

# **Court of King's Bench of Alberta**

**Citation: Alberta Provincial Justices' Association v Alberta, 2026 ABKB 145**

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**Docket:** 2403 04470  
**Registry:** Edmonton

Between:

**Alberta Provincial Justices' Association**

Applicant

- and -

**His Majesty the King in Right of Alberta and the Lieutenant Governor in Council**

Respondents

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**Memorandum of Decision  
of the  
Honourable Justice Donald Lee**

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**I. Introduction**

[1] In 2021, a judicial compensation commission was convened in Alberta to determine the appropriate judicial salaries payable to provincially appointed Justices and Applications Judges for the period covering April 1, 2021, to March 31, 2025 (“the 2021 JCC”). The 2021 JCC submitted their report to the Alberta government on July 5, 2023 (“the 2021 JCC Report”). It recommended the following salaries for the period of its mandate:

- Effective April 1, 2021, an increase of 3.1% to \$328,500;
- Effective April 1, 2022, an increase of 5.9% to \$348,000;
- Effective April 1, 2023, an increase of 4.0% to \$362,000; and,
- Effective April 1, 2024, an increase of 2.9% to \$372,500.

[2] These salary recommendations reflect a total cumulative increase of 16.95% over four years.

[3] On October 26, 2023, the Lieutenant Governor in Council passed Order in Council 182/2023 which rejected the 2021 JCC's salary recommendations and implemented the following numbers:

- Effective April 1, 2021, an increase of 1.0% to \$321,685;
- Effective April 1, 2022, an increase of 2.0% to \$328,119;
- Effective April 1, 2023, an increase of 3.0% to \$337,963; and,
- Effective April 1, 2024, an increase of 3.0% to \$348,102.

[4] This represents a total cumulative increase of 9.29% over four years. The Schedule to Order in Council 182/2023 (Alberta's Response) provides written reasons for deviating from the 2021 JCC's recommendations.

[5] The Applicant, the Alberta Provincial Justices' Association ("the Association"), represents the Justices of the Alberta Court of Justice. It has brought this application to judicially review the rejection of the 2021 JCC's recommendations.

[6] The Respondents, His Majesty the King in Right of Alberta and the Lieutenant Governor in Council, maintain that the departure from the 2021 JCC's recommendations is legitimate and justified. They will be referred to collectively as "Alberta" throughout the remainder of this decision.

## II. Background

[7] A judicial compensation commission is a constitutionally mandated independent tribunal whose task is to make recommendations to government about appropriate levels of judicial compensation. The 2021 JCC was established by the *Provincial Court Judges and Applications Judges 2021 Compensation Commission Regulation*, Alta Reg 65/2021 (the *2021 JCC Regulation*), pursuant to Alberta's authority under section 42 of the *Judicature Act*, RSA 2000, c J-2.

[8] Section 4(1) of the *2021 JCC Regulation* establishes that the 2021 JCC's role is to "conduct an inquiry respecting the appropriate level of compensation for judges and applications judges." Section 4(2) sets the mandate period and the effective date for the recommendations. Section 4(3) highlights the guiding principles of the 2021 JCC:

- (3) The Commission shall carry out its mandate, established in subsections (1) and (2) in accordance with the following principles:

- (a) the need for an independent, objective and effective process for determining judicial compensation;
- (b) the need to present an objective and fair set of recommendations dictated by the public interest;
- (c) the constitutional guarantee of judicial independence.

[9] Section 5.3(2) establishes the mandatory criteria that the 2021 JCC must consider when conducting the compensation review:

(2) The Commission, in making the recommendations, shall consider the following criteria:

- (a) the constitutional law of Canada and the need to maintain the independence of judges and applications judges;
- (b) the generally accepted current and expected economic conditions in Alberta, and the resulting impact on the price of labour in Alberta;
- (c) the change in the cost of living in Alberta;
- (d) the current and expected financial position of the Government over the fiscal years that are the subject of the recommendations;
- (e) the level of increases or decreases, or both, provided to other programs and persons funded by the Government;
- (f) the roles, duties and jurisdiction of judges and applications judges;
- (g) compensation provided to judges and applications judges in other Canadian jurisdictions, having regard to the differences between those jurisdictions and Alberta, especially as they relate to differences in the matters referred to in clauses (b), (c) and (d) in respect of those other jurisdictions;
- (h) the need to attract qualified applicants as judges and applications judges.

[10] Section 5.3(1) defines what constitutes “generally accepted current and expected economic conditions” for the purposes of section 5.3(2)(b):

5.3(1) In this section, “generally accepted current and expected economic conditions” in respect of a jurisdiction includes, without limitation,

- (a) real gross domestic product,
- (b) real gross domestic product per capita,
- (c) the employment rate,

- (d) the unemployment rate,
- (e) the labour force participation rate, and
- (f) the consumer price index.

[11] Of the eight criteria in section 5.3(2), the 2021 JCC Report concluded that three criteria did not, of themselves, support a salary increase:

- The constitutional law of Canada and the need to maintain the independence of Justices and Applications Judges (criterion (a)),
- The current and expected financial position of the Government over the fiscal years that are the subject of the recommendations (criterion (d)), and,
- The level of increases or decreases, or both, provided to other programs and persons funded by the Government (criterion (e)).

[12] Of the remaining five criteria, Alberta's economic position (criteria (b) and (c)) and comparisons to judicial salaries in other jurisdictions (criterion (g)) were the "main drivers" that justified judicial remuneration increases in Alberta.

[13] Alberta's Response provides the following reasons for rejecting the 2021 JCC's recommendations:

- A. In light of Alberta's policy of significant fiscal restraint in compensation of individuals funded by Government, criterion (e) supports a tempering of the increase in judicial salaries (as opposed to simply not of itself supporting an increase, as concluded by the 2021 Commission).
- B. While the 2021 Commission found that consideration of changes in the cost of living supported an increase in judicial salaries, they also concluded judges should not be unduly sheltered from the effects of inflation as compared to Albertans generally. Contrary to that finding, the recommended judicial salary increases significantly exceed the cost of living, effectively more than sheltering the judges from the economic realities Albertans have had to face, thereby potentially jeopardizing public confidence in the judiciary.
- C. The 2021 Commission adopted Statistics Canada's "Fixed weighted index of average hourly earnings" (FWI) as the appropriate metric for measuring the impact of economic changes on Albertans but lacked any detailed evidence on that metric over the relevant years. Alberta remains of the view that FWI is not the appropriate metric for this, but even considering the 2021 Commission's conclusion, the cumulative FWI increase of 11.6% is far lower than the recommended 17.0% increase in judicial salaries.
- D. The recommended increases do not place sufficient weight on the economic hardships caused by the pandemic and the subsequent period of recovery, which make 2021 and 2022 inappropriate years for large salary increase for those paid from the public purse.

