

In the Matter of Order in Council 359/2012

and

**In the Matter of an Inquiry by the First Case Management Masters Remuneration
Commission (April 1, 2011 to March 31, 2016)**

BETWEEN:

Her Majesty the Queen in Right of the Province of Ontario

(the “Government “)

and

The Masters’ Association of Ontario

(the “Case Management Masters”)

REPORT of the FIRST

CASE MANAGEMENT MASTERS REMUNERATION COMMISSION

A WAY FORWARD

Before: Larry Banack, Commissioner

Appearances

On Behalf of the Government:

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On Behalf of the Case Management Masters:

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Hearings were held in the City of Toronto on February 25, 26, April 8, 9, 10, 11, 16, 22, July 7, and August 6, 2014. Final written submissions were received by the Commission on May 29, 2015.

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ACKNOWLEDGEMENT

At the outset, I would like to advise the reader that this document is significantly longer than I had originally anticipated. Because this is the first Commission report that addresses the question of how to achieve fair and constitutionally acceptable remuneration for Case Management Masters in Ontario, it lays the foundation and establishes the governing principles that will decide this important question for many years to come.

For this reason, I felt obliged to review in depth the significant historical development of the office to discern why we are where we are today and, most importantly, where we should be heading. In addition, I have carefully considered all of the clearly argued, occasionally contradictory, submissions that I received from the parties who appeared before me. I thank Counsel for their tremendous assistance in helping me to prepare an objective and informed analysis to support my recommendations.

In particular, I wish to acknowledge with gratitude the invaluable assistance of my colleague, Ms. Teja Rachamalla. She made a major contribution to the preparation of this Report during what was at times an extremely challenging and complex process.

At the same time, as the Report's sole author, I accept full responsibility for its entire content, including any errors or omissions.

Larry Banack

Commissioner

A WAY FORWARD

EXECUTIVE SUMMARY

This is the report of the First Case Management Masters' Remuneration Commission. It was established as a result of litigation launched by the Case Management Masters who sought improvements to their terms of independence, including security of tenure and financial security.¹

The Superior Court of Justice held that Case Management Masters are entitled to an independent, effective, and objective process for determining their remuneration in accordance with the Supreme Court of Canada's decision in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*.² The Court of Appeal for Ontario agreed.

This Commission was established with a mandate of making recommendations regarding the remuneration of Case Management Masters.

It is manifest from the evidence before me that the office of Case Management Master is both a continuation and expansion of the historical office of Master (referred herein as "Traditional Master") which, by Government policy, is being phased out. Both offices perform the same role and function in the Superior Court of Justice, exercising an important subset of the jurisdiction of a Superior Court Judge while providing and maintaining critical access to civil justice in the busiest urban centres in this province.

While the two offices share the same Traditional Master jurisdiction, Case Management Masters have been granted a much wider jurisdiction with significantly enhanced judicial powers.

Despite their increased workload and enhanced judicial powers, Case Management Masters receive a markedly lower level of remuneration in comparison to Traditional Masters. Traditional Masters have long been linked by a relationship of remuneration parity with Provincial Court Judges. However, Case Management Masters have been linked for their remuneration to the SMG3 civil service group classification. The latter linkage, in place since 2001, was neither the result of a constitutional process nor has it been subject to periodic review, as constitutionally required, until now.

As the Supreme Court of Canada held in *PEI Reference*, judicial remuneration must be adequate and commensurate with the status, dignity, and responsibility of the office. A primary criterion governing this First Commission's mandate is the need to recommend fair and reasonable remuneration for Case Management Masters. The remuneration linkage to the SMG3 classification has failed, virtually since its inception, to provide an appropriate level of remuneration for Case Management Masters, who sit in the position of a Superior Court Judge where mandated in this province.

In 1973, the Ontario Law Reform Commission recognized that the office of Traditional Master required an enhanced level of judicial independence based on the nature of its judicial duties. It therefore recommended security of tenure for this office on par with Provincial Court Judges. In accepting this recommendation, the Government also embarked on a policy of maintaining remuneration parity with Provincial Court Judges, ultimately enshrining this relationship in the *Courts of Justice Act*.

An independent assessment of Case Management Masters' duties and functions reveals that this office could be deserving of a higher level of remuneration than that provided to Traditional Masters. Nevertheless, the overall level of remuneration provided to Provincial Court Judges, which determines the current remuneration of Traditional Masters, is also in keeping with an appropriate level of judicial independence for the expanded office of Case Management Master.

As of 2015, Traditional Masters and Provincial Court Judges both earned salaries of \$287,345, while Case Management Masters earned salaries of \$193,346. Case Management Masters salaries, which are \$94,000 lower than Traditional Masters' and Provincial Court Judges', do not provide Case Management Masters with a requisite level of remuneration to guarantee judicial independence.

Traditional Masters also earn pensions under the Provincial Judges' Pension Plan and belong to the same benefits plan as Provincial Court Judges. Case Management Masters however receive pensions under the Public Service Pension Plan, as do the SMG3s, and receive the same public service benefits plan as SMG3s. It is well-established that public service pension plans are not appropriate for judicial officers. This is to protect their judicial independence while in office, ensuring that they not be vulnerable because of any concerns about inadequate levels of remuneration following retirement from office.

As of April 1, 2013, by example, those Traditional Masters and Provincial Court Judges appointed at age 50 and who wished to retire at age 65, with 15 years of judicial service, would be entitled to an annual pension of \$153,761. Under the same circumstances, Case Management Masters would receive an annual pension of \$52,252. This disparity grows with increased years of service. The differing values of pensions earned by judicial officers performing comparable work are significant and inexplicable.

Case Management Masters also earn fewer benefits, and on less favourable terms, than Traditional Masters and Provincial Court Judges.

I recommend that Case Management Masters, given their judicial role in the Superior Court of Justice, their greatly expanded jurisdiction as compared with Traditional Masters, and the adjudicative skill and ability that they exercise on par with Superior Court and Provincial Court Judges, receive the same salaries, pensions, and all benefits as Traditional Masters and Provincial Court Judges in this province. Case Management Masters are entitled to the same security of tenure as Traditional Masters, which is the same as that provided to Provincial Court Judges, as has been concluded by the Superior Court of Justice. I also recommend that the Government consider providing Case Management Masters with the same opportunity to earn *per diem*

income while in receipt of a pension as is provided to Traditional Masters and Provincial Court Judges. This would be of mutual benefit to the province and to the Case Management Masters.

Given the reality that Case Management Masters represent a resurrection and expansion of the historic office of master in this province, I recommend that the Government also consider changing the title of this office to simply “Master” to better reflect the nature, history, and function of this office in Ontario.

For a judicial office consisting of 16 individuals, the costs of implementing these changes are reasonable. Case Management Masters have for too long shouldered more than their fair share of the burden of economic restraint while the province as a whole has benefited greatly from the quality of their judicial services. A lengthy litigation process was required to establish this independent commission, in accordance with the *PEI Reference*. In my view, there must be no further delay in implementing the recommendations presented in this Report to achieve the overriding constitutional principle of judicial independence.

Now is the time to correct a significant inequality in the remuneration of Case Management Masters. In addition, I recommend that the Government consider conducting all future reviews of the remuneration for this office as part of the process already in place for Provincial Court Judges, as has been the case for Traditional Masters. This will reduce costs and create greater efficiencies in protecting the judicial independence of these important contributors to our justice system over the long term.

The evidence adduced before this Commission has conclusively established that Case Management Masters are full judicial officers exercising an important and broad jurisdiction in the busiest courts in the country. They must be remunerated accordingly to preserve the principles established by the Supreme Court of Canada. These Recommendations are intended to provide A Way Forward to achieve that objective.

¹ See Litigation History in Appendix A

² [1997] 3 S.C.R. [hereinafter *PEI Reference*]

INTRODUCTION

"Canadians are privileged to live in a peaceful country. Much of our collective sense of freedom and safety comes from our community's commitment to a few key values: democratic governance, respect for fundamental rights and the rule of law, and accommodation of difference. ... A strong and independent judiciary guarantees that governments act in accordance with our Constitution. Judges give effect to our laws and give meaning to our rights and duties as Canadians. Courts offer a venue for the peaceful resolution of disputes, and for the reasoned and dispassionate discussion of our most pressing social issues. Every judge in Canada is committed to performing this important role skillfully and impartially. Canadians should expect no less."

The Right Honourable Beverley McLachlin, P.C.,

Chief Justice of Canada

Canadians are indeed fortunate to live in a free and democratic society grounded in the rule of law. We need only look to the unrest, violence and corruption rampant in totalitarian countries around the world to be vividly reminded that not all people enjoy the same rights and freedoms that we do.

The rule of law demands that justice be applied equally to all persons and all institutions and that members of the public have confidence in its integrity and impartiality. The principle of judicial independence is clearly a vital factor in the maintenance and proper functioning of our system of justice. Only when members of the judiciary can make fair and unbiased decisions can this principle be maintained effectively.

Judicial officers must not be influenced by the executive or legislative branches of the government or by political or partisan concerns. They must be guaranteed security of tenure, financial security, and administrative independence. These requirements must be met not for the benefit of members of the judiciary, but to protect the society they serve. The public must be

confident that legal judgments are based solely on the law and are completely free from influence, fear of reprisal or any other considerations.

The Office of Case Management Master was created in 1996 in response to a growing crisis in the civil justice system. While in theory the office may have been intended to be a distinct and separate office from that of the Traditional Master with much more limited, administrative duties, in reality Case Management Masters were almost immediately obliged to assume the historical functions of Traditional Masters, in addition to performing their defined range of duties. Nevertheless, despite their expanded responsibilities and important role in supporting the efficient administration of justice, Case Management Masters were not entitled to fulfill their responsibilities in accordance with the same principles of judicial independence as Traditional Masters. Instead, their terms of office remained closely tied to those of civil servants.

In the ensuing years, the responsibilities of Case Management Masters continued to increase. Their importance in maintaining the efficiency of our system is well recognized, but they have still been denied the protection of the principle of judicial independence in carrying out their duties.

In an attempt to secure a remedy to address this situation, in 2000 a group of Ontario Masters initiated court action. Subsequently, in 2009 the Superior Court and then the Court of Appeal for Ontario recognized that the process for remunerating Case Management Masters was unconstitutional. Both courts ordered that a fair process of remuneration determination be established comparable to those applied to other judicial officers serving the Province of Ontario. This Commission has been created in response to the Courts' decisions and concerns.

Our country is recognized worldwide as a leading model of judicial independence. It has earned that reputation because we have remained vigilant in safeguarding our democratic principles. We understand that a sustainable democracy must continually evolve and adapt to meet the ever-changing needs of its citizens.

This province's Case Management Masters play a critical role in the administration of justice by helping to maintain an effective and accessible civil justice system. As such, they must be

accorded all the rights and protections of judicial independence that have been enshrined in our Constitution.

As is stated in the Supreme Court of Canada decision in *PEI Reference*:

“the purpose of the constitutional guarantee of financial security ... is not to benefit the members of the courts which come within the scope of those provisions. The benefit that the members of those courts derive is purely secondary. Financial security must be understood as merely an aspect of judicial independence, which in turn is not an end in itself. Judicial independence is valued because it serves important societal goals -- it is a means to secure those goals.

One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another societal goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule. It is with these broader objectives in mind that these reasons, and the disposition of these appeals, must be understood. [paras. 9-10]

THE MANDATE OF THIS COMMISSION

This is the first independent review of the remuneration of Case Management Masters since the creation of the office in 1996. This Case Management Masters Remuneration Commission (“Commission” or “First Commission”) was established by Order in Council 359/2012, dated March 27, 2012, after the conclusion of litigation between the Masters’ Association of Ontario and the Government of Ontario. I was appointed Commissioner at the joint selection of the parties to the Commission.

In this First Commission, my task is to conduct an inquiry into and make recommendations regarding the remuneration of Case Management Masters for the period beginning April 1, 2011 and ending March 31, 2016. In Schedule 1 to the Order in Council, the term “remuneration” is defined as including salaries, pensions, and benefits.¹

In developing my recommendations on remuneration, as directed, I consider herein the following criteria:

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

The terms of the Order in Council also specifies that subsequent commissions will be convened to conduct similar independent reviews for every four-year period beginning April 1, 2016.³

¹ Order in Council 359/2012, Schedule 1, paras. 1 and 6(1).

²*Ibid.* at para. 9.

³ *Ibid.* at para. 6(1)(b).

THE REVIEW PROCESS

The Commission's process has been undertaken in conformance with paragraph 8 of Schedule 1 to Order in Council 359/2012.

Prior to the start of the hearing, I convened several conferences with the parties and held two preliminary hearings to determine a number of procedural matters. A notice to the legal profession ("Notice"), which was drafted with the input and agreement of the parties to the Commission, invited interested persons to provide submissions to the Commission. The Notice was published in the *Ontario Reports*, and was also sent in individual letters to the Law Society of Upper Canada, the Ontario Bar Association, and the Advocates' Society. A copy of the Notice is attached as Appendix C to this report.

The Commission received written submissions from a number of interested parties, including from two Traditional Masters. A list of the individuals and associations that provided written submissions to the Commission is attached as Appendix D to this report.

Public hearings were held in Toronto on February 25 and 26, April 8-11, inclusive, April 16 and 22, July 7, and August 6, 2014. The parties filed extensive written submissions, supported by large volumes of evidence. Final submissions were received in May 2015. No witnesses appeared before the Commission.

In the interests of public transparency and ongoing disclosure, the Commission established a public website on which it posted a copy of the Notice as well as all written submissions as received in real time.

THE PARTIES' POSITIONS ON REMUNERATION

Since 2001, Case Management Masters have had their remuneration linked to the remuneration of the Government's Senior Management Group 3 ("SMG3") classification. As a result of this linkage, since April 1, 2011 Case Management Masters' annual salaries have remained at \$193,346. Like the SMG3s, they also receive pensions under the Public Service Pension Plan ("PSPP"), as well as the same benefits as are available to the SMG3s, with the exception of additional vacation days.

As outlined in their submissions, the Case Management Masters sought remuneration on par with Traditional Masters and Provincial Court Judges. They submitted that they should receive the same salaries as Traditional Masters and Provincial Court Judges, including automatic annual increases based on the Industrial Aggregate Index ("IAI") for Canada. They also submitted that they should be transferred into the same judicial pension and benefits plans applicable to, and on the same terms as Traditional Masters and Provincial Court Judges.

In addition, the Case Management Masters sought a recommendation that they be granted the ability to continue to work on a *per diem* basis post-retirement while in receipt of a pension, as is the case for Traditional Masters and Provincial Court Judges. As well, they sought the same judicial allowances relating to the purchase and maintenance of judicial attire, luggage, books and publications.¹

In the alternative to being placed in the same benefits plans as Traditional Masters and Provincial Court Judges, the Case Management Masters requested that changes be made to key items in their current benefits package to bring them in line with those provided to Traditional Masters and Provincial Court Judges.

The Government submitted that the remuneration provided to Case Management Masters as of 2011 is an appropriate starting point. As such, it submitted that the level of remuneration for the period of this Commission's mandate should include: a salary increase of 1.51 percent in 2011 (which the Government said has already been implemented through the application of the SMG3 formula); 0 percent in 2012 and 2013; and increases in accordance with the Consumer Price

Index (“CPI”) (Ontario) in 2014 and 2015. It also sought that insured benefits be harmonized with the Ontario Public Service Employees Union (“OPSEU”) plan, and submitted that Case Management Masters’ should remain in their current pension plan.

¹ See Order in Council 1441/2013, s. 32.

THE CONSTITUTIONAL FRAMEWORK

As full judicial officers of the Superior Court of Justice, Case Management Masters are protected by the constitutional principle of judicial independence. This Commission was established to make recommendations as required by the Supreme Court of Canada in its decision in *PEI Reference* which outlined the constitutional framework for determining judicial remuneration in this country.

The decision in *PEI Reference* was released in 1997, shortly after the first Case Management Masters were appointed to office. The Court held that judicial independence is, at its root, an unwritten constitutional principle recognized and affirmed by the preamble to the *Constitution Act, 1867*.¹ In addition, the Court held that the guaranteed protections extend to all courts of this country.² It confirmed its earlier holding in *Valente v. The Queen*³ that judicial independence has three core characteristics: security of tenure, financial security, and administrative independence. He said that judicial independence consists of two dimensions, namely, the individual independence of a judge, and the collective or institutional independence of the court of which that judge is a member.⁴

The Court confirmed its description of individual independence as “the complete liberty of individual judges to hear and decide the cases that come before them” as held in its earlier decision of *Beauregard v. Canada*.⁵ In *Beauregard*, the Court further explained that this meant that “no outsider—be it government, pressure group, individual or even another judge—should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.”⁶ In *PEI Reference*, the Court observed that individual independence is “necessary for the fair and just adjudication of individual disputes.”⁷

On the other hand, the collective or institutional dimension of judicial independence arises out of every court’s role as protector of the Constitution. In *Beauregard*, the Court described the need for this second dimension of judicial independence:

24 The rationale for this two-pronged modern understanding of judicial independence is recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it – rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies.⁸

In *PEI Reference*, the Court held that “[i]nstitutional independence enables the courts to fulfill that second and distinct constitutional role.”⁹ The Court also found that institutional independence “flows as a consequence” of the need to maintain the separation of powers between and amongst the legislative, executive, and judicial branches of government,¹⁰ and protects the courts from interference by the litigants and the public.¹¹ It held that while individual independence attaches to each judge, institutional independence attaches to the court or tribunal as an institutional entity.¹²

Financial security, one of the three core characteristics of judicial independence, also has both an individual and an institutional dimension.¹³ To ensure its individual dimension, the Court in *PEI Reference* adopted its holding in *Valente*,¹⁴ stating that salaries must be established by law and not permit executive interference in a manner that could “affect the independence of the individual judge”.¹⁵

This Commission was established to make recommendations addressing financial security in the context of the institutional dimension of judicial independence. In *PEI Reference*, the Supreme Court explained this concept:

131 Given the importance of the institutional or collective dimension of judicial independence generally, what is the institutional or collective dimension of financial security? To my mind, financial security for the courts as an institution has three components, which all flow from the constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be depoliticized. As I explain below, in the context of institutional or collective financial security, this imperative demands that the courts both be free and appear to be free from political interference through economic manipulation by the other branches of government, and that they not become entangled in the politics of remuneration from the public purse.¹⁶

The Court went on to establish a constitutional framework to govern the financial security of members of the judiciary, detailing the three components that must be included:

133 First, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation. What judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration. Those bodies are often referred to as commissions....The recommendations of the commission would not be binding on the executive or the legislature. Nevertheless, though those recommendations are non-binding, they should not be set aside lightly, and, if the executive or the legislature chooses to depart from them, it has to justify its decision -- if need be, in a court of law....

134 Second, under no circumstances is it permissible for the judiciary--not only collectively through representative organizations, but also as individuals--to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence. As I explain below, salary negotiations are indelibly political, because remuneration from the public purse is an inherently political issue. Moreover, negotiations would undermine the appearance of judicial independence, because the Crown is almost always a party to criminal prosecutions before provincial courts, and because salary negotiations engender a set of expectations about the behaviour of parties to those negotiations which are inimical to judicial independence. When I refer to negotiations, I utilize that term as it is traditionally understood in the labour relations context. Negotiations over remuneration and benefits, in colloquial terms, are a form of "horse-trading". The prohibition on negotiations therefore does not preclude expressions of concern or representations by chief justices and chief judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration.

135 Third, and finally, any reductions to judicial remuneration, including de facto reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries.

I note at the outset that these appeals raise only the issue of judges' salaries. However, the same principles are equally applicable to judges' pensions and other benefits.¹⁷

The Court observed that the main concern in these matters is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. It emphasized that these relationships must be depoliticized such that "the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary".¹⁸ It found that maintaining these depoliticized relationships can be difficult, observing that:

143 ...the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. The three core characteristics of judicial independence--security of tenure, financial security, and administrative independence--are a reflection of that fundamental distinction, because they provide a range of protections to members of the judiciary to which civil servants are not constitutionally entitled.

145 With respect to the judiciary, the determination of the level of remuneration from the public purse is political in another sense, because it raises the spectre of political interference through economic manipulation. ...

146 The challenge which faces this Court in these appeals is to ensure that the setting of judicial remuneration remains consistent--to the extent possible given that judicial salaries must ultimately be fixed by one of the political organs of the Constitution, the executive or the legislature, and that the setting of remuneration from the public purse is, as a result, inherently political--with the depoliticized relationship between the judiciary and the other branches of government. ... The three components of the institutional or collective dimension of financial security, to my mind, fulfill this goal.¹⁹

The Court also recognized that the constitutional prohibition against salary negotiations places the judiciary at an inherent disadvantage compared to others paid from the public purse. It held, however, that:

189 ...the mandatory involvement of an independent commission serves as a substitute for negotiations, because it provides a forum in which members of the judiciary can raise concerns about the level of their remuneration that might have otherwise been advanced at the bargaining table. Moreover, a commission serves as an institutional sieve which protects the courts from political interference through economic manipulation, a danger which inheres in salary negotiations.

190 At the end of the day, however, any disadvantage which may flow from the prohibition of negotiations is a concern which the Constitution cannot accommodate. The purpose of the collective or institutional dimension of financial security is not to guarantee a mechanism for the setting of judicial salaries which is fair to the economic interests of judges. Its purpose is to protect an organ of the Constitution which in turn is charged with the responsibility of protecting that document and the fundamental values contained therein. If judges do not receive the level of remuneration that they would otherwise receive under a regime of salary negotiations, then this is a price that must be paid.²⁰

The Court explained that the Constitution protects judicial salaries from falling below an acceptable minimum level to shield the judiciary from political interference and maintain public confidence, adding:

193 ...If salaries are too low, there is always the danger, however speculative, that members of the judiciary could be tempted to adjudicate cases in particular way in order to secure a higher salary from the executive or the legislature or to receive benefits from one of the litigants. Perhaps more importantly, in the context of s. 11(d), there is the perception that this could happen. As Professor Friedland has written, *supra*, at p. 53:

We do not want judges put in a position of temptation, hoping to get some possible financial advantage if they favour one side or the other. Nor do we want the public to contemplate this as a possibility.

I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public. As Professor Friedland has put it, speaking as a concerned citizen, it is “for our sake, not for theirs” (p. 56).²¹

The Court observed that the idea of a minimum salary has been recognized in a number of international instruments. It adopted the direction of the *Draft Universal Declaration on the Independence of Justices*, which provides:

The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and shall be periodically reviewed to overcome or minimize the effect of inflation.²²

The Court held that the guarantee of a basic minimum salary not only provides financial security against reductions in remuneration by the executive or legislature, but also protects against the erosion of judicial salaries by inflation.²³

Finally, I want to emphasize that the guarantee of a minimum acceptable level of judicial remuneration is not a device to shield the courts from the effects of deficit reduction. Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times. Rather, as I said above, financial security is one of the means whereby the independence of an organ of the Constitution is ensured. Judges are officers of the Constitution, and hence their remuneration must have some constitutional status.²⁴

This constitutional backdrop must guide, and ground, all of my recommendations in respect of the remuneration of Case Management Masters, having regard for many factors including the lengthy history of Masters in Ontario.

¹ *PEI Reference*, at para. 83.

² *Ibid.* at para. 106

³ [1985] 2 S.C.R. 673 [hereinafter *Valente*].

⁴ *PEI Reference*, at para. 118.

⁵ [1986] 2 S.C.R. 56 [hereinafter *Beauregard*].

⁶ *Beauregard*, at para. 21.

⁷ *PEI Reference*, at para. 123.

⁸ *Beauregard*, at para. 24.

⁹ *PEI Reference*, at para. 123, quoting *Valente* at p. 70.

¹⁰ *PEI Reference*. at paras. 125, and 130.

¹¹ *Ibid.* at para. 130.

¹² *Ibid.* at para. 118.

¹³ *Ibid.* at paras. 118-121.

¹⁴ *Valente*, at 706.

¹⁵ *PEI Reference*, at para. 121.

¹⁶ *Ibid.* at para. 131.

¹⁷ *Ibid.* at paras. 133-136.

¹⁸ *Ibid.* at para. 140.

¹⁹ *Ibid.* at paras. 143-146.

²⁰ *Ibid.* at paras. 189-190.

²¹ *Ibid.* at para. 193.

²² *Ibid.* at para. 194.

²³ *Ibid.* at para. 195.

²⁴ *Ibid.* at para. 196.

THE HISTORY OF MASTERS IN ONTARIO

As part of its jurisdiction, the *Courts of Justice Act* assigns to Case Management Masters “the jurisdiction of a master conferred by the rules of court”.¹ The office of master has a long and rich history as a judicial office in this province. A review of this history is critical for understanding the role of Case Management Masters in Ontario and necessarily informs the level of judicial independence and remuneration appropriate for the office.

THE OFFICE OF TRADITIONAL MASTER

The office of master can be traced to three historical judicial offices in this province: the Clerk of the Crown and Pleas, the Referee in Chambers, and the Master in Ordinary.

The Court of Appeal for Ontario held in *Masters’ Association of Ontario v. Ontario (A.G.)* (“*Masters’ Association (OCA)*”)² that the office of master finds its roots in the oldest of these judicial offices, the Clerk of the Crown and Pleas.³ The Clerk of the Crown and Pleas was a common law office established along with the Court of King’s Bench in 1794, shortly after the creation of the Province of Upper Canada in 1791.⁴ Subject to certain named exceptions, this office exercised the same jurisdiction as a judge sitting in chambers in the courts of common law.⁵ This function, which remains a part of the core duties for the office of master, has therefore existed in this province for almost as long as the province itself. In 1871, a parallel office was established in the Referee in Chambers, which exercised the same jurisdiction in the court of equity. Every order or decision of the Clerk or the Referee was deemed “as valid and binding” as those of a judge sitting in chambers.⁶

The title and office of “Master” was officially introduced to this province in 1837 with the creation of the Court of Chancery, or the court of equity. The office of Master in Ordinary was established as part of this court. It had roots in England where masters had been a feature of the

High Court of Chancery since at least the 15th century.⁷ The jurisdiction of the Master in Ordinary consisted primarily of conducting references in the court of equity.⁸

In 1881, a reorganization of the courts formally fused and unified the courts of law and equity. The Master in Ordinary was granted jurisdiction to conduct references in both law and equity. The offices of the Clerk of the Crown and Pleas and the Referee in Chambers were merged to form a new office called the Master in Chambers. With its combined jurisdiction, the Master in Chambers had all the authority of a judge sitting in chambers in both common law and equity, except with respect to those matters that had been excluded from the jurisdiction of the two former offices. The overall reference jurisdiction and the duties of a judge in chambers remained the core functions for the office of master in this province.

These predecessor offices were all valued as important judicial offices. The extent of the jurisdiction conferred occasionally raised questions about whether some of these officers were, in fact, federally appointed judges.⁹ As early as 1870, the *Canada Law Journal* noted the important judicial nature of the office of Master in Ordinary, given its reference jurisdiction:

The importance of having the office of Master filled by a man of ability as well as strict integrity will be admitted by everyone who is at all aware of the duties discharged by that officer. He is not a mere ministerial officer; he is a *judicial* officer. Nor are the questions disposed of by him of a trifling character. Many thousands of pounds are frequently involved in the references submitted to his judgment. He is daily called upon to hear and weigh evidence often submitted without a thorough examination, and under circumstances which render it more than ordinarily difficult justly to estimate its value. He should be well versed in the principles which govern our court, and be prompt in the despatch of business.¹⁰ [Emphasis in original]

Similarly, by 1875, so extensive was the judicial role of the Referee in Chambers that questions arose as to whether it was more properly that of a judge and, in particular, that of a federal judge. The Premier and Attorney General of the province at the time wrote to the federal government to propose changing the name of the office to that of “chancery judge”, “practice judge”, or “judge simply”, and questioned whether remuneration ought to be paid instead by the federal government.¹¹ In 1885, the federal Minister of Justice raised a similar issue with the subsequent office of Master in Chambers, noting the extensive jurisdiction granted to the office and warning of the need not to encroach upon the federal power to appoint judges. The Minister did not,

however, go so far as to suggest that changes be made to the existing provincial statutory jurisdiction.¹²

In 1923, the single office of Master was created with the merger of the offices of Master in Ordinary and Master in Chambers. It inherited all the duties of the former offices, and has been referred to as the office of “Traditional Master” at this Commission. With the combined jurisdiction, the Traditional Master exercised all the authority of a judge in chambers, subject to exceptions, and had additional jurisdiction, primarily in conducting references.

Further confirming the judicial nature of the office of Traditional Master, the Supreme Court divided its offices into two branches as part of the 1923 reforms. “The Master’s Office” was designated as the Judicial Branch, while the “The Registrar’s Office” was designated as the Administrative Branch.

It was the judicial nature of the office of Traditional Master that prompted the Ontario Law Reform Commission, in its 1973 *Report on Administration of Ontario Courts*, to conclude that the civil servant status of the office was not appropriate, and that it was entitled to a degree of judicial independence equivalent to that granted to Provincial Court Judges:

While the operation of the Master’s Office is generally satisfactory, it is our view that the manner of appointment and the conditions of employment of the Masters at Toronto are not appropriate to the nature of the office and the duties they are required to perform.

Masters are essentially judicial officers and the manner of their appointment should reflect this fact. ...

The nature of the duties performed by the Masters underlines the desirability that they be given a greater degree of independence than they possess at the present time. *We recommend that the Masters at Toronto be given the same security of tenure as Provincial judges.*

The Masters submitted that their civil servant status is anomalous because of the growing involvement of the government of Ontario in civil litigation. We agree with this submission. The present status of the Masters when called upon to give decisions in litigation to which the government is a party is not consistent with the concept of judicial

independence. This is particularly true with respect to the Masters at Toronto, who devote their full time to their duties as Masters.¹³ [Emphasis added]

In 1975, the Government acted on the recommendations of the Ontario Law Reform Commission by introducing reforms to improve the judicial independence of the office of Traditional Master. When introducing the amendments, the Honourable John Clement, the Attorney General at the time, remarked that it was the nature of the office that prompted the need for a level of judicial independence equivalent to that of Provincial Court Judges, ultimately agreeing with the Ontario Law Reform Commission's conclusions:

The office of Master of the Supreme Court is frequently called upon to determine issues between the Crown and private individuals, a function which is inconsistent with the civil service status masters now hold. The first six sections of the Bill relate to the titles, appointments, tenure, conditions of employment, censure and removal from office of masters. They ensure judicial independence equivalent to that presently enjoyed by provincial court judges under the *Provincial Courts Act*.¹⁴

The Government immediately followed these reforms with corresponding salary increases for Traditional Masters that provided near-parity and then parity with Provincial Court Judges.¹⁵ In my view, these salary increases were in keeping with the preceding reforms on security of tenure that had already been implemented for Traditional Masters to reflect the nature of that office.

The office of Traditional Master continued until 1989 when, as part of a broader series of court reforms, the Government of Ontario enacted legislation that repealed the statutory authority to appoint individuals to this office. The Government explained that it intended to phase out the office through a process of attrition, with the existing Traditional Masters to be grand-parented in their positions. Going forward, as Traditional Masters retired or resigned, it was intended that then district court judges or court registrars would take up their work, as had already been the case in areas of the province where there were no masters. In fact, the Government stated that in most other provinces, the work of masters was performed by federally appointed judges. The goal was to standardize that practice in Ontario.¹⁶

THE OFFICE OF CASE MANAGEMENT MASTER

Not long after the Government's decision to phase out the office of Traditional Master, the office of Case Management Master was created as part of the response to a crisis in the civil justice system that emerged in the early 1990s. The crisis was characterized by unacceptable delays in the disposition of disputes, backlogs in the courts, and rising costs for litigants, all of which were seen to affect both access to and public trust in the system of civil justice.¹⁷

In 1994, the Civil Justice Review was established at the joint initiative of the provincial judiciary and the Government. Its mandate was to find solutions for the crisis that was plaguing the system.¹⁸ Among other reforms, the Civil Justice Review recommended the introduction of a system of province-wide caseflow management that would mean a fundamental change to the litigation process in Ontario.

Early intervention by the judiciary was instead then seen as critically important for the disposition of cases.¹⁹ Caseflow management was expected to accomplish this by building in the potential for early and, if appropriate, repeated "judicial or quasi-judicial intervention,"²⁰ primarily through case conferences prescribed at fixed points in the process, or called at the instance of the judiciary or by counsel. Creating opportunities for the judiciary to work with counsel to determine how a case should proceed was seen as a positive development.²¹

The Civil Justice Review's recommendation came as a result of extremely positive reviews of case management pilot projects that had been implemented in three urban centres across the province.²² An independent review²³ of these pilot projects concluded not only that the program had been successful in resolving cases more quickly,²⁴ but also that case management itself must be viewed as a core judicial function.

The pilot projects made clear, however, that judges had insufficient time and resources to conduct both their case management duties and their regular trial duties.²⁵ In particular, the judges in the Toronto pilot project noted that a void had been created by the phasing out of the office of Traditional Master. They anticipated that the new system of case management would take an unreasonable toll on their overall workload if they were also meant to assume the work left behind by a declining number of Traditional Masters. In a report to the Civil Justice Review, these judges called for the restoration of the office of Master, along with an expansion of its duties so that it could play a role in the new system of case management, stating:

Case management is the way of the future. The judges in the Toronto Region, who have been involved in either the individual calendar system or in the team, support the expansion to 100% case management for all civil cases in the Toronto Region, other than commercial, family and landlord and tenant. ... There are not sufficient judges to hear the necessary trials, if judges are also expected to do motions presently being conducted by the masters. Additional judicial assistance is required to assist with routine contested motions. *The restoration and expansion of the masters is the way to provide this much needed assistance.* As well, significant improvements in the system could be achieved. Mandatory early conferences at the close of pleading and trial scheduling conferences, both conducted by masters, would promote early settlement and would result in fewer, shorter trials. *We urge the Task Force in the interests of the public to recommend the immediate restoration and expansion of the office of master to permit the expansion of case management.*²⁶ [Emphasis added]

It seems that any intention the Government may have had to see the work of the phased-out office of Traditional Master assumed by federally appointed judges was not achievable in reality.

A judicial support officer,²⁷ renamed Case Management Master in the Civil Justice Review's final report, was initially envisioned to be a non-ministerial, non-administrative, and non-judge role that would provide "case management and judicial support"²⁸ and would only render "independent decisions of a quasi-judicial nature"²⁹ that characterization did not reflect the true nature of the position. In fact, from the outset, Case Management Masters were empowered with and exercised a primarily judicial role that has only broadened over time.

In keeping with the recommendations of the judges in the Toronto pilot project, the Civil Justice Review expected the office of Case Management Master to fulfill dual functions: first, it would assume the role and function of the office of Traditional Master that was being phased out; and second, it would take on a broader role in the newly identified function of judicial case management.

As the Civil Justice Review remarked, the new office would therefore have “as part of its heritage the traditional office of Master in the Ontario system”³⁰ to fill the vacuum that had been left by the declining number of Traditional Masters. The Civil Justice Review felt that this would address a number of increasingly pressing needs, including the “need to deal with the flood of motion and interlocutory work” that was “*drowning the system*” and the need to preserve the reference and construction-lien functions that were “*being performed by a dwindling number of Masters*”.³¹ [Emphasis added] Accordingly, the Civil Justice Review underscored the broader role to be filled by Case Management Masters:

We repeat, though, that while the judicial support officer will deal with the motion workload at one time dealt with by Masters, he or she will perform a much broader role as well -- the discharge of early evaluation functions, ADR functions and case management functions. The judicial support officer will occupy a position which is more flexible and more fitted to the integrated civil justice system which the Review is proposing.³²

Given these duties and functions, the Civil Justice Review recommended that Case Management Masters *not* be classified as civil servants. Indeed, it recommended establishing minimum qualifications for the office that were essentially the same as those required of a judge. In doing so, it is my view that the Civil Justice Review recognized the importance, complexity, and level of expertise required of this judicial work. The Civil Justice Review also proposed ensuring appropriate terms of independence for this new judicial office, including with respect to remuneration:

While it is not contemplated that a separate “court-like” structure will be established for the judicial support officer, the judicial support officer *should not be a civil servant* (as that term is generally understood) and the office must be such as to carry with it the necessary stature and respect to enable the holder of the position *to operate in an independent fashion* and to make decisions that are accepted by those who are subject to them. Working closely with the judiciary, as part of the case management team, will

assist in this regard. The judicial support officer's *remuneration will need to be consistent with such a position*. In addition, the position requires a legally trained person and, we propose, one who has practised law for at least 10 years. He or she will also require training and experience in acting as a provider of ADR services.

