joint Book of Authorities, Tab 7

144. At paragraph 331, the Government claims that the main rationale behind the joint proposal was to allow the parties and the Commission access to updated economic data and other relevant information for the last two years of this JCC's mandate. This claim falls flat as the economic circumstances described by the various economic experts is not so unusual as to present a reasonable justification to depart from the well-established cyclical process.

145. At first blush, the Government's proposed joint submission appears to mirror the position it has taken in collective bargaining with public sector employees. However, there is a critical distinction. Unionized groups were able to negotiate significant and variable incentives in exchange for agreeing to a 0% general wage increase for two years, followed by the right to access interest arbitration to determine wage adjustments for the third year if the parties could not agree. Many of the incentives or other benefits negotiated by the public sector unions are not relevant or applicable to judges (nor are they contemplated by the Government's proposal). To put it bluntly, unlike public sector employees, judges were offered no carrots, only the stick.

146. The Government's proposed joint submission left no room for misunderstanding that its primary concern is to avoid any potential impact on its dealings with public sector employees and to ensure it can suggest to voters that it has been successful in holding the line on wages paid by the public purse. This is confirmed by its current position to this 2017 JCC. When the Association refused to accommodate the Government's political concerns by advancing a joint submission for a two year freeze followed by an effective "wage re-opener" in the third year, the Government did not respond with a proposal that considers judicial compensation on its own merits based on the criteria identified in the *Commission Regulation*. Rather, it responded by proposing no increases at all over the entire four years.

147. Leaving aside these differences, JCCs in other jurisdictions have declined to find that a government's position in public sector bargaining should be applied to judges.

148. Similar to the requirement in Alberta, BC JCCs are obliged to consider "changes in the compensation of others paid by public funds" as a factor in assessing appropriate compensation for judges. Nonetheless, the 2013 BC JCC recognized that the Government's policy of fiscal restraint did not necessarily reflect its true fiscal position, reasoning:

On the other side of the coin, the salary sought by the Government (i.e., no increase for the first two years) also does not sufficiently reflect the true financial position of British Columbia. It is based too heavily on the Government's policies of fiscal restraint and wage freezes in the public sector. It ignores the fact that judges are not public servants but a distinct branch of government. The proposal of Government would have Provincial Court judges falling far behind their comparators on other courts. Indeed, the salary position of BC Provincial Court judges in comparison to the salaries in other provinces would cease to have any relation to the relative economic strengths of the province. It would also contradict the Government's policy of setting itself "3rd to 5th nationally amongst the provincial and federal governments" in relation to executive compensation.

2013 BC JCC Report, Association's Documents, **Tab 38**, page 46

149. Similarly, the 2016 BC JCC, chaired by The Honourable Frank Iacobucci, cautioned against emphasis on the province's position in public sector bargaining:

In this Commission's view, changes in [public sector] compensation is a statutory-mandated factor that is must, and did, consider. Similar to the criterion in sub-section 5(5)(c), its utility is in ensuring commissions consider whether judicial salaries in British Columbia are getting out of step. However, it must be remembered that the judicial role is unique: judges and judicial justices hold an office. They are not employees. Thus, they are not easily compared with others in the British Columbia economy, even those in senior leadership in the public service. Moreover, the constitutional role of judicial compensation commissions is to depoliticize the determination of reasonable compensation. Therefore, too much emphasis on compensation changes to public sector employees, which is the result of political decisions made by Government in setting its fiscal policy, must be avoided.

150. Back in 2010, the BC Government had also pursued a policy of wage restraint in collective bargaining with public sector employees which it termed its "net zero mandate". This allowed employees to negotiate increases only to the extent that they could find savings elsewhere. The BC Government rejected the recommendations of the 2010 BC JCC, which included increases in 2013 which were inconsistent with that bargaining mandate. The BC Government sought to apply the net zero mandate to judges, despite that judges were constitutionally precluded from engaging in negotiation to find savings elsewhere in order to be eligible for any increase, arguing that the application of across-the-board measures was supported by *PEI Reference*. The BC Supreme Court was unequivocal that such a bargaining mandate did not obviate the need for government to comply with its constitutional obligations:

[77] In my view, the passage from PEI Reference, considered in context, is illustrative but strengthens the requirement that government commit itself to the process. The factual matrix in the present case differs significantly from the scenario outlined above.