- E. Less weight should be given to following the 2021 jump in federal judicial salaries, given that this was a result of indexing to Average Weekly Earnings (AWE), which spiked during the pandemic due to the temporary elimination of lower paying jobs from the workforce.

### III. Relevant Legal Principles

[14] The Association brought this application to challenge the reasons provided in Alberta's Response. It argues that the reasons do not meet the standard set by the relevant Supreme Court of Canada (SCC) jurisprudence.

[15] The Association's application engages a unique form of judicial review. Such an application is rooted in the constitutional guarantees of judicial independence and is not a conventional administrative law exercise. Rather, it evaluates the sufficiency of the government's response to the report of the judicial compensation commission in order to ensure that the commission's recommendations have had a meaningful effect on setting the appropriate judicial salary levels in the province.

[16] The framework and threshold for such an application have been articulated by the SCC in several governing cases.

a) ***Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 SCR 3, 1997 CanLII 317 [PEI Reference].***

[17] The principles governing judicial compensation commissions were introduced in the ***PEI Reference***. It confirms that judicial independence is an unwritten constitutional principle and establishes a baseline framework for how judicial remuneration must be determined.

[18] The purpose of a judicial compensation commission is to depoliticize the determination of judicial compensation and to avoid the possibility or appearance of political interference in the judiciary through economic manipulation: see ***PEI Reference*** at para 135. Judicial compensation commissions must be independent, objective and effective: see ***PEI Reference*** at para 169.

[19] Independence means the commission is not under the control of either the government or the judiciary. Rather, it acts as an "institutional sieve" between the two branches: see ***PEI Reference*** at para 170.

[20] The commission's salary recommendations must be based on objective criteria, not political motivations: see ***PEI Reference*** at para 173. Though not mandatory, the commission's deliberations should be guided by a list of relevant factors included in the enabling legislation or regulation, such as increases in the cost of living, the adequacy of judicial salaries or attracting excellent candidates to the bench: see ***PEI Reference*** at para 173.

[21] The commission process must also be effective. Governments are constitutionally bound to participate in the process and the commission's recommendations must have a meaningful effect on the determination of judicial salaries: see ***PEI Reference*** at para 175. Further, the government

must formally respond to the commission's report within a specified period of time: see *PEI Reference* at para 179. If the government decides to depart from the commission's recommendations, it must justify that decision (in court, if necessary): see *PEI Reference* at para 133. The commission's independent recommendations should not be set aside lightly, and a government decision based on insufficient reasons may be unconstitutional: see *PEI Reference* at paras 133, 180. The requirement to provide sufficient reasons for departing from the recommendations is what ensures the commission's effectiveness: see *PEI Reference* at para 180.

[22] The sufficiency of the government's reasons is judged on a standard of rationality: see *PEI Reference* at para 183. This standard requires the government to articulate legitimate reasons why it has departed from the commission's recommendations. Further, the reasons for departure must be based on a reasonable factual foundation. The *PEI Reference* explains this standard in the following terms:

183 The standard of justification here, by contrast, is one of simple rationality. It requires that the government articulate a legitimate reason for why it has chosen to depart from the recommendation of the commission, and if applicable, why it has chosen to treat judges differently from other persons paid from the public purse. A reviewing court does not engage in a searching analysis of the relationship between ends and means, which is the hallmark of a s. 1 analysis. However, the absence of this analysis does not mean that the standard of justification is ineffectual. On the contrary, it has two aspects. First, it screens out decisions with respect to judicial remuneration which are based on purely political considerations, or which are enacted for discriminatory reasons. Changes to or freezes in remuneration can only be justified for reasons which relate to the public interest, broadly understood. Second, if judicial review is sought, a reviewing court must inquire into the reasonableness of the factual foundation of the claim made by the government...

b) *Provincial Court Judges' Association (New Brunswick) v New Brunswick (Minister of Justice)*; *Ontario Judges' Association v Ontario (Management Board)*; *Bodner v Alberta*; *Conférence des juges du Québec v Quebec (Attorney General)*; *Minc v Quebec (Attorney General)*, 2005 SCC 44 [*Bodner*].

[23] Despite the guidance provided in the *PEI Reference*, courts struggled with how to apply the relevant principles and governments struggled with how to develop reasons for departure that satisfied the rationality standard: see *Bodner* at para 3. In *Bodner*, the SCC further developed the test that should be used when judicially reviewing a government response that rejects salary recommendations made by a judicial compensation commission. This test is now known as a "*Bodner* review".

[24] *Bodner* confirms that the principles underlying judicial independence and the constitutional requirement for judicial compensation commissions are still valid: see *Bodner* at

paras 4–12. It also reiterates that that the commission process is meant to act as an “institutional sieve”, or a “structural separation”, between the government and the judiciary: see *Bodner* at para 14.

[25] The commission process is flexible and, unless there are reasons to the contrary, the starting point of the inquiry should be the date of the previous commission’s report: see *Bodner* at para 14. In fact, the “reports of previous commissions and their outcomes form part of the background and context that a new compensation commission should consider”: see *Bodner* at para 15.

[26] Commission reports are consultative and, unless otherwise stated by legislation, they are not binding on the government: see *Bodner* at para 21. If the government departs from the commission’s recommendations, they must provide legitimate reasons for doing so: see *Bodner* at para 25. Reasons that are complete and consider the commission’s recommendations in a meaningful way will meet the standard of rationality: see *Bodner* at para 25.

[27] *Bodner* builds on the analysis from the *PEI Reference*, adding a third part to the test governing whether a government’s decision to depart from a commission’s recommendations meets the rationality standard: see *Bodner* at para 31:

1. Has the government articulated a legitimate reason for departing from the commission’s recommendations?
2. Do the government’s reasons rely on a reasonable factual foundation? and
3. Viewed globally, has the commission process been respected and have the purposes of the commission – preserving judicial independence and depoliticizing the setting of judicial remuneration – been achieved?

[28] Under the first two parts of the test, the focus is on the government’s reasons. The reasons must give weight to the commission’s recommendations and must not simply reiterate submissions that were already made to or substantially addressed by the commission: see *Bodner* at paras 23–24. A bald rejection of the commission’s recommendations will be insufficient: see *Bodner* at para 25. Rather, the government response must:

...show that the commission’s recommendations have been taken into account and must be based on sound reasoning. They must state in what respect and to what extent they depart from the recommendations, articulating the grounds for rejection or variation. The reasons should reveal a consideration of the judicial office and an intention to deal with appropriately. They must preclude any suggestion of attempting to manipulate the judiciary. The reasons must reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence: see *Bodner* at para 25.

[29] The government’s reasons for departure or rejection must also rely on a reasonable factual foundation: see *Bodner* at para 26. The reasons for departure, and the factual foundation

underlying those reasons, must be clearly stated in the government’s response to the recommendations: see *Bodner* at para 27.