To ensure the requisite degree of stability and stature for the position, we recommend that the appointment be for life (with compulsory retirement at age 65) or at least for a lengthy period of time.³³ [Emphasis Added]

In addition to better allocating scarce judicial resources, the Civil Justice Review noted several cost efficiencies that could be achieved by caseload management. Not only were savings expected as a result of a reduced number of motions, I take particular note that the Civil Justice Review stressed the costs savings to Ontario taxpayers that would result by having "less expensive" Case Management Masters conducting this judicial work, instead of the "more expensive" federally appointed Superior Court Judges:

In the first place, the taxpayer is saved the added costs of either having a more expensive section 96 judge performing functions which a less expensive judicial support officer can perform equally well, and perhaps better. More importantly, the taxpayer is saved the cost of the added strains and inefficiencies in the system which spring inevitably from the unavailability of a section 96 judge to perform the judicial functions attending that office, and thus in having the functions go unperformed or at least inadequately performed.³⁴

This acknowledgement that the office of Case Management Master was introduced and justified, in part, to perform the work of Superior Court Judges at a reduced cost compared to that office informs my assessment of the level of judicial independence required for Case Management Masters. While recognizing that Case Management Masters do not have the full jurisdiction of a judge, the remuneration paid to Superior Court Judges must provide important guidance.

In 1996, the Government largely implemented the recommendations of the Civil Justice Review. On Second Reading of the bill to introduce the office of Case Management Master, the Government stated that the bill's main purpose was to set the stage for greater efficiency in Ontario's civil courts, consistent with the Government's goal of developing a more accessible and effective justice system.³⁵

In my view, by appointing Case Management Masters to hold office only in the same three urban centres that had been served by the Traditional Masters, which is a unique geographic limitation, and with the expectation that the former would assume the duties of the latter, there was a clear intended functional connection between the two offices. The offices were only different in the expanded case management role granted to Case Management Masters, as then Attorney General Charles Harnick acknowledged before the Standing Committee on Administration of Justice (“Standing Committee”):

...That’s why the case management master is so important, because this individual, *as well as having the same powers as current masters, as set out in the rules of civil procedure, will also have an expanded role in administering case management.*

...I think to put in perspective the role of the master is to take a look at the masters that we now have and the role they now play and the function that they now play and to say, “How are these masters going to be different?” *They’re going to have the same role as the existing masters, but in addition they will also have the administrative role that case management would provide. So that is the extra dimension...*³⁶ [Emphasis added]

As will be discussed, case management confers additional judicial powers shared with Superior Court Judges but are not granted to Traditional Masters.

Despite the initial overlapping duties of the two offices of master, there is nevertheless evidence to suggest that the Government’s longer-term objective was to create an office distinct from that of Traditional Master. Before the Standing Committee, Attorney General Harnick indicated that the Government’s intention was to move the civil justice system to a model of full case management as quickly as possible.³⁷ However, this goal was found not to be achievable in the busy urban centre of Toronto. Consequently, despite the formal phasing out of the office of Traditional Master, the duties of that office were simply continued through the office of Case Management Master. As events unfolded, the historic Traditional Master duties soon became the most prominent duties of the new office. Judicial case management, *simpliciter*, instead came to occupy a much more minor and secondary role. In short, despite what may have been the original Government intent, the creation of the office of Case Management Master ultimately resulted in

a complete resurrection of the office of Traditional Master, but with enhanced judicial powers and an expanded functional and geographic jurisdiction.

In 1996, the *Courts of Justice Act* was amended to include two new sections, 86.1 and 86.2, to create the office of Case Management Master.³⁸ In keeping with the recommendations of the Civil Justice Review, and as the Attorney General had acknowledged when introducing the bill in the legislature, subsection 86.1(6) granted the new office the same jurisdiction as Traditional Masters, with additional responsibility in case management.

In 1997, Rule 77 was enacted as part of the *Rules of Civil Procedure*³⁹ (“*Rules*”), establishing civil case management in Ontario. It gave both Case Management Masters and Superior Court Judges extensive powers to make orders, give directions, extend or abridge the time prescribed by the *Rules*, establish or amend timetables, and convene case conferences.⁴⁰ These powers enabled the court to take an unprecedented proactive approach to litigation, imposing strict deadlines for specific events and encouraging litigants to settle, narrow, or consolidate issues.⁴¹

In a news release on April 11, 1997, the Government announced the appointment of Ontario’s first three Case Management Masters, to be located in Toronto, Ottawa, and Windsor. In its news release, the Government stated that civil justice in the province was about to speed up and that the appointments advanced its plan of making its civil justice system more efficient and faster.⁴²

Although the Government may have initially intended to create a judicial office that was distinct from that of the Traditional Master to primarily address the new function of judicial case management, this is not what occurred. The evidence shows that, except for a brief period from 2001 to 2005, Case Management Masters have spent the majority of their time exercising their Traditional Master jurisdiction.⁴³

In November 1998, three additional Case Management Masters were appointed in Toronto, and the percentage of new actions assigned to case management was increased to 25 percent. Notwithstanding the increase in case-managed actions, the reduced number of Traditional Masters were still overwhelmed by the volume of motions that were not case-managed, so Case Management Masters began to assist with those motions as well. Since Case Management Masters could order any case into case management, this was done frequently.⁴⁴

THE CRISIS OF 1998

Despite the increased complement of Case Management Masters in Toronto, I received undisputed evidence that an acute crisis developed in Toronto in 1998, just two years after the office was established. This crisis had been precipitated by the retirement of two Traditional Masters and the sudden death of another. According to submissions provided to this Commission by Master Emeritus Ross B. Linton, Q.C., a retired Traditional Master, and the affidavit of Master Calum MacLeod, a Case Management Master, Attorney General Harnick called a meeting and agreed to appoint two additional Case Management Masters to deal with the rapid decline in the number of Traditional Masters in Toronto and the corresponding backlog in Traditional Master motions.⁴⁵

Traditional Master Linton, who was the Reference Master in Toronto, stated in his submissions that:

When the Government decided to bring back Masters only six years later [following the repeal of the power to appoint Traditional Masters], it was ostensibly to support the new case management processes but from the very beginning it was obvious the Case Management Masters would be required to take over the work of the “traditional masters”. When the first Case Management Master was appointed in Toronto there were still 12 of us in office but our ranks dwindled quickly thereafter. With the unfortunate death of Master Peppiatt in 1998 and following the retirement of Masters Donkin and Garfield, there developed a crisis in the backlog of motions. I was personally in attendance at a meeting with the then Attorney General in which he agreed to appoint more Case Management Masters to rectify this situation which he did.⁴⁶

What is key from this evidence, which I accept, is that the Government sought to address a motions backlog crisis in Toronto, brought on by the rapid attrition of Traditional Masters, by hiring additional Case Management Masters. In other words, the addition of new Case Management Masters at that time was meant to specifically address the backlog in Traditional Master work.⁴⁷

THE EVOLUTION OF THE OFFICE

A simple comparison of the job postings for the position of Case Management Master in 1998 and 2006 demonstrates the Government's recognition that its original vision for the office had evolved. In 1998, the posting provided by the Ministry of the Attorney General reflected the Government's initial, narrower view of the role:

This position offers an opportunity to work with the civil case management judges of the Ontario Court of Justice (General Division). The position requires legal, mediation and administrative skills. You will participate in early case management screening and referrals to A.D.R. and will conduct case management actions and will hear masters' motions in case managed actions.⁴⁸

In 2006, however, the posting described the position more broadly and reflected a shift in focus away from case management. The Ministry now also acknowledged the expanded need for adjudicative skills, included the full Traditional Master jurisdiction, and specified reference work in construction-lien matters:

This is an order in council appointment pursuant to s. 86.1 of the Courts of Justice Act. The position offers an opportunity to work with the judges of the Superior Court of Justice in civil actions. You will require legal, adjudicative, mediation and administrative skills. Case Management Masters exercise the jurisdiction assigned to Masters and Case Management Masters by the *Rules*. At the direction of the Regional Senior Judge you may be assigned to hear motions, carry out case management functions, conduct settlement conferences and exercise certain trial management functions. Case Management Masters may also be assigned to conduct references under the Construction Lien Act.⁴⁹

By 2006, therefore, in postings for appointments, the Government acknowledged the expansion from 1996 of the role granted to Case Management Masters, including the full Traditional Master jurisdiction. Case Management Master Andrew T. Graham, who was appointed in Toronto in 2006, affirmed in an affidavit to this Commission that when he began his appointment he spent approximately 80-85 percent of his time hearing civil motions, conducting essentially the same work as Traditional Masters had before him.⁵⁰ By 2006 Case Management Masters were apparently being recruited primarily for Traditional Master work.

As needs changed and additional Traditional Masters retired, the jurisdiction of Case Management Masters continued to expand to further incorporate and in fact move significantly beyond the jurisdiction of the Traditional Masters. In January 2007, Toronto began enforcing Rule 48.14, and as a result, Case Management Masters began conducting status hearings, a jurisdiction that was not held by Traditional Masters.⁵¹

Important regional variations also arose in Case Management Masters' jurisdiction, again according to needs. In Ottawa, Case Management Masters were granted extensive jurisdiction to make orders in family law, involving such matters as temporary custody, access, and child and spousal support.⁵² In Windsor, the single Case Management Master was granted the authority to conduct the majority of family case conferences for family law proceedings in the Superior Court of Justice.⁵³ This family law jurisdiction was not shared with Traditional Masters.⁵⁴ I have also been informed that Case Management Masters in Ottawa and Windsor began presiding over motions for non-compliance with mandatory mediation in estates and trust and substitute decision matters, pursuant to Rule 75.1.10. This jurisdiction was also not shared with Traditional Masters.

With the retirement in August 2008 of Traditional Master Linton, whose role had been dedicated to general reference work, Case Management Masters also began conducting the general reference work that had previously only been assigned to him.⁵⁵

In his 2008 report, The Honourable Chief Justice Warren Winkler noted the significant changes that had occurred in the nature of the work conducted by Case Management Masters

as a result of the case management reforms. He noted that since there was no longer a need to preside over scheduling matters in all cases, much of the Case Management Masters' time was freed up to deal with "more important" motions, pre-trials in simplified procedure cases, and status hearings.⁵⁶ In his report, Chief Justice Winkler noted:

While case management under Rule 77 was intended to improve the backlog already forming in the Superior Court at the time, there is general consensus that in practice it compounded the problem by using up judicial resources on cases that did not require it. Case management work for masters took up approximately half of their time. This had the benefit of allowing masters to better understand the details and the cases before them, but at the cost of increasing backlogs and decreasing timely access to justice for cases that needed the courts attention. With the implementation of Rule 78, masters reported that they are now doing less direct case management. They are spending less time dealing with minor procedural and timetabling compliance issues, and are available for more complex motions, pre-trials and status hearings. For example, between January and June of 2006, the masters heard 18 long motions (over two hours). In 2007, for the same period, the masters heard 100 long motions.⁵⁷

In December 2008, the *Rules* were amended, effective in 2010, resulting in further increases to the jurisdiction of Case Management Masters. Rule 50, for example, was amended to require pre-trial conferences in all actions and gave Case Management Masters increased jurisdiction to make certain orders at pre-trial conferences. Again, this jurisdiction was not granted to Traditional Masters and was shared only with Superior Court Judges.⁵⁸

As of January 1, 2010, both Rules 77 and 78 were revoked and a streamlined single case-management system was created pursuant to a new Rule, 77, which currently applies to Toronto, Ottawa and Windsor. Under this new Rule, a case is no longer automatically subject to case management, which is only provided "for those cases for which the court determines there is a need."

In January 2012, the Case Management Masters' jurisdiction expanded further. The work of Registrars in Bankruptcy, historically the work of Traditional Masters, but which had been withdrawn for a time, was re-assigned to Case Management Masters.⁵⁹ The Honourable Heather Forster Smith, the Chief Justice of the Superior Court of Justice, re-assigned the authority to hear bankruptcy matters to Case Management Masters in Toronto, stating that:

After consulting with Regional Senior Justice Then and Justice Morawetz, and after receiving submissions from the current registrars in bankruptcy, I have determined that it would best serve the administration of justice to have bankruptcy matters in Toronto, currently heard by Court Services Division staff, heard and determined by Case Management Masters. As you may know, masters have historically heard bankruptcy matters in Ontario.⁶⁰

In Ottawa, Case Management Masters spend a portion of their time dealing with bankruptcy matters, including trustee and lawyer taxations, trustee-opposed discharges, and motions that include appeals from trustees disallowing claims.

I was also advised that some Case Management Masters circuit to Newmarket, Brampton and Milton to conduct pre-trial conferences in these jurisdictions,⁶¹ which represents both a functional and geographic expansion of the duties beyond the office of Traditional Master.

¹ See *Courts of Justice Act*, R.S.O 1990, c. C.43, s. 86.1(6)(a).

² 2011 ONCA 243 (CanLII), 105 O.R. (3d) 196 [hereinafter *Masters' Association (OCA)*].

³ *Ibid.* at para. 4.

⁴ J.M. Ferron, "The Masters" (1988) XXII L. Soc. Gaz. 323 at 338 [hereinafter "The Masters"].

⁵ The exceptions were: 1. All matters relating to criminal proceedings; 2. The removal of causes from inferior courts, other than the removal of judgments for the purpose of having execution; 3. The referring of causes under the Common Law Procedure Act; 4. Reviewing taxation of costs; 5. Staying proceedings after verdict; and 6. Appeals in insolvency. *Ibid.* at 339.

⁶ *Ibid.* at 341.

⁷ Master C. MacLeod, "170 years of masters in Ontario" (2007) 18:3 [hereinafter "170 years"].

⁸ "The Masters" at 328.

⁹ *Ibid.* at 334.

¹⁰ "Chancery Reforms" (1870) VI Can. L. J. 29 at 29. See also "The Masters" at 334.

¹¹ "The Masters" at 341.

¹² *Ibid.* at 343-344.

¹³ Ontario Law Reform Commission, *Report on Administration of Ontario Courts, Part III* (Toronto: Ontario Law Reform Commission, 1973) (Chairman: H.A. Leal) at 3-5 [hereinafter Law Reform Commission Report].

¹⁴ Ontario, Legislative Assembly, *Debates* (22 May 1975) at 2045 (Hon. J. Clement) [hereinafter *Debates* (22 May 1975)]. See also *Masters' Association of Ontario v. Ontario (A.G.)*, [2010] O.R. (3d) 90, 2010 ONSC 3714 at para. 11, [hereinafter *Masters' Association* (SCJ)].

¹⁵ In 1977, the Government could only establish near-parity because of a restriction imposed by the Anti-Inflation Board, but the salary revisions were retroactive to October 1975. By 1979, the Government confirmed that salary parity would be established, effective October 1978. See Letter from G.W.S. Scott to Senior Master A.F. Rodger (5 April 1977), Letter from Attorney General R. Roy McMurtry to Master G.C. Saunders (14 June 1979), and Letter from G.H. Carter to Master D.H. Sandler (16 July 1979).

¹⁶ Ontario, Legislative Assembly, *Debates* (2 November 1989) at 1600-1610 (Mr. Polsinelli) [hereinafter *Debates* (2 November 1989)]. See also G.D. Watson & M. McGowan, *Ontario Civil Practice 1991-92*, contr. eds. J.T. Porter, C.W. Caverly & M.C. McGaw (Scarborough: Thomson Professional Publishing Canada, 1991) at 65.

¹⁷ "Chapter 1 – The Modern Civil Justice System: An Overview" (Excerpt), *Civil Justice Review – First Report*, (Toronto: Ontario Civil Justice Review, 1995) at 3 [hereinafter *First Civil Justice Review* (Chapter 1 Excerpt)].

¹⁸ *First Civil Justice Review* (Chapter 1 Excerpt) at 3. See also The Honourable Chief Justice W.K. Winkler, *Evaluation of Civil Case Management in the Toronto Region – A Report on the Implementation of the Toronto Practice Direction and Rule 78* (Toronto: February 2008) at 3 [hereinafter *Winkler Report*].

¹⁹ "Chapter 13 – Management of Cases", *Civil Justice Review – First Report* (Toronto: Ontario Civil Justice Review, 1995) at 170, 171, and 184 [hereinafter *Civil Justice Review – First Report* (Chapter 13)]. See also "Chapter 5.1 – Case Management Regime and Rules", *Civil Justice Review - Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, 1996) at 36 and 47 [hereinafter *Civil Justice Review – Final Report* (Chapter 5.1)].

²⁰ *Civil Justice Review – First Report* (Chapter 13) at 171.

²¹ *Ibid.* at 171-172.

²² Pilot projects were established in Sault Ste Marie, Windsor and Toronto to represent small, medium and large urban centres. Control sites and mechanisms were put in place for comparative purposes. *Civil Justice Review – First Report* (Chapter 13) at 173 and 192.

²³ See reference to QUINDECA Report in *Ibid.* at 176.

²⁴ *Ibid.* at 176.

²⁵ *Ibid.* at 179-180.

²⁶ *Ibid.* at 180-181.

²⁷ *Ibid.* at 188. The term was changed to Case Management Master approximately a year later, in the Civil Justice Review's Supplemental and Final Report, *Civil Justice Review – Final Report* (Chapter 5.1) at 37.

²⁸ *Civil Justice Review – First Report* (Chapter 13) at 182.

²⁹ *Ibid.* at 182, 188-190, and 193.

³⁰ *Ibid.* at 188.

³¹ *Ibid.* at 192.

³² *Ibid.* at 194.

³³ *Ibid.* at 190.

³⁴ *Ibid.* at 195.

³⁵ Ontario, Legislative Assembly, *Debates* (3 October 1996) at 1730-1740 (Mr. D. Tilson) [hereinafter *Debates* (3 October 1996) (Tilson)].

³⁶ Ontario, Legislative Assembly, *Committee Transcript – Standing Committee on Administration of Justice* (21 October 1996) at 1600 and 1630 (Hon. C. Harnick) [hereinafter *Standing Committee Transcript* (21 October 1996)(Harnick)].

³⁷ *Standing Committee Transcript* (21 October 1996)(Harnick) at 1600.

³⁸ *Masters’ Association* (SCJ) at para. 21.

³⁹ R.R.O. 1990, Regulation 194.

⁴⁰ *Masters’ Association* (SCJ) at para. 25.

⁴¹ *Winkler Report* at 6.

⁴² Ministry of the Attorney General, News Release, “Case Management Masters to Speed-up Civil Justice” (11 April 1997).

⁴³ Affidavit of Case Management Master Ronald Dash at paras. 4-14, filed [hereinafter Affidavit of Master Dash].

⁴⁴ Affidavit of Case Management Master Calum MacLeod, filed at para. 9 [hereinafter Affidavit of Master MacLeod].

⁴⁵ Submissions of Master Emeritus Ross B. Linton, Q.C., filed at para. 17 [hereinafter Submissions of Master Linton]. See also Affidavit of Master MacLeod at para. 10.

⁴⁶ Submissions of Master Linton at para. 17, filed.

⁴⁷ In particular, the actions of the Government appear to be inconsistent with the letter from Attorney General Harnick in July 1998, which stated that the office of Case Management Master was never intended by Government to replicate the office of Traditional Master. Letter from Attorney General C. Harnick to Case Management Master J. Polika (23 July 1998).

⁴⁸ The Ministry of the Attorney General, Job Posting for Case Management Master (10 July 1998).

⁴⁹ The Ministry of the Attorney General, Job Posting for Case Management Master (13 January 2006).

⁵⁰ Affidavit of Andrew T. Graham at para. 2 [hereinafter 2014 Affidavit of Master Graham].

⁵¹ Affidavit of Master Dash at paras. 10-13.

⁵² *Family Law Rules*, O. Reg. 114/99, Rule 42 [hereinafter *Family Rules*].

⁵³ *Ibid.* Rules 17(9) and 41.

⁵⁴ See jurisdiction chart in Case Management Masters' Amended Notice of Application, Application Record (Ontario Superior Court of Justice) at para. 14, filed [hereinafter Amended Notice of Application].

⁵⁵ Affidavit of Master Dash at paras. 14-15.

⁵⁶ *Winkler Report* at ii and 29.

⁵⁷ *Ibid.* at 29.

⁵⁸ 2014 Affidavit of Master Graham at para. 9.

⁵⁹ Affidavit of Master MacLeod at para. 15.

⁶⁰ Letter from The Honourable H.F. Smith, C.J., Superior Court of Justice (2012), filed.

⁶¹ See Submissions of Master Sandler at 6.

JURISDICTION OF CASE MANAGEMENT MASTERS

It is evident that the scope of the Case Management Masters' jurisdiction has evolved considerably from the original concept advanced by the Civil Justice Review in 1995. Yet the parties before me were not in agreement when characterizing the Case Management Masters' current jurisdiction.

Both the *Courts of Justice Act* and the *Rules* make it clear that: (1) Case Management Masters have the same powers and jurisdiction as Traditional Masters, with fewer restrictions and with additional duties that include, but are not limited to, case management; and (2) Case Management Masters, like Traditional Masters, not only share their jurisdiction with Superior Court Judges, but are also meant to function much like judges within their prescribed jurisdiction.

The *Courts of Justice Act* and the *Rules* refer separately to the two categories of master in Ontario, namely, the "masters", who, as discussed, are referred to as "Traditional Masters" in this report, and the "case management masters". By definition, all references to Traditional Masters in the Act also include Case Management Masters. The jurisdiction of the former, therefore, is completely subsumed under that of the latter.

At law and also from the perspective of a litigant or a member of the public, Case Management Masters sit in the place of a judge for those numerous and significant matters over which they have jurisdiction. A Case Management Master, similar to a Superior Court Judge, is the "court" to which appropriate deference and respect are owed as a fundamental principle of the administration of justice in a civil society. The remuneration of the office must reflect this important role.

The evidence before this Commission demonstrates that some Case Management Masters' current workload consists of approximately 80 percent Traditional Master work, and 20 percent combined pre-trial conference, status hearing, and case management work, all of which is work that would otherwise be conducted by Superior Court Judges.¹ In Toronto, some Case

Management Masters reported that as little as five percent of their workload is now taken up by case management.² In Ottawa, the two Case Management Masters only spend upwards of 30 percent of their time on case management.

Some Case Management Masters function entirely as their Traditional Master predecessors and perform no case management functions at all. For example, beginning in 2006, Case Management Master Carol Ann Albert took over as a full-time Construction Lien Master in Toronto, having presided over such matters part-time since 2001. Her current work is exactly the same as that of Traditional Masters who had previously been assigned to construction-lien work. She conducts references, including trials, hears motions, conducts pre-trials, and presides in construction-lien ex parte court.³

I note that section 58(1) of the *Construction Lien Act* indicates that while Traditional Masters are limited in their reference jurisdiction under that Act to their assigned geographic region, Case Management Masters are subject to no such restriction when it comes to construction-lien references. Furthermore, pursuant to s. 58(4) of that Act, both Case Management Masters and Traditional Masters assume all the jurisdiction, powers, and authority of the court in the context of these references, including complete disposal of the action and all related matters.

Thus, Case Management Masters have a broader geographic jurisdiction and the same extensive powers as Traditional Masters in construction-lien references, which are more akin to those of judges.

Currently, there are two dedicated “Construction Lien Masters” in Toronto who are Case Management Masters performing primarily construction-lien work.⁴ They divide their time between conducting reference trials (which includes conducting the trials, adjudicating costs, and drafting reference reports), motions and pre-trial conferences. In Ottawa, Case Management Masters are also conducting a growing number of construction-lien references.⁵

Importantly, pursuant to s.71(3)(b) of the *Construction Lien Act*, there are no appeals from an interlocutory order made by the court,⁶ which includes orders made by a Construction Lien Master.⁷ Thus, the decisions of Case Management Masters in interlocutory construction-lien

motions are final. Under the *Construction Lien Act*, therefore, Case Management Masters' interlocutory proceedings serve as the court of both first and last resort. This is a unique situation in our civil justice system. In addition, no interlocutory step in construction-lien matters may be taken without leave from the court, and there is no appeal from a refusal to grant leave. Clearly, the Case Management Masters who hear these final and determinative motions play a critical and consequential role in the civil justice system in Ontario.⁸

Although not a comprehensive list, I provide below some of the key areas of current jurisdiction for the office of Case Management Master, pursuant to the *Courts of Justice Act*, the *Rules*, and other legislation. Those matters that are bold-faced fall beyond the current jurisdiction of the Traditional Masters:

- Hearing and adjudicating interlocutory motions in non-case managed proceedings (Rules 37.02(2) and 37.04);
- Adjudicating uncontested, unopposed, *ex parte*, and contested motions brought in writing (Rule 37.12.1);
- Hearing and conducting general references, which can include the entire proceeding or a particular issue (Rules 54.02 and 55, and *Courts of Justice Act*, s. 86.1(6)(a));
- Hearing and conducting reference trials and motions pursuant to s. 58.1 of the *Construction Lien Act*, ***without geographical restraints***;
- Hearing and conducting references directed by a default judgment in a mortgage action (Rule 64);
- **Conducting case conferences, pre-trial conferences, and trial management conferences in case-managed proceedings (Rule 77 and s. 86.1(6)(b) of the Courts of Justice Act)**;
- **Hearing and adjudicating motions in case-managed proceedings (Rule 77.07(1))**;
- **Conducting status hearings (Rule 48.14)**;
- **Conducting pre-trial conferences in ordinary and Simplified Procedure actions (Rules 50 and 76)**;

- **Making orders for matters in family law, including temporary custody, access, and child and spousal support (Ottawa, Rule 42 of the Family Law Rules, O. Reg. 114/99, made pursuant to the Courts of Justice Act);**
- **Conducting case management for family law proceedings in the Superior Court of Justice (Windsor, Rules 17(9) and 41 of the Family Law Rules);**
- **Hearing and adjudicating motions arising from non-compliance with mandatory mediation in estates, trust, and substitute decision matters (Ottawa and Essex County only, under Mandatory Mediation for Estates, Trusts and Substitute Decisions, Rule 75.1.10);**
- **Hearing and adjudicating exclusively bankruptcy matters within the jurisdiction of a Registrar in Bankruptcy (Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, ss. 2, 184, and 192);**
- **Hearing motions in Commercial List cases, where such motions are within the jurisdiction of the Registrars in Bankruptcy;**
- **Hearing and adjudicating referrals by the mediation coordinator for non-compliance with mandatory mediation (Rule 24.1); and**
- Adjudicating requests for fee waivers in Superior Court of Justice proceedings (s. 4.4(1) of the *Administration of Justice Act*, R.S.O. 1990, c. A-6).⁹

This review of the evolution of the jurisdiction of the Case Management Master has convinced me that the evidence simply does not support the Government's narrow view of the current jurisdiction granted to Case Management Masters. It failed to establish that Case Management Masters are members of a distinct group with only circumscribed duties or a limited jurisdiction relating primarily to their case management functions, as well as to specific non-case management functions as set out in the *Rules*.¹⁰

Rather, I accept the submissions of the Case Management Masters that a large percentage of their time is spent on civil motions in non-case managed actions, including regular motions, long motions, *ex parte* motions and in-writing motions, and that additional time is required for the preparation and writing of reserve judgments.

With the enactment of the Toronto Practice Direction just over a decade ago, followed by the introduction of Rule 77, judicial case management has become merely one of the many implements in the civil justice toolbox whose use is largely limited to particularly complex cases. Contrary to the Government's initial intention, case management has been reduced to but one among several functions Case Management Masters perform, rather than being their primary responsibility.

As a result of their decreased role in case management and in keeping with the jurisdiction conferred upon their office, I find that Case Management Masters perform all the functions of Traditional Masters, as well as significant additional judicial duties, the majority of which are shared only with Superior Court Judges. The evidence demonstrates that as Traditional Masters have retired, their role has nonetheless continued virtually unchanged and been fully assumed by Case Management Masters.

The courts and the wider legal community have arrived at the same conclusion. In *Masters' Association* (SCJ), Platana J. held:

112 The evidence in this application establishes that the actual role of Case Management Masters, whether by design or default, has significantly expanded since the 1996 and 1997 case management Rule. When the last Traditional Master retires, all of the Traditional Masters judicial work will be discharged by Case Management Masters.

113 I accept the argument of the Applicant that virtually all of the actors in the Ontario judicial system – with the obvious exception of the Respondent – view both Traditional Masters and Case Management Masters as being one and the same. As noted by the Honourable Coulter Osborne, “no useful purpose is served by maintaining the distinction between Masters and Case Management Masters.” Further the evidence is clear that all masters are performing virtually the same work.¹¹

On appeal, the Court of Appeal for Ontario agreed, stating at paragraph 7 that "...Case Management Masters exercise the same powers as traditional Masters, with the additional responsibility of case management."¹² The Court went on to note, however, that despite this confluence of function and jurisdiction, Case Management Masters have received compensation that is both lower and determined in a different way than Traditional Masters.¹³ Certainly, this is among the matters for review by this Commission.

CONCLUSION

Although the office of Case Management Master may have initially been conceived and implemented as a new and distinct quasi-judicial office, I find that in fact the office both replaced and subsumed the role of the Traditional Masters. That was the outcome recommended by the judiciary in Toronto in its early submission to the Civil Justice Review.¹⁴

This finding has not been seriously challenged by any evidence submitted to this Commission and has therefore had a significant impact on my final recommendations on remuneration.

What is more, Case Management Masters deal with complex matters in numerous areas of civil, bankruptcy and family law. The *Courts of Justice Act* further provides, at section 76, that both Case Management Masters and Traditional Masters have the same powers as judges to direct court personnel when the court is in session, including registrars, court clerks, court reporters, interpreters and other court staff who are present in the courtroom. Section 82 of the Act provides that both Case Management Masters and Traditional Masters have the same immunity from liability as judges of the Superior Court of Justice. The only other provincial judicial officials who enjoy this same immunity from liability are other judges, namely, Provincial Court Judges, and Deputy Judges. In exercising their jurisdiction, Case Management Masters in certain respects have virtually all the power and authority of a Superior Court Judge.

There is also considerable regional and individual variation in the work of Case Management Masters. In Toronto, there is a degree of specialization among the 13 Case Management Masters, with two dealing primarily with construction-lien matters, and two dealing primarily with bankruptcy matters. With such specialization, Case Management Masters continue the tradition of providing valuable and particular expertise to the litigation bar in Toronto and to the industries so served.¹⁵

The Case Management Masters in Ottawa and Windsor serve more as generalists, and also deal with family law matters, which do not form part of the jurisdiction in Toronto. Some Case Management Masters, such as the dedicated Construction Lien Master in Toronto, do not conduct any case management functions at all.

The office of Case Management Master plays an important role in achieving timely and effective access to civil justice. Without Case Management Masters, and in the absence of an increased complement of section 96 judges appointed to the Superior Court of Justice, there would no doubt be an impossible strain placed on the civil courts in the larger urban centres in Ontario, as has occurred several times in the past.

On occasion Case Management Masters travel outside their assigned urban centres and in certain construction matters render decisions which are final and in respect of others from which no appeal may be taken.

The mandate of Case Management Masters has become significantly enhanced since inception of the position in 1996. The task of this Commission is to make recommendations as to fair and reasonable compensation for the judicial position as it now exists. This review has demonstrated the evolving and expanded jurisdiction of Case Management Master.

Given this conclusion, I feel compelled to offer the following suggestion, which, although not falling strictly within my mandate, is consistent with my recommendations related to remuneration: I urge the Government to effect an immediate change to the title of this judicial office from “Case Management Master” to simply “Master.” The current title, while it may have reflected an earlier Government expectation when it established the office in

1996, is now a gross misrepresentation of the role. Not only is it a misleading and confusing title, implying that such masters' work is limited to case management, but its continued use also offends against the dignity and history of this important judicial office.

In my view, Government recognition of the need to address this significant misnomer is imperative. The title "Master" is reflective of the true nature of the position. The Government should take immediate action to rectify the nomenclature in order to reflect both the reality of the situation and the significant strides that have been made in enhancing access to the judicial system since the 1994 Civil Justice Review.

I now turn to a review of each of the criteria established by Order in Counsel 359/2012.

¹ 2014 Affidavit of Master Graham at paras. 2 and 11. See also Affidavit of Master Dash at para. 19. See also Submissions of Master D.H. Sandler at 4 [hereinafter Submissions of Master Sandler].

² 2014 Affidavit of Master Graham at para. 11.

³ Affidavit of Master Albert at para. 9.

⁴ Retired Traditional Master Sandler, who had been sitting part-time on construction-lien matters in Toronto, was due to retire completely as of January 2015. See Submissions of Master Sandler at 4.

⁵ The Case Management Masters reported that due to the backlog in civil motions in Toronto, there are currently 1.5 dedicated Construction Lien Masters in Toronto.

⁶ "Court" is defined as the "Superior Court of Justice" in the *Construction Lien Act*.

⁷ Submissions of Master Sandler, p.5; See also *Construction Lien Act*, s.71(3)(b). Note that s.71(3)(a) provides that there is also no appeal from a judgement or an order on a motion to oppose confirmation of a report under the Act, where the amount claimed is \$1,000 or less.

⁸ Submissions of Master Sandler, at. 5-6.

⁹ *Masters' Association* (SCJ) at para. 29; See also Amended Notice of Application at 7-9.

¹⁰ The Government submitted that Case Management Masters do not have the ability to set aside, vary, or amend the order of a judge, to order a motion to be converted into a motion for judgment, or to make trial management orders where a motion for summary judgment has not been successful.

¹¹ *Masters' Association* (SCJ) at paras. 112-113

¹² *Masters' Association (OCA)* at para. 7.

¹³ *Ibid.*

¹⁴ *Civil Justice Review – First Report* (Chapter 13) at 180-181.

¹⁵ See Submissions of Master Sandler at 4, regarding the value of expertise in construction-lien matters.

CRITERIA

1. THE LAWS OF ONTARIO

In my view, this criterion must be broadly considered to take into account not only provincial legislation but also all relevant federal laws and constitutional requirements with which the Province of Ontario must comply. The overriding consideration, and the reason this Commission was established, is to confirm that Case Management Masters are full judicial officers within the Superior Court of Justice and thus ought to be afforded the full protections given to judges of our criminal and civil courts in accordance with the constitutional principle of judicial independence.

Case Management Masters, like their predecessors, the Traditional Masters, derive their jurisdiction entirely from statute. For this reason, I have carefully considered the primary sources of their statutory jurisdiction, including the *Courts of Justice Act*,¹ the *Rules of Civil Procedure*, and the *Family Law Rules*.² I have also reviewed the *Construction Lien Act*,³ as well as the federal *Bankruptcy and Insolvency Act*,⁴ which provide authority for key aspects of their jurisdiction.

In addition, I have considered all relevant statutes, regulations, Orders in Council, and case law that have been presented in submissions to this Commission. These have been discussed and referenced, as necessary, throughout this report.

In summary, the constitutional tenets and relevant laws applicable in Ontario regarding the financial security to be provided to judicial officers have informed the conclusions and recommendations of this Commission.

¹ R.S.O. 1990, c. C.43.

² O. Reg. 114/99.

³ R.S.O. 1990, c. C. 30.

⁴ R.S.C. 1985, c. B-3.

2. THE NEED TO PROVIDE FAIR AND REASONABLE REMUNERATION TO CASE MANAGEMENT MASTERS

Many commissions have identified this criterion as the most important for consideration. My approach necessarily relies upon an assessment of key comparators, as identified by the parties, some of which are less appropriate, and others of which significantly inform my recommendations. In doing so, it is clear that the most appropriate comparators in assessing what constitutes fair and reasonable remuneration for Case Management Masters are found in the Traditional Masters and Provincial Court Judges.

Criterion 2 requires consideration of “the *need to provide* fair and reasonable remuneration for case management masters”. [Emphasis added]. The premise therefore is recognition of the existing “need” to fairly and reasonably remunerate Case Management Masters. Further, this language suggests that “fair and reasonable remuneration” must be assessed within a particular context. That context, in my view, is the constitutional guarantee of judicial independence, which exists in the public interest to preserve and maintain a well-functioning democracy.

The Fifth Justices of the Peace Remuneration Commission (“Nairn Fifth JP Commission”), which considered this same criterion, similarly concluded that “the primary goal of this criterion is to ensure the independence of this judicial office.”¹ Guidance in assessing this criterion also comes from the Supreme Court of Canada. In *PEI Reference*, whose findings apply to all judges and related judicial officers, the Court adopted the language of the United Nations’ *Draft Universal Declaration on the Independence of Justice*, stating that judicial salaries and pensions ought to be “adequate, commensurate with the status, dignity and responsibility” of the office.

To understand the status, dignity, and responsibility of the office of Case Management Master, any assessment of fair and reasonable remuneration must involve a close review of the nature, duties, and functions of the office, as well as an evaluation of the compensation necessary to attract candidates of the highest calibre. In the context of this First Commission, the assessment must also involve an understanding of the evolution of responsibilities of the office of Case Management Master, as well as the history of the office of Master in this province.