[78] PEI Reference does not grant government a pass on its constitutional obligations, even in difficult economic times. The government reliance on the net-zero mandate cannot be permitted to trump the constitutional obligations applicable to setting judicial remuneration. The mandate is only a negotiating position for bargaining with public sector unions. Judges are not constitutionally permitted to participate in collective bargaining with government. The JCC understood that it was not bound by the net-zero mandate of government.

Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General), 2012 BCSC 1022 (per Macaulay J.), Association's Documents, **Tab 36**

151. JCCs and reviewing courts have also taken into account the differing impact of a freeze for judges versus employees in the public sector. As noted, the steps in the wage grids set out in various public sector collective agreements routinely involve increases in the neighbourhood of 1-3% per year as employees advance with seniority within their

classification. Even if public sector employees are affected by 0% general wage increases, individual employees may still be eligible to advance up their classification grid or have access to increases through reclassification or promotion.

152. The Newfoundland Court of Appeal recognized the inconsistency in that government's stated desire to impose equal treatment on judges by applying to them the same salary freeze that was applied to civil servants:

191 Furthermore, there was no recognition, in the government's analysis, of the differing impact which a freeze would have on judges, who were on a fixed salary, and other public servants who had their wage scales frozen but were still able, within the freeze period, to receive actual salary increases by moving up steps within the frozen scales. In its submission to the Whalen tribunal, the government enunciated the principle that the judges should not be expected to bear "a disproportionate burden of restraint measures". Yet, the fact that some comparable highly paid senior public servants, such as the Deputy Minister of Justice, were able to continue to receive real money increases during the period of the freeze, and thereby avoid being "frozen" in actual terms relative to the financial position of judges, might well be perceived as requiring the judges to bear a "disproportionate burden" and would thereby contradict the principle underpinning the rationale for the government's submissions to the tribunal. Whilst it is true that there may be justifications, such as the elimination of existing inequities, for allowing scaled public servants to continue to receive actual money increases when the judges did not, it surely was incumbent on the government, in light of the principle espoused at the tribunal hearings, to provide a reason for adopting a different policy position and maintaining, in the face of the Whalen recommendations, that the judges should receive no increases whatsoever.

Newfoundland Provincial Court Judges v. Newfoundland, [2000] N.J. No. 258 (CA), Association's Documents, **Tab 40** (excerpt)

153. The 2011 Manitoba JCC also recognized that applying the same general wage increases to judges does not result in "equal treatment", since the general wage increases in a collective bargaining agreement are part of a whole package and often reflect other gains or concessions. The findings of the 2011 Manitoba JCC were discussed at paragraphs 322-323 in the Association's Submission.

154. More recently, both Manitoba and Nova Scotia went a step further than the governments in BC or Alberta and passed wage restraint legislation which purports to limit the compensation increases that can be negotiated by or for government employees. When it came time for the next JCC in each of those provinces, the Manitoba and Nova Scotia governments both argued that judges should be obliged to share the economic burden imposed on public sector employees by being granted only the same limited wage increases set out in the legislation. In both provinces, the government's arguments were rejected.

155. The 2016 Nova Scotia Provincial Judges Salary and Benefits Tribunal rejected application of the government's proposed wage restraint to judges on the following basis:

The Tribunal must make two observations in relation to this approach adopted by the Government. Firstly, the Supreme Court of Canada and Courts of Appeal across this country have indicated that civil servant salaries, for the most part, are not appropriate comparators in the exercise of setting judicial salaries. The Government formally acknowledged this principle, but nonetheless made consistent reference to civil servant salaries to describe context, background and the like in relation to its wage mandate. This is problematic, because, secondly the Tribunal is bound to make recommendations on salaries (and the other issues within its mandate) by considering and balancing the factors found in section 21E(3) of the *Provincial Court Act* – duly enacted, and insofar as the sections relating to this Tribunal's activities are concerned, proclaimed into force, and therefore binding on the Tribunal. On the other hand, the unproclaimed *Public Services Sustainability (2015) Act*, and the Government's wage mandate, is not binding on this Tribunal in any sense. [underlining added]

156. The 2017 Manitoba JCC expressed many different reasons for rejecting the Government's proposal to apply to judges the same 0%, 0%, 0.75% compensation adjustments that the Government had legislated for employees in the public sector. Among other reasons, the 2017 Manitoba JCC wrote:

Firstly we acknowledge that it is open to a JCC to recommend a wage freeze for Judges, but only a consideration of all relevant factors. We also stress that no JCC has accepted and endorsed a principle that there should be equality of treatment with public sector employees.