[30] If the government ascribes a different weight to a relevant factor than the commission did, it must justify the different approach: see *Bodner* at para 26. The government’s reasons may rely on comparisons with public servants or the private sector, but “the use of a particular comparator must be explained”: see *Bodner* at para 26. The government may also “analyse the impact of the recommendations and...verify the accuracy of information in the commission’s report”: see *Bodner* at para 26.

[31] At the third stage of the *Bodner* test, the Court must assess the whole of the government’s participation in the process and its response to determine whether it meaningfully engaged with the commission process: see *Bodner* at para 38. A court should not intervene simply because a particular reason or aspect of the government’s process is flawed: see *Bodner* at paras 38, 43. If, when viewed globally, the commission process was effective and the setting of the judicial remuneration was depoliticized, then the government’s decision should stand: see *Bodner* at para 43.

[32] If the government’s reasons for departure are challenged and the reviewing court finds that the government’s response does not pass the *Bodner* test, generally, the appropriate remedy will be to refer the matter back to government for reconsideration: see *Bodner* at para 44. In fact, the SCC explicitly notes that “courts should avoid issuing specific orders to make the recommendations binding unless the governing statutory scheme gives them that option”: see *Bodner* at para 44.

c) *British Columbia (Attorney General) v Provincial Court Judges’ Association of British Columbia*, 2020 SCC 20 [BC SCC 2020].

[33] The focus of *BC SCC 2020* was the government’s disclosure obligations during a *Bodner* review. However, it also elaborated on the application of the *Bodner* test and the appropriate scope of the rationality standard.

[34] *BC SCC 2020* confirms that the first two parts of the *Bodner* test focus on the government’s response, while the third part looks at the process and the response as a whole: see *BC SCC 2020* at paras 37–38. The government’s response must demonstrate respect for the judicial office, for judicial independence and for the commission process: see *BC SCC 2020* at para 83. Government reasons that do not consider the distinctive nature of judicial office and that treat judges simply as a class of civil servants will fail to engage with the principle of judicial independence: see *BC SCC 2020* at para 85. In other words, the third part of the *Bodner* test requires the court to take a global perspective and consider whether the government demonstrated respect for the judicial office by engaging meaningfully with the commission process: see *BC SCC 2020* at para 38.

[35] The government cannot rely on public reasons that are “facially legitimate and appear grounded in a reasonable factual foundation” if those reasons are not given in good faith or are intended to conceal an improper or colourable purpose: see *BC SCC 2020* at para 41. The government’s reasons must not reveal political or discriminatory motives and must not attempt to manipulate or influence the judiciary: see *BC SCC 2020* at para 43. Ultimately, “[c]onsiderations of legitimacy and respect for the process – and, conversely, considerations of impropriety or colourability – permeate the entire *Bodner* process”: see *BC SCC 2020* at para 43.

#### IV. The Standard of Review

[36] The parties disagree on how to interpret the standard of rationality applicable to a *Bodner* review. Alberta submits that it is more deferential than a typical reasonableness review in administrative law. In turn, the Association alleges that this is a mischaracterization of the law and represents an “unduly deferential” application of the *Bodner* test.

[37] On a *Bodner* review, the court must conduct a focused, yet robust form of judicial review: see *BC SCC 2020* at paras 5, 83. This is a deferential review which acknowledges the government’s unique position, accumulated expertise, and its constitutional responsibility for management of the province’s financial affairs: see *Bodner* at paras 30, 40. Though the government must show that the commission’s recommendations had a meaningful effect on its decision, there is no presumption in favour of accepting the recommendations: see *British Columbia (Attorney General) v Provincial Court Judges’ Association of British Columbia*, 2024 BCCA 233 at paras 58, 63–64 [2024 BCCA].

[38] The grounds for a *Bodner* review are narrower than those for a typical judicial review: see *BC SCC 2020* at para 51. They focus on the legitimacy of the government’s reasons, the reasonableness of the factual foundation it relied on, and whether the government has shown respect for the commission process more generally such that the objectives of the process – namely, depoliticizing decisions about judicial remuneration and preserving judicial independence – have been met: see *BC SCC 2020* at paras 47, 86. Reasons that are complete, that address the commission’s recommendations in a meaningful way, that are compatible with the common law and the Constitution, and that deal with the issues in good faith will meet the standard of rationality: see *Bodner* at para 25.

[39] In *Alberta Provincial Judges’ Association v Alberta*, 2022 ABQB 415 [*Ross Decision*], Justice Ross conducted a *Bodner* review of the government’s response to the recommendations of Alberta’s 2017 judicial compensation commission (the 2017 JCC). When discussing the standard of rationality, Justice Ross made the following statement:

The *Bodner* test is both deferential and robust if the court applies each branch of the test in line with the guidance provided in *Bodner*, keeping in mind that judicial review is intended to ensure that commission reports have “a meaningful effect on the determination of judicial salaries”: *PEI Reference* at para 175. Such review

remains deferential, because the government may disagree with the commission for a broad range of legitimate reasons based on a reasonable factual foundation, for which the standard of review is rationality. But, if the additional guidance in *Bodner* is followed, the review is also robust. It is not sufficient that the government’s reasons “are facially legitimate and appear grounded in a reasonable factual foundation”: *British Columbia, SCC 2020* at para 41. The requirements of “sound reasoning” go beyond this. The government’s response “must demonstrate respect for the judicial office, for judicial independence, and for the commission process; as well, the broader objectives of the process must be achieved” *British Columbia, SCC 2020* at para 83. Legitimate reasons must respond to and give weight to the commission’s recommendations. If government weighs relevant factors differently from the commission, this difference must be justified. Overall, the government’s response must be engaged with and consider the reasoning of the commission: see *Ross Decision* at para 35.

[40] This is an accurate and succinct description of the standard applicable to a *Bodner* review. I adopt the rationality standard as articulated in the *Ross Decision*.

## V. First and Second Stages of the *Bodner* Review

[41] The parties agree that *Bodner* is the governing test but disagree on whether Alberta’s Response passes that test.

[42] Alberta’s Response provides five reasons for departing from the 2021 JCC’s recommendations. Below, I analyze each reason under the first two stages of the *Bodner* test. The third stage of the *Bodner* review is conducted globally, considering all the reasons together and the process as a whole.

## VI. Reason A: Public Sector Compensation

A. *In light of Alberta’s policy of significant fiscal restraint in compensation of individuals funded by Government, criterion (e) supports a tempering of the increase in judicial salaries (as opposed to simply not of itself supporting an increase, as concluded by the 2021 Commission).*

[43] Criterion (e) of the 2021 JCC Regulation directs consideration of the increases or decreases in compensation to others funded by the government. The evidence presented to the 2021 JCC demonstrated decreases in compensation to other publicly funded persons, which the 2021 JCC found signaled a government policy of significant fiscal restraint. Further, this policy of fiscal restraint applied to most of the public sector, which the SCC jurisprudence confirms is relevant, *prima facie* rational, and generally aimed at advancing the public interest. In light of this evidence, the 2021 JCC concluded that criterion (e) did not “of itself” justify an increase in judicial salaries. However, according to Reason A, where a commission finds that there has been a significant drop

in compensation to others funded by the government, then the only logical conclusion is that judicial salaries should also be tempered (not simply “not increased”).