There is a consensus among remuneration commissions that any determination of “fair and reasonable” remuneration entails a relational analysis² involving a review of the remuneration provided to appropriate comparators. The Fifth Provincial Judges Remuneration Commission (“Davie Fifth PCJ Commission”), for example, found that the term “fair and reasonable” inevitably inspires the question: “In relation to whom or what?”³

The need for a comparative analysis is also supported by the use of the term “adequate” in *PEI Reference*. The 2000 federal Judicial Compensation and Benefits Commission (“Drouin Sixth Federal Commission”) concluded that this term is a relational one that raises several questions, including: “Adequate for what purpose?”; “Adequate in relation to who or what?”; and “Adequate over what time frame?”. That commission found the operative definition of “adequacy” meant that it had to consider carefully what constitutes a “fair and sufficient salary level” for the judiciary.⁴

The Supreme Court of Canada in *Provincial Court Judges’ Assn. of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judges’ Assn. v. Ontario (Management Board)*; *Bodner v. Alberta*; *Conférence des juges du Québec v. Québec (Attorney General)*; *Minc v. Québec (Attorney General)*, [hereinafter *Bodner*] also held that the focus of the independent commission process is to identify the “appropriate” level of remuneration for the judicial office in question.⁵ I note that the Framework Agreement for the Provincial Court Judges’ remuneration commissions, which has been incorporated into the *Courts of Justice Act*, specifically directs those commissions to conduct an inquiry respecting the “appropriate” salary, pension, and benefits for that office.⁶ The Davie Fifth PCJ Commission concluded that the term “appropriate” which has been incorporated into the Framework Agreement for Provincial Court Judges, like “fair and reasonable remuneration”,⁷ is a relational term, with “appropriate” leading one to ask “in what manner and for what purpose?”⁸

I have undertaken a comparative analysis of various groups submitted for consideration by the parties. A lengthy examination was needed to assess the parties’ submissions and determine to what extent, if any, a remuneration recommendation for Case Management Masters might be informed by the treatment of other like groups in our society.

¹ *Fifth Justices of the Peace Remuneration Commission Report* at 14 [hereinafter Report of Nairn Fifth JP Commission].

² See, for example, *Third Deputy Judges Remuneration Commission Report* at 8 [hereinafter Report of Nairn Third DJ Commission]. See also the *Fifth Provincial Judges Remuneration Commission Report* at 21 [hereinafter Report of Davie Fifth PCJ Commission].

³ Report of Davie Fifth PCJ Commission at 21.

⁴ *Judicial Compensation and Benefits Commission Report (2000)* at 23 [hereinafter Report of Drouin Sixth Federal Commission].

⁵ [2005] S.C.R. 286, 2005 SCC 44 at para. 14.

⁶ *Courts of Justice Act*, Schedule, Appendix A of Framework Agreement, s. 13 [hereinafter Framework Agreement].

⁷ Framework Agreement, s. 25.

⁸ Report of Davie Fifth PCJ Commission at 21.

COMPARATORS

APPROACH TO COMPARATOR ANALYSIS

A comparator analysis is critical for determining fair and reasonable remuneration for judicial officers. In my review of the commission reports filed by the parties, comparators appear to have been considered for three main purposes: 1) to understand how groups that perform work of a similar nature and have comparable characteristics are compensated; 2) to understand the level of compensation required to attract outstanding candidates to office; and 3) to understand how governments have compensated their most senior civil servants.

GROUPS OF A SIMILAR NATURE

Remuneration commissions have often relied heavily in their comparator analyses on identifying groups of a similar nature. They have sought to identify groups with analogous roles, responsibilities, duties, and functions, as well as comparable skills, abilities, and experience. They have considered the complexity and structure of the work, as well as the terms of office.

It is not surprising that other remuneration commissions have found the most compelling comparators to be judicial officers who perform similar functions and share key characteristics.¹ Such comparisons often take into account factors that are unique to the judiciary and which must be considered when determining fair and reasonable remuneration. Collectively, judicial officers form a distinct group; that is, they are *sui generis*. Unlike any other group in our democratic society, their compensation is governed by the need to protect their independence from the executive and legislative branches of government both during their judicial tenure and following retirement from office. Also, unlike any other group, full-time judicial officers are required to make extraordinary personal and professional sacrifices that often restrict their social, economic, and political relationships.²

Past remuneration commissions have emphasized that where the level of adjudication is comparable, and the adjudicative work is exercised by persons of similar skill and ability, differences in legal subject matter, such as civil, criminal, or family law, are of little import. In other words, no single area of law should be viewed as subordinate to another.³

Remuneration commissions have also accepted comparisons to judicial offices that are within the jurisdictions of different levels of government. In such circumstances, however, commissions have generally rejected any direct or formulaic remuneration linkages because of concerns about improperly transferring decision-making authority from one government to another. Each government is accountable to its own taxpayers and must not relinquish its responsibility in this important area.⁴ As well, each commission is governed by a unique set of criteria that must be considered when making its recommendations.

Nevertheless, where judicial officers in other jurisdictions have similar roles, responsibilities, or functions, their level of remuneration or associated relationships can inform decisions on judicial remuneration. For example, Provincial Court Judges in Ontario have had their remuneration determined in large part by comparison with Superior Court Judges, despite the fact that they adjudicate in different areas of law and are remunerated by different governments. The 1988 Ontario Provincial Courts Committee (“Henderson First PCJ Commission”) recognized that the work of Provincial Court Judges is of “equivalent responsibility, volume and complexity” as that of federally appointed judges, and that the minimum qualifications for the two offices are identical.⁵ For these reasons, it considered the salaries paid to federally appointed judges to be important for comparison.⁶

The 1998 Fourth Provincial Judges Remuneration Commission (“Beck Fourth PCJ Commission”) found that the transfer of the criminal law jurisdiction from the Superior to the Provincial Court over several years had effectively divided the Ontario court system into two conceptual divisions: one dealing primarily with property and civil rights (the Superior Court), and the other dealing with criminal law (the Provincial Court).⁷ It rejected the notion of any hierarchy existing between these areas of law or levels of court, given the basically equivalent level of adjudicative work.⁸ In doing so, the commission recalled the remarks of former Attorney

General Ian Scott, who acknowledged that the judges of both courts are of equal calibre and skill:

Judges who conduct trials in Ontario whether criminal, civil or family matters will all be members of the same court ... All judges in this Province must meet the same high standard prior to being appointed: ten years' experience at the bar. This is the highest standard in Canada for judicial appointment. Judges of this calibre of legal experience drawn from the same pool of lawyers in the Province should be able to enjoy the full range of judicial work in their area of legal expertise without artificial restrictions based on hierarchy.⁹

The Beck Fourth PCJ Commission found, as had its predecessors, that the administration of justice is best served when the judges of both courts are similarly compensated. Although the Beck Fourth PCJ Commission rejected the idea of parity, it found no reason to continue to permit a significant disparity in remuneration when the two areas of law – civil and criminal – are, and must be seen to be, equivalent. The Commission concluded:

While we do not consider that there ought to be automatic linkage with the federally-determined salary for judges of the General Division, we do think that the time has come for a substantial increase in the salary of the judges of the Provincial Court, such that the disparity with the General Division is considerably narrowed. As outlined above, successive governments have turned a deaf ear to the recommendations of the Committees and Commissions over the years with respect to appropriate remuneration. ...

There are a number of factors that we consider relevant in setting an appropriate remuneration base. One very clearly is the salary paid to the judges of the General Division. The General Division is the Civil Court of Justice for Ontario; the Provincial Court is the Criminal Court of Justice for Ontario, and we can see no reason that justifies a significant disparity in the remuneration paid to the Provincial judges. While we reject the concept of automatic linkage, the salary of \$175,800 currently paid to judges of the General Division is one very important factor which we would take into account.

In considering the salaries of the federal judges as extremely relevant, we are mindful of the writings of Professor Peter Russell, the leading scholar of the Canadian courts. Russell has noted that the differential treatment of federal and provincial judges promotes the perception of a two-level system of justice. To paraphrase Russell, this may have been tolerable when the provincial courts dealt with minor matters. It is not tolerable, however, when those courts are vested with jurisdiction over the most vital matters between the citizen and the state—the criminal law.

While we do not recommend parity, *we think the time is long past-due to end outdated notions of hierarchy and second class status.*¹⁰ [Emphasis added]

In other words, the criminal law jurisdiction exercised by Provincial Court Judges was seen to be at the same level of complexity and importance as the primarily civil law jurisdiction of the Superior Court Judges. The Beck Fourth PCJ Commission further highlighted the absurdity of maintaining a significant discrepancy between the remuneration of these two offices by noting the transfer of the family law jurisdiction that had taken place from the Provincial Court to the Superior Court. The commission said that the work of these judges, regardless of the level of court, is essentially the same:

The inequity in a significant discrepancy between the salaries of federal and provincial judges, is brought into sharp relief by the creation of the Family Court. As noted, approximately three-quarters of the appointments to that Court have and will come from the Provincial Division. And when appointed, the salary becomes that of a judge of the General Division – for doing essentially the same work that was being done while in the Provincial Division. ... The matter is one of pure happenstance – the creation of the Family Court and the appointment of a significant number of Provincial Court judges to it. *The question then becomes: should those who exercise the criminal law jurisdiction be paid significantly less than those who exercise the family law jurisdiction? We think not.* [Emphasis added]

Therefore, it is the level and quality of the adjudicative work that is the paramount consideration in a comparator analysis. The subsequent Davie Fifth PCJ Commission reached the same conclusion about the comparability of provincially and federally appointed judges.¹¹

Similar analyses across several areas of law and between different governments have proven crucial in determining the appropriate level of remuneration for federal Prothonotaries. In 2013, Special Advisor Cunningham narrowed the appropriate comparators for federal Prothonotaries to

Masters in some provinces as well as to Federal Court Judges¹² because, despite differences in specific areas of legal jurisdiction, the overall nature of their work and responsibilities were similar.¹³

Some remuneration commissions have considered as appropriate comparisons with government appointees to quasi-judicial, administrative tribunals on the basis that they exercise a similar adjudicative function. Their duties may include, for example, conducting hearings, assessing documentary and oral evidence, and rendering oral and written decisions on the rights of the parties appearing before them.¹⁴

However, most remuneration commissions have found that there are significant limitations to the use of such comparators because tribunals are simply not courts, their appointees are not judicial officers,¹⁵ and their remuneration is solely determined by the executive branch of government. For all of these reasons, such individuals are not entitled to the same level of independence. Those appointments are made by the Lieutenant Governor in Council and are typically limited to 10 years.¹⁶ Since adjudicative agencies are creatures of their enabling statutes and typically only deal with disputes arising under that statute they are also often limited in scope and jurisdiction.¹⁷ Many government appointees are not required to be lawyers or to have any legal training, although some are lawyers appointed in their professional capacity.

These factors tend to make government appointees poor comparators for this type of review.¹⁸ The key concern expressed by many commissions is that government appointees are paid salaries that are unilaterally determined by the executive branch of government, which constitutes a fundamental distinction in their level of independence from that required for the judiciary.

As the Third Deputy Judges Remuneration Commission (“Nairn Third DJ Commission”) observed:

... They report to the executive branch of government. They are not independent of the executive in the same manner or degree as a court. Ultimately they form part of the executive branch, not the judicial branch. Their remuneration is unilaterally set by the Government and is not subject to any constitutionally mandated independent review.¹⁹

Special Advisor Adams also noted that:

... there have always been limits to the use of such comparables because judges are *sui generis* and their compensation cannot simply be or appear to be an output of a government's will. Moreover, appointments to administrative agencies do not demand ten years of practice as a lawyer. Agency heads do not have security of tenure. Indeed, many come from outside the public sector, will never qualify for a full pension and are not taking on the job as life-time employment. It is a stepping stone in a productive career or the culmination of a full career elsewhere.²⁰

The Davie First DJ Commission also stressed that a government appointee is not a judge of a court and said that "it is difficult, if not impossible, to compare judges to non-judges."²¹

THE NEED TO ATTRACT OUTSTANDING CANDIDATES

A key comparator for judicial offices is the pool of candidates from which judicial officers are drawn²² since remuneration must be set at a level that continues to attract candidates of the highest calibre. Certainly it is in the public interest to do so.²³

Remuneration commissions have recognized that excellent candidates can be found in the ranks of all areas of legal endeavour, including from academia, government service, private practice, and in-house counsel;²⁴ however, the overwhelming focus for this comparator has been on senior lawyers in private practice because they are the primary source of candidates for many judicial offices.²⁵ With private sector lawyers often representing the highest income earners in a generally well-paid legal profession,²⁶ as a practical matter, commissions have recognized that judicial remuneration must be set at a level that continues to encourage strong candidates from among this group to seek appointment.²⁷ At the very least, the level of judicial remuneration should not serve as a disincentive to the best and brightest who might consider appointment to the judiciary.

Special Advisor Cunningham cited a different purpose for taking the incomes of private sector lawyers into consideration that recalls the Supreme Court of Canada's direction in *PEI Reference* that judicial remuneration should reflect the dignity of the office. He noted that private sector lawyers regularly appear before the federal Prothonotaries and that it was important that any disparity in their levels of compensation not be so great as to impact the dignity of that office.²⁸

I agree and note that this observation has direct application to Case Management Masters, before whom lawyers in private practice regularly appear. It also echoes the remarks of the 1983 federal Commission on Judges' Salaries and Benefits ("Lang First Federal Commission"), which said that the prestige of judicial office might not persist where there is a marked difference between the remuneration of lawyers and judges.²⁹

Remuneration commissions have also been clear that there is no intent to set judicial remuneration at the most lucrative level,³⁰ as judicial remuneration must not be so great that the office is sought for its monetary rewards alone.³¹ As the McLennan Seventh Federal Commission emphasized in its report, appointments to the judiciary:

... should appeal to those highly qualified persons of maturity and judgment who seek to provide a valuable public service to their country. In other words, we are of the view that "too much" would not be in the public interest just as "too little" is obviously not in the public interest.³²

At the provincial level, the Henderson First PCJ Commission nevertheless found that the need to attract candidates of the highest quality requires salaries high enough to show that the Government of Ontario "respects and trusts the professionalism and dedication of its judiciary". It found, as well, that while the salary ought not to be excessive, it should be "sufficiently generous to offset the financial and social restrictions" required of the office, and should attract those qualified candidates "who are willing to exchange some income for the security of tenure and the honour of a judicial appointment."³³

The challenge presented by this comparator, however, has been the availability and reliability of data on private sector incomes.³⁴ Nevertheless, as the 2000 federal Judicial Compensation and Benefits Commission ("Drouin Sixth Federal Commission") concluded, although the comparison may be difficult, it is not irrelevant or impossible.³⁵

Where different judicial offices presiding in the same geographic jurisdiction require the same qualifications for office, this situation also affects the ability to attract outstanding candidates to each such office. This is because such offices compete for the same pool of candidates, as has been acknowledged for Provincial Court Judges and Superior Court Judges. Commissions have therefore determined that it serves the justice system and the public interest best if the disparity in the remuneration between such offices is minimized. In that way candidates are encouraged to seek the most appropriate appointment for their skills, expertise and interests, rather than merely the office with the higher level of remuneration.

PUBLIC SECTOR COMPARATORS

The Supreme Court of Canada confirmed in *PEI Reference* that judges are not civil servants, nor can they be treated as such for the purposes of remuneration since expenditures from the public purse are inherently political³⁶:

...the fact remains that judges, although they must be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. The three core characteristics of judicial independence--security of tenure, financial security, and administrative independence--are a reflection of that fundamental distinction, because they provide a range of protections to members of the judiciary to which civil servants are not constitutionally entitled.³⁷

At the federal level, the Drouin Sixth Federal Commission stressed the fundamental distinction between members of the judiciary and those of the public service, stating that:³⁸

... judicial salaries are not to be addressed “*as though judges were subject to the conditions of service of federal government employees*” because they are “*a distinct group with compensation requirements that set them apart from the public service*”. This proposition is not simply a matter of policy perspective. It has long been recognized in the relevant jurisprudence. As articulated by the House of Lords in 1933:

It is we think beyond question that the Judges are not in the position occupied by civil servants. They are appointed to hold particular offices of dignity and exceptional importance. They occupy a vital place in the constitution of this country. They stand equally between the Crown and the Executive, and between the Executive and the subject. They have to discharge the gravest and most responsible duties. It has for two centuries been considered essential that their security and independence should be maintained inviolate. [Emphasis in original]

Many commissions, particularly in Ontario, have rejected public servants as comparators because of the distinctly unique role of judicial officers and their need for independence.³⁹ As the Davie Fifth PCJ Commission observed in specifically rejecting Deputy Ministers as relevant comparators for judges, their respective duties and skills are markedly different, and the principle of judicial independence is not served where there is reliance on salaries that are unilaterally determined by Government:⁴⁰

We do not view the remuneration received by Deputy Ministers as a relevant comparator. Simply put, the duties and responsibilities of these civil servants, the skills required, and the compensation schemes under which they operate are so different from those of the Provincial Judges as to make comparison impractical. Moreover, and as expressed by the First and Second Triennial Commissions, there are significant and legitimate concerns about judicial independence when one relies upon salaries which are unilaterally set by the Government.

I agree that members of the judiciary cannot be directly compared with civil servants for the purposes of remuneration. To the extent that remuneration commissions in Ontario have accepted civil servants as comparators for judicial officers, it has largely only been to provide a minimum benchmark in the event that judicial salaries are found to be much lower than the most senior civil servants, or as a guide for appropriate salary treatment in the context of significant or extraordinary salary increases awarded by Government to its most senior civil servants.

The latter was the case for the 1998 Provincial Judges Remuneration Commission (“Beck Fourth PCJ Commission”), which was the only commission to consider the salaries paid to senior civil servants in making its recommendations of judicial remuneration.⁴¹ That commission’s conclusions were made in the context of recent substantial salary increases that had been provided to the Deputy Minister 3 level in Ontario (“Ontario DM3”), to address “the deteriorating position of the most senior officials”⁴² after years of stringent financial restraint.

That commission noted that Provincial Court Judges had been denied similar salary increases. Their salaries remained far below those of the Ontario DM3s, as a result of a multi-year salary freeze on judicial salaries, which had been followed by only minimal increases because of automatic indexing.⁴³ The Beck Fourth PCJ Commission found that “how the government treated

its most senior officials when the economy improved in 1997⁴⁴ in terms of extraordinary salary increases, was relevant for its analysis.

I note that at the time of the Beck Fourth PCJ Commission the much higher salaries that were paid to Ontario DM3s were in fact in the range of, or exceeded, those paid to Superior Court Judges, the primary comparator put forward by the Provincial Court Judges.⁴⁵ The subsequent Davie Fifth PCJ Commission stressed that the relationship, if and when relevant, is limited to ensuring comparable positive treatment for the judiciary, rather than comparable levels of remuneration:⁴⁶

Although the actual salaries received by Deputy Ministers are not, standing alone, a relevant factor or appropriate comparator, how the Government has treated and continues to treat its most senior civil servants may be relevant. *For example, where the Government is able to provide significant or extraordinary increases to Deputy Ministers, it would be appropriate to conclude that similar types of increases are warranted to establish “fair and reasonable compensation in light of prevailing economic conditions.” Conversely, if there is a significant disparity between lower salaries paid to Provincial Judges and higher salaries paid to Deputy Ministers, one can more readily conclude that the salary established by the Government for its most senior civil servants provides at least a minimum benchmark or guidepost to determine an appropriate salary for Provincial Judges.* This is not to suggest that the salaries of Provincial Judges and Deputy Ministers should be in lockstep, but merely to indicate that circumstances similar to those present before the Beck Commission, where Deputy Ministers had recently received extraordinary increases leading to a disproportionate disparity, are not present here. In the circumstances presented before this Commission therefore we have placed little reliance on salaries paid to Deputy Ministers as a comparator, or as an aid in determining “fair and reasonable” compensation for Provincial Judges. [Emphasis added]

The general principles outlined above have found acceptance in many remuneration commission reports and have guided my analysis of the comparators proposed by the parties to this matter. In reviewing the proposed comparators, I find that the Case Management Masters have excellent judicial comparators in the Traditional Masters, Superior Court Judges, Provincial Court Judges, and the federal Prothonotaries. In my opinion, these offices are the most compelling comparators for determining fair and reasonable remuneration for Case Management Masters in this First Commission.

COMPARATOR ANALYSIS

Having now considered the approach to be taken, I turn to the comprehensive comparator analysis for Case Management Masters.

TRADITIONAL MASTERS

It is clear from a review of the history, nature and jurisdiction of the office of master in this province that Traditional Masters are an ideal comparator for Case Management Masters. The office of master has undergone numerous changes since its origins as the Clerk of the Crown and Pleas in 1794. This evolution has simply continued with the office of Case Management Master, which represents an expansion of the historical role that its predecessors, including the Traditional Masters, have occupied over the last two centuries in Ontario.

For most of the past two decades, Case Management Masters have primarily exercised their Traditional Master jurisdiction, working alongside and in virtually the same manner as their Traditional Master counterparts in the Superior Court of Justice. As the Superior Court of Justice held in *Masters' Association* (SCJ), “the evidence is clear that all masters are performing virtually the same work” and that “virtually all of the actors in the Ontario judicial system...view both Traditional Masters and Case Management Masters as being one and the same.”⁴⁷ The Court of Appeal for Ontario also confirmed that “Case Management Masters exercise the same powers as Traditional Masters”.⁴⁸

In reality, despite their different names, these are not truly separate offices: one is simply an extension of the other. I am therefore in the fortunate position of having a direct judicial comparator in the office of Traditional Master. The fact that the Case Management Master’s range and nature of judicial powers exceeds those of the Traditional Master must be considered in the final, comparative analysis on remuneration.

SUPERIOR COURT JUDGES

Because the office of Case Management Master has been granted with a much more robust and flexible set of judicial tools that have significantly expanded its judicial reach over time, Superior Court Judges are perhaps even better comparators. The evidence has established that although Case Management Masters, like Traditional Masters, are not judges and their jurisdiction is narrower than that of a judge,⁴⁹ they are full judicial officers exercising an important and broad civil, bankruptcy and family law jurisdiction that is essentially a subset of that of a Superior Court Judge.

As has also been established, when exercising their duties, Case Management Masters function as would a judge, with virtually the same role and responsibilities. The office of Case Management Master was created due to a crisis in the civil justice system at a time when it was discovered that there would be insufficient federal judicial appointments to meet the court's unmanageable civil caseload. The crisis was precipitated in part by the Government's decision to phase out the office of Traditional Master.

This crisis was somewhat alleviated by the creation of the office of Case Management Master. It assumed the responsibilities of a Superior Court Judge where needed and constitutionally permitted, as did Traditional Masters.

For the most part, outside Toronto, Ottawa, and Windsor, the Case Management Masters' jurisdiction is performed exclusively by Superior Court Judges.

PROVINCIAL COURT JUDGES

Provincial Court Judges are also highly suitable comparators for Case Management Masters. Both Provincial Court Judges and Case Management Masters are creatures of statute with limited areas of responsibility, many of which were derived from those held by Superior Court Judges, one primarily in the area of criminal law and the other primarily in civil law.

In accordance with the structure of the court system in Ontario, the two offices are attached to separate courts: the Case Management Masters to the Superior Court of Justice to deal with civil matters, and the Provincial Court Judges to the Ontario Court of Justice for criminal cases. In both cases, they perform their duties in essentially the same manner as Superior Court Judges.

The fact that the jurisdiction of Provincial Court Judges is primarily criminal law, and that Superior Court Judges also have judicial responsibilities in this area, does not weaken the comparison. I note that when the provincial court previously comprised three separate divisions, criminal, civil, and family, all Provincial Court Judges received the same level of remuneration regardless of their subject-matter jurisdiction. There was no suggestion that any particular area of law trumped another, or that the judges from one division were not equivalent in stature to those from another based on their particular subject-matter jurisdiction.⁵⁰

Similarly, in an interest arbitration chaired by William Kaplan in 2000, the panel found that the most senior Crown Counsel in government had enjoyed an historic relationship of remuneration parity with Provincial Court Judges, and that this relationship continued to be relevant for determining their remuneration. Importantly, the remuneration linkage was accepted as appropriate without any indication that these lawyers practised exclusively in the area of criminal law.⁵¹ Special Advisor Adams also accepted “all provincial and territorial court judges” across Canada as a comparator for the federal Prothonotaries, which would have included Ontario’s Provincial Court Judges. He made this finding despite the fact that the Prothonotaries, like Case Management Masters, are restricted from dealing with matters affecting the liberty of the subject.⁵²

I note that Case Management Masters in Ottawa and Windsor share important responsibilities for family law matters with both Provincial Court and Superior Court Judges. Within this shared jurisdiction, all three offices perform similar adjudicative work. In his submissions, Traditional Master Linton advised that at the time of the Government decision to phase out the office of Traditional Master, then Attorney General Ian Scott met with the Traditional Masters and offered to appoint some of those doing family law work to the office of Provincial Court Judge.⁵³ In my

view, that proposed course of action by the province's most senior law officer illustrates the well-recognized similarity in adjudicative functions between these two positions.

Notwithstanding their current shared jurisdiction in family law, the Court in *Masters' Association* (SCJ) suggested that the Case Management Masters' lack of criminal law jurisdiction does not diminish the value or quality of their adjudicative work. Justice Platana held that "[w]hile they have no criminal jurisdiction, there can be no doubt that Case Management Masters make important judicial decisions that affect, from a practical perspective, the final outcome of civil litigation."⁵⁴

As has been previously recognized in relation to its predecessor offices, the legal issues that Case Management Masters deal with are not trifling in nature. They address complex matters in both civil and family law that can have a profound impact on the lives of individuals and the success of businesses in Ontario. Their lack of criminal law jurisdiction is only relevant to my review to the extent that it demonstrates that Case Management Masters operate within a subset of a Superior Court Judge's full jurisdiction; it does not, however, invalidate the comparison to either Provincial Court or Superior Court Judges.

In my view, it is significant that the legislature has determined that Case Management Masters must possess the same minimum level of skill and expertise as is required of both Provincial Court and Superior Court Judges, as was also the case for Traditional Masters. No other judicial office in this province shares the same mandatory qualifications for office. As the former Attorney General Scott remarked in 1989, these qualifications represent the most stringent requirements for judicial office in Canada. Thus, the office of Case Management Master largely recruits from the same pool of candidates as Provincial Court and Superior Court Judges.

The validity of the comparison between Provincial Court Judges and Case Management Masters is supported by the principled, long standing remuneration linkage that has been in effect for nearly forty years between those judges and Traditional Masters. As the Ontario Law Reform Commission confirmed in its 1973 review, the basis for that linkage is the strong similarity between the functions performed by, and the nature of, these offices.

The suitability of the Provincial Court Judge as a comparator for the office of Case Management Master is further supported by the fact that Masters in British Columbia,⁵⁵ Manitoba,⁵⁶ and Alberta⁵⁷ who have similar functions as Traditional Masters have their remuneration formally linked through statute or regulation to their province's provincial judges. I note that both Special Advisors Adams and Cunningham, who conducted reviews for the federal Prothonotaries, accepted and considered the remuneration of the British Columbia, Manitoba, and Alberta Masters in arriving at their conclusions.⁵⁸

The Alberta and Manitoba remuneration commissions, in fact, turned their minds to the appropriateness of the remuneration linkage between masters and provincial judges. Their conclusions are informative here. The 2009 Alberta Judicial Compensation Commission ("2009 Alberta Judges Commission") stated:

VII. Masters in Chambers

Our mandate is to make recommendations covering remuneration for Judges of the Provincial Court. *Subject to provincial acceptance, those recommendations will also apply to Masters in Chambers.* There are vastly more Provincial Court Judges than there are Masters in Chambers, the latter office being something of a constitutional anomaly. While the Masters in Chambers operate within the Court of Queen's Bench of Alberta, they are not Section 96 Superior Court Judges. As a result the remuneration is subject to Provincial not Federal jurisdiction.

For a variety of very practical reasons *the remuneration and pension arrangements for the Masters in Chambers are linked directly, by Section 9.1 of the Compensation Regulation to those established for Judges of the Provincial Court.*

For the reader, we wish to make it clear that the emphasis on the Provincial Court and the absence, in the submissions and in our resulting recommendations, of references to the role of Masters in Chambers, is no indication that we are not cognizant of their special and vitally important role in the court system of Alberta. It is simply a result of a statutory link between the two offices and *an apparent acceptance all around of this historical linkage.*

Masters in Chambers exercise a wide variety of jurisdictions on behalf of the Court of Queen's Bench. Their ready availability and their particular expertise in important practice matters add considerably to the efficiency of the Court of Queen's Bench and to the speed and quality of justice available to litigants before the court. *They have experienced many of the same trends in terms of their jurisdiction and concentration of*

*their work as have their colleagues on the provincial bench. The importance of judicial independence, the need to recruit and retain qualified candidates and the requirement for wisdom in their judicial duties and discretion and propriety in their private lives applies equally to those who hold this important office.*⁵⁹ [Emphasis added]

In its submissions to this Commission, the Government urged me to find that the 2009 Alberta Judges Commission merely accepted that, for practical reasons such as administrative efficiency, the remuneration of masters and judges had been linked by regulation. In considering the entire passage, however, I am not persuaded by the Government's assertions. That commission clearly considered the issue of parity and expressed its approval, while also acknowledging that the linkage had already been established by regulation.

The findings of the 2002 Judicial Compensation Committee for Manitoba ("2002 Manitoba Freedman Commission") provides even more persuasive evidence of the acceptance of the appropriateness of a linkage between masters and provincial judges. That commission faced a unique situation in which legislation entitling its provincial masters to the same salary, benefits, and pensions as provincial judges had not yet come into effect, which meant that it had to consider the suitability of the remuneration linkage independently. The commission noted that prior to the legislative amendment the masters in Manitoba had been classified as civil servants, which had led to a growing disparity between their remuneration and that of provincial judges. The commission observed:

Although the Masters are not Judges, the clear intent of Chapter 34 is to vest them with a sufficient degree of independence that, for our purposes, renders any difference immaterial...

In light of the provisions of Bill 46 we do not need to analyze in detail the role, responsibility and work of the Masters. Among the observations made by the Masters and not challenged by the Province, were: "They are judges in everything but name"; "They have a regular docket in Family Court"; "They are Registrars in Bankruptcy"; "Their role is complex"; "They are required to give written reasons" (one example was given of a Master who has written almost 300 written decisions over 14 years); "They have been undervalued by the system." Counsel for the Masters made it clear that other "judicial officers" did not have the same characteristics as did the Masters; those others were more like clerks, fulfilling an administrative role, whereas the role of the Masters was similar in fact to that of Queen's Bench Judges except that they did not have criminal law authority. They had a breadth of jurisdiction encompassing family law, administrative

law, bankruptcy and other matters. It is clear that, as a matter of public policy from and after July, 2001, the Province has determined that the work, responsibility and position of the Masters entitles them to the same compensation package as the Judges.

The facts provided to us demonstrate that the work of the Masters has not diminished from the time when their salaries started to diverge from the Judges'. At the very least, the work and responsibilities of the Masters remained at the same level, and if anything appears to have increased. During this time the Masters were compensated essentially on a basis unilaterally determined by the Province and outlined in detail in the submissions.⁶⁰

The 2002 Manitoba Freedman Commission went on to conclude that Masters should receive the same salaries, benefits and pensions as provincial judges for the period during its mandate that was not subject to the statutory amendment authorizing automatic linkage. In addition, although the suggestion went beyond its authority, that commission also urged the Manitoba government, by invoking "moral suasion", to rectify the historically inadequate compensation paid to its Masters during the time period that preceded its mandate.⁶¹

Thus, that commission conducted an independent review of the duties and responsibilities of the Masters in Manitoba to determine their proper level of compensation. It concluded that maintaining remuneration parity with provincial judges was the right course. I find the conclusion of that commission to be informative for my mandate.

In its submissions to this Commission, the Government argued that the narrowing of salaries between Provincial Court Judges and Superior Court Judges in Ontario was due primarily to a transfer of criminal law jurisdiction from the Superior to the Provincial Courts. It submitted that Traditional Masters have unjustifiably reaped windfall benefits by virtue of their remuneration linkage to Provincial Court Judges. It contended that this historical linkage therefore cannot provide guidance to this Commission regarding the appropriate level of compensation for Case Management Masters. To support this position, it relied on the following passage from the Court of Appeal for Ontario in *Masters' Association (OCA)*:

It is true that there has been a growing gap between the salaries of Case Management Masters and traditional Masters. However, I agree with the application judge's explanation for the current salary of the two remaining traditional Masters, namely, the link between the salaries for traditional Masters and provincial court judges was made in the context of the abolition and staged phasing-out of the office of traditional Master. Moreover, the traditional Masters benefited from this linkage by, in effect, riding on the coattails of the provincial court judges who enjoyed substantial salary increases to take account of their mushrooming criminal workload. Accordingly, I agree with the application judge's observation that the "salary level [for traditional Masters] does not reflect constitutional minimum requirements."⁶²

In my view, the Court of Appeal is referring here to the legislative link that occurred in 1994, following the decision to phase out the office of Traditional Master. However, this legislative link was preceded by a long-standing policy that tied the remuneration of Masters with Provincial Court Judges. I also note that the Court of Appeal's remarks apply exclusively to Traditional Masters and Provincial Court Judges, not to Case Management Masters, and are therefore *obiter dicta*. Assuredly, that Court would not have intended to predetermine or limit the very mandate of this Commission.

The Court of Appeal remarks about "riding on the coattails of the provincial court judges", while aimed solely at the office of Traditional Master, cannot be considered to apply by extension to Case Management Masters. From the inception of the office in 1996, Case Management Masters have exercised a much broader jurisdiction than that of Traditional Masters.

Moreover, throughout its existence, the office of Case Management Master has undergone considerable and rapid expansion in the volume and complexity of its judicial work as well as in its assigned jurisdiction. Thus, any argument that an increased criminal workload contributed to the large salary increases granted in 1998 to Provincial Court Judges following the Beck Fourth PCJ Commission can arguably also be applied to Case Management Masters. Yet Case Management Masters have not seen similar significant increases in their salaries as a result of their "mushrooming" civil, bankruptcy and family law workload nor have they been paid the same remuneration as Provincial Court Judges.

When the Toronto Region moved to universal case management in 2001, the volume of the Case Management Masters' work increased tremendously. Despite their best efforts, the resources available were simply insufficient to meet the demand and a second crisis occurred in the civil courts. Because they lacked jurisdiction in case management, Traditional Masters were unable to assist during this crisis. As Chief Justice Winkler remarked in 2007, it was widely recognized that the 11 Case Management Masters in Toronto at the time⁶³ had exerted heroic efforts in the face of an unmanageable caseload. He wrote:

Notwithstanding its early success in Ottawa and Windsor, universal case management was not workable in Toronto. This was largely due to the volume of cases, and relative lack of resources. The bulk of the case management work fell to a handful of case management masters and court administrators, but notwithstanding their Herculean efforts, it soon became apparent that they could not micromanage the almost 20,000 cases filed every year in the Toronto Region, to the extent mandated by Rule 77.

I do want to say what, in my view did *not* cause the problem. Court staff, judges and in particular the case management masters were more dedicated and diligent than anyone had a right to expect. They were given an impossible task, and worked under what ultimately proved to be impossible circumstances.⁶⁴ [Emphasis in original]

As already discussed, the jurisdiction of Case Management Masters continued to grow in the years that followed as the needs of the civil justice system evolved. Case Management Masters came to assume an even greater subset of Superior Court Judges' work, continuing to exceed the jurisdiction of Traditional Masters in civil law and assuming additional responsibilities in family law. They were also re-assigned to bankruptcy law, which had been earlier withdrawn from the jurisdiction of Traditional Masters. Thus, if increased criminal law jurisdiction played a role in the salary increases of Provincial Court Judges, then it can be said that Case Management Masters have experienced comparable and significant increases to their civil, bankruptcy and family law jurisdiction.

I agree with the Case Management Masters' submission that the fundamental philosophical underpinning of the recommendations for pay increases in both the Beck Fourth and Davie Fifth PCJ Commissions was the recognition that the role, functions, and qualifications for office of

Provincial Court Judges were essentially the same as those of Superior Court Judges: both offices preside within their jurisdictions as members of a single court of justice in Ontario. Any material disparity in remuneration could therefore no longer be justified or accepted.⁶⁵ Indeed, their near equivalence is clearly shown by the ease with which certain areas of jurisdiction were transferred back and forth between the two courts. As the Beck Fourth PCJ Commission concluded, the time was “long past-due to end out-dated notions of hierarchy and second class status.”⁶⁶

The Government submitted that the remuneration linkage between Traditional Masters and Provincial Court judges has not been determined by any objective assessment of the duties and responsibilities of Traditional Masters, but simply as a matter of administrative convenience as their office was phased out. It argued that the linkage was not an explicit recognition that the judicial functions of the two offices are equivalent, or that Provincial Court Judges are suitable comparators for Traditional Masters.⁶⁷ It emphasized that it made a deliberate decision, when the office of Case Management Master was created, not to link the salaries of its holders to those of Provincial Court Judges.⁶⁸

The Government also relied on the Court of Appeal decision in *Masters’ Association (OCA)*, which stated that it agreed with “the application judge’s explanation for the current salary of the two remaining traditional Masters, namely, the link between the salaries for traditional Masters and provincial court judges was made in the context of the abolition and staged phasing-out of the office of traditional Master.” In my opinion, however, the Court of Appeal was referring here simply to the *automatic* linkage that was put in place by legislation following the decision to phase out the office of Traditional Master.