We do not accept the fact that just because a Government adopts a policy of restraint, that this reflects the true fiscal position of the Province. We acknowledge however that a high deficit and a high annual level of interest payments to service the Province's debt load are important factors to consider and we must place appropriate weight on this factor. However, this consideration cannot be done without considering the six statutory factors.

2017 Manitoba JCC Report, Association's Documents, **Tab 42**, page 72

157. Later in its analysis, the 2017 Manitoba JCC wrote:

We agree with the Association's submission that certain public sector employees are negotiating provisions in their collective agreements, such as workload restrictions, which Judges are unable to bargain. Certain public sector employees receive incremental wage increases based on seniority which are separate and apart from general across the board increases. Judges do not receive such incremental increases as there is one salary level for all levels of seniority for Provincial Court Judges. Therefore to recommend increases of 0%, 0% and .75% would not afford Judges equality of treatment with public sector employees.

2017 Manitoba JCC Report, Association's Documents, **Tab 42**, page 74

Details of the Minister's Compensation Proposal

158. As to the Government's paragraph 133, the Association submits that the Government has failed to justify its proposed four year freeze. As detailed above, the Government's position is an obvious extension of its position in collective bargaining and does not reflect the unique concerns that apply to the setting of fair and appropriate judicial compensation as required by the *Commission Regulation*.

159. The Government's focus on the fact the Association rejected its proposed joint submission is curious. Among the many reasons set out in the discussion above, first and foremost, is that the proposal was not appropriate based on all of the criteria that

apply to determining judicial compensation. In addition, as the proposal was so obviously political, such a departure from the process contemplated in the *Judicature Act* (and by *Bodner*) would not further the purpose of the process in depoliticizing the setting of judicial compensation.

Age of Eligibility for the Part-time Program

160. For the reasons outlined in the Association's Submission, the Association agrees with the Government's proposal to reduce the age of eligibility for the part-time program from 60 to 55.

Professional Allowance

161. The Government proposes to increase the judges' professional development allowance from \$3,750 to \$4,500 per annum. The Association has carefully weighed adopting the Government's proposal. While it does consider the current limit to be inadequate, the Association made the difficult decision not to join the Government in its proposal.

162. To be clear, the proposed increase in the allowance amount should not be viewed as an increase in compensation. It is intended to be a tool which assists judges in their continuing education. It would allow those judges who have paid out of pocket for expenses incurred beyond the current limit of the allowance, to be reimbursed for those further expenditures.

163. An increased professional development allowance would benefit judges who attend one or more out of province conferences in a year and who, as a result, almost certainly exceed the limit. With the support of the Chief Judge's office, the Association has made significant efforts in recent years to find efficiencies in the provision of judicial education, and considers education to be of critical importance. Despite these efforts, it is apparent that some judges will have to continue to pay out of pocket for professional development expenses if no increase is granted (and perhaps, even if an increase is granted).

164. While the current situation is of obvious concern to the Association, in light of the four year salary freeze that is proposed by the Government, the Association decided it would better serve all of its members if it focused its proposals on appropriate salary adjustments.

Judicial Indemnity

165. At paragraphs 337 to 341, the Government has purported to respond to the Association's proposal regarding the judicial indemnity before the Association had made its argument. The Association relies on the detailed submission presented in its Submission.

The Government Misconstrues the Association's Proposal

166. As detailed in the Association's Submission, the Association's salary proposals are supported by consideration of all of the relevant criteria, respect the reasoning of past JCCs and the arguments advanced by the Government to past JCCs and in accepting the recommendations of past JCCs. There is no basis to suggest, as the Government does at paragraph 344, that the proposal is "primarily based on applying to Alberta the recommendations of the 2018 Ontario Commission".

167. The arguments set out at paragraphs 345 to 352 have been dealt with above, in some cases repeatedly, and thus the Association's response will not be repeated here.