[44] Reason A alleges that, despite recognizing the policy of significant fiscal restraint, the 2021 JCC did not undertake a transparent analysis of the evidence regarding decreases to other areas of public sector compensation. Rather, it relied on the notion that public sector compensation decisions are inherently political as a reason not to engage with this criterion.

[45] Reason A also references *Provincial Court Judges' Association of British Columbia v British Columbia (Attorney General)*, 2021 BCCA 295 [2021 BCCA] for the proposition that failing to meaningfully assess the evidence because it implicates political decision-making is an error. Ultimately, Reason A concludes that, because the 2021 JCC specifically recognized there was a government policy of significant fiscal restraint, it should have determined that criterion (e) supported tempering judicial salary increases, as opposed to not “of itself” supporting an increase.

**a) The Association’s Position**

[46] The Association argues that Reason A does not pass the first two stages of the *Bodner* review and advances four main arguments in support of this conclusion.

[47] First, it notes that Alberta’s Response specifically refers to historical information regarding how judicial salary increases compared to public sector wage increases. However, Alberta did not advance an argument before the 2021 JCC about how historical comparisons between judicial increases and public sector increases should be considered in relation to criterion (e). It is not legitimate for Alberta to raise this argument for the first time in its Response.

[48] Historical comparisons should not inform how judicial salaries are handled during the relevant mandate period. The only public sector wage changes that are relevant are those that occur during the 2021 JCC’s mandate. By focusing on historical comparisons, Alberta is framing judicial salaries as historically excessive.

[49] In response, Alberta contends that it did rely on the public sector compensation trends that were operative during the mandate period as a justification for tempering judicial salary increases. Further, it was not implying that judicial salaries have been historically excessive. Historical data was mentioned to emphasize the point that, when reliance is actually placed on criterion (e), it may support a moderated increase.

[50] Second, the Association argues that Alberta’s Response indicates that criterion (e) supports a tempering of judicial salary increases. However, before the 2021 JCC, Alberta actually argued that it supported a modest salary increase. The 2021 JCC went further by suggesting that criterion (e) supports no increase.

[51] Third, Alberta’s submissions to the 2021 JCC indicated that its proposals reflected the “core trends” in public sector compensation for the first three years of the mandate. However, other

forms of compensation provided to public sector employees, beyond general wage increases, are not reflected in the “core trends” data.

[52] In any event, the Association argues that the “core trends” aspect of Reason A is not legitimate because it involves wages set by a collective bargaining process, which do not represent an across-the-board measure like the type discussed by the SCC. In fact, an across-the-board measure neither existed nor was put before the 2021 JCC as evidence.

[53] According to Alberta, it was not taking the position that there was an across-the-board salary measure in which judges should be included. Rather, it was emphasizing the SCC’s recognition that public sector compensation levels are relevant and appropriate factors for a commission to consider and may even constitute a *prima facie* rational reason to depart from commission recommendations. In other words, broad government measures are relevant considerations, even if they are not applied across-the-board.

[54] Finally, the Association submits that Alberta criticizes the 2021 JCC for not providing a detailed and transparent analysis of the evidence regarding changes in public sector compensation. However, the 2021 JCC expressly acknowledged that it had taken all criteria into account. Given the 2021 JCC’s specific finding that the government was operating on an underlying policy of significant fiscal restraint, a detailed explanation of the evidence regarding changes in public sector compensation was unnecessary.

#### **b) Alberta’s Position**

[55] Alberta maintains that the 2021 JCC did not review the evidence relating to criterion (e) in sufficient detail. While it did recognize that evidence regarding changes in public sector compensation demonstrated a government policy of fiscal restraint, it used this conclusion to assess only whether an increase was justified. What it should have done was use the information to assess the appropriate level of judicial compensation overall. This is the approach required by the *2021 JCC Regulation* and, if utilized, it could have indicated an increase or a decrease.

[56] In response, the Association indicates that neither party proposed a judicial salary decrease; thus, the only task in front of the 2021 JCC was to assess whether an increase or, alternatively, no increase was justified. The 2021 JCC explained at the outset that it had considered all relevant criteria. Three criteria, of which criterion (e) was one, did not support an increase. It follows that the three criteria which do not support an increase restrain the overall level of the increase supported by the other five criteria.

[57] Alberta submits that the 2021 JCC expressed hesitation about relying on criterion (e) because of the inherently political nature of fiscal policy decisions. As such, the 2021 JCC gave no weight or reliance to this mandatory criterion. Further, Alberta is entitled to weigh criterion (e) differently than the 2021 JCC, as long as it provides sufficient justification. It takes the position that it has justified the different weights by providing an assessment of how changes in public sector compensation inform the appropriate size of a judicial salary increase (not just whether there

should be an increase, as the 2021 JCC did). It also justified the difference by highlighting the 2021 JCC's failure to explain how this factor related to its conclusions regarding appropriate salary amounts and its corresponding failure to place any reliance on this criterion.

[58] Alberta relies heavily on *2021 BCCA* to support its arguments. In that case, the British Columbia Court of Appeal specifically found that the British Columbia government was rational and justified in departing from the commission's report. The British Columbia commission had misconstrued the concept of politicization and, as a result, wrongly decided not to engage with public sector wage comparisons on the basis that they were inherently political. According to Alberta, the 2021 JCC made this same mistake.

[59] In response, the Association argues that Alberta's reliance on *2021 BCCA* is misplaced. A similar argument relying on *2021 BCCA* was advanced by Alberta in the *Ross Decision* and was, ultimately, dismissed: see *Ross Decision* at paras 38 to 43, 130, 138. Here, the 2021 JCC's comments regarding politicization were made in response to Alberta's submission that fiscal policy is a choice for the government to make. The 2021 JCC agreed that it is required to consider changes in public sector compensation and that matters of fiscal policy are the government's sole responsibility, but it also pointed out that fiscal policy does not dictate the outcome of the 2021 JCC's process. Further, because it must act as an "institutional sieve" between the government and the judiciary, it is not bound to mirror the decisions the government makes with respect to other aspects of public sector compensation.

### c) Analysis

[60] When assessing criterion (e), the 2021 JCC specifically found that there was a government policy of significant fiscal restraint. As a result, it concluded that criterion (e) did not, of itself, support a judicial salary increase. I reject Alberta's position that the 2021 JCC was required to provide an explicit, detailed assessment of the specific impact criterion (e) had on the overall level of judicial compensation. In fact, in its oral submissions, Alberta specifically argued that the government was not required to use formula or detailed math to justify its Response or to demonstrate how its substituted salary numbers were determined. If Alberta is not held to such a standard, then the same principle applies to the 2021 JCC. The 2021 JCC examined whether each criterion supported an increase or not. This was the exact approach taken by Alberta at the 2021 JCC hearings. It is not legitimate for Alberta to adopt a certain analytical approach and then criticize the 2021 JCC for implementing the same method.