Both the evidence before me and the reasoning of the Court of Appeal in *Masters’ Association (OCA)* reveal that the remuneration parity between Traditional Masters and Provincial Court Judges has been subject to an objective process, resulting in a level of remuneration that can be relied upon by this Commission. As already discussed, the Court of Appeal for Ontario held unequivocally that Traditional Masters, by virtue of their linkage to the remuneration process for Provincial Court Judges, have indeed been subject to the independent process required by *PEI*

Reference, and that the office of Case Management Master in this province was, at the time of its decision, “the solitary exclusion from this shared, and constitutionally appropriate, picture.”⁶⁹

In 1973, the Ontario Law Reform Commission conducted a thorough review of the history and terms of independence of the office of Traditional Master. It made a non-binding recommendation to the Government of Ontario⁷⁰ that Traditional Masters be provided with the same security of tenure as Provincial Court Judges, based on the nature of their duties.⁷¹ When the Government chose to implement the Law Reform Commission’s recommendations on tenure, its subsequent decision shortly thereafter to pursue remuneration parity, following input from the Traditional Masters themselves,⁷² and after seeking Cabinet approval,⁷³ was in keeping with those recommendations.

I note that, subsequently, in 1988 the Henderson First PCJ Commission made specific observations about the remuneration of Traditional Masters, having received submissions from the Masters’ Association of Ontario and from Traditional Master Sandler,⁷⁴ although it acknowledged that this matter lay beyond its mandate.⁷⁵ That commission nevertheless stated:

We were informed that, by agreement with a former Attorney General, the Supreme Court Masters receive remuneration and benefits at the same rates and upon the same basis as Provincial Court Judges. In view of the work they perform in our judicial system they are clearly judicial officers, and in view of the complexity and the monetary value of the issues that come before them, it is appropriate that this equivalence continue.⁷⁶

In 1989, when the Government made the decision to phase out the office of Traditional Master, it could have fixed its salary at any amount it believed was appropriate, including a reduction from parity. Instead, in 1994, it entrenched the remuneration linkage with Provincial Court Judges into the *Courts of Justice Act*, which meant adhering to the binding salary recommendations of the commissions for Provincial Court Judges.

I note that administrative efficiency could still have been achieved had the Government legislated a linkage that was less than parity. For example, it could have chosen to legislate salaries as a fixed percentage of Provincial Court Judge salaries. The choice to legislate parity, however, was in keeping with the long-standing remunerative relationship that it had implemented following the Ontario Law Reform Commission’s report. It demonstrates the

Government's acceptance of the appropriateness of that linkage and its agreement with the remarks of the Henderson First PCJ Commission regarding Traditional Master remuneration.

On the matter of pensions, Traditional Masters had already been placed in the same judicial pension plan as Provincial Court Judges beginning in 1984. As of the 1994 legislative amendments, therefore, any changes to that plan for Provincial Court Judges also automatically applied to Traditional Masters. I note that pensions are paid from the time of eligibility for the entire life of the recipient, with additional benefits paid to a surviving spouse. The cost of providing Traditional Masters with the same judicial pension plan as Provincial Court Judges cannot have been viewed as inconsequential, but the Government chose not only to accept this cost in 1984, but also entrenched it in legislation 10 years later.

The Government also chose to legislate the remuneration linkage between Traditional Masters and Provincial Court Judges at a time when the number of Traditional Masters still in office was significant. When in 1989 the Government announced the repeal of the power to appoint Traditional Masters, with 16 in office at the time, it predicted that the process of attrition would be completed in 10 to 15 years.⁷⁷ In 1994, when the Government enacted an automatic remuneration linkage between Traditional Masters and Provincial Court Judges, it knew that binding recommendations on salaries and benefits for Provincial Court Judges could potentially be applied to Traditional Masters for at least 10 more years. In 1995, just one year after the legislative reforms were enacted, there were still 10 full-time and six part-time Traditional Masters in office, a significant complement that compares well to the 16 Case Management Masters in office today.

In addition, under the terms of the judicial pension plan, retired Traditional Masters can continue to serve on a part-time, *per diem* basis earning income in addition to their pensions, up to a maximum of a full-time Traditional Master salary. The attendant costs cannot have been regarded as insignificant, yet in its submissions the Government declared they were incurred simply as a matter of administrative convenience.

I have difficulty accepting the suggestion that the Government implemented remuneration parity in 1994 purely as a matter of administrative convenience. I cannot believe that the Government would have knowingly and willingly committed taxpayers' money to provide a level of judicial remuneration that it believed to be inappropriate. Rather, I conclude that this was a deliberate, thoughtful action, approved by the Legislative Assembly that was intended to achieve a specific objective: parity.

I find further support for my conclusion in the similar findings of other remuneration commissions, for example, Special Advisor Cunningham, who conducted the second review of the federal Prothonotaries' remuneration in 2013 and accepted Masters in other provinces, specifically those in Alberta, British Columbia, and Manitoba, as proper comparators based on the nature of the positions and the work performed. He did not express any concern that these Masters, like Traditional Masters in Ontario, had been linked to a compensation process applied to provincial judges instead of separate commission processes.⁷⁸ Moreover, in its official response, the federal government did not challenge that commission's reference to provincial masters when presenting its recommendations on remuneration.⁷⁹

Independent of the Court of Appeal's corroborative finding, I find that the Traditional Masters level of remuneration, which provides parity with Provincial Court Judges, can be relied upon as an appropriate level of financial security for the judicial office of Case Management Master.

The Government submitted that as an "abolished" office, with only two retired incumbents serving on a part-time *per diem* basis at the time of the hearings, Traditional Masters comprise too small a group to serve as a sufficiently robust comparator for Case Management Masters. It argued that an analogous situation presented itself before the Davie First DJ Commission. The Government said that that commission rejected a proposed comparator group, a former division of the office of Provincial Court Judge, because it was part of an abolished office whose numbers had fallen dramatically through attrition. The Government also referred to the decision of Special Advisor Adams, who, in 2008, rejected the Traditional Masters in Ontario as a comparator for the federal Prothonotaries, since the group was considered too small to serve as a robust comparator.⁸⁰

In my opinion, these assertions are not persuasive nor do they apply to the situation before me. I am unable to accept the suggestion that this comparator should be disregarded in my deliberations solely on the basis of its small size. I would point out that the federal commissions for Superior Court Judges, whose office numbers in the thousands, consistently consider an extremely small but elite class of Deputy Ministers, who typically number less than 15, in setting an appropriate level of remuneration for those judges.⁸¹

Further, in the unique situation before me, in that the role and function of Case Management Masters are a continuation of the office of Traditional Master, I am not dealing with two entirely different judicial offices. Although technically the office of Traditional Master is being phased out, its role and functions certainly are not. The two offices have worked alongside one another in the same province as part of the same court with overlapping authority and jurisdiction since the creation of the office of Case Management Master. What has actually occurred is a transfer of duties from one to the other, with additional responsibilities that are consistent with the overall role of Master.

For all the reasons discussed, I have concluded that Traditional Masters, Superior Court Judges, and Provincial Court Judges are excellent comparators for the Office of Case Management Master. As a result, their respective levels of remuneration must carry significant weight in my assessment of what constitutes fair and reasonable remuneration for its officeholders.

PROTHONOTARIES

Federal Prothonotaries are good comparators for Case Management Masters since both offices have their origins in the same historical office of Master and therefore play an analogous judicial role. In fact, because of their similar roles, the independent remuneration commissions for the federal Prothonotaries have looked to the offices of various provincial Masters for guidance in their reviews.

Although they adjudicate in different areas of law, the federal Prothonotaries occupy a similar judicial position in the Federal Court to the Case Management Masters in the Superior Court of Justice. In fact, there has been a long-acknowledged historical link between the Prothonotaries and the Traditional Masters in Ontario, the Case Management Masters' predecessor office.

In 1993, in *Aqua-Gem Investments Ltd.*, the Federal Court of Appeal noted the common origins of the two offices. The Court stated that when Parliament created the office of Prothonotary, it was mindful of the role of Masters not only in the judicial system of England but also in Ontario, "both of which made extensive use of these judicial officers".⁸² Thus, the office of Prothonotary, which was established by federal statute in 1971,⁸³ was modeled to an extent on the role and functions of the Traditional Master in Ontario, which the Case Management Masters inherited. The comparison led Special Advisor Adams, who conducted the first review in 2008, to conclude the following about the federal Prothonotaries:

They function essentially as a master does in the judicial systems of England and Canada. This judicial role is therefore ancient and, where it is employed, has become integral to the independent administration of the rule of law.⁸⁴

Special Advisor Adams also noted with approval that the dominant remuneration objective of the federal government when the first Prothonotaries were appointed in 1985 was parity with the Ontario Traditional Masters. He reported that the Prothonotaries' salaries quickly fell behind, however, because at that time a direct link was instead made to a particular class of federal government appointees chosen because its salary had initially approximated that of the Traditional Masters'; however, over time, their compensation failed to keep pace with Traditional Masters.⁸⁵ Ultimately, Special Advisor Adams considered as comparators Masters in British Columbia, Alberta, and Manitoba, whose work is similar in function to that of Ontario's Traditional Masters, to inform his recommendations.⁸⁶

Special Advisor Cunningham, who conducted the second review of Prothonotary remuneration in 2013, also found these same provincial Masters were important judicial comparators for the federal Prothonotaries, in addition to their closest judicial comparators, the Federal Court Judges,⁸⁷ based on the nature of these positions and their associated work.⁸⁸

In my view, a comparison between the roles and responsibilities of federal Prothonotaries and Case Management Masters in Ontario informs my conclusions on fair and reasonable remuneration. The federal Prothonotaries conduct work that is not only judicial in nature, but also essential to the efficient management and timely disposition of proceedings before the Federal Court.⁸⁹ This is the same role that Case Management Masters perform, as did Traditional Masters before them, in the Superior Court of Justice. Like Case Management Masters, who exercise a significant subset of the powers and functions of a Superior Court Judge, the federal Prothonotaries have many of the powers and functions of a Federal Court Judge.⁹⁰

I am not persuaded that there are any significant differences in the Prothonotaries' jurisdiction that would serve to detract from the comparison. For example, the fact that the federal Prothonotaries have full trial jurisdiction with a monetary limit of \$50,000 has little relevance to my deliberations. By virtue of their reference jurisdiction, Case Management Masters essentially conduct trials and are unrestricted by any monetary limits. In fact, the significance, scale, and complexity of civil matters dealt with by the Case Management Masters, which may involve multiple parties (including the Federal or Provincial Crown) and potential judgments in the hundreds of millions of dollars largely blur any distinctions between the two offices.

Like Case Management Masters, the federal Prothonotaries are full-time judicial officers who require ten years of experience as a lawyer to qualify for appointment. This requirement, Special Advisor Adams observed, reflects the high level of skill and judgment required to deal with many of the complex matters that are heard in the Federal Court.⁹¹ The same is true for Case Management Masters.

While I note that both Special Advisor Adams and Special Advisor Cunningham rejected the Traditional Masters as a comparator for the federal Prothonotaries, neither appeared to do so based on a comparison of functions. In my view, none of the reasons they offered undermines the appropriate comparison of federal Prothonotaries with Case Management Masters in this review.⁹²

In fact, I find that the historical linkage between the salaries of the Prothonotaries and the Ontario Traditional Masters that was accepted by Special Advisor Adams supports a comparison with the Case Management Masters who inherited that same role. Moreover, the responsibilities of Case Management Masters, unlike Traditional Masters, include important duties of conducting case management and presiding over pre-trial conference proceedings, which they uniquely share with the Prothonotaries.

In their reviews, neither of the Special Advisors mentioned Ontario's Case Management Masters as potential comparators for the Prothonotaries. The limited evidence available to me, however, suggests that the office of Case Management Master might have been mischaracterized before them. For example, Special Advisor Adams reported that in its submissions one of the reasons the federal government urged him to reject masters in Ontario as a comparator was because "[i]t is almost twenty years since Ontario *limited the jurisdiction of new masters to case-management*, leaving only one remaining full-time, grand-fathered 'traditional master'."⁹³ [Emphasis added]

Implicit in this statement is the incorrect notion that the offices of Case Management Master and Traditional Master are entirely distinct, without any overlapping jurisdiction, functions, or roles. Moreover, the portrayal of Case Management Masters' duties as being limited only to case management is simply wrong.

In summary, having had the benefit of reading both of the Special Advisors' reports, I am convinced that the federal Prothonotaries occupy a position that is fully comparable to the office of Case Management Master, albeit in a different court. In addition to the recommendations of the Special Advisors, I note the federal government's decision in February 2014 to substantially implement the recommendations of Special Advisor Cunningham and, in the case of pensions, go beyond them, to provide pension benefits on the same basis as Federal Court Judges. This

informs my recommendations regarding the determination of fair and reasonable remuneration for Ontario's Case Management Masters.

JUSTICES OF THE PEACE

There is no doubt that Justices of the Peace play an important role in the criminal justice system, as their periodic remuneration commissions have acknowledged.⁹⁴ There is no basis, however, for comparing Justices of the Peace with Case Management Masters. While all judicial officers exercise an adjudicative function, it does not follow that all judicial officers are appropriate comparators for one another. The crux of the issue here is not the lack of shared subject matter, but rather the vastly different qualifications for office, which clearly must affect the level of remuneration that can be considered appropriate. Different qualifications for office also require different compensation incentives to attract the best candidates to office.

Justices of the Peace are not required to be lawyers or to have legal training. On the other hand, Case Management Masters share the same qualifications for office as Provincial Court and Superior Court Judges, which is at least 10 years of experience as a lawyer. The differences in the required training and experience for these two offices also reflect the different nature of the adjudicative work and make them distinct. They require an entirely different level of judicial remuneration as a result.

I note that the Government, in its submissions before the Justices of the Peace remuneration commissions, has taken this very same position. It objected to Provincial Court Judges as a comparator precisely because of the difference in the qualifications for the two offices, and despite their shared jurisdiction in criminal law, including their ability to affect the liberty of the person. In 2000, the Second Justices of the Peace Remuneration Commission ("Houlden Second JP Commission") accepted the Government's position and stated:

Turning then to the salaries of Justices of the Peace, counsel for the AJPO submitted that the salaries of Justices of the Peace should be 70% of that received by Justices of the Ontario Court of Justice. We can find no such justification for such an award. *A judge of the Ontario Court of Justice is a lawyer who has practised law for at least ten years and*

*has shown that he or she has attained a pre-eminent position in the legal profession. As counsel for the Attorney General pointed out, the salary of a judge of the Ontario Court of Justice is heavily impacted by the need to attract senior counsel without requiring undue financial sacrifice. This has no application to Justices of the Peace.*⁹⁵ [Emphasis added]

Subsequent Justice of the Peace remuneration commissions have reached the same conclusion.⁹⁶

As is the case for Provincial Court Judges, the markedly different qualifications for office make Justices of the Peace an inappropriate comparator for Case Management Masters.

DEPUTY JUDGES

Deputy Judges are similarly not appropriate comparators for Case Management Masters. Both the qualifications for appointment and the terms of office for Deputy Judges result in fundamentally different and much reduced requirements for their financial security when compared with full-time Case Management Masters. As such, and notwithstanding the difficulty of comparison with full-time salaries, the amount of Deputy Judge *per diem* rates has no bearing on the appropriateness of the level of remuneration for Case Management Masters.

PRIVATE SECTOR LAWYERS

The majority of Case Management Masters in this province have come from the ranks of senior members of the private bar. It is important therefore to take the incomes of this group of lawyers into account when determining an appropriate level of remuneration for this office. Because the earnings of many of these private sector lawyers fall within higher income brackets, the level of remuneration for Case Management Masters must not be set at a level that might dissuade those outstanding candidates from within this group from seeking office. Rather, the office must continue to attract those with the requisite skills, knowledge, and expertise from within this group, who represent the best and brightest in the province.

The issue is magnified by the fact that Case Management Masters share the same qualifications for office as Provincial Court and Superior Court Judges, and therefore compete for the same pool of private sector lawyers. I note that many remuneration commissions, particularly for Superior Court Judges, have accepted the incomes of private sector lawyers as an important, and in some cases, the *most* important comparator for determining judicial remuneration,⁹⁷ taking into account the considerable value of the judicial pensions often provided to those offices.⁹⁸

As such, the overall remuneration of Case Management Masters must be sufficiently competitive so that the most capable candidates continue to consider appointment to this important judicial office. If not, those able candidates who may be interested in and well-suited for the role of Case Management Master may choose instead to apply to the better-compensated judicial positions of Provincial Court or Superior Court Judge, or may choose not to seek office as a Case Management Master at all, because of a perception that it is one of significantly inferior status based on comparative levels of remuneration.

As the Davie Fifth PCJ Commission observed when justifying a narrowing of the disparity between the salaries of Provincial Court and Superior Court Judges, the relationship between compensation and status is a reality that must be acknowledged:

It is self-evident that the most qualified candidates who may aspire to judicial appointments are more likely to be attracted to the appointment which is better compensated, or which is perceived to have greater status or stature because of higher compensation. It is perhaps unfortunate that compensation and status are too often related in our society. However, when it comes to our system of justice, that relationship between compensation and status may have an adverse impact not only by causing the public to view the lower paid Provincial Judges as “inferior,” but also by acting as a disincentive to the application of otherwise qualified candidates. The potential pool from which both the federal and provincial government appoints the judiciary is limited. On the basis of the material presented we accept that to fill vacancies in the Ontario court system both levels of Government recruit and select from the same pool. A significant disparity in salary is likely to negatively affect that “competition” for the most suitable candidates.⁹⁹

Although many remuneration commissions have accepted income tax data from the Canada Revenue Agency (“CRA”) as providing the most appropriate guidance for this comparison, most have remarked on the multiple challenges inherent in the collection and proper use of such

data.¹⁰⁰ Difficulties have arisen, for example, in determining the most appropriate age range and salary segment to best represent the target population, as well as the geographic locations from which data should be drawn. The accuracy and reliability of the available numerical data have also been called into question.

In fact, I endorse the approach of the Beck Fourth PCJ Commission, which also acknowledged the many challenges inherent in relying on CRA income tax data. That commission chose instead to simply use the salary paid to Superior Court Judges, the Provincial Court Judges' primary comparator, as an approximation, stating that this represents "a reasonable level of remuneration for those who we hope would seek appointment to the Provincial bench."¹⁰¹ Given that much of the analysis of private sector income data has occurred at the federal level, and that the salaries of Superior Court Judges have been determined, in part, on the basis of such a comparison, a similar approach is appropriate for the Case Management Masters. I find that the salaries of Provincial Court Judges also provide a reasonable approximation for the private sector income comparison, since their remuneration has been driven in large part by a comparison with Superior Court Judge salaries.

The Government submitted that it has not had any difficulty in recruiting and retaining Case Management Masters, as the Court of Appeal also held in *Masters' Association (OCA)*.¹⁰² On that basis, it argued that the current level of remuneration for Case Management Masters is sufficient, and that any comparison to private sector incomes is not meaningful at this time. In support of its position, the Government submitted data on the number of applications it has received in response to previous postings for the office of Case Management Master, which have been tabulated in the following table:¹⁰³

POSTINGS FOR CASE MANAGEMENT MASTER POSITIONS	
<i>Year</i>	Number of Applications Received
2001	125
2005	83
2006	95
2009	82
2012	47

I first note that the data reveal that the number of applications, in fact, decreased significantly by about 40-50 percent in 2012, in comparison with previous years. I note as well that the 2012 data was not before the Court of Appeal, which rendered its decision in 2011. More important, however, is the fact that such data provide no indication of the quality of the applications received, which is of course of great relevance. As the McLennan Seventh Federal Commission found, the number of outstanding candidates is only ever a small subset of the total number of applicants.¹⁰⁴

Accordingly, the gross number of applications received in response to a posting, on its own, is not meaningful in determining whether the current level of remuneration for Case Management Masters is indeed appropriate. It is not in the public interest to merely attract a certain number of applicants to the office of Case Management Master. What is key is attracting the most able candidates. When those candidates are drawn from those earning some of the highest incomes in the private sector, the level of remuneration of the judicial office must be a point of comparison and must provide a reasonable incentive.

It is recognized that with remuneration coming from the public purse, it is not possible to match those private sector salaries that fall within the highest income brackets. Nor is it desirable to do so, since judicial office must not be sought for its monetary rewards alone. As many of the federal remuneration commissions have found, many highly qualified private sector lawyers accept the financial sacrifice involved in an appointment to judicial office because of the other attractions of judicial life. These include, for example, the opportunity to contribute to public service, the prospect of participating in interesting work that contributes to the development of the law, complete freedom from the need to generate business, and full security of tenure.¹⁰⁵

The concern, however, is that if the current disparity between the remuneration of Case Management Masters and the salaries of private sector lawyers, as approximated by Provincial Court and Superior Court Judge salaries, is permitted to persist or even to grow, it will no doubt prove increasingly difficult to attract a healthy number of outstanding candidates from that group to this judicial office. This does not serve the public interest of ensuring the highest quality system of justice in this province.

The Davie Fifth PCJ Commission, in fact, reached the same conclusion in the absence of concerns surrounding recruitment, stating:

We do not have any reason to doubt or question the Government's assertion that the current level of remuneration has been adequate to attract outstanding candidates. Neither do we dispute the premise that highly paid lawyers do not necessarily make better judges, or the relevance of adding Crown counsel salaries into the mix when examining the incomes of lawyers. Our concern with totally ignoring, or largely discounting, the remuneration of practicing lawyers is that growth in the existing disparity between the levels of remuneration will, over time, adversely affect the current enviable record of the Government in attracting quality candidates. To that end the income tax data submitted by both participants before this Commission was relevant as providing a very general sense of lawyer's remuneration, and a somewhat impressionistic context of the relationship between the salaries of members of the bar and the bench.¹⁰⁶ [Emphasis added]

I note, as well, the decision of an interest arbitration in 2000, chaired by William Kaplan, which reviewed the compensation of Crown Counsel in Ontario. In that decision, the arbitration panel similarly concluded that the incomes of private sector lawyers were an important comparator for

Government lawyers. It found that a substantial wage increase was justified on that basis,¹⁰⁷ despite the absence of any problems with attrition. It concluded that:

Considering the sophisticated and highly responsible work being performed by Association members, it is clear, looking at the data presented to us, that private sector lawyers' salaries are well in excess of those earned by government lawyers, even when adjusted by this award. *Market conditions for lawyers are relevant, and while attrition among Association members is not great, it is appropriate to compare lawyers with lawyers.* While this award will not result in achieving parity of crown lawyer salaries with private sector lawyer incomes, it will substantially redress the existing salary disparity since 1991. In that respect, it provides further and independent justification for the salary increase we have awarded.¹⁰⁸ [Emphasis added]

The same reasoning applies for Case Management Masters. Whether or not there are current concerns with recruitment or retention, the comparison remains live and relevant. A reasonable relationship must be maintained with the incomes of private sector lawyers.

For the reasons discussed above, I find that the income levels of private sector lawyers in Ontario are one consideration for determining the appropriate level of remuneration for Case Management Masters. However, given the difficulties identified with the available private sector income data, the underlying purpose of attracting the best and brightest candidates is most appropriately and usefully served by considering the income levels of Provincial Court and Superior Court Judges, with whom private sector incomes have been compared or have been considered. In this way, those judicial incomes provide a further basis upon which the level of remuneration that adequately meets the needs of judicial independence for Case Management Masters can be determined.

CROWN COUNSEL

Senior government lawyers, like senior lawyers in private practice, represent a qualified pool of candidates from which Case Management Masters may be drawn. While the main reason for comparing practising lawyers to judicial officers is to understand the level of remuneration that would attract the best and brightest candidates to this important office, government lawyers are

directly employed by the executive branch of government which they serve. For this reason the process for setting their salaries cannot be directly applied to the judicial context.

As is the case with many judicial offices, the overwhelming majority of Case Management Masters come from the rank of the private sector. Of the 22 Case Management Masters that were appointed between 1996 and 2014, only three have been former Crown Counsel. There have been no Crown Counsel appointed to the office since 2005, and one of the previous appointees has since retired.

Since they have a small representation within the office of Case Management Master, it would seem that Crown Counsel are not a particularly informative comparator for my current mandate. One reason for the small number of appointments from among Crown Counsel, however, could be that the current level of remuneration for Case Management Masters provides an insufficient incentive for those well-qualified candidates from this group to seek appointment to this office.

Case Management Masters, in fact, are paid less than all of the most senior Crown Counsel who are the most appropriate government lawyer comparators. In other words, the current level of remuneration of Case Management Masters is inadequate to recruit Crown Counsel with the requisite expertise and skills for this important judicial office.

In their submissions, the parties proposed a number of classifications of Crown Counsel as comparators for Case Management Masters, each representing varying degrees of legal experience, skill, and responsibility. Of these classifications, I conclude that the Crown Counsel 4 (“CC4”) group represents the most helpful comparator group for Case Management Masters, whose qualifications for office and skills have been compared to judges in this province.

As the evidence confirms, Case Management Masters are drawn from a small and select group of seasoned, senior practitioners who have an exceptional grasp of both substantive law and procedural matters. Their broad judicial jurisdiction in civil, bankruptcy, construction and family law frequently includes high-value, complex matters that may well involve multiple issues and parties. Since the creation of the office in 1996, the jurisdiction of Case Management Masters has continued to evolve and grow. They conduct their judicial work independently, making

critical judgments and writing decisions based on their analysis of the law and the specific facts before them.

Similarly, the CC4s are a senior, elite group of lawyers singled out for their superior skills and abilities. As their job description states:

This class level is reserved for those legal practitioners who have consistently demonstrated outstanding legal ability. They frequently advise or represent the Crown on significant legal issues whose outcome is critical to justice administration, the reputation of the Ministry and the interests of the Province. Allocation to the Crown Counsel 4 level is determined by the Deputy Attorney General through a competitive promotional process.¹⁰⁹

With a complement of 30 lawyers, it is a small group, similar in size and character to the Case Management Masters. Although the precise number of years of experience for lawyers classified as CC4s was not presented in evidence, the description above suggests that, as a group, they have demonstrated in their careers the exceptional qualities required for appointment to the office of Case Management Master.

This conclusion is supported by the findings of the interest arbitration in 2000 chaired by William Kaplan between the Government and both the Association of Law Officers of the Crown and the Ontario Crown Attorneys Association, the arbitration panel described the CC4 classification as consisting of the most senior lawyers in Government, representing only two percent of all government lawyers.¹¹⁰ In recommending substantial salary increases, the panel accepted that there was an historical relationship of parity between the compensation of these senior Crown Counsel and Provincial Court Judges--the same relationship that has long governed the remuneration of the office of Traditional Master in this province. It also found that Crown lawyers are properly compared to private sector lawyers for the purposes of determining suitable compensation.¹¹¹

In its submissions before the arbitration panel, the Government had denied any historical linkage between the CC4s and Provincial Court Judges and discounted the validity of any comparison with private sector lawyers. The panel nonetheless concluded that:

It is manifest from the materials filed that lawyers employed by the government have, historically, dating back to the 1960s, enjoyed, at the most senior levels – a cohort limited to 2 percent of all the government lawyers – parity with the judiciary, in particular with what are now provincial court judges. Restoring this parity, openly acknowledged at times by the parties, provides ample justification for a substantial wage increase given the gap that currently exists. A wage increase is, however, independently justified in this rather exceptional case for a number of other reasons.

The compensation earned by external comparators, including Ontario lawyers employed in the private bar – lawyers with the identical training and qualifications of the government lawyers – leads one to the conclusion that a substantial wage increase following a long period of no increases, is justified. While the evidence persuades us that there is a compensation relationship or parity between the most senior, most highly classified crown attorneys and provincial court judges, we cannot conclude that there has ever been parity between crown lawyers and lawyers practising in the private sector. Nevertheless, given the identical training and qualifications – the same duties and responsibilities – we are of the view that Ontario private sector lawyers’ salaries are a relevant consideration and are useful to the determination of the salaries of Ontario public sector lawyers’s [sic] salaries. Whether working for the people of the province or for private sector clients, the professional profile for both groups is the same, as are the governing professional obligations. While often adverse in interest, government lawyers and private sector lawyers work side-by-side¹¹² before the same courts, tribunals and agencies.¹¹³ [Emphasis added]

I am unable to accept any suggestion that the CC4 group, which currently comprises 30 highly experienced lawyers, is too small to serve as a comparator, particularly since it is being compared with a group of less than 20 equally capable Case Management Masters. I also note that federal remuneration commissions have consistently used the small but similarly elite group of Deputy Minister 3 (“DM3”) classification as a comparator for the thousands of federally appointed judges sitting across the country. In 2013 the Levitt Ninth Federal Commission reported that the DM3 group consisted of only 13 individuals.¹¹⁴

For the purposes of this review, as set out below, I do not consider the Crown Counsel 5 (“CC5”) classification to be a relevant comparator group. The CC5s were described as “all lawyers in the Lawyers’ Compensation Plan who exercise managerial duties and who are excluded from the bargaining unit established for lawyers.”¹¹⁵

The Case Management Masters submitted, and the Government agreed, that the CC5 group represents senior management, and in fact, its members hold an equivalent position within the Ministry of the Attorney General to the Senior Management Group 3 (“SMG3”) in other Ministries, with whom Case Management Masters were previously linked by formula following the 2001 Settlement. In other words, within the Ministry of the Attorney General, Assistant Deputy Ministers are uniquely classified as CC5s, not SMG3s. Thus, although equivalent in level to the SMG3 classification in other Ministries, the CC5 group is distinct in that it is comprised of lawyers. Equally important, the CC5s earn higher salaries than SMG3s, and at least half of the CC5 group also earned higher salaries than the Case Management Masters.

It is perhaps revealing that the Government distinguishes between the compensation of lawyers occupying positions of senior management at the Ministry of the Attorney General and those who are not lawyers but work at the same level of senior management in all other Ministries, with the former group being paid at a higher rate. Legally trained individuals are paid more. Consequently, it is difficult to understand why the Government submitted the SMG3 classification as an appropriate comparator for Case Management Masters, while failing to present the CC5s as comparators, who, like Case Management Masters, are lawyers. I note that prior to her appointment, Case Management Master May Jean served as the Registrar in Bankruptcy when that position was made a civil servant position for a time, and was classified at the CC5 level during her initial tenure in that position. In her role as a Case Management Master, she was re-assigned as Registrar in Bankruptcy in 2012, performing the same work, but earning less than the median and average salaries reported for the CC5s.

Certainly, there may be some justification for considering the CC5 classification as a comparator for Case Management Masters. However, despite the fact that this group consists of senior lawyers, clearly the functions of the classification are more managerial in nature. This classification does not serve as a good comparator for setting the remuneration of Case Management Masters.

As well, the much more junior Crown Counsel 3 (“CC3”) classification, as proposed by the Government, is also not an appropriate comparator for Case Management Masters. Membership

in the CC3 group requires only five years as a lawyer, far short of the minimum qualifications for the office of Case Management Master. In fact, the Case Management Masters submitted that they have an average of 19 years of practice as a lawyer prior to their appointment. Obviously, there can be no meaningful comparison regarding the remuneration of two groups with such dissimilar levels of experience as lawyers.

It is in the public interest to set the remuneration of judicial officers at a level that will continue to attract candidates of the highest calibre to office. It also serves the dignity of the office to ensure that remuneration reflects the judicial responsibilities undertaken. While the compensation paid to senior government lawyers is not determinative of appropriate compensation for Case Management Masters, it provides guidance for the level that will provide sufficient incentive to the best and brightest from within those ranks.

With the most appropriate Crown Counsel comparators already being paid higher salaries than Case Management Masters, even without considering any public sector pensions and benefits plans, the analysis demonstrates the gross inadequacy of the overall remuneration of Case Management Masters. The fact that the most senior government lawyers have had both Provincial Court Judges and private sector lawyers as comparators in determining their compensation further informs my recommendations.

PUBLIC SECTOR COMPARATORS

Because of the unique needs and functions of the judiciary, I do not consider public servants to be appropriate comparators for determining the remuneration of Case Management Masters. Public servants perform entirely different functions and receive compensation that is solely determined by the Government, often through negotiation with bargaining units. There may, however, be limited circumstances, as the Davie Fifth PCJ Commission found, in which the compensation provided to the most senior members of the public sector can provide some guidance, although it cannot be determinative.

As has been noted, Case Management Masters sit in the place of Superior Court Judges, and, in certain family law matters, Provincial Court Judges. They have the same qualifications for office and must perform their duties with the same skill and competence as judges. For these reasons, I have concluded that Provincial Court Judges and Superior Court Judges are two of the most appropriate comparators.

For both federally and provincially appointed judges, comparisons regarding remuneration have been made almost exclusively with the compensation of Deputy Ministers, the highest ranking group of provincial public servants. That particular level has been selected because Deputy Ministers share the attributes of outstanding character and skill that is required of judges.¹¹⁶ It is the Deputy Minister level, therefore, that is the appropriate reference for making any comparison to Case Management Masters with respect to responsibilities and remuneration.

This conclusion is supported in the earlier report of Special Advisor Adams. He similarly found that civil servants at the Deputy Minister level are the most appropriate public-sector comparators for federal Prothonotaries, who perform an analogous role to that of the Case Management Masters. In doing so, he determined that the compensation of public sector groups falling below the level of Deputy Minister, such as the Assistant Deputy Ministers with whom the salaries of the Prothonotaries had previously been linked, were not relevant for determining the remuneration of that judicial office.¹¹⁷

I similarly find that the Senior Management Group 3 (“SMG3”),¹¹⁸ with whom Case Management Masters were previously linked for the purposes of remuneration following the 2001 Settlement, are not appropriate comparators for this group. The 2001 Settlement, which became effective November 1, 2001, pegged the annual salary for Case Management Masters at 100.2847 percent of the maximum of the SMG3 salary range, plus the maximum percentage performance incentive that can be earned.¹¹⁹

In my view, the formula set by the 2001 Settlement, in fact, demonstrates that the SMG3 classification is an inappropriate comparator since it guarantees that Case Management Masters will at all times receive a salary that is higher than the absolute maximum salary, including the maximum performance pay that can be earned in any given year by individuals at the SMG3 level. Since Case Management Masters always earn a higher salary than the SMG3s, the formula itself acknowledges that these two groups are not equals.

The public sector comparison is not about comparing respective levels of “seniority”, as government contended. Where such comparators have been accepted, the comparison relates to the high-level skills required. I find that, for the purposes of comparison to other public servants in the limited circumstances discussed, and given their role and responsibilities in the justice system, Case Management Masters are, like Provincial Court Judges, most accurately compared to provincial Deputy Ministers.

The Government argued that both the Court of Appeal and the Superior Court of Justice have endorsed the effectiveness and objectivity of linking Case Management Masters to SMG3s for the purpose of remuneration. In particular, its counsel cited the Court of Appeal, which remarked that the remuneration linkage with the SMG3s had been effective in substantially increasing Case Management Masters’ salaries over a 13-year period. Counsel noted that the province’s highest court had also said that the choice of the SMG3 as a comparator was “the epitome of objectivity at the time” of the 2001 Settlement. The Government argued that there is therefore no reason for me to depart from these findings in coming to my own conclusions.

With respect, I cannot accept the Government’s interpretation of the Court of Appeal’s statements about using SMG3s as a comparator in these matters. There is a fundamental distinction between the question that was before that Court, and the one I must consider. I have been tasked with determining an adequate and appropriate level of compensation for the office of Case Management Master; the issue that the Court of Appeal addressed was whether the then “current process for determining the remuneration of Case Management Masters” was

independent, effective, and objective, as that test had been articulated by the Supreme Court of Canada.¹²⁰

Thus, the Court's statements about effectiveness and objectivity were in relation to the appropriateness of the *process* in place for determining remuneration, not the appropriateness of its nature or amount. The Court found that the settlement process through which the SMG3s were selected as a comparator for Case Management Masters was an objective one. It also found that the formula for determining Case Management Masters' salaries had been effective because it had provided for a sizeable salary increase over time, resulted in higher salaries than most public sector employees and all Justices of the Peace received, and had not hindered recruitment.¹²¹ However, nowhere did the Court say that the SMG3 comparator was an appropriate comparator for the office of Case Management Master. Rather, it held that the process lacked an independent reviewing body and therefore failed the constitutional test¹²²:

[42] I share the view of the application judge that this is what is missing in the special process set out for Case Management Masters in Order-in-Council 458/2003. There is no "body" or "entity" or "commission" or "person" between the government and the judiciary; there is no "institutional sieve".