The Government's Costing of the Parties' Compensation Proposals

168. At paragraph 355-358, the Government explains that its costing analysis includes the increases in the normal cost of the pension benefits that were required as a result of the March 31, 2017 Actuarial Valuations (provided at Tabs 34 and 35 in the Government's Attachments). This is inappropriate for a number of reasons.

169. Firstly, any increase in the Government's cost as required by the Actuarial Valuations is clearly contemplated by the current plan and, as such, by the recommendations of past JCCs which established that plan.

170. Secondly, the increase in normal cost as determined by the actuary is only as good as the assumptions on which it is based. Among the key assumptions is that salaries will increase “2% per annum for 4 years and 3.0% per year thereafter from 2.25% for 3 years, 3.25% per year thereafter”.

Actuarial Evaluations as at March 31, 2017 for the Provincial Court Judges and Masters in Chambers Registered Pension Plan, Government’s Attachments, Tab 34, page 12

Actuarial Evaluations as at March 31, 2017 for the Provincial Court Judges and Masters in Chambers Unregistered Pension Plan, Government’s Attachments, Tab 35, page 11

171. Under the Government’s proposal of a four-year salary freeze, there would be significant savings in the normal cost of the plan over the course four years, as compared with what is set out in the Actuarial Valuation. That is not accounted for in the Government’s costing of its own proposal. Similarly, the differences between the Association’s proposed increases and the actuarial assumption are not accounted for in the Government’s costing.

172. The actual salary increases, together with a reconsideration of all assumptions, will be taken into account in future valuations. Only then will the actual normal costs for this period be known. As such, while it is a current obligation for Government to make the additional contributions determined to be appropriate in March 31, 2017 Actuarial Valuations, savings may later be realized. For that reason, these additional costs cannot be fairly relied on and included in any costing of the proposed changes in compensation.

173. In considering the costs of the pension plan, it is important to consider that the Sauvé Report, with which the Government’s actuary Mr. Moore agrees, makes it clear that the relative value of Alberta’s pension plan is significantly lower than the pension arrangements in Ontario, the federal jurisdiction and Saskatchewan. Even according to the Aon Hewitt Report, which uses different (and contested) assumptions, Alberta’s pension is said to be in the middle of pack in terms of overall value.

174. As to the calculations themselves, which appear at Tab 37 in the Government's Attachments, the Association is not in a position to fully understand the basis for the calculations presented. That said, the following observations raise further questions about their reliability:

- (a) In calculating the cost of the Association's proposal, the Government has relied on a forecast of increases in the IAI for Canada which was prepared in February 2016 (Government's Attachments, Tab 33). As we are now in 2018, the actual IAI adjustments for 2017 and 2018 are now known and reveal the estimates for those years to have been inaccurate. Federal salaries were increased by 0.38% and 2.0% in those years respectively, much less than the 2.2% and 2.4% adjustments predicted in February 2016. Accordingly, it is unreasonable to rely on the estimates set out in the outdated document for the last two years.
- (b) In calculating the cost of both proposals, the Government has assumed that all judges will spend the entirety of their professional allowances. While this is the case for many judges, it is not the case for all. As such, the total cost is inflated.

175. Quite apart from concerns about accuracy, the overall usefulness of the information presented in the Tables at the Government's Tab 37 is far from clear. The Association submits that the main takeaway should be that judicial compensation represents a minuscule proportion of the overall budget for the Department of Justice, never mind the Government of Alberta as a whole. Viewed from this perspective, the difference in the cost of the two proposals is even less significant.

176. While this is so from the perspective of the cost to Government, the same is not true for individual judges or to potential applicants to the Court in the ensuing years. Adherence to the Government's proposed freeze would cause the salary for Alberta judges to fall well behind that of their well-established comparators, in spite of the fact that fair consideration of the objective criteria favours a continued linkage. Not only is this likely to reduce to the attractiveness of the Provincial Court to highly qualified candidates

in the years to come, but it is likely to create the need for a significant “catchup” at the time of the 2021 JCC.

177. The Association urges this 2017 JCC to reject the Government’s highly political approach and instead apply the consistent reasoning of the past Commissions to the current information regarding each of the criteria. The Association is confident that in so doing, the 2017 JCC will conclude that the Association’s proposals achieve the appropriate balance.

All of which is respectfully submitted this 31st day of October, 2018.



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