[61] Further, the 2021 JCC concluded that criterion (e) did not support an increase, as opposed to the modest increase that Alberta advocated at the initial hearings. Alberta's Response now takes the position that criterion (e) justifies a tempering of judicial salary increases. It is not legitimate for Alberta to change the position it advanced before the 2021 JCC and then use that as a justification for rejecting the 2021 JCC's recommendations.

[62] Alberta's reliance on historical comparisons between judicial salary increases and public sector wage compensation is also problematic. Though there was historical information in evidence before the 2021 JCC, Alberta did not explain how these comparisons should inform the 2021 JCC's decision-making with respect to criterion (e). In other words, the historical comparison argument was expressly raised for the first time in Alberta's Response.

[63] Both parties must put all evidence and arguments that they intend to rely on before the 2021 JCC. Saving arguments for later undermines the commission's objectives and renders the process ineffective. Thus, if Alberta wanted the historical relationship between judicial salary increases and public sector compensation increases to be considered in a specific way under criterion (e), it should have made that express argument before the 2021 JCC. Raising it for the first time in its Response is not legitimate.

[64] In oral submissions, Alberta disputed that its Response raised a new argument about historical comparisons. In Alberta's view, saying something new does not equate to making a new argument. In fact, Alberta suggests that the historical comparisons were provided for context only and nothing turns on this section of its Response. If it is true that nothing turns on this information, then it is difficult to see how it justifies reweighing the regulated factors. In other words, if, by Alberta's own admission, nothing turns on the contextual historical information provided in its Response, then it does not constitute a legitimate reason or a reasonable factual foundation for departing from the 2021 JCC's recommendations.

[65] Reason A also suggests that the 2021 JCC should have given more weight to the identified policy of restraint in public sector compensation. If it had, then it would have recognized that judicial salary increases required tempering. However, this aspect of Reason A fails to recognize that the public sector compensation trends presented to the 2021 JCC were mostly the result of a collective bargaining process, which is distinct from the process that an independent judicial compensation commission is required to follow. Broad salary measures that impact most public sector employees may be relevant, but it is not necessarily appropriate to transpose the negotiated salaries achieved through a collective bargaining process into a constitutionally required process that specifically prohibits negotiation or bargaining of any sort: see *PEI Reference* at paras 157, 186.

[66] Reason A contends that the 2021 JCC did not provide sufficient weight to public sector compensation levels because it relied on the notion that public sector compensation decisions are inherently political. As a result, it did not meaningfully engage with criterion (e) or provide a transparent analysis of the evidence regarding public sector wages. Put another way, the 2021 JCC did not give sufficient weight to criterion (e) because of its fear of the inherently political nature of fiscal policy decisions.

[67] I disagree. The 2021 JCC reviewed and responded to the overall evidence regarding criterion (e). Its politicization comments were made in response to Alberta's submission that fiscal policy is a choice for the government to make. The 2021 JCC specifically acknowledged that it is

required to consider changes in public sector compensation and that matters of fiscal policy are the government's sole responsibility, but it also pointed out that fiscal policy does not dictate the outcome of the 2021 JCC's process. Unlike the approach taken by the British Columbia commission in *2021 BCCA*, the 2021 JCC specifically recognized that Alberta's public sector wages were subject to a general policy of significant fiscal restraint and then used that finding to inform its conclusion that criterion (e) did not support a judicial salary increase.

[68] Alberta is permitted to depart from the 2021 JCC's recommendations, as long as it provides legitimate reasons for doing so, which must be based on a reasonable factual foundation. Alberta's position that the 2021 JCC did not adequately consider criterion (e) is not legitimate. It is clear that the 2021 JCC directly considered public sector wage data, concluded that public sector compensation was subject to a policy of fiscal restraint, and determined that these considerations did not support a judicial salary increase. The 2021 JCC was not required to isolate criterion (e) and explain how it dictates the size of any salary increase, nor was it required to identify what specific weight was accorded to each individual factor. In fact, as was specifically noted in Alberta's Response and echoed in its oral submissions, "the determination of judicial salary from the criteria is not formulaic and requires a consideration of all factors."

[69] The 2021 JCC's conclusion that criterion (e) did not support an increase was considered in the overall decision-making process and weighed against the other criteria that were identified as specifically justifying an increase. This global balancing exercise is appropriate. While Alberta is entitled to give more weight to criterion (e) than the 2021 JCC did, suggesting that the 2021 JCC gave it no weight at all when there is direct evidence to the contrary does not provide a legitimate reason for departing from the 2021 JCC's recommendations.

[70] Further, Alberta's attempt to depart from the 2021 JCC's recommendations by relying on historical comparison data that "nothing turns on" or by suggesting that the 2021 JCC misconstrued the concept of politicization does not provide a reasonable factual foundation. As a result, I conclude that Reason A does not pass the first two stages of the *Bodner* review.

## VII. Reason B: Cost of Living Analysis

- B. *While the 2021 Commission found that changes in the cost of living supported an increase in judicial salaries, they also concluded that judges should not be unduly sheltered from the effects of inflation as compared to Albertans generally. Contrary to that finding, the recommended judicial salary increases significantly exceed the cost of living, effectively more than sheltering judges from the economic realities Albertans have had to face, thereby potentially jeopardizing public confidence in the judiciary.*

[71] In the *PEI Reference*, the SCC declined to impose mandatory criteria that a commission must consider when reviewing judicial salaries. However, it suggested that increases in the cost of living would be a relevant and important factor to include if provinces decided to legislate their

own criteria: see *PEI Reference* at para 173. As such, criterion (c) requires consideration of “the change of the cost of living in Alberta”: *2021 JCC Regulation*, s 5.3(2)(c).

[72] At the 2021 JCC hearing, both parties used information about Statistics Canada’s Consumer Price Index (“CPI”) as a proxy metric for the cost of living. However, Alberta maintains, both at the hearing and in its Response, that CPI as a proxy for cost of living has certain limitations. First, it measures the change in the price of a fixed basket of goods over time, rather than measuring price changes required to maintain a certain standard of living. Second, it has a higher impact on lower income households, which means that negative changes in the CPI will have a greater impact on the purchasing power of lower income individuals.

[73] The 2021 JCC accepted CPI as an acceptable metric but also acknowledged that its limitations must be kept in mind. It concluded that the evidence regarding CPI and the cost of living supported an increase in judicial salaries, but that the increase should be tempered to avoid unduly sheltering judges from the economic realities faced by all Albertans.