[43] The Crown contends that the institutional sieve is the SMG3 classification. However, that cannot be. The SMG3 classification is established and controlled by the government; it is the precise opposite of an intermediary at arm's length from the government.

[44] Moreover, to my eyes, there is a glaring irony in the Crown's anchor for its submissions, the need for flexibility in the design of "special processes" for dealing with judicial remuneration, and the Crown's proposed outcome flowing from such flexibility, a linkage in perpetuity between the salaries for Case Management Masters and a single classification in the Ontario public service, the SMG3 classification.

[45] On this point, I set out again what the Supreme Court of Canada said in *Provincial Court Judges' Assn. of New Brunswick*, at para. 11:

Compensation commissions were expected to become the forum for discussion, review and recommendations on issues of judicial compensation. Although not binding, their recommendations, it was hoped, would lead to an effective resolution of salary and related issues. Courts would avoid setting the amount of judicial compensation, and provincial governments would avoid being accused of manipulating the courts for their own purposes.

In a similar vein, in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13 (CanLII), [2002] 1 S.C.R. 405, [2002] S.C.J. No. 13 (“Mackin”), Gonthier J. said, at para. 59, that “*the salary commission must convene when a specified period has passed since its last report was submitted in order to examine the adequacy of the judges’ salaries in light of the cost of living and other relevant factors*”.

[47] *The linkage, in perpetuity, between Case Management Masters’ salaries and the SMG3 classification does not permit the process described in these two cases to develop, unfold and deliver.*

[49] On this point, I agree with the application judge, who said [at para. 120]:

*Selecting a comparator, and assuming that it will be appropriate for all eternity, is short sighted and doomed to fail if there is no process in place through which judicial officers can challenge the appropriateness of that comparator in the future.*¹²³ [Emphasis added]

Historically, there has never been a constitutionally valid process applied to assess whether the Case Management Masters’ salary or the SMG3 linkage are, in fact, adequate or appropriate for this office. That question is now properly before, and must be independently determined by, this First Commission.

Similarly, I am unable to accept that the Senior Management Group 4 (“SMG4”), a level lower than that of Deputy Ministers, or Chairs or Vice-Chairs of adjudicative agencies, are relevant comparators for Case Management Masters. Unlike Case Management Masters, Chairs and Vice-Chairs of administrative agencies are not required to have any legal training, let alone the many years of legal experience required of Case Management Masters, Superior Court Judges and Provincial Court Judges.

Although some Chairs and Vice-Chairs of adjudicative agencies may possess highly specialized knowledge in particular areas of law, Case Management Masters are required to exhibit a high level of expertise over a wide range of legal issues; moreover, they must perform their duties at

the level of a judge who is fully conversant with the sophisticated procedures and practices of the Superior Court of Justice.

Equally important, Chairs and Vice-Chairs are appointed directly by the executive branch of Government and are subject to unilaterally determined levels of remuneration. Their appointments are for limited terms to a maximum of ten years.¹²⁴ In addition, whereas Chairs and Vice-Chairs are permitted to supplement their income from external sources, Case Management Masters, like other full-time judicial officers, are prohibited from seeking other remunerative work.¹²⁵

In the highly limited circumstances in which a public service comparison may provide some guidance, I believe that it is only at the level of the Deputy Minister that such considerations can begin. In that regard, the evidence demonstrated that Case Management Masters earn less than the midpoint of a Deputy Minister's salary which is in turn, far less than the salaries of Traditional Masters and Provincial Court Judges. The salaries of Deputy Ministers simply serve as another indication of the inadequacy of their current remuneration.

CONCLUSION

In this First Commission, a significant consideration in determining fair and reasonable remuneration for Case Management Masters, given the nature and jurisdiction of the office, as well as the need to provide judicial independence in the public interest, is the remuneration provided to its appropriate judicial comparators. It is clear that the office of Case Management Master is both a continuation and expansion of the phased-out office of Traditional Master. It represents a further evolution of the office of Master in this province, whose roots trace back to pre-Confederation, and whose history is one of continued development and growth. The office exists to ensure efficient and effective access to civil justice, which is critically important for businesses, the economy, and individuals in Ontario. Indeed, the office was created out of a need to address an acute crisis in the civil justice system, and was key to addressing the subsequent crises that developed in 1998 and 2003.

The Case Management Masters' role in performing a significant subset of the civil law jurisdiction of Superior Court Judges must be properly recognized. Although Case Management Masters lack the full jurisdiction of a Superior Court Judge, they function as a judge for the broad scope of matters over which they preside. As noted, their jurisdiction has expanded far beyond that of Traditional Masters and they have been granted enhanced judicial powers, for example, through their judicial case management and additional non-case management functions, rendering their role even more judge-like, in a broader geographic jurisdiction.

Case Management Masters are also properly compared with Provincial Court Judges. Both are statutory offices essentially performing a subject-matter subset of Superior Court Judge's jurisdiction. From the perspective of remuneration, any distinction in area of law is immaterial. All are equally important to a properly functioning justice system that protects the rights of individuals and other legal entities in the public interest.

The federal Prothonotaries have also proven a useful comparator. Their office, which was created with reference to the office of Traditional Master, performs an analogous role in the Federal Court. Until their most recent remuneration review, the federal Prothonotaries received pensions and benefits according to public sector plans, similar to the current situation for Case Management Masters. As a result of the review conducted by Special Advisor Cunningham in 2013, however, the federal government responded by increasing their salaries relative to those of Federal Court Judges, and importantly, by moving the Prothonotaries out of the public sector pension and benefits plans and providing those benefits instead based on the same terms as those provided to federally appointed judges. This, the federal government asserted, was to "better recognize their status as judicial officers".¹²⁶ The same is true for Case Management Masters at this point in time.

Case Management Masters are not civil servants and their independently determined remuneration must reflect that fact. In my view, their prior linkage to the SMG3 group of civil servants, implemented by a litigation settlement which inevitably involved compromise, and

which has since been declared to be unconstitutional, has never been appropriate for this judicial office.

In addition, unlike other provincial judicial officers, Case Management Masters' salaries did not increase each year after 2001 because of restrictive public sector compensation policies that were periodically applied to the SMG3s, which were then reflected in the formula used to determine Case Management Masters' salaries. Thus, unlike their judicial comparators, the salaries of Case Management Masters were not protected from erosion by inflation, as required by *PEI Reference*.

The situation is similar to that of the Prothonotaries when their salaries were initially linked to those of a federal government appointee to approximate the salaries of Traditional Masters.¹²⁷ The Prothonotaries' salaries failed to keep up with those of Ontario's Traditional Masters. Now, their salaries, benefits, and pensions have been linked to a more appropriate judicial comparator, the Federal Court Judges.

Traditional Masters, whose entire jurisdiction is a subset of that of the Case Management Masters, and Provincial Court Judges, with whom Case Management Masters can be properly compared, both earned a salary of \$287,345 in 2015, which was \$94,009 more than Case Management Masters. Because of automatic salary indexing, those judicial offices continued to receive annual salary increases, not applicable to the SMG3 public sector salary, to which the Case Management Master salaries had been linked.

The SMG3 linkage failed, wholly and spectacularly, to provide a proper level of financial security for this judicial office with respect to its salary, and as will be discussed, also in relation to its benefits and pension entitlements. In fact, the difference in salaries is greatly compounded upon consideration of the discrepancies between public sector pension and benefits plans, to which Case Management Masters currently belong, and those specifically designed for the judiciary. The Case Management Masters reported that in 2013, the combined annual difference in salary and pension value compared with Traditional Masters and Provincial Court Judges, who both receive the separate judicial pension and benefits plans, amounted to \$166,615.

The differences in remuneration between Case Management Masters and their most appropriate provincial comparators, the Traditional Masters and Provincial Court Judges, in my view, will allow a gross misperception that this office occupies a lower-level judicial status.

As well, both the dignity of the office, before which private sector and government lawyers regularly appear, and the continued need to attract outstanding candidates, dictate that Case Management Masters must be remunerated at a level that better takes into account the much higher salaries earned by lawyers in private practice. Again, I am mindful of the Supreme Court of Canada's direction that:

The salaries and pensions of judges should be adequate, commensurate with the status, dignity and responsibility of their office, and shall be periodically reviewed to overcome or minimize the effect of inflation.¹²⁸

I note that many remuneration commissions have cited the need to consider these factors while also maintaining a certain standard of living, reflective of the esteemed position of the judiciary in society, and the *sui generis* nature of their role, when determining appropriate remuneration.¹²⁹ In particular, I agree with the findings of Special Advisor Cunningham, who stressed that the disparity between the salaries of members of the judiciary and those of lawyers in private practice must not be so great as to affect the dignity of the office.¹³⁰

In its submissions before this Commission, the Government has attempted to downplay the judicial role of the office of Case Management Master. It is incorrect in that respect. Case Management Masters function as judges of the Superior Court of Justice and their compensation must respect the importance of that role and provide them with a commensurate level of financial security. As remuneration commissions have recognized,¹³¹ and, as noted earlier in this Report, Professor Martin Friedland has declared: financial security for the judiciary is sought “for our sake, not for theirs.”¹³² Any comparison or linkage to the salaries of the SMG3 classification fails on all counts.

Consistent with the review conducted by the Ontario Law Reform Commission as early as 1973 and its specific recommendations on the terms of independence required for that office, the Government embarked on a long-standing policy of parity in remuneration between Traditional Masters and Provincial Court Judges, including with respect to salaries, pensions, and benefits. As discussed, the Court of Appeal found that by linking Traditional Masters to Provincial Court Judges, the constitutional process for determining remuneration for judicial officers in fact applies to the office of Traditional Master.¹³³

To recognize the fact that Case Management Masters have an expanded jurisdiction and increased judge-like powers in comparison to their immediate predecessors, the Traditional Masters, fair and reasonable remuneration dictates that consideration should in fact be given to remunerating them at a higher rate than has been provided to Traditional Masters. As will be discussed, this would be consistent with the principles of compensation theory and practice in Canada.

With Traditional Masters earning the same salaries as Provincial Court Judges, however, who are judges earning the highest level of remuneration provided by the Government of Ontario, it is not presently possible to recommend a higher salary for Case Management Masters. I find that the historical remuneration linkage to Provincial Court Judges continues to be appropriate for the office of Case Management Master. It is even more appropriate when considering the enhanced judicial powers and increased responsibilities of the office of Case Management Master beyond those of Traditional Masters.

The evidence of the functions and jurisdiction of Case Management Masters demonstrates that fair and reasonable remuneration for these members of the judiciary must be at the same level that has been provided to Traditional Masters and Provincial Court Judges. This must include not only salary but also the same pension and benefits plans. I note that this is consistent with the constitutional imperative to provide an appropriate level of judicial independence, and conforms with the level of remuneration provided to the federal Prothonotaries and the Masters in British Columbia, Alberta, and Manitoba, all of whom perform a similar role.

In this First Commission, the assessment of fair and reasonable remuneration has involved a consideration of the history, nature and duties of the office. In particular, this has involved a review of the evolution of its broad and important responsibilities contributing to timely and cost effective access to justice in Ontario. There have been increased adjudicative demands and workloads imposed on Case Management Masters. Appropriate remuneration must reflect the enormous burdens Case Management Masters shoulder in the busiest courts of this country.

¹ See, for example, Report of Davie Fifth PCJ Commission at 26.

² See, for example, First Deputy Judges Remuneration Commission Report at 37-38 [hereinafter Report of Davie First DJ Commission].

³ Fourth Provincial Judges Remuneration Commission Report at 44 [hereinafter Report of Beck Fourth PCJ Commission].

⁴ Report of Beck Fourth PCJ Commission at 8-9. See also Report of the Ontario Provincial Courts Committee (1988) at 65-66 and 68, and footnotes 208-209 [hereinafter Report of Henderson First PCJ Commission].

⁵ Report of Henderson First PCJ Commission at 66-67. See also Report of Beck Fourth PCJ Commission at 8.

⁶ Report of Henderson First PCJ Commission at 67.

⁷ Report of Beck Fourth PCJ Commission at 2.

⁸ *Ibid.* at 43-44.

⁹ *Ibid.* at 2.

¹⁰ *Ibid.* at 42-44.

¹¹ Report of Davie Fifth PCJ Commission at 29-30.

¹² Report and Recommendations of The Honourable, J. Douglas Cunningham, Q.C., to the Minister of Justice (2013) at 22-24 [hereinafter Report of Special Advisor Cunningham].

¹³ Report of Special Advisor Cunningham at 22.

¹⁴ Report of Davie First DJ Commission at 42. See also Report of Nairn Second DJ Commission at 27. See also Report of The Honourable George W. Adams, Q.C. (2008) at 26 [hereinafter Report of Special Advisor Adams].

¹⁵ Second Deputy Judges Remuneration Commission Report at 28 [hereinafter Nairn Second DJ Report].

¹⁶ Report of Nairn Third DJ Commission at 28.

¹⁷ Report of Davie First DJ Commission at 43. See also Report of Nairn Third DJ Commission at 28.

¹⁸ Report of Davie First DJ Commission at 43. See also Report of Nairn Second DJ Commission at 29. See also Report of Nairn Third DJ Commission at 28.

¹⁹ Report of Nairn Third DJ Commission at 28.

²⁰ Report of Special Advisor Adams at 26.

²¹ Report of Davie First DJ Commission at 42.

²² See, for example, Report of Henderson First PCJ Commission at 70; First Federal Commission Report at 3 [hereinafter Report of Lang First Federal Commission]; Fifth Federal Commission Report at 14 [hereinafter Report of Scott Fifth Federal Commission].

²³ See remarks in Seventh Federal Commission Report at 12-13 [hereinafter Report of McLennan Seventh Federal Commission].

²⁴ See Report of Davie Fifth PCJ Commission at 24; Report of Drouin Sixth Federal Commission at 36; and Report of McLennan Seventh Federal Commission at 16.

²⁵ Report of Special Advisor Adams at 26. See also Report of Drouin Sixth Federal Commission at 37.

²⁶ Second Federal Commission Report at 8 [hereinafter Report of Guthrie Second Federal Commission].

²⁷ Report of Lang First Federal Commission at 2. See also Report of Drouin Sixth Federal Commission at 23 and 35.

²⁸ Report of Special Advisor Cunningham at 24.

²⁹ Report of Lang First Federal Commission at 2.

³⁰ Report of Drouin Sixth Federal Commission at 46.

³¹ Report of McLennan Seventh Federal Commission at 13.

³² *Ibid.* at 13.

³³ Report of Henderson First PCJ Commission at 70-71.

³⁴ See Report of Drouin Sixth Federal Commission at 34; Report of McLennan Seventh Federal Commission at 31 and 41-42; and Report of Special Advisor Adams at 26.

³⁵ Report of Drouin Sixth Federal Commission at 37.

³⁶ *PEI Reference* at para. 142.

³⁷ *Ibid.* at para. 143.

³⁸ Report of Drouin Sixth Federal Commission.

³⁹ Report of Henderson First PCJ Commission at 45, 52-53, and 70. Second Provincial Judges Remuneration Commission Report at 8 [hereinafter Report of Henderson Second PCJ Commission]. Report of Davie Fifth PCJ Commission at 22.

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- ⁴⁰ Report of Davie Fifth PCJ Commission.
- ⁴¹ Report of Beck Fourth PCJ Commission at 44.
- ⁴² Report of Beck Fourth PCJ Commission at 44.
- ⁴³ *Ibid.* at 14-16, 39, and 44.
- ⁴⁴ *Ibid.* at 45.
- ⁴⁵ *Ibid.* at 39, 42 and 44.
- ⁴⁶ Report of Davie Fifth PCJ Commission at 22-23.
- ⁴⁷ *Masters' Association* (SCJ) at para. 113.
- ⁴⁸ *Masters' Association* (OCA), at para. 7.
- ⁴⁹ *Masters' Association* (SCJ) at para. 5.
- ⁵⁰ See, for example, Report of Henderson First PCJ Commission at 6-12 and 72.
- ⁵¹ Interest Arbitration Award (2000) (William Kaplan, Chair) at 6, filed [hereinafter Kaplan Arbitration].
- ⁵² Report of Special Advisor Adams at 56. See also "Agreed Statement of Facts of the Prothonotaries of the Federal Court and the Government of Canada" at 4 and 7, in Report of Special Advisor Cunningham.
- ⁵³ Submissions of Traditional Master Linton, at para. 15.
- ⁵⁴ *Masters' Association* (SCJ) at para. 111.
- ⁵⁵ *Supreme Court Act*, R.S.B.C., c. 443, s. 11(3) and 12(1). See also *Judicial Compensation Act*, S.B.C, c. 59.
- ⁵⁶ *The Court of Queen's Bench Act*, C.C.S.M. c. C280, s. 11.17(1).
- ⁵⁷ *Provincial Court Judges and Masters in Chambers Compensation Regulation*, AR Reg. 176/98, s. 9.1.
- ⁵⁸ Report of Special Advisor Adams at 56-57. Report of Special Advisor Cunningham at 22-24.
- ⁵⁹ Alberta Judicial Compensation Commission Report (2009), pp. 31-32 [hereinafter Report of 2009 Alberta Judges Commission].
- ⁶⁰ Judicial Compensation Committee Report (Manitoba, 2002) [hereinafter Report of 2002 Manitoba Freedman Commission].
- ⁶¹ *Ibid.* at 78-79.
- ⁶² *Masters' Association* (OCA) at para. 36.
- ⁶³ Affidavit of Master Dash at para. 3.
- ⁶⁴ The Honourable W.K. Winkler, C.J. (2007 Lecture) at 5-6, filed.
- ⁶⁵ Report of Beck Fourth PCJ Commission at 2 and 42-47; Report of Davie Fifth PCJ Commission at 30-31.

⁶⁶ Report of Beck Fourth PCJ Commission at 43-44.

⁷⁰ Law Reform Commission Report at xxix and 18-22.

⁷¹ *Ibid.* at 4 and 19.

⁷⁴ Report of Henderson First PCJ Commission at 146-147.

⁷⁵ *Ibid.* at 38-39.

⁷⁶ *Ibid.* at 131.

⁷⁷ Debates (2 November 1989) at 1610 (Polsinelli),

⁷⁸ Report of Special Advisor Cunningham at 22.

⁷⁹ See *Response of the Minister of Justice to the Report of the Special Advisor on Federal Court Prothonotaries' Compensation*, filed [hereinafter Federal Government Response to Cunningham Report].

⁸⁰ See Report of Special Advisor Adams at 56.

⁸¹ See Report of Drouin Sixth Federal Commission at 23; Report of McLennan Seventh Federal Commission at 29; and Ninth Judicial Compensation and Benefits Report at 9, footnote 26 [hereinafter Report of Levitt Ninth Federal Commission].

⁸² Report of Special Advisor Adams at 12, quoting *Canada v. Aqua-Gem Investments Ltd. (C.A.)*, [1993] 2 F.C. 425.

⁸³ *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 12, and see Report of Special Advisor Adams at 6.

⁸⁴ Report of Special Advisor Adams at 12.

⁸⁵ *Ibid.* at 31-32 and 34.

⁸⁶ *Ibid.* at 56-57.

⁸⁷ Report of Special Advisor Cunningham at 22.

⁸⁸ *Ibid.* at 22.

⁸⁹ Report of Special Advisor Adams at 6, 12 and 41.

⁹⁰ *Ibid.* at 2.

⁹¹ *Ibid.* at 41.

⁹² *Ibid.* at 22.

⁹³ *Ibid.* at 47.

⁹⁴ See, for example, Fourth Justices of the Peace Remuneration Commission Report at 4-6 [hereinafter Report of Cory Fourth JP Commission].

⁹⁵ Second Justices of the Peace Remuneration Commission Report (2000) at 7-8 [hereinafter Report of Houlden Second JP Commission].

⁹⁶ Cory Fourth JP Commission at 4.

⁹⁷ See, for example, Report of McLennan Seventh Federal Commission at 41, and Report of Scott Fifth Federal Commission at 14.

⁹⁸ Report of Levitt Ninth Federal Commission at 15; Report of Beck Fourth PCJ Commission at 45-46; and Report of Davie Fifth PCJ Commission at 25-26.

⁹⁹ Report of Davie Fifth PCJ Commission at 31-32.

¹⁰⁰ Report of Davie Fifth PCJ Commission at 23. See also discussion in Report of Drouin Sixth Federal Commission at 47-46, and Report of McLennan Seventh Federal Commission at 31-49.

¹⁰¹ Report of Beck Fourth PCJ Commission at 45.

¹⁰² See *Masters' Association* (OCA) at para. 35.

¹⁰³ Affidavit of Rosanna Giancristiano at 1-2, filed.

¹⁰⁴ Report of McLennan Seventh Federal Commission at 20.

¹⁰⁵ *Ibid.* at 49. Report of Levitt Ninth Federal Commission at 15.

¹⁰⁶ Report of Davie Fifth PCJ Commission at 25-26.

¹⁰⁷ Kaplan Arbitration at p. 6.

¹⁰⁸ *Ibid.* at 7.

¹⁰⁹ Class Standards for CC3 and CC4, filed.

¹¹⁰ Kaplan Arbitration at 2 and 6.

¹¹¹ *Ibid.* at 6.

¹¹² The Case Management Masters made an analogous argument about working alongside their colleagues, the Traditional Masters.

¹¹³ Kaplan Arbitration at 6-7.

¹¹⁴ Report of Levitt Ninth Federal Commission at 9, footnote 26.

¹¹⁵ Class Standards for CC5, filed.

¹¹⁶ Report of Drouin Sixth Federal Commission at 31 and Report of Levitt Ninth Federal Commission at 8-9. Report of Beck Fourth PCJ Commission at 44.

¹¹⁷ Report of Special Advisor Adams at 31, 46, and 55-57.

¹¹⁸ See Approved Salary Range Adjustments for Senior Managers, filed.

¹¹⁹ See Terms of 2001 Settlement at 2, filed.

¹²⁰ *Masters' Association* (OCA) at paras. 28-33.

¹²¹ *Ibid.* at paras. 34-35.

¹²² *Ibid.* at para. 52; *Masters' Association* (SCJ) at paras. 120-121.

¹²³ *Masters' Association* (OCA) at paras. 42-49.

¹²⁴ Government Appointees Directive, filed.

¹²⁵ *Courts of Justice Act*, s. 46 and s. 86.1(7).

¹²⁶ Federal Government Response to Cunningham Report at 2.

¹²⁷ Report of Special Advisor Adams at 31-32.

¹²⁸ *Beauregard*, para. 33; *PEI Reference*, para. 194.

¹²⁹ See Report of Lang First Federal Commission at 3, Report of Guthrie Second Federal Commission at 5, Third Federal Commission Report (1989) at 9 [hereinafter Report of Courtois Third Federal Commission], and Report of Drouin Sixth Federal Commission at 7-8, 13 and 21-22; Report of Special Advisor Adams at 29; Report of Henderson First PCJ Commission at 57.

¹³⁰ Report of Special Advisor Cunningham at 24.

¹³¹ See, for example, Report of Beck Fourth PCJ Commission at 49-50.

¹³² Report of Beck Fourth PCJ Commission at 49-50.

¹³³ *PEI Reference* at para. 51.

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

My Order in Council requires me to consider the “economic conditions in the province, as demonstrated by indicators such as the provincial inflation rate” when developing my recommendations. Although the Government urged caution when interpreting certain economic indicators, I am in the fortunate position of having at hand actual retrospective figures for the majority of my 2011-to-2016 period of review, rather than merely future projections.

For the years 2011 to 2014, in particular, I have relied on the value of the economic indicators as confirmed in the subsequent budget reports in evidence before me. For the years 2015 and 2016, for which figures are necessarily prospective, I note that the Government has attempted to take some of the uncertainty into account in making its projections. For example, the province’s most recent budget report (“2015 Budget”) indicated that the Government had chosen to rely on more conservative projections for its economic indicators, rather than the more robust figures forecasted by private sector economists, to allow for more prudent fiscal planning.¹

Like other economies around the world, Ontario regularly relies on such indicators for economic forecasting, planning projections, fiscal policies, and annual budgets.² Similarly, I will rely on the Government’s more conservative projections when considering my recommendations for Case Management Master remuneration.

Having reviewed successive Ontario budgets following the 2008-2009 recession, I find that Ontario’s economic indicators have shown consistent improvement, demonstrating steady and healthy economic growth throughout the period of my mandate. Ontario recovered well during the immediate post-recessionary period, faring better than many other developed economies around the world, including the province’s largest trading partner, the United States.

As early as 2010, the Government noted in its budget report (“2010 Budget”) that there were clear signs that Ontario’s economy had already stabilized and that recovery was taking shape: jobs, GDP, merchandise exports and manufacturing sales had all improved from the lows posted during the recession.³

Subsequent annual provincial budget reports from 2011 to 2015 have indicated steady and sustained economic growth in the province, which is forecast to continue through 2018. By 2013, many key economic indicators in Ontario, including real GDP, exports, employment, household income and household consumption had surpassed their pre-recessionary peak levels. According to the province’s budget report of 2014 (“2014 Budget”), by March of that year all key indicators had surpassed their 2008 pre-recessionary peak levels.⁴

ONTARIO EMERGING STRONGER FROM 2008-2009 RECESSION⁵				
ONTARIO INDICATOR	Pre-Recession Peak	Recessionary Low	Level as of 2014 Budget	Per Cent Change from Recessionary Low
REAL GDP	\$602.0 Billion (2008 Q2)	\$573.3 Billion (2009 Q2)	\$632.6 Billion (2013 Q4)	+10.3%
EXPORTS	\$337.1 Billion (2008 Q3)	\$274.9 Billion (2009 Q2)	\$353.8 Billion (2013 Q4)	+28.7%
EMPLOYMENT	6,708,600 (September 2008)	6,442,800 (June 2009)	6,902,300 (March 2014)	+7.1%
HOUSEHOLD INCOME	\$414.3 Billion (2008 Q2)	\$410.3 Billion (2009 Q2)	\$476.2 Billion (2013 Q4)	+16.1%
HOUSEHOLD CONSUMPTION	\$342.3 Billion (2008 Q3)	\$335.6 Billion (2009 Q2)	\$394.8 Billion (2013 Q4)	+17.6%

I note that the Government's projections of economic indicators have continued to be consistently positive. For example, the 2015 Budget reported that economic trends in the province are "favourable",⁶ that Ontario has a "diversified and resilient economy",⁷ that current economic conditions "highlight Ontario's advantage—its solid economic foundation",⁸ and that "[t]his is a time for strong business confidence in Ontario".⁹

Most importantly, the 2015 Budget projected continued strong and improved economic growth, particularly when compared with other domestic and global economies:

Ontario's economy is expected to grow at a solid pace. This is despite continued slow growth in most advanced economies following the global economic recession, as well as volatility in global financial and commodity markets. Most forecasters are predicting Ontario will be among the provincial leaders in economic growth over the next two years, with growth outpacing the national average.

Economic indicators have demonstrated a resumption of more robust growth for Ontario in 2014, which is expected to continue. ...¹⁰

While it is true, as the Government submitted, that several provincial budgets following the recession described the pace of Ontario's economic growth as moderate,¹¹ this subjective assessment should not obscure the fact that there has been consistent, steady, year-over-year economic growth in the province. The 2015 Budget reported that real GDP, household spending, exports and imports have not merely improved from their recessionary lows, they have surpassed their pre-recessionary peaks by at least 7.0 percent.¹²

This is significant growth by any standard. In addition, as budget reports have indicated, this sustained growth has been achieved despite a challenging global environment that has included financial-market vulnerabilities and weaker-than-expected global growth.¹³

The following table shows the performance of the major economic indicators, including the values from 2007 to 2014 as reported retrospectively, and the projected values from 2015 to 2018. All demonstrate continued, steady growth since the provincial economy was rocked by the recession. The shaded rows indicate the years specific to this Commission's mandate:

ONTARIO ECONOMIC OUTLOOK¹⁴ (PERCENT)				
	Real GDP Growth	Nominal GDP Growth	Employment Growth	CPI Inflation
2007	2.3	4.5	1.8	1.8
2008	(0.9)	0.1	1.6	2.3
2009	(3.2)	(0.9)	(2.5)	0.4
2010	3.2	5.2	1.7	2.5
2011	2.2	4.0	1.8	3.1
2012	1.7	3.2	0.7	1.4
2013	1.3	2.4	1.8	1.0
2014	2.2	3.6	0.8	2.4
2015	2.7	4.2	1.1	1.2
2016P	2.4	4.2	1.3	2.0
2017P	2.2	4.2	1.4	2.0
2018P	2.1	4.1	1.3	2.0

P = Ontario Ministry of Finance planning projection

The Government reported that it consults with private sector economists and tracks their forecasts to inform its planning assumptions.¹⁵ The 2015 Budget noted that many private sector economists hold the similar view that Ontario is well positioned for continued economic growth, and that this assumption is supported by recent economic data.¹⁶ On average, these private sector economists expect real GDP to grow by 2.8 percent in 2015, 2.5 percent in 2016, 2.3 percent in 2017, and 2.2 percent in 2018.¹⁷

I note that over half a million net new jobs have been created since the recessionary low of June 2009, which means, as Ontario's budget reports have indicated, that Ontario has now recovered all the jobs it lost since the recession began, with the majority being full-time, private sector, above-average wage jobs.¹⁸ This steady job growth caused the unemployment rate in the province to fall to 7.3 percent by March 2014, well below the recessionary high of 9.4 percent in June 2009; in fact, this is the lowest unemployment rate reported rate since 2008.¹⁹ The 2014 Budget concluded that the gains in employment have marked a "strong recovery"²⁰ while the 2015 Budget has forecast that employment in Ontario will continue to increase by an average of 4.1 percent per year from 2016 to 2018; the unemployment rate is predicted to fall to 6.3 percent by 2018.²¹

The inflation rate is expected to remain at a moderate level in Ontario. The Consumer Price Index ("CPI") increased by 1.0 percent in 2013, the lowest increase since 2010. In 2014, the CPI increased by 2.4 percent, partially due to higher import prices that resulted from the decline in the Canadian dollar. The 2015 Budget, however, reported that the CPI inflation rate is expected to resume its long-run moderate trend, averaging 2.0 percent per year from 2016 to 2018.²²

Other key indicators have also shown improvement. In 2014, new auto sales increased by 11.5 percent, international merchandise exports rose by 8.0 percent, wholesale trade increased by 7.5 percent, manufacturing sales increased by 6.1 percent, and retail sales rose by 4.8 percent.²³ Overall, the Government has projected that Ontario's real exports will increase by an average of 3.5 percent annually between 2014 and 2017, outpacing a 2.5 percent increase in imports.²⁴ Household income in Ontario increased by 3.4 percent in 2014 and is projected to grow by an

average of 4.2 percent annually over the 2015 to 2018 period. Real household spending growth is expected to average 2.4 percent per year over the same time period.²⁵

I also note that throughout the period of my mandate the Government has made considerable strides in its efforts to eliminate the deficit by 2017-2018; and it is on track to achieve its goal.²⁶ Year after year, since the onset of the provincial deficit, the Government has consistently exceeded its annual deficit targets. In every fiscal year from 2009-2010 to 2013-2014, the province reported an actual deficit that was billions of dollars lower than previously forecast.²⁷

In its 2013 Budget Report (“2013 Budget”), the Province stated that it was the only government in Canada to achieve this level of success, and that it was one of only two governments in the country that was projected to exceed its fiscal target that year.²⁸ In its 2014 Budget, the Government reported that its unprecedented record had been maintained for the fifth year in a row, resulting in an accumulated deficit that was more than \$24 billion lower than expected.²⁹

On the basis of the above facts and expert projections, I find that these are not the “difficult economic times” contemplated by the Supreme Court of Canada in *PEI Reference*. Neither are these “exceptional circumstances” as considered by the Federal Court of Appeal in *Aalto v. Canada (Attorney General)* (“*Aalto*”),³⁰ which was an appeal of the judicial review of the federal government’s 2009 rejection of Special Advisor Adams’ remuneration recommendations for the Prothonotaries. In *Aalto*, the Court held that, in light of the global financial crisis that had occurred immediately after the release of Special Advisor Adams’ report in 2008, the federal government had been justified in rejecting his recommendations.³¹

I note that the Government’s argument that previous remuneration commissions have refrained from recommending substantial remuneration increases in similar economic circumstances is not applicable here and is not supported by the evidence. In 2013, for example, during a period of continued national economic recovery from the recession, the federal government chose to implement sweeping changes that significantly increased the remuneration of Prothonotaries to a level even exceeding the pension recommendations presented in Special Advisor Cunningham’s review.³²

As Special Advisor Cunningham observed, a steadily improving economy is sufficient to warrant substantial increases in judicial remuneration in accordance with the principle of judicial independence:

In my view, based upon the evidence before me which I accept, Canada has indeed weathered the economic storms of 2008-2009 better than many countries. Canada's prudence in managing the economy has paid dividends such that we are now in much better shape, in relative terms, than many other countries. Are we out of the woods? Are we immune from economic shocks generated elsewhere? Of course we are not, however, in my view we are much better poised to deflect such forces. Whether budget balance would occur over a slightly longer time frame, as Professor Seccareccia suggests, without the current measures is debatable. However, I see no inconsistency in adjusting Prothonotaries salaries now...

In 2015, a similar conclusion can be reached with respect to the remuneration of Case Management Masters. With Ontario's economic indicators having already reached greater heights than their pre-recessionary peaks, and with its economic growth set to outpace the national average, current economic conditions in the province cannot prevent the implementation of appropriate remuneration increases for Case Management Masters in accordance with the principle of judicial independence.

Although the Government made comparisons with the economic situation faced by the Brown Third PCJ Commission, I note that the Government submitted before that body that the province was in "serious financial straits".³³ It did not make the same argument in these proceedings. Rather, in its recent budget reports the Government has consistently projected healthy and continued growth, with a deficit that has been decreasing, year after year, at a rate faster than expected. The Government argued that substantial increases in remuneration should only occur in times of robust provincial economic growth, as it said was the case during the time of the Beck Fourth PCJ Commission's mandate.

In many ways, current economic conditions are more comparable to those described by the Beck Fourth PCJ Commission, which resulted in the Government implementing the substantial salary increases that the commission recommended for Provincial Court Judges. At that time, the province still had a deficit, but it had been rapidly decreasing over the previous four-year period. As is the case with the province's current projections, the provincial deficit was expected to be eliminated within two years' time.

The Beck Fourth PCJ Commission noted that the economy was expanding, not only as demonstrated by economic indicators, but also as a result of new Government spending initiatives in such areas as transportation, health care, youth training and student assistance. These and other initiatives were predicted to "run into billions of dollars of expenditures" over a number of years.³⁴

In its submissions before the Beck Fourth PCJ Commission the Government argued then that, although the provincial economy was strong and continuing to grow, there was still an "astronomical debt-load" to manage, which meant that the province's overall fiscal condition would not permit large wage increases. It argued then, as it similarly did before me, that while the economy was continuing to recover, it still had "some way to go to reach full health".³⁵ At the time of the Beck Fourth PCJ Commission, the Government also warned, again as it did in its submissions to me, that continued strong economic growth could not be guaranteed and caution was therefore warranted.³⁶

The Beck Fourth PCJ Commission remarked, however, that in other forums the Government had emphasized the province's strong position in the midst of global economic uncertainty. The Beck Fourth PCJ Commission concluded that it was "unquestionably clear that the Ontario economy is in excellent shape and is continuing to grow and create jobs at record rates."³⁷ It maintained that no case had been made "for restraint based on the condition of the provincial economy, or expenditure restraint by the Government itself."³⁸

Although the Government argued before the Beck Fourth PCJ Commission that the province's fiscal conditions at that time would not permit substantial increases, it has since adopted that commission's conclusions that the substantial remuneration increases awarded then were indeed

warranted. Since the fiscal conditions considered by the Beck Fourth PCJ Commission are in many ways akin to current circumstances, its conclusions simply provide support for my own findings on current conditions and the remuneration for Case Management Masters.

I must also consider the manner in which other full-time members of the judiciary have been treated with respect to their remuneration during this period of economic recovery. Of particular note is the fact that *no* full-time members of the judiciary who fall under provincial jurisdiction have been subject to any wage freezes. In fact, as required by *PEI Reference*, their salaries, whose base levels have been determined by constitutional processes, have continued to increase in accordance with salary indexing.

I also note the way in which the Government treated the remuneration of Traditional Masters, the Case Management Masters' immediate predecessors, during difficult economic times in the past. In 1992, prior to the review conducted by the Brown PCJ Commission and in a period of economic restraint that included a multi-year salary freeze for Provincial Court Judges,³⁹ the Government nevertheless took action to formally align, by single regulation, the salary and benefits of Traditional Masters with those of Provincial Court Judges. In 1994, in the midst of continuing difficult economic times, in which Provincial Court Judges' salaries themselves remained frozen at 1992 levels, the Government decided to further formalize remuneration parity between Traditional Masters and Provincial Court Judges through legislation.

In other words, during a time of severe economic restraint, the Government made it a priority to provide the Traditional Masters with the same salary, pension, and benefits as Provincial Court Judges, who receive the highest judicial compensation provided by the province. The Government chose not to scale back the remuneration of Traditional Masters. Instead, it took deliberate and carefully considered action to strengthen the relationship of remuneration parity, clearly revealing the value that it placed on the office of Traditional Master and the level of protection it felt were required to ensure its independence. There is no evidence in the report of the subsequent Brown Third PCJ Commission that the Government expressed any concerns that it might have had about Traditional Masters continuing to receive the same level of remuneration as Provincial Court Judges.

In my view, the Government's past position on Traditional Master remuneration, particularly during troubled economic circumstances, are inconsistent with its submissions before this Commission. While the Supreme Court of Canada, in *PEI Reference*, held that the judiciary cannot be shielded from the effects of deficit reduction and stressed the need for judicial officers to shoulder their fair share of the burden during difficult economic times,⁴⁰ the Court did not assert that judicial officers should shoulder *more* than their fair share. Given my findings on fair and reasonable remuneration I have concluded that for many years Ontario's Case Management Masters have indeed been bearing more than their fair share of the economic burden compared to judicial officers with equivalent levels of responsibility.

In summary, I have determined that the level of Case Management Masters' remuneration has been inadequate for much of the existence of this judicial office. The provincial economy has experienced healthy and steady growth throughout the period of my mandate, and economic indicators have forecasted continued positive growth. There is nothing in the health of the economy that prevents the Government from fulfilling its obligation to provide Case Management Masters with a level of financial security that complies with the constitutional principle of judicial independence.

¹ 2015 Budget at xxviii, 233 and 257, filed.

² See, for example, 2015 Budget at 233.

³ 2010 Budget, filed.

⁴ 2014 Budget at 190, filed.

⁵ See "Chart 2.3 – Ontario Emerging Stronger from 2008-2009 Recession" in 2014 Budget at 190.

⁶ 2015 Budget at xxviii.

⁷ *Ibid.* at 197.

⁸ *Ibid.* at xxviii.

⁹ *Ibid.* at xxviii and 233.

¹⁰ *Ibid.* at 233-234.

¹¹ See, for example, 2014 Budget at 189.

¹² 2015 Budget at 235.

¹³ 2014 Budget at 189.

¹⁴ The values for these economic indicators represent the last-reported values in Ontario budget reports. The budget reports list the sources for these statistics as Statistics Canada and the Ontario Ministry of Finance. See 2010 Budget at 74; 2011 Budget at 156, filed; 2012 Budget at 122, filed; 2013 Budget at 164, filed; 2014 Budget at 189; and 2015 Budget at 233.

¹⁵ 2015 Budget at 257.

¹⁶ 2014 Budget at 191. See also 2015 Budget at 235.

¹⁷ 2015 Budget at 257.

¹⁸ *Ibid.* at xxviii and 236-237.

¹⁹ 2014 Budget at 191 and 193. See also 2015 Budget at 237.

²⁰ 2014 Budget at 193.

²¹ 2015 Budget at 250.

²² *Ibid.* at 249. See also 2014 Budget at 207.

²³ *Ibid.* at 234.

²⁴ 2014 Budget at 216.

²⁵ 2015 Budget at 250.

²⁶ *Ibid.* at 199-201.

²⁷ *Ibid.* at 199.

²⁸ 2013 Budget at 105.

²⁹ 2014 Budget at xxiv.

³⁰ 2010 FCA 195 (CanLII), [2012] 1 F.C.R. 290 at para. 27 [hereinafter *Aalto*].

³¹ *Ibid.* at para. 27.

³² Federal Government Response to Cunningham Report at 2.

³³ Third Provincial Judges Remuneration Commission at 6 and 9 [hereinafter *Brown Third PCJ Commission*].

³⁴ Report of Beck Fourth PCJ Commission at 34-35.

³⁵ *Ibid.* at 36.

³⁶ *Ibid.* at 35-37.

³⁷ *Ibid.* at 38.

³⁸ *Ibid.* at 38.

³⁹ *Ibid.* at 12.

⁴⁰ *PEI Reference* at para. 196.

4. RECENT ONTARIO PUBLIC SECTOR COMPENSATION TRENDS

Although recent public sector compensation trends have consisted mainly of wage freezes and limits on annual salary increases, these compensation restraints have been applied to employee groups whose base levels of compensation have previously been determined. For example, compensation restraints have variously applied to members of the Ontario Public Service, the Broader Public Sector, Members of Provincial Parliament (“MPPs”), and other public sector compensation groups that are governed by collective agreements.¹ Put another way, there has been no trend applying compensation restraints to employee groups whose base levels of compensation are being established for the first time, as is the case for Case Management Masters.

There is no established base salary for Case Management Masters to freeze or to which to apply limited increases. I find that recent public sector compensation trends therefore do not apply to my initial determination in this First Commission. The absence of an existing base level of compensation for Case Management Masters is a fundamental point of distinction and is of prime importance when assessing the submissions on this criterion.

Recent public sector compensation trends in Ontario can only be relevant, as necessary, once a constitutional, base level of remuneration has been set for Case Management Masters. It is only from that starting point that this criterion might have application, and only then in a manner that is consistent with the increases or restraints that the Government has applied to the remuneration of other full-time judicial officers, and particularly for Traditional Masters and Provincial Court Judges, their most appropriate provincial comparators at this time.

The Government itself has advocated this very position in the past, in response to the report of the Davie First DJ Commission. That commission, which was the first constitutionally-established process to review Deputy Judge *per diem* rates in this province, rejected this same criterion at the time, even noting the Government’s acquiescence on this point:

I do not consider relevant to this first Commission “recent Ontario public sector compensation trends.” The fact that 2005, 2006 and 2007 wage settlements in collective bargaining at both the public sector and private sector have been below 3%, or the fact that settlements in the broad civil service have been moderate averaging to just over 2.5%, is irrelevant to the current circumstances where the per diem paid to Deputy Judges has not been increased for 25 years. *The government itself did not suggest that such moderate or normative increases were appropriate.* Without commenting in any fashion on the weight which may be given to this factor by future commissions, it has not been a relevant factor to this first Commission in making these recommendations.² [Emphasis added]

In the Government’s official response to the Davie First DJ Commission’s report (“Government DJ1 Response”), it appeared to accept that this criterion does not apply to an initial assessment of base levels of remuneration. It indicated that it is only after an appropriate base level of remuneration has first been determined and implemented for a judicial office that this criterion then applies. The Government DJ1 Response stated:

The Commission was also mandated to consider the growth or decline in per capita income and recent Ontario public sector compensation trends but disregarded both of these factors as irrelevant. *Once a fair and reasonable per diem rate was determined for 2005, these criteria are relevant to subsequent increases from 2006 to 2009.*³ [Emphasis added]

In short, even the Government DJ1 Response supports this Commission’s conclusion that recent public sector compensation trends do not apply to the initial determination and, equally important, the implementation of an appropriate base level of compensation for Case Management Masters.⁴

However, the Government submitted that the level of remuneration provided to Case Management Masters as of 2011 represents the appropriate starting point for this Commission’s recommendations. It argued that the 2001 Settlement, in fact, already established an appropriate base level of remuneration for Case Management Masters. It sought support for its position in *Masters’ Association* (OCA) and the Court’s comments regarding the objectivity and effectiveness of the process used for setting Case Management Masters’ remuneration as a result of the 2001 Settlement. The Government submitted that:

...as a starting point, the remuneration of Case Management Masters as of 2011 was appropriate. Although the process used to determine that remuneration was not sufficiently independent as it did not involve the participation of an independent Commission, the Court of Appeal found that the formula agreed to in 2001 by the Master's [sic] Association of Ontario and the then-sitting case management masters was objective and had proven effective, as it had provided for a 73 percent increase in salary for Case Management Masters over a 13-year period."

I cannot accept the Government's contention that the salary as of 2011 constitutes an appropriate starting point for Case Management Masters, or that it represents an already existing appropriate level of remuneration. In effect, the Government's position seeks to establish the results of the 2001 Settlement as a constitutionally-valid base level of remuneration, despite the fact that the overall process was found by the Court of Appeal to be unconstitutional,⁵ and therefore invalid.

Other remuneration commissions have accepted the principle that, in the absence of a constitutional process for determining judicial remuneration, any existing level of remuneration cannot be deemed to be constitutionally appropriate. As Special Advisor Cunningham observed:

...Indeed rejecting the same argument advanced by the Government in the Military Judges Compensation Review, the majority report said it failed to recognize that, as with Prothonotaries, the present remuneration for Military Judges could not be considered adequate as it had never been recommended by an independent Commission. I agree with this.⁶

Having already determined that the SMG3 classification is an inappropriate comparator for Case Management Masters, and that the current level of remuneration for this judicial office falls far below that of their most appropriate judicial comparators, the remuneration as of 2011 cannot serve as an appropriate starting point. In the absence of an appropriate base level of remuneration, recent public sector compensation trends in the province cannot apply.

In assessing the application of this criterion, it is also significant that the *Public Sector Compensation Restraint to Protect Public Services Act, 2010*, specifically excluded Case Management Masters, and all other judicial officers from its application. Indeed, as a result of joint submissions accepted by the remuneration commissions for other full-time judicial officers in Ontario, in which the Government fully participated, the salaries for those judicial offices continued to increase following the recession due to automatic indexing.⁷

Unlike Case Management Masters, therefore, the salaries of Traditional Masters, Provincial Court Judges, and Justices of the Peace have not been subject to a freeze during the period following the recession. Rather, their base salaries, as previously determined by constitutional processes, have continued to increase in accordance with the automatic salary indexing applicable to those offices, sanctioned by the Government through its participation in joint submissions presented to their respective commissions.

There is no principled reason why Case Management Masters should be the sole full-time judicial officer to be subject to wage freezes or receive modest salary increases applied to an inappropriate base level of remuneration. As already discussed under the criterion reviewing the provinces economic conditions, such a situation would mean that Case Management Masters are shouldering more than their fair share of the burden in this period of healthy economic recovery, which is not in keeping with Supreme Court of Canada jurisprudence.

I have concluded that the recent public sector compensation trends in Ontario should not inform my initial assessment of the appropriate base level of remuneration for Case Management Masters.

¹ See, for example, 2011 Budget at 60; 2012 Budget at 70-71; 2013 Budget at 108 and 125; and 2014 Budget at 152.

² See Report of Davie First DJ Commission at 30.

³ Ontario Government Response to First Deputy Judges Remuneration Commission Report at 2 [hereinafter Government DJ1 Response].

⁴ Government DJ1 Response at 3-4. See also Report of Nairn Second DJ Commission at 18.

⁵ *Masters' Association (OCA)* at para. 52; *Masters' Association (SCJ)* at para. 120.

⁶ Report of Special Advisor Cunningham at 15.

⁷ See Report of Nairn Fifth JP Commission at 18. See also Eighth Provincial Judges Remuneration Commission Report at 4 [hereinafter Report of Kaplan Eighth PCJ Commission].

5. THE GROWTH OR DECLINE IN PER CAPITA INCOME

The Order in Council establishing this Commission directs me to consider the growth or decline in per capita income in formulating my recommendations. Unfortunately, however, the parties' submissions on this criterion, including supplementary submissions filed at my request, failed to include sufficient supporting evidence to demonstrate how this measure should be properly assessed and applied to my deliberations.

Both parties in fact agreed that little weight, if any, should be given to this criterion, and argued that such an approach would be consistent with that taken by other judicial remuneration commissions.

I note that, although other remuneration commissions in Ontario have been directed to consider this or a similar criterion, there has often been little discussion of this concept in their reports and most have given it little, if any, weight. Where there has been some discussion, the measures chosen to represent per capita income and the approaches taken regarding its application have been inconsistent.

The Government argued that although remuneration commissions are required to assess the criteria listed in their respective Orders in Council, they are not required to give the same weight and consideration to each criterion. I agree.

Based on the submissions before me, I find no basis for giving this criterion any weight in my determination of the appropriate level of remuneration for Case Management Masters at this time.

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

The evidence submitted to me has detailed several relevant financial and compensation policies and priorities of the Government of Ontario. These include: reducing the deficit through program spending restraint, particularly with respect to compensation, while maintaining key public services; honouring the collective bargaining process; introducing pension reforms, such as phased retirement programs; and making major investments in several priority areas.

As in previous years, the Government stated in its 2015 Budget that managing compensation costs is critical to achieving its goal of balancing the budget. As such, it said that compensation costs must be addressed within this fiscal framework, and therefore cannot include funding for significant wage increases. It said that any modest wage increases must be offset by other measures to create net-zero agreements and that all public sector partners must continue to work together to control current and future compensation costs.¹

With respect to the criterion related to recent public sector compensation trends, I have already discussed the reasons why this compensation restraint policy cannot not apply to my initial determination of an appropriate base level of remuneration for Case Management Masters. As also discussed, with their inappropriately low levels of remuneration, Case Management Masters have been shouldering a greater share of the burden during this time of deficit reduction than not only other judicial officers, but also most public sector groups. To apply a freeze or only minimal salary increases to their current inadequate salaries would be, in my view, not only unfair and unprincipled, but unconstitutional.

As further discussed, the Government has repeatedly exceeded its deficit reduction targets on an annual basis and is on track to eliminate the deficit in 2017-2018. It was within this context that in 2014 the Government announced a 10-year plan (“10-Year Economic Plan”) to make major investments in the provincial economy.²

As such, the Government's fiscal policies and priorities have not been limited to only restrictive measures. Rather, and consistently since 2010, the Government has announced substantial new investments in this province, with a particular emphasis on key public services, infrastructure, development of skills and talents and strategies to develop a more dynamic and resilient economy. Its 10-Year Economic Plan includes, for example, \$130-billion pledged for public infrastructure initiatives. I note that the 2015 Budget included justice infrastructure as one of its priority areas for investment.³

Clearly, the Government's long-standing policy of making major investments while still carrying a deficit must inform my conclusions and recommendations. With planned investments ranging from tens to hundreds of millions of dollars, including over \$100 billion for infrastructure as discussed, such investments far exceed the remaining deficit of \$10.9 billion forecast in the 2015 Budget.⁴

Although the Government's submissions repeatedly stressed its statement in 2013 that "eliminating the deficit is the single most important thing the government can do to secure Ontario's prosperity," it has also emphasized its goal of protecting, preserving, and *investing* in the key public services upon which the public relies. The Government consistently indicated that it will not pursue its goal of eliminating the deficit at the expense of providing needed public services.

In fact, its 2011 Budget stated that:

While the Government will continue to tackle the deficit with determination, it will not put vital services at risk or resort to arbitrary, across-the-board-cuts.

Its 2012 Budget also said that:

While a return to balanced budgets is a key fiscal objective, it alone is not a goal – it is a means to an end: ensuring that Ontario families continue to receive the best value through the best education and health care in the world, and a strong economy that creates jobs.

Its 2014 Budget repeated the same sentiment, stating:

Where expenses can be cut, we will cut them. Where services can be provided more efficiently, we will do so. We will not sacrifice important public services, like schools, hospitals, social services and measures that create jobs and help middle-class families.⁵

The obvious foundation of any constitutionally based guarantee of judicial independence is the strong and unwavering protection of the financial security of judicial officers; anything less would represent a threat to the integrity of our system of justice. Providing members of the judiciary with adequate financial security to ensure their judicial independence is clearly in accordance with the Government's stated objective of protecting and preserving key public services while pursuing the goal of deficit reduction. Moreover, in my view, it is a clear constitutional obligation.

The Case Management Masters provide a key public service within the judicial system. They constitute a small but critical group of judicial officers who adjudicate complex rights in civil and family law in the Superior Court of Justice alongside the justices of that Court. In fact, the office of Case Management Master was created to address a crisis in the civil justice system that was caused, in part, by the phasing out of its predecessor office of Traditional Master. For virtually the entire life of the office, however, the Case Management Masters' level of remuneration has been inadequate in relation to their level of authority and responsibilities.

In its 2014 Budget, the Government stated:

We will cut expenses where we can. We will invest where we must.⁶

In my view, on the basis of the Government's stated financial and compensation policies and priorities, at this time of major fiscal investment by Government when the steady decline in the provincial deficit has exceeded all forecasts and with financial security for Case Management Masters an overriding constitutional obligation, there are no valid impediments to providing their office with an appropriate level of remuneration.

Other remuneration commissions have adopted a similar view. When making recommendations for the federal Prothonotaries, for example, Special Advisor Cunningham was faced with the challenge of providing his recommendations during a similar period of economic recovery. In his report, Special Advisor Cunningham said that he found no reason to justify a delay in providing the appropriate remuneration increases even while the federal government was searching for greater efficiencies within the public service and attempting to balance its budget. He stated:

I am particularly attracted to the British Columbia Supreme Court decision in *Provincial Court Judges' Association of British Columbia v. Attorney General of British Columbia*, [2012] B.C.S.C. 1022, which, in agreeing with the JCC's rejection of the provincial government's attempt to rely on its "net-zero mandate" stated:

"[78] PEI Judges Reference does not grant government a pass on its constitutional obligation, even in difficult 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."

In my view the constitutional requirement concerning the setting of judicial remuneration ... cannot be trumped by such things as "net-zero mandate" or a return to budgetary balance by 2015-2016. What always must be in the forefront of these discussions is whether the Prothonotaries current remuneration is adequate even though it may be linked to that of Federal Court Judges. I have concluded it is not and requires a revision upward. I am satisfied on the basis of the evidence advanced that their salaries have not merely been consistently among the lowest of full time judicial officers in Canada but that the disparity has only intensified over the years. Clearly this was recognized by my predecessor, The Honourable George Adams, and only because of a devastating recession in 2008-2009 were his recommendations rejected.⁷

I agree with this conclusion. The Case Management Masters are in a comparable position to that occupied by the Prothonotaries when Special Advisor Cunningham conducted his review. It is now the Case Management Masters, however, who occupy the inappropriate low end of the remuneration scale for comparable judicial officers in Ontario and across Canada, and whose

remuneration disparity with its most appropriate comparators has continued to grow over the years.

As was the case for Special Advisor Cunningham, I find nothing in the Government's financial or compensation policies and priorities that prevents bringing Case Management Masters' remuneration up to the level required for their judicial independence.

I note, in addition, that there are other Government policies that are relevant to my review. For example, the Government has introduced reforms to modernize the public sector pension system, including amendments to the *Pension Benefits Act*. These amendments permit pension plans to offer "phased retirement programs" that allow members who are of retirement age to continue working and accruing pension benefits while receiving their pensions. In 2010, the phased retirement option was included in amendments to the *Pension Benefits Act*, although the effective date of this option has not yet been proclaimed.

In my view, the Government's decision to permit phased retirement programs for members of the public sector is highly relevant in considering whether Case Management Masters should be permitted to earn judicial income on a part-time, *per diem* basis following their retirement while also receiving a pension. Currently, both Traditional Masters and Provincial Court Judges may do so, while Case Management Masters cannot. In fairness and equity, I believe that the Government's policy of providing phased retirement programs in the public sector must also be applied to Case Management Masters, as discussed elsewhere in this Report.

As well, the Government's policy of honouring the collective bargaining process in the midst of its compensation restraint policies has application to this Commission. As this is the First Commission established to determine the appropriate base levels of compensation for Case Management Masters, this constitutional process must similarly be allowed to unfold absent those same policies. It is only after an appropriate base level of remuneration for this judicial office has been implemented that the Government's other policies and priorities can be considered.

I note the remarks of the Nairn Third DJ Commission, which was subject to a similar criterion relating to the Government's financial policies and priorities, and which urged caution in its application:

...prevailing economic conditions, as demonstrated by the various indicators, do not necessarily create a compensation envelope beyond which recommendations may not be made, as other criteria may weigh more heavily (as was seen in the Davie Commission report). It is the case that a government also takes these economic indicators into account, as well as a multitude of other factors, in formulating its policies and priorities. The Government's financial policies and priorities remain, however, one criterion for consideration, and to automatically accord greater weight to that criterion would necessarily result in a failure of decision-making on the part of a Commission, in direct contradiction of the constitutional requirement that a remuneration commission process be independent, objective, and effective.⁸

Indeed, at the start of the public hearings, the Case Management Masters initially questioned the inclusion of the word "compensation" in this criterion, which they said is the first time it has appeared in such a criterion for a remuneration commission in Ontario. They submitted that by including this term, which compels this Commission to consider the Government's compensation policies and priorities, the Government is inappropriately attempting to dictate the outcome of this Commission's deliberations.

In other words, they initially argued that including this term undermines the independence of the Commission process itself. When pressed, however, the Case Management Masters chose not to proceed with any assertion before this Commission that the inclusion of the word "compensation" impacts on either the independence of the Commission or the constitutionality of the Order in Council.

I concur with the conclusions of the Nairn Third DJ Commission as highlighted above. I find that the Government's current financial and compensation policies do not pose a barrier to providing Case Management Masters with the level of remuneration required to protect the judicial independence of this office.

¹ 2015 Budget at 210, 211 and 232.

² 2014 Budget at 241.

³ 2015 Budget at 63.

⁴ *Ibid.* at 201.

⁵ 2014 Budget at xviii.

⁶ *Ibid.* at xxiv.

⁷ Report of Special Advisor Cunningham at 15-16.

⁸ Report of Nairn Third DJ Commission at 40.

7. THE PRINCIPLES OF COMPENSATION THEORY AND PRACTICE IN CANADA

As other commissions have found, many of the principles applicable to this criterion have already been reviewed in considering the criterion relating to the need to provide fair and reasonable remuneration.¹ Such principles include the need to attract and retain the best candidates to office, to ensure that the level of remuneration reflects the inherent value, complexity, and responsibility of the work in its own right as well as in relation to relevant comparators,² and to reflect changes in responsibility and workload.³

The principle of “equal pay for equal work” is a major consideration in determining the appropriate level of Case Management Master remuneration. In terms of the comparison undertaken with the office of Traditional Master, the matter of gender equity is also a significant consideration. Currently, nearly 50 percent of Case Management Masters are female, while all appointed Traditional Masters were male. Both offices have performed precisely the same role in the Superior Court of Justice, with Case Management Masters also responsible for many additional functions. As discussed, Case Management Masters have in fact taken on greater, more judge-like responsibilities over time.

I note that one of the first three Case Management Masters appointed in 1997 was female. Since then, women have regularly been appointed to this office, most recently in 2015, a year when only one Case Management Master was appointed. I also note that in *Masters’ Association* (SCJ), the Court found that the single Case Management Master appointed in Windsor in 1998 performed no case management functions during her first six years in office. Instead, she fulfilled the same role, and exercised the same jurisdiction, as her Traditional Master predecessor.⁴

In an affidavit filed before this Commission, Case Management Master Carol Ann Albert, who was also among the first women to be appointed in 1998, and who since 2006 has served as a full-time Construction Lien Master, attested that her work and role “is exactly the same as for all traditional masters who had been assigned to construction lien” work. Indeed, there was a period

of overlap, during which she exercised the very same construction lien jurisdiction as Traditional Masters serving in office.⁵

There can be no justification for the disparity between her level of remuneration throughout the period of her tenure and that of her Traditional Master counterparts performing precisely the same work. In both fairness and law, the remuneration of the two offices must reflect this fact.

I am also unable to accept the Government's main submission on this criterion. It argued that the principle of market forces, or the supply and demand theory of compensation as has been applied in the context of interest arbitration, should similarly be applied to the matters before this Commission. It cited Morley Gunderson's 1983 discussion paper entitled, "Economic Aspects of Interest Arbitration" for support.

Gunderson posits that if public sector wages are too low relative to their private sector counterparts or for the requirements of the position, they will fail to attract a sufficient number of qualified applicants, or resignation rates will rise. Conversely, he argues that if wages are too high, there will be an excess supply of individuals for the position. The theory, which involves the use of "disequilibrium quantity measures", borrows from basic principles of economics to use measures of supply as a gauge for whether a given level of compensation is appropriate.

The Government's argument relies on theoretical market forces. It is simply not appropriate to apply a purely economic supply-and-demand model to the recruitment and retention of judicial officers. In upholding the rule of law, the judiciary stands apart from the legislative and executive branches of government, and is often called upon to hold them to account. In the interests of society as a whole, we must seek the highest quality of judgment, ability, and integrity in candidates for judicial office.

Although the level of remuneration for the office must be adequate to protect judicial independence and to attract the ablest candidates from a generally well-paid profession, it cannot and must not be governed by mere market forces. To the extent that such forces may be relevant, they will have already been taken into consideration in any well-reasoned analysis of fair and reasonable remuneration, as the Nairn Second DJ Commission concluded:

Separate consideration of market forces is of limited assistance in assessing appropriate remuneration as it is effectively captured by the comparative analysis and must be weighed against competing factors including, for example, the element of public service.⁶

In addition, it must be noted that there are many factors beyond the level of remuneration that should form part of the decision of a senior practising lawyer to seek judicial office. Such factors include opportunities to serve the public and the justice system; to apply the law in a decision-making role; to meet the intellectual and analytical challenges of the work itself; and to contribute to the evolution of our jurisprudence.

The Nairn Third DJ Commission, in fact, rejected outright the notion that the level of judicial remuneration has any bearing on recruitment or retention, stating that there is no evidence to substantiate that notion. Indeed, this conclusion is borne out in the reports of the many federal and provincial remuneration commissions in evidence before me. When it comes to the judiciary, the concern has never been one of shortages of supply, for example, even in the face of chronic, inadequate levels of remuneration. Rather, it has been one of ensuring that the best candidates continue to seek appointments to judicial office.

The fact that the Government received 47 applications when it sought to appoint a new Case Management Master in 2012 does not necessarily imply that current compensation levels are adequate. On its own, and without further analysis, the mere number of applications provides no insight into the quality of the applicants or their suitability for judicial office. The public interest is best served when recruitment efforts are successful in attracting sufficient numbers of outstanding candidates with the skills and experience to best fill the judicial role.

The McLennan Seventh Federal Commission, which examined data from across Canada in its review of the federal judicial appointments process from 1988 to 2004, found that half of the applicants fell into the category of “Unable to Recommend”.⁷ That commission also recognized that even amongst those candidates who were considered qualified, or even highly qualified, only a few could be considered to be outstanding:⁸

We must also be mindful that, as shown in Table 6, the number of applicants who are recommended or highly recommended by the provincial and territorial Judicial Appointment Committees and the Federal Judicial Appointments Secretariat that inform the Minister of Justice, relative to the number of vacancies, demonstrates that current levels of salary and benefits do attract qualified candidates. This consideration must be tempered by the fact that, while many potential candidates may be qualified or even highly qualified, what is important for the well-being of our judicial system and democracy, and what is mandated for us, to ensure that salary and benefit levels are adequate to attract, or at least not discourage, *outstanding* candidates, in other words, the best and the brightest, which must be only a subset of even those who may be highly recommended.⁹ [Emphasis in original]

I note that the Government adduced no evidence as to the suitability of the 47 applications it received for the office of Case Management Master in 2012. I also note that if the number of applications is meant to be informative, the Government's position is weakened by the fact that the 47 applications received in 2012 fell far below the number received in previous recruitment efforts. The Government reported that previous postings for the office of Case Management Master had attracted between 82 and 125 applications.¹⁰ By comparison, the 47 applications received in 2012, which resulted in one appointment, represent approximately 57 percent of those received during its previous postings in both 2005 and in 2009, when only one appointment was made. In my view, the drop in the number of applications in 2012 in fact fails to support the Government's market-forces analysis and its corresponding contention that the level of remuneration for this office is adequate.

Gunderson himself noted in his discussion paper that there were a number of potential problems with using "disequilibrium quantity measures", particularly when the employer is the government itself. To be clear, the judiciary is not "employed" by the Government, but it is paid from the public purse. By way of analogy, Gunderson noted that wages may not increase, for example, even when shortages prevail, because governments must take into account considerations that are unrelated to market forces when determining wages.¹¹

In summary, I have concluded that the disparate levels of remuneration provided to Case Management Masters and Traditional Masters, who perform the same work and function, and notwithstanding the additional responsibilities assigned to Case Management Masters, fails to meet the well-accepted principle of “equal work for equal pay” and is inconsistent with established principles of compensation theory and practice in Canada.

¹ Report of Davie First DJ Commission at 31; Report of Nairn Second DJ Commission at 112.

² Report of Nairn Second DJ Commission at 37.

³ See, for example, Report of Brown Third PCJ Commission at 9.

⁴ *Masters’ Association* (SCJ) at para. 32.

⁵ Affidavit of Case Management Master Carol Ann Albert (28 March 2014) at paras. 1 and 8-9.

⁶ Report of Nairn Second DJ Commission, pp. 37-38.

⁷ Report of McLennan Seventh Commission at 21.

⁸ *Ibid.* at 20.

⁹ *Ibid.* at 20.

¹⁰ Affidavit of Rosanna Giancristiano at 1-2, filed.

¹¹ M. Gunderson “Economic Aspects of Interest Arbitration” (1983) at 44-45, filed.

REMUNERATION ANALYSIS

I must conduct my assessment of remuneration matters in accordance with the criteria listed in my Order in Council, the unique circumstances before me, and the overriding principle of judicial independence. My conclusions about the individual criteria have assisted in determining the relative weight to be given to each. Having carefully considered all of the criteria, it is clear that the overwhelming priority at this time is the need to establish an appropriate base level of remuneration that takes full account of the judicial independence required for the office of Case Management Master. This is long overdue.

In this First Commission I take particular note of the office's protracted history in its attempts to seek appropriate terms of independence, more reflective of its judicial stature, function, and history in the Superior Court of Justice. The complete absence of a constitutional process for determining the remuneration of Case Management Masters for the nearly 20 years that the office has existed informs the urgency of the matters before me.

There has been an historic failure to not only conduct an initial assessment of the appropriate level of remuneration for this office, but also to undertake periodic reviews, as required by *PEI Reference*. Given the significant evolution of their judicial role, including the broadening of their jurisdiction and their increased workload over the life of this office, there is no longer time for delay.

I have concluded that the office of Case Management Master is simply an expansion of the office of Traditional Master, and this is widely recognized within the Ontario legal community. It follows that Case Management Masters are at least entitled to the same package of financial security that is accorded to Traditional Masters.

The decisions of the Ontario Courts support this conclusion. In *Masters' Association*, the Court of Appeal confirmed that Case Management Masters exercise the same powers as Traditional

Masters, with additional responsibilities.¹ The lower court held that, given their shared role, the post-retirement terms of office existing for Case Management Masters were unconstitutional since they fell below the security of tenure enjoyed by Traditional Masters.²

Security of tenure and financial security are two fundamental components of judicial independence. As Justice Platana held on the issue of security of tenure, I similarly find that there is no principled basis for providing Case Management Masters with a salary that is lower than that of Traditional Masters. To do so relegates Case Management Masters to a second-class status with respect to their remuneration, and, as with tenure, this status does not meet the requirements of judicial independence.

With Case Management Masters occupying the same position as Traditional Masters, and with the Courts having held that Case Management Masters are entitled to the same security of tenure as Traditional Masters, their financial security must be the same as well. This includes all aspects of remuneration, including salaries, pensions, and benefits.

In fact, with Case Management Masters exercising judicial powers that exceed those of Traditional Masters, it is arguable that Case Management Masters are entitled to a *higher* level of full-time remuneration than provided to their Traditional Master counterparts.

It is in the public interest to provide an appropriate degree of financial security to Case Management Masters which does not exist at the present time.

In my review of this Commission's criteria, including the province's economic conditions, the Government's financial and compensation policies and priorities, and recent public sector compensation trends, there are no impediments to fully implementing the salary required to ensure the judicial independence of Case Management Masters.

All key provincial economic indicators since 2010 have shown consistent and steady growth. By 2014, all economic indicators surpassed even their pre-recessionary peaks, and that trend has continued into 2015.

While it is clear that there has been a general policy of fiscal restraint in public sector compensation, this policy cannot apply to the initial determination of remuneration required of this First Commission. Rather, it is initially necessary to establish an appropriate base level of remuneration for Case Management Masters that preserves the principle of judicial independence.

This conclusion is also consistent with both the Government's submissions before previous remuneration commissions, and its simultaneous policies of protecting key public services while making necessary investments in infrastructure and economic development.

At their core, these Government policies include the preservation of the goals and principles of a robust democratic society whose economic interests are dependent on a dispute resolution mechanism that is timely and effective. Case Management Masters perform a vital function within the judicial system that is constitutionally protected and as such, their remuneration must be commensurate with the importance of their role in the justice system.

I commend the Case Management Masters who, over the life of this office, have discharged their duties with professionalism and diligence despite several crises in the administration of the civil justice system. In addition, they have been challenged by a broad and complex range of increased responsibilities, including in such areas as civil law, family law, and bankruptcy law and most recently have begun presiding in a larger geographic area that includes Brampton and Milton. With the establishment of this First Commission, the time has now come to remedy the significant and unjustified disparity in remuneration between Case Management Masters and Traditional Masters, and to provide necessary increased protections that have for too long been denied to the office of Case Management Master.

SALARY

I have determined that the previous linkage to the SMG3 salary, which was not constitutionally determined, was ineffective in providing an adequate salary for the office of Case Management Master, given its judicial role and functions. Almost immediately after the linkage was made, the salaries of Case Management Masters fell materially behind those of their more appropriate judicial comparators, and the gap only continued to grow.

As a result, Case Management Masters have, for the better part of two decades, shouldered more than their fair share of the burden during difficult economic times and have been grossly undercompensated during periods of economic prosperity. The linkage, which automatically incorporated any unilateral executive action to restrain SMG3 compensation, constituted the very executive interference forbidden by *PEI Reference*. It is time now to set this right.

I note the remarks of the Levitt Ninth Federal Commission when it addressed the federal government's submissions relating to public service comparators:

...the Government's analysis failed to give sufficient weight to the constitutional status and role of the judiciary and also the importance of its appearance and image to the effective performance of that role.³

Although the context was different, the sentiment is nonetheless true here as well. In its submissions before me, the Government downplayed the important judicial role of the office of Case Management Master and the need for enhanced financial security to protect its judicial independence.

In 2011, Case Management Masters earned \$193,346, which represented only 74 percent of the Traditional Master salary of \$262,113 at that time. With Case Management Master salaries frozen at their 2011 levels, and with Traditional Master salaries continuing to increase annually as a result of automatic salary indexing, the salaries earned by Case Management Masters in 2015 dropped to only 67 percent of the Traditional Master salary of \$287,345.

Based on such a significant salary discrepancy, it is easy to imagine that Case Management Masters might be wrongly perceived as judicial officers of much lower rank and status than Traditional Masters. The true functions and roles of Case Management Masters have not been adequately represented in the salaries they have received as a result of the inappropriate linkage to the SMG3 civil servant classification. These salaries have experienced further *de facto* reductions as a result of two successive freezes imposed since 2008.

As The Honourable Coulter A. Osborne observed in his 2007 report on the *Civil Justice Reform Project*:

...on the subject of masters, it seems to me that no useful purpose is served by maintaining the distinction between masters and case management masters. All masters should exercise the same jurisdiction and receive the same salary.⁴

I have reached the same conclusion. For this First Commission, it is appropriate to recommend that salaries for Case Management Masters rise at least to the level of that of a Traditional Master serving on a full-time basis, which is also equivalent to that of a full-time Provincial Court Judge. I emphasize that this level of salary is the minimum adequate level for Case Management Masters, who exercise a much greater range of judicial duties than Traditional Masters. This is a level of salary which will, I believe, continue to attract outstanding candidates to the office. Equally important, as the Supreme Court of Canada held in *PEI Reference*, this salary level is commensurate with the status, dignity, and responsibility of this important judicial office.

My recommendations on salary for the first year of my mandate is as follows:

- a) Effective April 1, 2011, the base salary for Case Management Masters should be \$262,113, the equivalent salary earned by Traditional Masters at that time.
- b) Thereafter, for the remainder of this Commission's mandate, the base salary for Case Management Masters should be the equivalent indexed salary as earned by Traditional Masters and Provincial Court Judges.

In making this recommendation, I also note the remarks of the Beck Fourth PCJ Commission when in 1998 it urged significant salary increases for Provincial Court Judges:

If the increases are thought to be generous, they are only so in light of the extremely restrictive salary position since 1991...

As to generosity, we would adopt the words of Professor Martin Friedland in his study for the Canadian Judicial Council, *A Place Apart: Judicial Independence and Accountability in Canada*, at p. 56:

[T]he greater the financial security, the more independent the judge will be, and so, in my view, it is a wise investment for society to err on the more generous side. Even if economic conditions were such that a very large portion of the bar was willing to accept an appointment at a much lower salary, we would still want to pay judges well to ensure their financial independence – for our sake, not for theirs.⁵

In this case, my recommendations are not reflective of any generosity, but are simply necessary to provide Case Management Masters with the minimal level of financial security that is a constitutional imperative, which is a level that is equivalent to that of Traditional Masters, their predecessor officeholders.