[74] Reason B takes the position, which Alberta also advanced at the 2021 JCC hearing, that it would be inconsistent with the public interest to entirely shield judges from the effects of inflation. Reason B also reiterates Alberta’s position from Reason A that the 2021 JCC did not provide an explanation for how this legislated criterion supports the actual salary figures. It argues that the logical conclusion flowing from the 2021 JCC’s recognition that judges should not be unduly sheltered from the effects of inflation would have been salary increases reflecting (not exceeding) the changes in the cost of living. This is especially true when considering the fact that CPI changes have a greater impact on lower income households than they do on higher income households (like judges).

[75] Reason B also argues that there should be a recognition of the difference between the calendar year of an economic measure like CPI and the fiscal year of a salary increase. It contends that the recommended judicial salary increases should have been indexed to the CPI in the previous calendar year. This aligns both with the approach taken by the federal judicial compensation commission and with references in the 2021 JCC Report. If prior year indexing is used, then changes in the CPI suggest an overall cumulative salary increase of 14.6%, rather than the 16.95% recommended by the 2021 JCC.

[76] According to Reason B, the recommended salaries are much higher than they would have been if they had been indexed to CPI. In fact, the recommended salaries significantly exceed the increase in cost of living. This completely shelters judges from the effects of inflation and results in an increase in their real purchasing power. When combined with the fact that CPI changes have a higher impact on low-income households, it follows that the recommended increases would completely shield judges from the economic realities faced by other Albertans.

**a) The Association's Position**

[77] The Association advances three specific criticisms of Reason B.

[78] First, by claiming that salary increases which exceed purely inflationary increases are inconsistent with the 2021 JCC's conclusion that judges should shoulder their fair share of the economic realities faced by all Albertans, Reason B implies that the 2021 JCC was limited to recommending increases less than the anticipated rate of inflation. If this approach were followed, it would make this one factor determinative, which is inconsistent with the obligation to consider all the legislated criteria.

[79] Similarly, Reason B relies on the fact that CPI changes have a greater impact on low-income households to argue that the recommended increases would unduly shelter judges from the effects of inflation. However, the 2021 JCC specifically recognized that criterion (c) supported a tempered increase to avoid unduly sheltering judges from the effects of inflation, which demonstrates a consideration of all the statutory criteria. Reason B essentially treats CPI changes as a ceiling for the 2021 JCC's recommendations. This approach prioritizes one factor and ignores the 2021 JCC's obligation to consider all the legislated criteria.

[80] Second, Reason B acknowledges that the 2021 JCC recognized the limitations of using CPI as a metric. It goes on to imply that the 2021 JCC failed to account for these limitations but does not explain how. Rather, it merely points out that the recommended salaries are higher than they would have been if they had been indexed to CPI changes for the previous calendar year.

[81] The Association takes issue with indexing salary increases to the CPI from the previous calendar year. While the 2021 JCC did refer to this approach, it did not adopt any explicit method of comparison between salary increases and CPI increases. It also did not recommend any form of indexing. In any event, Alberta's submissions to the 2021 JCC presented public sector wage information that was based on yearly CPI changes, not indexed to CPI changes from the previous year.

[82] If the recommended increases are compared to the CPI changes presented to the 2021 JCC, two things are apparent. First, the recommended increases are below the CPI changes for two years of the mandate and, second, the cumulative salary increase only exceeds the cumulative CPI changes by less than 1%. Even if Alberta's previous year indexing approach is used, the recommended increases exceed cumulative CPI changes by only 2.06%. This sufficiently reflects the 2021 JCC's conclusion that judges should not be unduly sheltered from the effects of inflation.

[83] Finally, the 2021 JCC recommended salary increases exceeding inflation in the last two years of its mandate because expert evidence presented at the hearing demonstrated that wage growth would equal or exceed CPI during that time frame. There was also evidence that, beyond 2024, Alberta's annual wage and salary growth would exceed inflation. Even Alberta's reply

submissions at the hearing specifically acknowledged that per capita income in Alberta was expected to surpass inflation in the later years of the 2021 JCC's mandate.

**b) Alberta's Position**

[84] Alberta argues that it is entitled to place more emphasis on criterion (c) than the 2021 JCC, as long as it provides a sufficient justification for doing so. In Alberta's view, the salary increases recommended by the 2021 JCC completely shelter judges from the economic realities faced by other Albertans.

[85] In response to the Association's specific arguments, Alberta notes that giving this factor more weight than the 2021 JCC did does not mean it was given determinative weight. Alberta relies heavily on the notion that there is nothing improper about placing more weight on this factor than the 2021 JCC did.

[86] Alberta concedes that, in its submissions before the 2021 JCC, it did not advance the prior year indexing approach. Rather, it took the calendar year approach and compared the recommended salary increases to the CPI change in that same calendar year. In fact, it was the Association that relied upon comparisons to the CPI in the prior calendar year (it relied upon 2020 CPI numbers in its salary proposal for 2021). The 2021 JCC did not adopt either method; rather, it considered the total cumulative increase of CPI. Alberta decided to adopt the indexing approach in its Response, which is the exact approach relied upon by the Association when using 2020 CPI numbers to support its 2021 salary proposals.

[87] Finally, in response to the Association's argument that Alberta's wage growth was predicted to equal or exceed CPI increases in the last two years of the 2021 JCC's mandate, Alberta points out that this does not acknowledge that wage growth lagged behind CPI increases in the first two years of the mandate. Considered together, Alberta's cumulative wage growth during the 2021 JCC's mandate period was still less than the cumulative change to the CPI.

**c) Analysis**

[88] The 2021 JCC considered the cumulative change in CPI when assessing the appropriate level of judicial salaries. Reason B adopted a different approach by indexing judicial salaries to the CPI change in the previous calendar year. This was not the approach that Alberta advocated for at the 2021 JCC hearings. It is not legitimate for Alberta to rely on one approach in its submissions to the 2021 JCC and then adopt a completely different method in its Response.

[89] Alberta is entitled to reach different conclusions than the 2021 JCC, but it must provide a legitimate reason for doing so. Alberta has not provided sufficient justification for completely changing its approach when assessing the evidence relevant to criterion (c). If it wanted to use a prior year indexing approach, then it should have relied on that approach before the 2021 JCC.

[90] Further, since the recommended judicial salary increases only exceed the cumulative CPI increases by roughly 1%, the evidence does not support Alberta's proposition that the 2021 JCC recommended increases that "well exceeded" the cost of living or failed to demonstrate a "tempering" of judicial increases. I agree with the Association's argument that, by rejecting the salary recommendations largely because they exceeded CPI, Alberta's Response essentially treats cost of living increases as a judicial salary cap. This, in turn, places determinative weight on criterion (c) and ignores the obligation to consider all legislated criteria.