With the current complement of Case Management Masters now fewer than 20—comparable to the size of the office of Traditional Master when it existed in full complement—the Government's expenditures would simply be to replace the expense of one judicial office with another, albeit one with significantly enhanced responsibilities.

In my view, it would be inconsistent with the principle of judicial independence to provide anything less to Case Management Masters.

PENSION

Adequate pensions are integral to the financial security required to protect judicial independence. Many remuneration commissions have concluded that pensions, even more than salary, are key to providing an appropriate level of financial security for the judiciary.⁶

As Professor Martin Friedland stated in his report, *A Place Apart: Judicial Independence and Accountability in Canada*:

...we want good pensions for judges so that they are not worried unduly about their future financial state...

Pensions are a crucial part of judicial security. If a judge's pension is inadequate or insecure, there is a danger that the judge will not be fully independent while sitting on the bench...If the pension is not adequate and secure, the judge may be inclined to favour a side that may be important in the judge's future, in particular, the government that may be looked to for a pension. Worse, the judge may be tempted to accept favours or bribes from litigants while on the bench.⁷ [Emphasis in original]

When legislation to provide pensions for Superior Court Judges was being introduced in 1903, Prime Minister Sir Wilfred Laurier similarly stated that the object was "to put judges above temptation, to ensure their dignity and independence, and to make them what they should be, the impartial arbiters of all differences in the community."⁸

In 2004, the McLennan Seventh Federal Commission also noted:

...those that hold [judicial] office can never be tempted, or seen to be tempted, to compromise their independence and integrity by reward or hope of reward, either during or after their judicial tenure. This latter consideration is why the judicial annuity is such an important part of the judicial compensation package.⁹

At the provincial level, the Henderson First PCJ Commission observed that:

...it is an emblem of a judge's independence that he or she be perceived by those within the larger community to be a person of means commensurate with his or her office. If a judge is perceived to be in straitened or reduced circumstances, he or she is more likely to

appear to the public to be susceptible to financial pressure or influence, whether or not that really is the case. Preservation of the status that people expect of judges requires that a certain level of expenditure be maintained.¹⁰

Remuneration commissions are in agreement that pensions are key to attracting the best candidates to judicial office.¹¹ As previously discussed, many candidates for judicial office are derived from private practice where salaries are often comparatively generous, but where pensions normally do not exist. The Beck Fourth PCJ Commission stated that “[i]t is widely acknowledged that one of the main reasons senior, highly remunerated practitioners are willing to accept a federal judicial appointment at a greatly reduced salary, is because of the generous pension plan.”¹² Special Advisor Cunningham also noted that pensions for Superior Court Judges constituted a major compensation-related incentive, making up for what, in many cases, is a sharp decline in income.¹³

The Drouin Sixth Federal Commission explained that freedom from the need to save for retirement is a key incentive when candidates seek judicial office:

...The pension value, however, is a significant factor to be taken into account in comparing the income position of judges and lawyers in private practice. This is so because lawyers in private practice form the group from whose ranks the majority of judicial candidates are selected. Further, such lawyers generally do not have the benefit of pension arrangements or pension schemes and are obliged to save for their retirement through Registered Retirement Savings Plans (“RRSPs”) and from after tax savings on an on-going basis. For some, therefore, it may safely be assumed that the judicial annuity is an important engine driving recruitment.¹⁴

Contrary to the Government’s submissions, civil service pension plans have consistently been found to be ineffective in providing members of the judiciary with an adequate level of financial security. As the Drouin Sixth Federal Commission observed, most public or private sector pension plans use an accrual rate or percentage that is multiplied by the number of years of service and then multiplied by an average of the best consecutive years of salary (often three or five years) to arrive at an annual pension amount. The maximum allowable pension is usually about 70 percent of the calculated average salary.¹⁵ For most such plans, accrual rates of two percent appear to be the norm, with 35 years of service required to achieve maximum pensions, which is largely unachievable for individuals appointed to office as a second or third career.

As a result, unique pension structures have been adopted for Superior Court Judges, the federal Prothonotaries, Traditional Masters and Provincial Court Judges, as well as for comparable judicial officers across Canada, to protect their judicial independence.

In fact, pensions have been referred to as the most distinctive aspect of judicial remuneration.¹⁶

As Special Advisor Adams found:

...It has been said that “the pension ratio” or accrual rate is as important as, and arguably more important than, salary. (See the Beck Commission (1999) at p. 5). Enhanced retirement income arrangements have been determined to be necessary and have been implemented for the federally appointed judiciary, for the provincially appointed judiciary *and for masters across Canada*. ...

The Freedman Commission (2002) at p. 74 ... point[ed] out that each province had distinctive pension arrangements for its judges as did the federal government for federally appointed judges. Judges and related judicial officials are not expected (or able) to apply for judicial office until at least mid-career. This is reflected in the required substantial minimum number of years of practice at the bar prior to appointment. This expectation is also reflected in the average age of judicial appointments across Canada. ... because a judicial appointment is for life (to age 75) and comes at the peak of a lawyer’s earning capacity, unique judicial annuities are the rule in order to safeguard judicial independence. Judicial pensions are neither anomalous nor anachronistic. The judicial annuity, with its accelerated accrual period in the range of 15 to 20 years, is what makes judicial compensation unique and accords with a judicial officer’s *sui generis* status. It is the most distinctive feature of judicial compensation.¹⁷ [Emphasis added]

The Sixth and Seventh Triennial Provincial Judges Remuneration Commissions (“Nairn Sixth and Seventh PCJ Commissions”) also recognized the need to maintain unique pension arrangements for the judiciary:

108. Yet pension is an immensely important feature of any compensation package and particularly so for judges. Having been appointed at a later stage in life judges typically have less time to accrue pensionable service and pension contributions have less time to accrue value for the benefit of the pension plan. Judges’ pensions therefore represent a significant benefit as well as a significant cost in a compensation package.¹⁸

Recognizing that judges and related judicial officers are appointed later in their careers, commissions have concluded that it does not serve the public interest to structure pensions in a way that encourages lengthy service for the sole purpose of obtaining a better pension. Rather, the nature of judicial duties favours a limited duration of time in office, with renewal of the bench an important public policy goal. As the Scott Fifth Federal Commission commented:

Informed observers, including responsible members of the Bar, are unanimous in the view that the ability of ordinary mortals to function in the judicial mode is finite in terms of time. The judge's role is a unique one, as is the case with all fact-finders and dispute-resolvers. Their task, which is to sit, to listen and to decide, while sometimes appearing unremarkable, requires mental discipline of a kind which in most human beings has its limitations. Where the requisite mental discipline is lacking or exhausted, the result is, or can be, a tendency to undermine, in a serious way, public acceptance of judicial decision making in individual cases. Furthermore, in a changing world, there is a constant need for rejuvenation of the Bench by younger persons expressive of current views. Renewal must be systematic so as to ensure that the profile of the Bench is expressive of contemporary societal values.¹⁹

The Government nevertheless cited the Supreme Court of Canada's decision in *Valente* to support its argument that civil service pensions are acceptable for judicial officers. In *Valente*, the Court found that because the executive was not able to interfere with the Ontario civil service pension plan, the judicial independence of the provincial courts had not been threatened on that basis.

The issue for this Commission, however, is not one of arbitrary influence by the executive potentially threatening judicial independence, but rather of the adequacy of the PSPP to provide Case Management Masters with post-retirement financial security. I note as well the remarks of Special Advisor Adams when the federal government raised a similar argument during his review of the Prothonotaries' remuneration. In concluding that unique judicial pension plans are required to safeguard judicial independence, he found that the concept had evolved considerably since the Court's decision in *Valente*:

The Government has pointed to Valente (supra) as standing for a contrary principle. However, Valente was concerned with the application of s. 11(d) of the Charter to both tribunals and provincial courts. Indeed, that perspective led the Court to conclude even salary commissions were not required in respect of judicial compensation. That obiter observation is no longer accurate. Moreover, by the time the Supreme Court spoke in Valente (1985) special provision had been made for a provincial judge's pension. More than a decade following Valente, the Court held in the PEI Judges Reference that judicial independence was not dependent on s. 11(d) of the Charter. Rather, it was an unwritten constitutional principle and its related concepts had evolved to extend to all courts, not just the superior courts of this county. (p.76) In my view, the Government's reliance on Valente is misplaced in this point in our understanding of judicial independence.²⁰ [Emphasis added]

Judicial pension plans are therefore typically subject to higher effective accrual rates and, once minimum eligibility requirements are met, provide members with a full pension after 15 to 20 years of service. Superior Court Judges, for example, are entitled to a full judicial pension equal to two-thirds of their final salary, once they have served for at least 15 years in office and the sum of their age and years of service is at least 80.²¹ I note that despite the fact that federal remuneration commissions have consistently accepted civil servant DM3s as a comparator for determining the salaries of federally appointed judges that is not the case with respect to their pensions.

I note as well that as a result of Special Advisor Cunningham's recent review, the federal government decided to allow the Prothonotaries, who had previously received pensions under a public service pension plan, to receive pension benefits calculated in the same way as the federal judicial plan. Special Advisor Cunningham observed that Prothonotaries, as judicial officers, are entitled to the full protections of judicial independence as established in PEI Reference,²² and stated:

In my view, the current pension arrangements enjoyed by the Prothonotaries are not appropriate for this group. These arrangements were designed for members of the public service as a benefit for those entering the service at a relatively young age, mindful of a long career. They are not adequate for judicial officers who are generally appointed mid to late career.²³

In Ontario, the PJPP provides both Provincial Court Judges and Traditional Masters with a minimum pension of 56 percent of final salary at age 65 with 15 years of service. Pension amounts are allowed to further increase by one percent per year for each year served beyond 15 years, either before or after age 65, up to the age of 75. The Nairn Sixth and Seventh PCJ Commissions, in fact, observed that from its inception the PJPP was meant to provide its judicial members with a target income replacement ratio of 75 percent after taxes, Old Age Security and CPP are taken into account.²⁴

Among their judicial comparators, Case Management Masters are the only ones that are not part of a judicial pension plan. The Case Management Masters have been placed into the civil service PSPP. This is composed of both a basic plan and a supplementary plan (“PSSBA”) that is meant for higher-earning individuals, which includes the Case Management Masters.

According to calculations provided by the Case Management Masters’ actuaries, Eckler Ltd., a Case Management Master theoretically retiring on March 31, 2013, at age 65 after 15 years of service under the PSPP would have earned a pension of \$52,252, whereas a Traditional Master or Provincial Court Judge retiring under the same circumstances would have earned an annual pension of \$149,719, a difference of \$97,467 per year. The pension differential increases after 2013, as a result of increases to Traditional Masters and Provincial Court Judge salaries.

Based on calculations performed by its actuaries, Aon Hewitt, the Government provided a theoretical scenario of the potential pension benefits that a Case Management Master could earn under the PSPP and PSSBA. These calculations were based on a series of assumptions that included an age of appointment of 45, a retirement age of 67, an accrual rate of 2 percent, retirement in 2013 with a pension credit of 22 years, and final average earnings of \$190,000.

The Government submitted that a Case Management Master in such circumstances would earn a yearly pension of \$75,925.²⁵ It submitted that this amount, which it said represents 39 percent of the current salary, is in and of itself “not a terrible pension”, and is a particularly good retirement income considering it reflects only one portion of an individual’s career.²⁶ A pension of approximately 39 percent of income falls far below the 56 percent of salary that is intended as a

minimum pension amount for Traditional Masters and Provincial Court Judges who meet the basic eligibility requirements.

This marked disparity in comparative pension earnings is unacceptable, given the Case Management Masters' important judicial role in the Superior Court of Justice. This disparity is even more troubling, given the major concerns that the Case Management Masters expressed in their submissions regarding their financial position in retirement. They contended that their inadequate pension arrangements have had a negative impact on their personal lives.

In an affidavit to this Commission, for example, Case Management Master Calum MacLeod stated that due to the insufficiency of the current pension plan, even if he remains in office for as long as possible, he will have no choice but to seek post-retirement work as a lawyer, mediator, or arbitrator. He indicated that other Case Management Masters have expressed similar concerns.²⁷

I note that Justices of the Peace, who are not appropriate comparators and whose salaries are lower than those of Case Management Masters, have been provided with unique supplemental pension arrangements to address some of the shortcomings in the PSPP and PSSBA of which they are also members. The evidence suggests that upon retirement after 22 years of service Justices of the Peace would qualify for a higher pension of \$84,156 under the PSPP, when compared with the \$75,925 that the Case Management Masters would earn according to comparable actuarial parameters.

This is despite the fact that Justices of the Peace earn a lower annual salary. Given the important role of Case Management Masters and the breadth of their judicial duties compared to Justices of the Peace, this highlights the inadequacy of the PSPP to provide suitable post-retirement income for Case Management Masters.

The main differences between the Case Management Masters' PSPP and the Traditional Masters' PJPP are:

- Under the PSPP, the accrual rate of 2 percent per year is effectively reduced to 1.8 percent per year, since the plan is integrated with the CPP at age 65, and must be reduced accordingly. While there is no accrual rate per se in the PJPP, a rate of 3.73 percent can be attributed to those who are age 50 at appointment and who retire at age 65 with 15 years of service. The CPP is not integrated with the PJPP, and therefore, there is no corresponding deduction in the PJPP.
- The PSPP requires 35 years of service in order to receive the maximum pension of 70 percent of average salary. The PJPP is focussed on the benchmark of a judge retiring with a pension of 56 percent of final salary after 15 years of service, assuming appointment occurs at age 50 and retirement is at age 65. An additional one percent of final salary per year of service over and above those 15 years can be earned, up to age 75.
- A pension under the PSPP is calculated using the average of the best 60 consecutive months of salary. Under the PJPP, the salary earned in the final year is used to calculate the pension that will be earned.
- Under the PSPP, there is no accrual past age 71, despite the ability of Case Management Masters to work until age 75; under the PJPP accrual is possible until age 75.
- Both the PSPP and the PJPP are indexed in retirement based on the CPI, but the PSPP is “capped”, since it is subject to a maximum annual increase of 8 percent, with any excess carried forward to a year when the increase is less than 8 percent. Indexing under the PJPP is not subject to an annual maximum nor is not “capped”.
- The member contribution rate under the PSPP is 6.4 percent of salary up to the CPP earnings limit and 9.5 percent of salary when above that limit. This results in an effective contribution rate of 8.7 percent when the CPP earnings limit is taken into account. Under the PJPP, the member contribution rate is 7 percent of salary, but this is effectively reduced to 6.6 percent since contributions cease once the basic service requirement is reached.²⁸

- Under the PSPP, a surviving spouse receives 50 percent of a retiree's pension. Under the PJPP, a surviving spouse receives 60 percent of a retiree's pension.

The Government submitted that pre-appointment savings must be considered when determining pensions for Case Management Masters, maintaining that it is not obligated to provide them with maximum pension entitlements, or to compensate them for periods of employment prior to their appointment.

In my view, the Government's submissions do not adequately reflect its constitutional obligations. The issue is not one of "compensating" for a lack of savings prior to appointment, but of providing an appropriate level of post-retirement income to ensure the judicial independence of members of the judiciary while in office. I have concluded that those obligations have not been met under the current arrangements for Case Management Masters.

With Traditional Masters, Provincial Court Judges, Superior Court Judges, federal Prothonotaries, and provincial judges and masters in other provinces, all receiving pensions under distinct judicial plans, there can be no doubt that Case Management Masters should also receive a comparable level of post-retirement financial security. As discussed, pensions for judicial officers must accrue at higher rates than those provided in civil service plans and full pension amounts must be achievable in a shorter period of time once minimum eligibility requirements are met.

I note that other remuneration commissions have also rejected the notion that pre-appointment savings should be considered when determining the appropriate pension levels for judicial officers. These commissions accepted that lawyers in their early years of practice who may be raising families and building their careers are unlikely to accumulate a large amount of savings. In fact, the Beck Fourth PCJ Commission rejected similar submissions from the Government on that very basis.²⁹

Since a judicial appointment often occurs at the peak of a lawyer's earning capacity, the candidate's prime opportunity to accumulate substantial savings over the full term of his or her career is, in fact, abandoned in order to take up this important post. As Special Advisor Adams stated, more than any other financial component, the judicial pension reflects a judicial officer's sui generis status, which is a function of both constitutional principle and the labour market reality of mid-career lifetime appointments.³⁰

I note that a similar argument was recently made before Special Advisor Cunningham for the Prothonotaries. He stated:

I completely reject the Government's position that pre-appointment RRSP contributions should form part of the mix. This position has been advanced elsewhere and rejected. As the British Columbia Supreme Court held in *Prothonotaries Association of British Columbia v. British Columbia (A.G.)* 2012, BCSC, 1022 "...absent any empirical evidence respecting pre-appointment retirement savings of private lawyers, the government response is not legitimate." I have no compelling evidence from the Government that would lead me to the contrary conclusion. I agree with the Prothonotaries that the [actuarial] evidence of Haripaul Hannu is of little assistance in that inappropriate assumptions are relied upon. More importantly, to me, personal financial circumstances of those being appointed should not become part of the equation. In engaging the constitutional imperative to provide an adequate level of income protection both during and after a term of office, these considerations, it seems to me, are irrelevant."³¹ [Emphasis added]

I agree with Special Advisor Cunningham's conclusion. First, in the similar case before me, the Government has presented actuarial evidence on potential pre-appointment savings based on assumptions and data that are wanting in reliability. More importantly, I agree that the constitutional principle of judicial independence renders any accounting of pre-appointment savings irrelevant. Maintaining financial security for judicial officers requires that they be provided with an adequate income both during and following their terms in office. In my view, it is unacceptable to say that candidates for judicial office must have set aside a particular amount of savings in advance so that society can be relieved of its constitutional obligation to guarantee adequate financial security in retirement.

In its submissions, the Government argued that the 2012 British Columbia Supreme Court decision, upon which Special Advisor Cunningham relied in reaching his conclusion above, has been superseded by a later decision of the same court.³² I note, however, that the matter was subsequently heard by the British Columbia Court of Appeal, which upheld the original decision upon which Special Advisor Cunningham relied.³³

The Government argued as well that the Case Management Masters' pension proposals exceed the jurisdiction of the Commission. Specifically, it said that the request for accrued pension benefits under the PSPP to be retroactively converted into judicial pension benefits lies outside the temporal jurisdiction of this Commission, since it pertains to benefits that were accrued during service prior to April 1, 2011. In addition, the Government submitted that a number of regulatory and legislative challenges, including how to transfer credit from the PSPP to the PJPP, would arise in any attempt to move the Case Management Masters into the PJPP. It noted that litigation currently taking place between the Provincial Court Judges and the Government relating to the PJPP poses further complications.

It also argued that incorporating Case Management Masters into the PJPP may require that submissions be made to the Provincial Judges remuneration commission for approval, and could increase the complexity of the PJPP, which could become subject to the recommendations of two different remuneration commissions. Finally, the Government argued that applying any pension changes to Case Management Masters who retired during the period of this Commission's mandate would be difficult, and would not conform to the conclusions of other remuneration commissions.

In my view, this Commission has the authority to make pension recommendations that affect years of service prior to April 1, 2011. This is because my Order in Council is subject to, and must comply with, the constitutional authority from which it is derived. This commission process is established under the constitutional principles for independent review of judicial compensation, as laid out by the Supreme Court of Canada in both *PEI Reference* and *Bodner*. In *Bodner*, the Court held that an individual commission may legitimately make recommendations

that reach beyond the confines of its official term, and may re-assess the situation that existed previously:

Each commission must make its own assessment in its own context. However, this rule does not mean that each new compensation commission operates in a void, disregarding the work and recommendations of its predecessors. The reports of previous commissions and their outcomes form part of the background and context that a new compensation committee should consider. A new commission may very well decide that, in the circumstances, its predecessors conducted a thorough 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.³⁴ [Emphasis added]

My recommendation to remove the Case Management Masters from the PSPP and to place them into the more appropriate PJPP would have little meaning without its being applied to the date of appointment to office. As already discussed in detail, pensions must accrue for judicial officers at a more rapid rate than is the case for civil service or private sector pension plans. To have a portion, and for some Case Management Masters, a majority, of years of service exempted from the terms of the PJPP because they fell in a period prior to April 1, 2011 would be arbitrary and unfair.

Having found the pension arrangements for Case Management Masters to be unacceptable, I believe this situation cannot be meaningfully addressed without taking into account of all their years of service. It cannot reasonably be argued that it is beyond the authority of this First Commission to make a full and comprehensive range of recommendations on all compensation matters, including pension benefits.

In addition, it should be kept in mind that pension changes are given effect in the future, for a present benefit – that of judicial independence while in office. My recommendations are intended to provide a currently unrealized benefit that nevertheless will have broad implications for the office currently. As the Government itself acknowledged, it is widely accepted that pensions are a form of deferred compensation that accrues each year in respect of service.³⁵ If past years of service are not appropriately taken into account, there is a real risk that Case Management

Masters' post-retirement financial security will not be achieved and thus their perceived judicial independence compromised.

On the issue of cost, as I have reported previously, many remuneration commissions have acknowledged that judicial pensions are expensive to fund and agree with Professor Friedland that society should err on the side of being generous. The Beck Fourth PCJ Commission concurred, observing:

It is recognized that judicial pensions, on a comparative basis, are expensive to fund. This is because judges are usually not appointed to the bench until significantly later in their careers, and their rate of accrual, as compared to other pension plans, must necessarily be considerably higher. It also explains why federal judges receive a full pension after 15 years of service. The higher accrual rate and the resultant high cost is an inherent feature of any judicial pension plan. But it is one of the necessary costs of a high-quality, respected justice system that attracts the ablest in the profession to a judicial appointment.³⁶

In my view, the Government's cost for moving the Case Management Masters into the PJPP at salary levels equivalent to Traditional Masters and Provincial Court Judges cannot be a rationale for denying the benefit founded in constitutional principles. I note that the Government has benefited from years of savings during which Case Management Masters were provided with unsuitably low pensions. The expense that must now be incurred is necessary to provide Case Management Masters with a constitutionally appropriate level of financial security. A continuation of the current disparity in pension entitlement cannot be justified.

Given that my mandate is confined to recommending an appropriate level of remuneration for Case Management Masters, I must call on the Government in consultation with the Case Management Masters to address any legislative or regulatory changes that may be necessary and to manage any transitional issues that may arise. I must stress, however, that any such concerns cannot override the Government's clear obligation to ensure that Case Management Masters are guaranteed full judicial independence.

Also, the current litigation between Provincial Court Judges and the Government on pension matters should not have any bearing on my recommendations. The PJPP, in whatever form it takes during the period of my mandate, is the correct plan for determining Case Management Masters' post-retirement income.

Further, as a matter of fairness and equity:

All pension recommendations should apply as well to those Case Management Masters who have retired or will retire from office during the period beginning April 1, 2011 and ending March 31, 2016.

If the current litigation between the Government and the Provincial Court Judges results in change to the terms of the PJPP, these changes should apply in the same manner to Case Management Masters as they would to Traditional Masters and Provincial Court Judges.

For the above-noted reasons, I recommend that the Case Management Masters be moved from the PSPP into the PJPP on the same terms as Traditional Masters and Provincial Court Judges, based on their date of appointment. Alternatively, Case Management Masters should be provided with a pension that is calculated in the same manner, and subject to the same terms, as those that apply to Traditional Masters and Provincial Court Judges.

¹ *Masters' Association (OCA)* at para. 7.

² *Ibid.* at para. 7.

³ Report of Levitt Ninth Federal Commission at 8-9.

⁴ *Civil Justice Review – First Report* (Chapter 13) at 88.

⁵ Beck Fourth PCJ Commission at 49-50.

⁶ *Ibid.* at 28.

⁷ M.L. Friedland, *A place Apart: Judicial Independence and Accountability in Canada* (May 1995) at 53 and 66, filed [hereinafter *A Place Apart*].

⁸ *Ibid.* at 66.

⁹ Report of McLennan Seventh Commission.

¹⁰ *Beauregard. PEI Reference* at para. 194.

¹¹ See Report of Guthrie Second Federal Commission at 5, Report of Drouin Sixth Federal Commission at 42, Report of McLennan Seventh Federal Commission at 57, Report of Special Advisor Adams, citing Report of Beck Fourth PCJ Commission at 28.

¹² Report of Beck Commission at 65.

¹³ Report of Special Advisor Cunningham at 7-8.

¹⁴ Report of Drouin Sixth Federal Commission at 42.

¹⁵ *Ibid.* at 65.

¹⁶ See, for example, Report of Beck Fourth PCJ Commission at 59; Report of Special Advisor Adams at 29; and Report of Special Advisor Cunningham at 25.

¹⁷ Report of Special Advisor Adams at 27-29.

¹⁸ Sixth and Seventh Provincial Judges Remuneration Commission Report at 27-29 [hereinafter Report of Nairn Sixth and Seventh PCJ Commission].

¹⁹ Report of Scott Fifth Federal Commission at 17.

²⁰ Report of Special Advisor Adams at 29-30.

²¹ Report of McLennan Seventh Federal Commission at 59; see also s. 42 of the *Judges Act*.

²² Report of Special Advisor Cunningham at 2.

²³ *Ibid.* at 28.

²⁴ Report of Nairn Sixth and Seventh PCJ Commissions at 8-9.

²⁵ See also AON Hewitt Value of Pension Benefit for Case Management Masters.

²⁷ See Affidavit of Case Management Master Calum MacLeod (14 February 2014) at paras. 7 and 13.

²⁹ Report of Beck Fourth PCJ Commission at 66.

³⁰ Report of Special Advisor Adams at 57.

³¹ Report of Special Advisor Cunningham at 28-29.

³² *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2014 BCSC 336, at paras. 164-165.

³³ *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2015 BCCA 136 (CanLII) at para. 48.

³⁴ *Bodner at para. 15.*

³⁶ Report of Beck Fourth PCJ Commission at 59.

PER DIEM WORK

The Case Management Masters submitted that the right to post-retirement per diem work should be recommended as a key part of the pension reforms required to bring their pension arrangements in line with those available to other judicial officers, both provincially and federally.

The Government submitted that the question of whether or not Case Management Masters are permitted to work on a per diem basis post-retirement is not a question of remuneration and therefore does not fall within the jurisdiction of this Commission. It said that requiring Case Management Masters to work only on a full-time basis is simply part of the duties of the office, which is a matter for determination by Government, and not this Commission. It submitted that only if the Government first chooses to implement such a system, would the need for review by a remuneration commission be triggered.

In my view, the matter of post-retirement per diem work falls within my mandate and can be properly be reviewed by this Commission, whether or not it is an initiative that has already been established or proposed by the Government.

First, per diem work clearly involves remuneration since it engages the issue of post-retirement income. As the Nairn Fifth JP Commission also recognized, post-retirement per diem work is a mechanism for judicial officers to enhance their income during retirement, in addition to providing courts with experienced members of the judiciary to help ease workloads.¹

Second, all forms of remuneration fall within this Commission's jurisdiction. In particular, Schedule 1 of my Order in Council states that the "Commission shall conduct an inquiry into and make recommendations regarding the remuneration of case management masters",² and the term "remuneration" is defined as a non-exhaustive list that "includes" salaries, pensions, and benefits.³ In my view, therefore, this Commission can properly review any form of remuneration, including post-retirement income.

Third, this matter as raised by the Case Management Masters has its genesis in equity concerns. Per diem work is a financial benefit that has been provided to all other full-time provincial judicial officers during retirement, including to the Case Management Masters' immediate predecessors, the Traditional Masters, but has been denied to Case Management Masters.

Fourth, I note that other remuneration commissions have addressed the matter of post-retirement income. Special Advisor Adams, for example, considered the similar issue of supernumerary status for the federal prothonotaries, stating that:

The Minister of Justice and the Chief Justice of the Federal Court, I recommend, should consider establishing the opportunity for prothonotaries upon retirement to elect supernumerary status. Such a program helps courts manage work load issues and permits the appropriate ongoing use of the expertise of older judicial officers...

The Special Advisor's mandate, as outlined by his Order in Council, was to "inquire into the adequacy of the salary and benefits of prothonotaries, whether current or past." As I have done, he interpreted his mandate to include the review of post-retirement remuneration.

In 1996, the legislature decided to exclude Case Management Masters from the application of the provisions which permit Provincial Court Judges and Traditional Masters to engage in full-time or part-time work after the age of retirement.⁴ The Government argued that the specific exclusion of Case Management Masters is reasonable, given the unique characteristics of the office and the operational needs of the Superior Court of Justice.

The Case Management Masters' most appropriate judicial comparators, the Traditional Masters and Provincial Court Judges, have been granted the ability to work on a per diem basis after retirement while in receipt of a pension. Thus, a post-retirement income inequity has been established and perpetuated. Indeed, as previously discussed, the Government's move to legislate reforms to the public sector pension system to enable civil servants to also earn post-retirement income while in receipt of a pension, supports the extension of this benefit to Case Management Masters as well. Doing so would certainly conform to the Government's financial and compensation policies and priorities, which is one of the specified criteria for my consideration.

The Government's characterization of these changes in the public sector as being pension reforms also supports my conclusion on the validity of my jurisdiction over this matter.

As the sole full-time judicial office in Ontario lacking the right to elect per diem status following retirement, and with the inherent benefits to both the court system and to retired Case Management Masters in such a model, I recommend that the Government grant Case Management Masters the ability, when called upon, to earn post-retirement income, in addition to their pensions, on a per diem basis on the same terms as are applicable to Traditional Masters and Provincial Court Judges.

¹ Report of Nairn Fifth JP Commission at 29.

² Order in Council 359/2012, Schedule 1 at para. 6(1).

³ *Ibid.* at para. 1.

⁴ See also O. Reg. 290/13, s. 5(1). See also Order in Council 1441/2013, Schedule A, para. 7 for *per diem* rate calculation.

BENEFITS AND ALLOWANCES

On February 18, 2014, one week prior to the start of this Commission's hearings, the Case Management Masters received a memorandum from the Ministry of Government Services indicating that changes to their benefits had been approved as part of the Government's policy of managing compensation spending, with many of these changes to take effect as of January 1, 2015.¹ The memorandum was sent to all non-bargaining employees, including to the SMG3s and to each of the Case Management Masters. It indicated that as part of its efforts to manage non-bargaining compensation costs in the Ontario Public Service, the Government was seeking greater alignment of their benefits with those of OPSEU.² In its memorandum, the Government indicated that its intent was that any future amendments to OPSEU benefits would also apply to such non-bargaining employees,³ and because of their previous remuneration linkage to SMG3s, this included the Case Management Masters.

The Government also announced its intention to make significant changes to the eligibility requirements for post-retirement insured benefits, or retiree benefits, for members of both the PSPP and the OPSEU Pension Plan. For those members retiring on or after January 1, 2017, eligibility for retiree benefits would require at least 20 years of service, instead of the current 10 years, along with immediate retirement to an unreduced pension. In addition, eligible members would be required to pay 50 percent of the premium costs for these retiree benefits, instead of full coverage of premium costs by the Government.⁴

The Case Management Masters voiced their strong objection to the Government's memorandum, submitting that the Government was unilaterally imposing compensation changes in the midst of a commission process, which was improper, unconstitutional, and a show of contempt for this Commission. They requested that the Government immediately withdraw the application of these changes to the Case Management Masters, pending the Commission's recommendations. They also submitted that the announced changes amounted to significant reductions to their level of benefits and reflected treatment of them as civil servants, rather than members of the judiciary.

On February 25, 2014, the first day of hearings, the Government submitted that its memorandum announcing changes to benefits for non-bargaining employees had been sent to the Case Management Masters in error, and that there had been no intention to unilaterally impose any changes to their benefits independent of the Commission process. The Government acknowledged that any changes to Case Management Masters' benefits could only result following the Commission's recommendations, and that it was not attempting to engage in any course of action that could potentially be considered improper, unconstitutional or in any way contemptuous of this Commission's process.

Notwithstanding, the Ministry's memorandum does reflect the erroneous thinking that Case Management Masters' compensation has any relation to government non-bargaining employees, including SMG3s. In fact, as described below, the Government urged adoption of the very reductions set out in the memorandum of February 18, 2014. Although the Government maintained that the memorandum was sent in error, the error was in expressing an intention to unilaterally reduce entitlements of the judiciary in an unconstitutional manner, not that the content was erroneous.

To ensure true remuneration parity, the Case Management Masters submitted that they should be moved into the group insurance plans provided to Provincial Court Judges. In addition, they submitted that the judicial allowance provided for in section 32 of Schedule B of Order in Council 1441/2013, which permits claims for certain expenses related to judicial duties, including judicial attire, books and publications, and membership in recognized professional associations, should also apply to them.

Only in the alternative, the Case Management Masters sought improvements with respect to some of the benefits already provided in their existing plan, including for prescription drug coverage, catastrophic drug coverage, vision care, hospital coverage, long term income protection ("LTIP"), sick leave, and short term disability coverage, to bring these benefits in alignment with those provided to Provincial Court Judges and Traditional Masters.

They submitted that the Government's proposal to harmonize their benefits with the OPSEU insured-benefits plan amounts to a massive restructuring of their benefits, with little evidence to support this radical change. They argued that the Government failed to present any reasonable rationale for such a move, and did not provide any substantive evidence that tangible administrative efficiencies would be achieved.

They maintained that harmonizing insured benefits with OPSEU would result in a significant reduction in their current level of benefits, which they submitted is already far below that of their most relevant comparators, the Provincial Court Judges and the Traditional Masters. Such harmonization would also link that aspect of their remuneration with members of OPSEU, with whom they submitted they share nothing in common. They noted that no such proposal to harmonize benefits in this way was made with respect to Provincial Court Judges, whose remuneration commission concluded its most recent review in November 2013.

The Case Management Masters submitted that the only harmonization plan that makes sense, in light of their comparable duties, is to move them into the benefits plan for Provincial Court Judges and Traditional Masters. In support of this argument, they pointed to the federal government's response to Special Advisor Cunningham's 2013 review of the federal Prothonotaries' remuneration. The federal government decided for both reasons of administrative efficiency, and, importantly, to better recognize their status as judicial officers, to grant the Prothonotaries the same salary and benefits as federal judges. The Case Management Masters urged me to adopt the same approach.⁵

On the issue of termination pay, the Case Management Masters urged me to recommend that they be granted an exception to the provisions of the judicial benefits plan. As part of their existing benefits, Case Management Masters are eligible for termination pay at the time of retirement equivalent to one week of salary per year of continuous service up to a maximum of 26 weeks. They noted that similar termination payment provisions for Provincial Court Judges were grandparented and are currently only available to those judges appointed prior to March 1, 1992. They submitted that in placing Case Management Masters into the judicial benefits plan, or otherwise providing equivalent benefits, these termination payments should similarly be

discontinued on a prospective basis, with grandfathering of this provision for existing Case Management Masters under the same terms as were applied to Provincial Court Judges.

In other words, the Case Management Masters requested, accrual of the benefit until they cease to hold office or start to serve part-time, and calculation of the severance based on the salary at the time of retirement. In any other scenario, the Case Management Masters argued that they should retain their termination pay benefit since this forms a large part of their current level of remuneration, however inadequate it might be.

The Government submitted that the insured benefits of Case Management Masters should be harmonized with the OPSEU insured benefits plan, as outlined in its February 2014 memorandum to non-bargaining employee groups, including the SMG3s. It argued that this package is fair and reasonable for Case Management Masters based on a number of reasons, including its assessment of the criteria in this Commission's Order in Council, and the fact that it made the same submissions on benefits to the Justices of the Peace Remuneration Commission.

The Government stated that, while Case Management Masters are judicial officers, they are not Provincial Court Judges, and there is no reasonable basis for establishing compensation parity between the two offices. It argued that, like the Justices of the Peace whose benefits are aligned with the public service MCP/Excluded Group, the benefits of Case Management Masters are aligned with an appropriate group of public servants, the SMG3s.

The Government said that these public service groups were affected by its announcement in February 2014 to implement changes to the benefits of all non-bargaining employees in the Ontario Public Service. It submitted that the purpose of these changes was to manage non-bargaining compensation costs. As a result, the insured benefits for non-bargaining groups are now being aligned with OPSEU's insured benefits plan.

With respect to termination pay, the Government noted that although Provincial Court Judges were permitted to continue receiving termination payments on a grandfathered basis, this was not the case for Justices of the Peace after this benefit was removed for that office. The Government also argued that any recommendation to permit termination pay for Case

Management Masters on a grandparented basis within the judicial benefits plan would result in a benefit that exceeds that of Provincial Court Judges.