[91] The 2021 JCC's salary recommendations closely reflect the CPI changes over the mandate period, which aligns with the conclusion that judges should not be unduly sheltered from the effects of inflation. While Alberta is entitled to weigh certain factors more heavily than the 2021 JCC, it is not permitted to place such heavy emphasis on one factor that it becomes determinative. By arguing that salary figures which cumulatively exceed CPI by roughly 1% are excessive, Alberta implies that judicial salaries must either align with or fall below CPI increases in order to be legitimate. Tying judicial salaries to CPI changes places undue emphasis on criterion (c), undermines the objectives of the commission process and demonstrates Alberta's failure to meaningfully engage with the 2021 JCC's analysis.

[92] Alberta points out that the wage growth for average Albertans lagged behind CPI increases in 2021 and 2022. However, it fails to recognize that the 2021 JCC also recommended judicial salary increases below CPI increases for those same years. Further, the 2021 JCC relied on expert evidence predicting that, in the last two years of the mandate period, wage growth would exceed CPI increases. In other words, it only recommended judicial salary increases exceeding inflation in those years where wage growth for the average Albertan was also expected to exceed inflation. Alberta has not explained why judicial salaries should not follow the same economic patterns applicable to the rest of the province

[93] Reason B also relies on the fact that CPI changes have a greater impact on lower income households to support the conclusion that the recommended judicial salaries (which cumulatively exceed CPI) would unduly shelter judges from the inflationary pressures experienced by other Albertans. However, the 2021 JCC Report specifically identifies this shortcoming of CPI as a metric and expressly noted that it was keeping these drawbacks in mind.

[94] The legitimacy of Reason B requires Alberta to meaningfully engage with the 2021 JCC's reasoning. The 2021 JCC identified the limitations of using CPI as a proxy metric and explicitly recognized that judges are expected to experience their fair share of the generally applicable provincial economic realities, including by shouldering some of the pressures of inflation. Despite this, Alberta does not provide any factual foundation to support its assertion that "the recommended increases are out of step with the economic times."

[95] Further, by relying on the sheltering rationale and effectively treating CPI increases as an implicit judicial salary cap, Reason B does not meaningfully engage with the 2021 JCC on its analysis of criterion (c). As a result, Alberta has failed to justify its different weighing of the

evidence and has not articulated a legitimate reason for why judicial salaries should not follow the wage growth patterns predicted for the rest of Alberta.

[96] Therefore, Reason B does not pass the first two stages of the *Bodner* test.

### VIII. Reason C: Impact of Economic Change on Albertans' Average Income

C. *The 2021 Commission adopted Statistics Canada's "Fixed weighted index of average hourly earnings" (FWI) as the appropriate metric for measuring the impact of economic changes on Albertans but lacked any detailed evidence on that metric over the relevant years. The Government remains of the view that FWI is not the appropriate metric for this, but even considering the 2021 Commission's conclusion, the cumulative FWI increase of 11.6% is far lower than the recommended 17.0% increase in judicial salaries.*

[97] Criterion (b) of the 2021 JCC Regulation requires consideration of the generally accepted current and expected economic conditions in Alberta, including the impact on the price of labour. The 2021 JCC identified this factor as one of the "main drivers" justifying judicial salary increases.

[98] The parties relied on different metrics as evidence of the price of labour. Alberta's metric focused on growth in the base pay rate, excluding considerations like progression through a salary range, overtime, commissions, bonuses, etc. In contrast, the Association relied on the report of its expert economist, Dr. Trevor Tombe, whose full compensation approach to the price of labour includes these additional components. As part of the discussion regarding his full compensation approach, Dr. Tombe referred to Statistics Canada's metric for "Fixed weighted index for average hourly earnings" (FWI).

[99] According to Reason C, the 2021 JCC chose FWI as the appropriate metric, but it did not have sufficient evidence to support this reliance. In fact, Reason C maintains that, by relying on a metric that was unsupported by sufficient data, the 2021 JCC was "unable to fully analyze and give appropriate weight to this criterion."

[100] Reason C emphasizes that criterion (b) requires consideration of how economic changes are experienced by Albertans. This factor directly connects to the public interest goal of ensuring that judges share in both good and bad economic times. Regardless of what metric is used for the price of labour, it is necessary for the 2021 JCC to consider detailed evidence about how the chosen metric connects to the proposed judicial salaries.

[101] Reason C produces a chart that uses a prior year indexing approach and shows a cumulative increase in the FWI of 11.6% over the 2021 JCC's mandate period (as opposed to the cumulative recommended judicial salary increase of 16.95%). Even if the 2021 JCC's overall finding that Alberta's strong economy supports a significant increase to judicial salaries is accepted, Reason C maintains that it must be analyzed within this context. During the 2021 JCC's mandate, the 11.6% cumulative FWI increase experienced by the average Albertan was overcome by the 14.6%

cumulative increase in the cost of living (as discussed in Reason B). As such, “it would be unfair to ask Albertans’s experiencing an average 11.6% increase to fund a 17.0% increase for judges.”

**a) The Association’s Position**

[102] The Association criticizes Reason C for mischaracterizing the 2021 JCC’s adoption of FWI as the only appropriate price of labour metric. Rather, it argues that the 2021 JCC accepted Dr. Tombe’s evidence that all features of compensation must be considered in order to conduct a fair comparison between judges and other Albertans. To this end, Dr. Tombe presented detailed evidence regarding wage and salary growth and household disposable income growth which, when considered together with the FWI, also informed the 2021 JCC’s analysis of criterion (b).

[103] In any event, the Association points out that Alberta never made the argument before the 2021 JCC that it did not have enough data to rely on Dr. Tombe’s approach. As such, it should be prohibited from raising that argument now. Further, the Association argues that it is inappropriate to directly compare the FWI to the proposed judicial salary increases. This approach suggests that judicial salaries should be driven by the price of labour, regardless of what metric is used, which ignores the 2021 JCC’s obligation to consider all legislated criteria.

[104] Reason C fixates on the price of labour aspect of criterion (b). In doing so, it ignores the other aspects of the generally accepted current and expected economic conditions in Alberta, as set out in section 5.3(1) of the *2021 JCC Regulation*. The evidence accepted by the 2021 JCC was that the economic conditions in Alberta would lead the country over the period of its mandate. Moreover, it was specifically acknowledged before the 2021 JCC that Alberta had the highest income and wages per capita in the country, though by a smaller margin than in the past, and that this trend was forecasted to continue throughout the 2021 JCC’s entire mandate period.

[105] According to the Association, the 2021 JCC considered Alberta’s relative economic position, relative wage and income position, and the other statutory criteria when concluding a judicial salary increase was warranted. By focusing on the 2021 JCC’s reference to the FWI metric in isolation, Reason C does not engage with the 2021 JCC’s reasoning and is, therefore, not legitimate.