On the issue of post-retirement insured benefits, or retiree benefits, the Government clarified that such benefits are not a provision of the PSPP, nor are they a pension benefit. However, since both Case Management Masters and Justices of the Peace accrue credit in the PSPP, they may become entitled to the same post-retirement benefits that apply to other plan members who are public servants and meet the credit requirements. The Government noted that changes to the eligibility requirements for retiree benefits were being proposed as a compensation restraint measure, and should apply to Case Management Masters.

The Government contended that it was making these same submissions for changes to benefits of the Justices of the Peace remuneration commission. It stated that singling out Case Management Masters for preferential treatment by preserving their current benefits entitlements and retiree benefits eligibility while implementing these changes for other affected groups would be inappropriate and unreasonable. The Government maintained that these are important compensation restraint measures that needed to be implemented in a fair and appropriate manner.

The Government also argued that administrative efficiencies would be achieved by including the Case Management Masters in the non-bargaining employee group and maintaining harmonization with OPSEU. In support of this position, the Government reported that in recent negotiations with AMAPCEO it had advanced the goal of administrative efficiency by harmonizing that group's health and dental benefits--with some exceptions--with the current terms for OPSEU members.

The Government contended that given the province's financial pressures, its efforts to streamline all insured benefits for both public servants and office holders with the OPSEU plan its proposal for Case Management Masters remuneration is fair and reasonable. It said that other benefits, such as vacation accrual, would remain as currently constituted. In fact, the Government noted that the number of vacation days granted would actually increase as a result of the elimination of the Case Management Masters' current Management Compensation Option ("MCO") days, which would be added to their vacation allotment under the new plan.⁶

On the issue of aligning Case Management Masters' benefits with Provincial Court Judges, the Government submitted that this approach could have a potentially significant impact on the premium rates for judges. Given the relatively small size of the judges' population in comparison to the non-bargaining employee group, it could have a major impact on judges' claims experience and premium rates if the claims experience of Case Management Masters turns out to be unfavourable. Within the larger non-bargaining group of 9,000 individuals, however, the claims patterns of Case Management Masters would not be significant. The Government submitted that the claims experience of the Case Management Masters represents an unknown factor that affects the ability to determine their potential cost impact, particularly within the smaller population of the Provincial Court Judges.

In my view, the fundamental question for this First Commission, with respect to benefits and allowances for Case Management Masters is whether they belong in the judicial plans, or whether harmonization of insured benefits with OPSEU best protects their judicial independence and reflects their status as judicial officers.

Based on an assessment of the criteria in my Order in Council, I have determined that the most appropriate provincial judicial comparators for Case Management Masters are their immediate predecessors, the Traditional Masters, as well as Provincial Court Judges. I have further determined that Case Management Masters should indeed receive the same remuneration as those judicial comparators. This includes their benefits and allowances. As noted earlier, the federal government recently came to the same conclusion in determining the remuneration of the Prothonotaries, who perform an analogous role in the Federal Court.

The Government's proposed harmonization of insured benefits with OPSEU is not appropriate for a number of fundamental reasons.

First, the Government's position rests on the premise that SMG3s, to whom harmonization is meant to apply, and Justices of the Peace, to whom the Government believes harmonization should apply, are appropriate comparators for Case Management Masters. As discussed, neither Justices of the Peace nor SMG3s are appropriate comparators for Case Management Masters. Therefore, the level of benefits and allowances provided to those groups provide no guidance for benefits and allowances appropriate for Case Management Masters.

Second, the harmonization initiative is a broad-ranging compensation-restraint measure meant to lower costs of the public service. As the Government noted in its February 2014 memorandum to all non-bargaining employees in the Ontario Public Service:

The government is continuing to take action to manage non-bargaining compensation costs in the Ontario Public Service. To support this, a number of changes have been approved to benefits applicable to non-bargaining employees.⁷

As discussed, in this First Commission my task is to determine a base level of remuneration that is appropriate for the office of Case Management Master, and therefore compensation restraint measure do not apply to this initial assessment. Only after an appropriate level of remuneration has been implemented can such compensation-restraint measures be considered—and only then in the same manner as they are applied to appropriate comparators, the Traditional Masters and Provincial Court Judges.

Third, OPSEU harmonization would serve to inappropriately and arbitrarily establish a linkage between the compensation of Case Management Masters, who are full judicial officers performing their duties at the level of a Superior Court Judge, and various public service bargaining groups that are neither considered to be, nor have been proposed as, comparators for this office.

The proposed inclusion of the Case Management Masters into a benefits package that pertains to a wide group of civil servants with which Case Management Masters share no material characteristics, who have not been proposed by either party as appropriate comparators, and whose remuneration is not subject to constitutional protections, but is determined unilaterally by the executive branch, serves to illustrate the inappropriateness of any such benefits plan for Case Management Masters.

Rather than ensuring that the Case Management Masters' unique judicial needs are addressed in any attributed benefits plan, the Government has proposed placing them in a plan whose benefits have been devised to meet the needs of a wide variety of non-comparable civil servants who are not guaranteed any level of constitutional protection. As a judicial office that adjudicates, within its jurisdiction, at the level of a Superior Court Judge, such a benefits package cannot be viewed as fair and reasonable, or commensurate with the status, dignity, and responsibility of this judicial office. A benefits package meant for a variety of civil service groups that does not take into account the particular needs of this judicial office cannot be seen to ensure a sufficient level of judicial independence.

Fourth, the Government's desire for optimal administrative efficiencies cannot trump its constitutional obligations. The current benefits plan for Case Management Masters, which was linked by the 2001 Settlement to that of the SMG3s, already requires significant improvement. Moreover, there is little evidence to support the notion that the contemplated administrative efficiencies are, in fact, achievable. As demonstrated by the tentative agreement reached with AMAPCEO, whose members will enjoy significant exceptions to the insured benefits provided under the OPSEU plan, achieving real "administrative efficiencies" may prove to be an elusive goal.⁸

I note that the benefits and allowances for Provincial Court Judges are described in Schedule B of Order in Council 1441/2013,⁹ and are further detailed in a number of group insurance policies applicable to judges. Pursuant to subsection 87(8) of the Courts of Justice Act, Traditional Masters automatically receive the same benefits and allowances as Provincial Court Judges.

As I have already recommended that Case Management Masters be placed into the judicial pension

plan, I also wish to comment on another troublesome Government proposal related to post-retirement benefits: that of changing the eligibility requirements for such benefits from 10 to 20 years of pension credit. The Case Management Masters pointed to the situation of Case Management Master Donald Short, who was appointed at age 60 with the understanding that he would be entitled to receive lifetime benefits by age 70 after 10 years of service. It is impossible for him to work for 20 years because he must retire at age 75. Indeed, because appointment to this office often arises after a second or even third career, in the future there may be many Case Management Masters who will not be able to meet such eligibility requirements for reasons entirely beyond their control. In the absence of post-retirement benefits, Case Management Masters are left vulnerable.

Finally, I note that the Traditional Masters, a group of less than 20, were successfully placed into the judges' benefits plan apparently without creating the problems raised by the Government in its submissions to this Commission.

I recommend that Case Management Masters be placed into the judges' benefits plans, or to otherwise have their benefits made equivalent. This includes the plans for retiree benefits.

Although the Government was unable to provide precise cost calculations for incorporating Case Management Masters into the judges' benefits plans, the issue of cost is largely irrelevant to the determinations of this First Commission, given the overriding need to secure judicial independence.

Further, the Case Management Masters comprise such a small group that the cost of moving them into the judges' benefits plan cannot, in my view, be prohibitive in light of the Government's constitutional obligation, and considering the major investments the Government is making in other areas. While there is no doubt that the cost of ensuring judicial independence is significant, it is one that must be borne to preserve and enhance this fundamental democratic principle.

Accordingly, I recommend that Case Management Masters should receive the same benefits and allowances both during office and in retirement as are granted to Provincial Court judges and Traditional Masters.

In addition, given that all Case Management Masters were appointed after 1992, I recommend that existing Case Management Masters retain the right to termination pay on a grandparented basis, under the terms in Order in Council 1441/2013 applicable to judges appointed prior to March 1, 1992.

¹ The exceptions were changes to sickness and disability benefits, which are set to take effect as of January 1, 2016.

² Email from K. Costante to Case Management Master R. Dash (18 February 2014) at 2, filed [hereinafter Costante Email].

³ “Questions & Answers: Non-Bargaining Employees Benefits Changes” at 2, filed.

⁴ “Questions & Answers: Post-Retirement Insured Benefits” at 1, filed.

⁵ Federal Government Response to Cunningham Report at 2.

⁶ “2014 Case Management Masters Benefits Impact Comparison – Alignment with MCP Benefits – Including Insured Benefits Harmonization to OPSEU Terms” at 66 to 67, filed.

⁷ Costante Email at 2.

⁸ *Highlights of the OPS Tentative Agreement* (6 August 2014), filed.

⁹ Order in Council 1441/2013.

RECOMMENDATIONS

Recommendation 1

I recommend that:

Effective April 1, 2011, the base salary of Case Management Masters should be \$262,113, the equivalent salary earned by Traditional Masters and Provincial Court Judges at that time.

Thereafter, for the remainder of this Commission's mandate the base salary for Case Management Masters should be the equivalent indexed salary as earned by Traditional Masters and Provincial Court Judges.

Recommendation 2

I recommend that:

Case Management Masters should receive pensions that are equivalent to the pensions that Traditional Masters and Provincial Court Judges receive under the Provincial Judges' Pension Plan, and should be based on the dates of appointment and retirement applicable to each individual Case Management Masters.

All pension recommendations should apply as well to those Case Management Masters who have retired or will retire from office during the period beginning April 1, 2011 and ending March 31, 2016.

If the current litigation between the Government and the Provincial Court Judges results in changes to the terms of the Provincial Judges' Pension Plan, these changes should apply in the same manner to Case Management Masters as they would to Traditional Masters and Provincial Court Judges.

Recommendation 3

I recommend that:

The Government grant to Case Management Masters, including those who retired or will retire during the period beginning April 1, 2011 and ending March 31, 2016, the ability, when called upon, to earn post-retirement income in addition to their pension income on a *per diem* basis on the same terms as are applicable to Traditional Masters and Provincial Court Judges.

Recommendation 4

I recommend that:

Case Management Masters should receive the same benefits and allowances, both during office and in retirement, as are granted to Traditional Masters and Provincial Court Judges.

Case Management Masters should retain the right to termination pay on a grand-parented basis under the same terms as are applicable to Provincial Court Judges appointed prior to March 1, 1992 as outlined in Order in Council 1441/2013.

Recommendation 5

I recommend that:

The Government should consider conducting all future reviews of Case Management Master compensation as part of the remuneration process already in place for Provincial Court Judges, as has been the case for Traditional Masters.

Recommendation 6

I recommend that:

The Government should consider changing the title of this judicial office from “Case Management Master” to “Master” to better reflect the true nature and function of the office in this province.

Recommendation 7

I recommend that:

Given the overall objective of equivalence with both Traditional Masters and Provincial Court Judges for the period beginning April 1, 2011 and ending March 31, 2016, changes to any aspect of the remuneration (including with respect to salaries, benefits, allowances and pensions) applicable to Provincial Court Judges during that period, as a result of reviews conducted by the Provincial Judges’ Remuneration Commission, should apply as well to the remuneration of Case Management Masters.

AFTERWORD

The evidence has established that the Province is economically stable with positive future prospects.

It is incumbent upon the Government to direct the necessary resources to give effect to these Recommendations, formulated after extensive consideration of the criteria established by Order in Council 359/2012, in order to maintain a properly functioning justice system.

The Government must accept the constitutional imperative and recognize the need to provide Case Management Masters with fair and reasonable remuneration. The economic cost of maintaining our judiciary is one required of every robust, democratic society and cannot be ignored or minimized. It is well understood by all to be for the benefit of the entire public.

In addition to being constitutionally mandated, this judicial expense to ensure efficient and effective access to civil justice is no less important than money directed toward health, education and infrastructure projects. They are all needed to maintain a strong, respected and prosperous Province.

The Government may offer many reasons to rationalize the rejection of some or all of the Recommendations in this Report. To do so however, will disrespect the status, dignity and responsibility of the office of Case Management Master. Further we must always be conscious that payment of appropriate remuneration is not for the benefit of individual members of the judiciary. It is a means to ensure judicial independence, which is not present in many countries around the world.

The relative cost of implementing these principled Recommendations for such a small group with such a large impact on our justice system is, to borrow the astute words of Professor Martin Friedland, “for our sake and not for theirs”.

The evidence adduced before this Commission has conclusively established the obvious. Case Management Masters are full judicial officers exercising an important and broad jurisdiction in the busiest courts in the country. They must be remunerated accordingly to preserve the principles established by the Supreme Court of Canada.

The Recommendations provided by this First Commission are intended to provide A Way Forward to achieve that objective and meet that obligation.

Dated at Toronto, Ontario this 30th day of November, 2015

A handwritten signature in black ink, consisting of the letters 'L' and 'B' in a stylized, cursive font, enclosed within a circular scribble.

Larry Banack, Commissioner

APPENDIX A: HISTORY OF LITIGATION BETWEEN THE PARTIES

The Case Management Masters have raised concerns about their level of remuneration since the creation of the office. In 1998, less than a year after being appointed, the three Case Management Masters in office sent a letter to Attorney General Charles Harnick expressing their concerns about the need for greater judicial independence. They called for terms of appointment and remuneration equal to those of Traditional Masters, and for an independent body to review their remuneration, as required by *PEI Reference*. They noted that Traditional Master remuneration was determined as part of the process in place for Provincial Court Judges.¹

In July 2000, the eight Case Management Masters in office launched an application for judicial review, seeking the same salary and terms of office as Traditional Masters, or, alternatively, the creation of an independent body to set and periodically review their level of remuneration.² At the time, their salaries and benefits were determined by the Lieutenant Governor in Council and were based on the SMG3 civil servant classification.

This litigation ended with the 2001 Settlement, which was signed by both parties on November 16, 2001 and was subsequently ratified by all the Case Management Masters then in office.³ Its terms provided for retroactive salary increases and future salary adjustments tied to the SMG3 salary range according to the following formula: 100.2847 percent of the maximum of the SMG3 salary range plus the maximum percentage performance incentive that can be earned.

Case Management Masters were to receive the same benefits as SMG3s, except with longer vacation entitlements. They could also become members of the PSPP as of the date of their appointment to office.⁴ Their seven-year appointments to office would also automatically renew unless removal occurred as a result of a complaints process. They were permitted to continue in office after age 65 for one-year terms, renewable on an annual basis, with joint approval of the Attorney General and the Chief Justice.⁵

In 2009, the Case Management Master again initiated litigation seeking a declaration, on a retroactive basis, that they were entitled to the same salary and terms of office that were being provided to Traditional Masters. They also sought a retroactive declaration that various sections of the *Courts of Justice Act*, and a number of Orders in Council relating to their remuneration and security of tenure were *ultra vires* as violating the constitutional principle of judicial independence. In the alternative, they sought the appointment of a commission to review and make recommendations on their terms of office.⁶

Justice Platana held that while neither Traditional Masters nor Case Management Masters fulfill the same functions as Superior Court Judges, they are appointed by the province and have their powers granted to them by provincial legislation and the Rules of Court. He held that while Case Management Masters have no criminal law jurisdiction, there was no doubt that they make important judicial decisions that affect the final outcome of major litigation. He noted that the role of Case Management Masters had greatly expanded since the office was created, and that when the last Traditional Master retired, all of the Traditional Masters' judicial work would be discharged by Case Management Masters. He accepted that virtually all of the participants in the Ontario judicial system viewed both Traditional Masters and Case Management Masters as one and the same.⁷ He held that "the evidence is clear that all masters are performing virtually the same work."⁸

On the issue of post-retirement reappointment, Justice Platana held:

116 Here, just as in *Valente*, the province has created a group of Masters with a second class of post-retirement tenure, holding office after age 65 at the pleasure of the minister. Recognizing again that with the work performed by both kinds of masters being essentially the same, it cannot reasonably be said that Case Management Masters are entitled to less security of tenure than Traditional Masters. This second class of tenure cannot be perceived as meeting the requirement of judicial independence.⁹

On financial security, Justice Platana acknowledged that an independent, objective and effective process was required to set judicial remuneration. He noted that the Supreme Court of Canada in *PEI Reference* stated that "... if judges salaries were set by the same process as the salaries of

public sector employees, there might well be reason to be concerned about judicial independence.”¹⁰ Justice Platana held that:

120 The current process for determining Case Management Master’s salary fails to meet that test [for a special process that is independent, effective, and objective]. While it may be appropriate to consider masters’ salaries in relation to an appropriate comparator, the process for selecting this comparator must be one which is independent from the sole discretion of the Executive branch. Moreover, the appropriate comparator may change over time. Selecting a comparator, and assuming that it will be appropriate for all eternity, is short sighted and doomed to fail if there is no process in place through which judicial officers can challenge the appropriateness of that comparator in the future. If the present case shows nothing else, it is the fact that judicial roles can change dramatically over relatively short periods of time.¹¹

He concluded that the then existing process for determining Case Management Masters’ salary did not meet the test of financial security.¹² He also commented on the effect of the 2001 Settlement, stating that it did not prevent the constitutional challenge, and that it had not been the product of a process that involved a review by an independent commission. He observed that:

139 ...The province and the masters cannot contract out of constitutionally required protections for judicial independence. Moreover, the right to judicial independence does not reside with either the Province or the masters; it belongs to society as a whole. As such, neither party can relinquish this requirement. Furthermore, with some exceptions, the parties are now different, and the circumstances surrounding the role of Case Management Masters have evolved significantly beyond what was contemplated by the agreement. The work done in 2001 may have been different than that of Traditional Masters, but as I have noted earlier, no distinction can be practically now be drawn.¹³

Justice Platana found that the provisions in the legislation respecting remuneration and tenure of Case Management Masters did not satisfy the conditions of judicial independence. He declared s. 53(1)(b) of the *Courts of Justice Act* invalid as it relates to remuneration, and s. 86.1(5.2) invalid with respect to tenure in so far as it references the Attorney General. However, he suspended his declaration of invalidity for a period of twelve months to allow the government to make legislative changes to create an independent, effective and objective process for determining the remuneration and tenure of Case Management Masters.¹⁴

The Government appealed the remuneration-related aspects of Justice Platana’s decision and the Case Management Masters cross-appealed, stating that a declaration of invalidity was insufficient, and that the remedies of severance and “reading in” should be applied to provide them with the same level of judicial independence as Traditional Masters.¹⁵ While the Court of Appeal found that the process was effective and objective, it did not comply with the “independent” component of the special process required by the constitutional principle of judicial independence. The Court dismissed the appeal and cross-appeal, except for replacing the citation of s. 53(1)(b) of the *Courts of Justice* in the formal judgment with “Order in Council 458/2003” since it was the Order in Council and not the legislative provision that set out the invalid process.

As a result, by Order in Council 359/2012, this Commission was established¹⁶ and began hearings on February 25, 2014.

¹ Letter to Charles Harnick at 2-3, Affidavit of Kierstyn Ellis, Government’s Court of Appeal Exhibit Book, Vol. II, Exhibit 5G.

² Amended Notice of Application at 3, paras. 1 and 5.

³ Terms of Settlement, filed.

⁴ *Ibid.* at paras. 3-6.

⁵ *Ibid.* at para. 8.

⁶ *Masters’ Association (SCJ)* at para. 3.

⁷ *Ibid.* at paras. 111-113.

⁸ *Ibid.* at para. 113.

⁹ *Ibid.* at para. 116.

¹⁰ *Ibid.* at para. 119.

¹¹ *Ibid.* at para. 120.

¹² *Ibid.* at para. 121.

¹³ *Ibid.* at para. 139.

¹⁴ *Ibid.* at paras. 140-141.

¹⁵ *Masters’ Association (OCA)* at para. 3.

¹⁶ Order in Council 359/20121.

APPENDIX B: ORDER IN COUNCIL



Ontario

Executive Council
Conseil exécutif

Order in Council Décret

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that:

Sur la recommandation de la personne soussignée, le lieutenant-gouverneur, sur l'avis et avec le consentement du Conseil exécutif, décrète ce qui suit :

WHEREAS the Court of Appeal for Ontario has ordered the Government of Ontario to create an independent, objective and effective process for determining the remuneration of case management masters;

AND WHEREAS the Minister of Government Services has been assigned, under the *Executive Council Act*, certain powers, duties, functions and responsibilities related to the remuneration of judicial officers under the *Courts of Justice Act*

AND WHEREAS the Minister of Government Services wishes to establish a committee to make recommendations regarding the remuneration of case management masters in accordance with the terms set out in Schedule 1 to this Order;

THEREFORE, PURSUANT TO section 6.1 of the Ministry of Government Services Act, the Case Management Masters Remuneration Commission is hereby established and its terms of reference are determined as set out in Schedule 1 to this Order.

Recommended


Minister of
Government Services


Concurred


Chair of Cabinet

Approved
and Ordered

MAR 27 2012

Date


Lieutenant Governor

SCHEDULE 1

Definitions

1. In this Schedule:

"Association" means the Masters' Association of Ontario or such other association that may represent case management masters and recognized as such by the Minister;

"Commission" means the Case Management Masters Remuneration Commission;

"Minister" means the Minister of Government Services;

"parties" means the Government of Ontario and the Association;

"remuneration" includes salaries, pensions and benefits;

Purpose and Intention

2. The purpose of this Schedule is to establish the terms of reference for the Case Management Masters Remuneration Commission, including a process for the determination of case management masters' remuneration that is independent, objective, and effective.

3. It is intended that both the process of making the report and the report made by the Commission shall:

(a) contribute to securing and maintaining the judicial independence of the case management masters; and

(b) promote co-operation between the executive branch of the government and the judiciary and the efforts of both to develop a justice system which is both efficient and effective, while also maintaining the judicial independence of case management masters.

Composition and Administration of Commission

4. (1) The Commission shall be composed of a single Commissioner selected jointly by the Association and by the Minister.

(2) The Commissioner shall be appointed by the Minister.

(3) A judge, a case management master, or a public servant employed under Part III of the *Public Service of Ontario Act, 2006* shall not be the Commissioner.

(4) The appointment of the first Commissioner shall begin on July 1, 2012 and shall end on September 30, 2015.

(5) Except for the appointment of the first Commissioner, the appointment of the Commissioner under subsection (1) shall:

(a) begin on October 1, 2015, and on October 1 in every fourth year thereafter, and

(b) be for a term of four years.

(6) The Commissioner, including the first Commissioner is eligible for reappointment.

(7) Despite subsections (4) and (5), if the term of office of the Commissioner expires after a matter is referred to the Commission under section 7 for an inquiry but before the Commission has submitted its report respecting the inquiry, and the Commissioner is not reappointed, his or her term is deemed to continue, but only for the purpose of completing and submitting the report.

(8) In the event that the Commissioner's office becomes vacant, a replacement shall be selected under subsection (1), as appropriate, within 30 days of the vacancy occurring and the Minister shall, within 90 days after being notified of the selection, appoint the selected person to the Commission for the remainder of the term of the person being replaced.

(9) The Commissioner shall be paid the remuneration fixed by the Lieutenant Governor in Council and reasonable expenses incurred in carrying out his or her duties in accordance with the relevant directives, guidelines and policies of the Treasury Board and Management Board of Cabinet.

Support Services for the Commission

5. The Commission may retain support services and professional services, including the services of counsel, as the Commission considers necessary and subject to the approval of the Minister.

Inquiries, Recommendations, Reports

6. (1) The Commission shall conduct an inquiry into and make recommendations regarding the remuneration of case management masters as follows:

- (a) for the first period beginning April 1, 2011 and ending March 31, 2016, and
- (b) for the four year period beginning on April 1, 2016 and for every four-year period thereafter.

(2) The first Commission shall submit a report containing its recommendations for the remuneration of case management masters to the Minister on or before a day that is one year after the Commissioner's appointment commences.

(3) Except for the first Commission report, the Commission shall submit a report containing its recommendations for the remuneration of case management masters for the four-year period that it considered to the Minister on or before April 1 in the first year of the period.

(4) The Commission may include in a report it makes under this section recommendations to improve its structure and process.

Referral of Matter to Commission by Minister

7. (1) The Minister may at any time refer any matter respecting the remuneration of case management masters to the Commission and the Commission shall conduct an inquiry into such matter and submit a report containing its recommendations to the Minister.

(2) The Commission shall submit its report on or before the date specified, after consultation with the Commission, by the Minister.

Conduct of the Inquiry

8. (1) Prior to conducting an inquiry under section 6 or 7, the Commissioner shall convene a conference with the parties, on a day to be determined by the Commissioner after consultation with the parties.

(2) At the conference, the Commissioner shall,

- (a) canvass with the parties the names of the witnesses and experts if any, to be called and the substance of their evidence;
- (b) explore whether admissions can be made that will facilitate proof of non-contentious matters;
- (c) explore alternative methods of presentation of evidence, such as the filing of affidavits or reports;

- (d) explore with the parties expeditious means for the presentation of evidence;
- (e) if possible, secure the parties' agreement on a specific schedule of events in the inquiry;
- (f) create a timetable for the inquiry; and
- (g) give directions that will facilitate the orderly and expeditious conduct of the inquiry.

(3) At least 15 days before the date of the conference, each party shall provide the Commissioner and the other party with,

- (a) a list of proposed witnesses and experts, if any; and
- (b) any other relevant information that may be available at that time.

(4) The Commissioner may convene a second conference, if necessary.

(5) In conducting an inquiry under section 6 or 7, the Commissioner shall consider written and oral submissions by the parties, as he or she considers appropriate, and may consider written and oral submissions from other interested persons and groups, as he or she considers appropriate.

(6) The Commissioner may limit the number of days for oral evidence and submissions.

(7) The Commissioner shall not receive evidence in any form from more than two experts from either party, unless the Commissioner deems it necessary to do so.

(8) Each of the parties shall give the other party a copy of their written submissions and each of the parties is entitled to make a written submission to the Commissioner in reply.

(9) Each of the parties is entitled to make an oral submission to the Commissioner in reply to the oral submission of the other party.

(10) The parties are entitled,

- (a) to be present at a hearing when the other party or any other interested person or group presents an oral submission to the Commissioner;
- (b) to receive copies of the written submissions of any other interested persons or groups.

(11) The Commissioner may exclude any person who is not one of the parties from a hearing while either of the parties is presenting an oral submission to the Commission.

(12) The parties may designate one or more persons to act on their behalf at an inquiry by the Commissioner.

9. In developing its recommendations under subsections 6(1) and 7(1), the Commission shall consider the following criteria:

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

10. (1) The Minister may, upon the request of the Commission, extend the time by which the Commission must submit its report under section 6 or 7, if the Minister is satisfied there are reasonable grounds for doing so.

(2) The extension shall not be longer than three months unless the Association agrees to a longer extension.

Determination of Remuneration

11. (1) The Minister shall submit each of the Commission's reports made under section 6 to the Lieutenant Governor in Council and shall then table the report in the Assembly if it is in session or, if not, within 15 days after the commencement of the next session.

(2) The Minister may also submit a report made by the Commission under section 7 to the Lieutenant Governor in Council.

APPENDIX C: NOTICE OF HEARING TO THE LEGAL PROFESSION

The Case Management Masters Remuneration Commission was established by Order in Council 359/2012 of the Government of Ontario in March 2012 to inquire into the adequacy of the remuneration of Case Management Masters.

The Commission invites interested parties from the legal community wishing to comment on matters within the Commission's mandate to forward their written submissions to the Commission by January 30, 2014 at the address indicated below.

Any such persons intending to file written submissions with the Commission may also request, in writing by January 30, 2014, an opportunity to make oral submissions at a public hearing. The public hearing dates are scheduled to be held in Toronto on February 10, 11, 12, 18, 19, 25, 26 and April 9, 10, 11, 2014. The Commission will determine what, if any, oral submissions are to be received.

Submissions should be sent to:

Case Management Masters Remuneration Commission

Arbitration Place

Suite 900, 333 Bay St

Toronto, ON M5H 2T4

Telephone: 416.848.0203

Email: mastersremunerationcommission@gmail.com

Larry Banack

Commissioner

APPENDIX D: SUBMISSIONS OF INTERESTED PARTIES

In addition to the written submissions filed by the parties to the Commission, the following individuals and organizations filed written submissions that were considered by the Commission and were posted on the Commission's public website¹:

County of Carleton Law Association

Master David H. Sandler

Master Emeritus Ross B. Linton, Q.C.

Ontario Bar Association

Ontario Trial Lawyers Association

The Advocates' Society

The County & District Law Presidents' Association

The Essex Law Association

Toronto Lawyers Association

¹See https://drive.google.com/folderview?id=0B5nqnUWm_at5YjFBTFIMRndrcTQ&usp=sharing.

APPENDIX E: COMPARISON OF SALARIES OF TRADITIONAL MASTERS AND CASE MANAGEMENT MASTERS

1997-PRESENT

YEAR	TRADITIONAL MASTERS	CASE-MANAGEMENT MASTERS
(EFFECTIVE APR. 1)	(SALARY TIED TO PROVINCIAL JUDGES PURSUANT TO O. REG 68/92)	
1997	128 623	150 000*
1998	150 000	153 500*
1999	161 440	153 500*
2000	172 210	153 500*
2001	185 000	155 000*
2002	198 000	155 000*
2003	206 348	164 342
2004	213 054	164 342
2005	219 979	174 721
2006	228 338	174 721
2007	234 503	184 928
2008	242 007	190 463
2009	248 057	190 463

2010	252 274	190 463
2011	262 113	193 346
2012	267 355	193 346
2013	274 573	193,346 ¹

*Salary levels listed are the retroactive salary levels that resulted from the 2001 settlement and found in OIC 551/2002, *supra*, Ex. Vol. VI, Tab 129.

Sources: See O. Reg. 68/92, *supra*, Ex. Vol. V, Tab 111, and O.I.C. 1484/99, Schedule A, *supra*, Ex. Vol. VI, Tab 128; Report of the Fourth Triennial Provincial Judges Remuneration Commission (1998), Chair Stanley Beck, at page 3, *supra*, Ex. Vol. VI, Tab 154, and Report of the Fifth Triennial Provincial Judges Remuneration Commission, 2001, Chair Louisa Davie, at pages 10 and 34, *supra*, Ex. Vol. I, Tab 6; O.I.C. 551/2002, Schedule A, *supra*, Ex. Vol. VI, Tab 129; Chart summarising Case Management Masters Salary from 2001-2011 prepared by the Government of Ontario in Response to the Association's disclosure request, *supra*, Ex. Vol. VI, Tab 137.

In addition, the Commission received the following updates regarding the Traditional Master and Provincial Court Judge salaries in 2014 and 2015:

2014	279 791	193 346
2015	287 345	193,346

¹ Reproduced from the *Submissions of the Masters' Association of Ontario*, at 336.

APPENDIX F: INVENTORY OF WRITTEN SUBMISSIONS AND EVIDENCE

I. WRITTEN SUBMISSIONS AND EVIDENCE FILED BY THE MASTERS' ASSOCIATION OF ONTARIO

DOCUMENT	DATE FILED
MAIN SUBMISSIONS	January 31, 2014
EXHIBIT BOOK, VOLUMES I TO XI	January 31, 2014
BOOK OF CONFIDENTIAL DOCUMENTS	January 31, 2014
LETTER FROM M. MITCHELL RE: CHANGES TO MASTERS' BENEFITS	February 20, 2014
REPLY SUBMISSIONS	February 21, 2014
REPLY EXHIBIT BOOK (ONE VOLUME)	February 21, 2014
LETTER FROM G. SCOTT TO M. MITCHELL RE: LETTER OF APRIL 5, 1977	February 25, 2014
SURREPLY SUBMISSIONS	April 8, 2014
SURREPLY EXHIBIT BOOK (ONE VOLUME)	April 8, 2014
RESPONSES TO UNDERTAKINGS, RESPONSES TO FURTHER UNDERTAKINGS, AND FURTHER SUBMISSIONS ON CRITERION 5	July 4, 2014
EXCERPTS FROM 2014 ONTARIO BUDGET	July 4, 2014
SUPPLEMENTARY DOCUMENTS OF THE MASTERS' ASSOCIATION OF ONTARIO	July 7, 2014
CHART ON PROVINCIAL COURT JUDGES/JUSTICES' PENSION BENEFITS	July 7, 2014

SUBMISSIONS ON THE 2014 ONTARIO BUDGET & DOCUMENTS FOR ORAL REPLY	July 21, 2014 (Submissions) July 25, 2014 (Documents for Oral Reply)
REPORT OF THE THIRD DEPUTY JUDGES REMUNERATION COMMISSION	August 5, 2014
HIGHLIGHTS OF THE OPS TENTATIVE AGREEMENT	August 6, 2014
M. MITCHELL CHART ON PRIVATE SECTOR LAWYER SALARIES	August 6, 2014
LETTER FROM C. BAUMAN REGARDING TERMINATION PAY	August 14, 2014
NEWS RELEASE FROM MINISTRY OF FINANCE REGARDING ONTARIO DEFICIT	October 1, 2014
SUBMISSIONS OF MASTERS' ASSOCIATION OF ONTARIO REGARDING ADDITIONAL REQUESTED PENSION INFORMATION	November 28, 2014
REPLY SUBMISSIONS OF THE MASTERS' ASSOCIATION OF ONTARIO REGARDING ADDITIONAL REQUESTED PENSION INFORMATION	December 19, 2014
SUBMISSIONS ON THE 2015 ONTARIO BUDGET	May 22, 2015
REPLY SUBMISSIONS ON THE 2015 ONTARIO BUDGET (LETTER FROM C. BAUMAN)	May 29, 2015

II. WRITTEN SUBMISSIONS AND EVIDENCE RECEIVED FROM THE GOVERNMENT OF ONTARIO

DOCUMENT	DATE FILED
MAIN SUBMISSIONS	January 31, 2014
BOOK OF AUTHORITIES, VOLUMES 1 AND 2	January 31, 2014
BOOK OF DOCUMENTS, VOLUMES 1 TO 4	January 31, 2014
REPLY SUBMISSIONS	February 21, 2014
BOOK OF AUTHORITIES, VOLUME 3	February 21, 2014
BOOK OF DOCUMENTS, VOLUME 5	February 21, 2014
LETTER FROM L. COMPAGNONE RE: NO CHANGES TO CASE MANAGEMENT MASTERS' REMUNERATION AT THIS TIME	February 25, 2014
APPELLANT'S EXHIBIT BOOK, VOLUMES II AND III (COURT OF APPEAL FOR ONTARIO)	April 8, 2014
SURREPLY SUBMISSIONS	April 9, 2014
BOOK OF DOCUMENTS, VOLUME 6, BOOKS 1 AND 2	April 9, 2014
2007 ORDER IN COUNCIL FOR APPOINTING SPECIAL ADVISOR FOR PROTHONOTARIES, 2012 ORDER IN COUNCIL FOR APPOINTING SPECIAL ADVISOR FOR PROTHONOTARIES, <i>DIXON V. CANADA (GOVERNOR IN COUNCIL)</i>, [1997] 3 F.C. 169 (F.C.A.), AND GOVERNMENT RESPONSE TO THE REPORT OF THE 2010 JUDGES COMPENSATION COMMISSION (MARCH 2013)	April 22, 2014
FURTHER SUBMISSIONS ON CRITERION 5	July 4, 2014
RESPONSES TO UNDERTAKINGS	July 4, 2014

FURTHER RESPONSE TO UNDERTAKING 8	July 8, 2014
FURTHER RESPONSE TO UNDERTAKING 3	July 16, 2014
SUBMISSIONS ON THE 2014 ONTARIO BUDGET AND THE ACTUARIAL REPORTS PROVIDED BY THE CASE MANAGEMENT MASTERS	August 5, 2014
LETTER FROM K. GOLDEN REGARDING TERMINATION PAY	August 26, 2014
SUBMISSIONS IN RESPONSE TO COMMISSIONER REQUEST FOR INFORMATION (CONFIDENTIAL)	November 28, 2014
SUBMISSIONS IN RESPONSE TO COMMISSIONER REQUEST FOR INFORMATION (REDACTED)	December 5, 2014
SUBMISSIONS IN RESPONSE TO REQUEST FOR FURTHER INFORMATION (LETTER FROM AON HEWITT)	December 5, 2014
EMAIL CORRESPONDENCE STATING THAT NO REPLY SUBMISSIONS WILL BE FILED REGARDING THE REQUEST FOR FURTHER INFORMATION	December 22, 2014
LETTER FROM K. GOLDEN STATING THAT NO REPLY SUBMISSIONS WILL BE FILED REGARDING THE REQUEST FOR FURTHER INFORMATION	January 6, 2015
SUBMISSIONS ON THE 2015 ONTARIO BUDGET	May 22, 2015
LETTER FROM T. AYERS STATING THAT NO REPLY SUBMISSIONS WILL BE FILED REGARDING THE 2015 ONTARIO BUDGET	May 27, 2015