**b) Alberta’s Position**

[106] Alberta maintains that the disconnect between the 11.6% increase in the FWI and the 14.6% increase in the cost of living (when using prior year indexing), on the one hand, and the 2021 JCC’s recommended 16.95% increase in judicial salaries on the other, provides a legitimate justification for departing from the 2021 JCC’s recommendations. Further, it cannot be ignored that the average wage and salary growth fell below cost-of-living adjustments. This means that Albertans were experiencing decreased purchasing power, which constitutes a reasonable factual foundation for deviating from the recommended salaries.

[107] According to Alberta, the 2021 JCC interpreted criterion (b) with reference to how Alberta's economy compared to the other economies across Canada. It is Alberta's position that criterion (b) should be interpreted with reference to how changes in Alberta's economy have impacted Albertans themselves. For example, the 2021 JCC found that the rate of economic decline and recovery had been worse in Alberta than in other parts of the country. However, it gave this finding little weight because, comparatively, Alberta's economy was still faring better than the rest of Canada. Conversely, Alberta would place greater emphasis on the "worse" rate of decline and recovery, which leads to the conclusion that Albertans are economically worse off than they were when compared to their own recent experiences.

[108] In response to the Association's specific arguments, Alberta denies that Reason C failed to consider the broader economic evidence relied on by the 2021 JCC. It simply chose to emphasize how ordinary citizens are faring in the context of Alberta's current economy.

[109] Further, Alberta maintains that it was reasonable for Reason C to focus on the 2021 JCC's adoption of the FWI metric. It held prominence in the 2021 JCC Report, and it was necessary for Alberta to analyze it in order to meaningfully engage with the 2021 JCC's reasoning.

### c) Analysis

[110] Alberta is permitted to deviate from the 2021 JCC's recommendations, provided it offers a legitimate reason for doing so, which must be based on a reasonable factual foundation. When justifying a deviation, Alberta is required to meaningfully engage with the 2021 JCC's reasoning. Reason C did not do so.

[111] The 2021 JCC's analysis of criterion (b) was extensive and identified several relevant economic considerations. In contrast, Reason C is short and focuses heavily on the 2021 JCC Report's short discussion of the FWI metric. Specifically, it argues that the 2021 JCC did not have sufficient evidence to support its reliance on FWI as a metric for the price of labour. However, Reason C fails to acknowledge that FWI was only part of the data that the 2021 JCC discussed under criterion (b). The 2021 JCC specifically acknowledged that it accepted the economic data referenced in Dr. Tombe's report which, in addition to mentions of FWI, included information about wage and salary growth and household disposable income growth in Alberta.

[112] The 2021 JCC was required to assess the impact that economic changes had on the price of labour in Alberta. However, as it noted, the phrase "price of labour" is not defined in the *2021 JCC Regulation* and the parties' submissions relied on competing price of labour metrics. The 2021 JCC decided to adopt the Association's full compensation approach on the basis that it would be unfair to examine only a part of the compensation paid to those in both the private and public sectors: see 2021 JCC Report at 33. The 2021 JCC stated that even if the price of labour is strictly interpreted as changes in base salaries, it would have still considered other forms of compensation as a relevant criterion, as permitted under section 5.3(4) of the *2021 JCC Regulation*. Further, it noted that it preferred Dr. Tombe's evidence, in part, because Mr. Antune's (Alberta's expert)

position was premised “on changes in the rate of growth in Alberta’s metrics measured against more distant past years, rather than the actual level of the various metrics”: see 2021 JCC Report at 19.

[113] The 2021 JCC sufficiently justified its preference of Dr. Tombe’s overall evidence and his full compensation approach to the price of labour. It did not, as suggested in the Response, adopt FWI as the sole price of labour metric. While Alberta is entitled to weigh Dr. Tombe’s evidence differently, it must provide sufficient justification for doing so. Unfortunately, Reason C does not engage with the 2021 JCC’s extensive discussion of the economic factors identified by Dr. Tombe. To put it another way, the 2021 JCC provided a reasoned basis for preferring Dr. Tombe’s economic evidence regarding criterion (b) in general, and the full compensation approach to the price of labour in particular, but this is not considered in Alberta’s Response. Instead, it criticizes the FWI metric, which was not the focus of the 2021 JCC’s analysis. This suggests that Reason C lacks legitimacy.

[114] Reason C relies on a prior year indexing approach to argue that the cumulative FWI increase of 11.6% does not support a cumulative judicial salary increase of 16.95% because it fails to reflect the economic realities of average Albertans. Alberta argues that the disconnect between FWI and the recommended judicial salaries provides a legitimate reason for departing from the 2021 JCC’s recommendations.

[115] Directly comparing judicial salary increases to FWI disregards the other economic data considered by the 2021 JCC under criterion (b). Even if FWI is viewed as the only relevant metric (which the 2021 JCC Report does not conclude), requiring exact parity between FWI and judicial salary increases makes criterion (b) determinative. This approach is inconsistent with the requirement that criterion (b) be weighed alongside the other mandatory factors.

[116] Further, the price of labour is only one aspect of criterion (b). The 2021 JCC was required to consider both the current and expected economic conditions in Alberta, as further defined by section 5.3(1) of the *2021 JCC Regulation*. In that regard, the 2021 JCC concluded that, regardless of which expert’s evidence was preferred, Alberta’s economic conditions were the strongest in the country. Though the margin was smaller than in the past, the relative strength of Alberta’s economy was a “main driver” justifying judicial salary increases.

[117] Alberta maintains that the 2021 JCC should have compared Alberta’s current economic situation to its own recent economic experiences, rather than to the economic circumstances in other parts of Canada. The 2021 JCC acknowledged Alberta’s concern that the provincial economy is not expected to return to its previous boom levels, but found the concerns were “of limited value given that period is nine to thirteen years ago”: see 2021 JCC Report at 31. Again, if Alberta wants to place different emphasis on this type of information, it is entitled to do so, provided it offers sufficient justification. It did not do so.

[118] By failing to acknowledge the full factual matrix that the 2021 JCC relied on to support its conclusions, Reason C did not meaningfully engage with the 2021 JCC’s reasoning on criterion (b), nor did it sufficiently explain why it weighed certain economic evidence differently. As a result, Alberta has failed to justify its departure from the 2021 JCC’s recommendations.

[119] Accordingly, Reason C does not pass the first two stages of the *Bodner* review.

## **IX. Reason D: Pandemic and Recovery Years**

D. *The recommended increases do not place sufficient weight on the economic hardships caused by the pandemic and the subsequent period of recovery, which make 2021 and 2022 inappropriate years for large salary increases for those paid from the public purse.*

[120] Reason D also disagrees with the weight the 2021 JCC gave to criterion (b) of the 2021 JCC Regulation.

[121] As already explained under Reason C, criterion (b) requires consideration of the generally accepted current and expected economic conditions in Alberta. The 2021 JCC identified this criterion and the strength of Alberta’s economy as one of the “main drivers” justifying judicial salary increases.

[122] Reason D contends that the 2021 JCC’s reliance on Alberta’s strong economy as one of the main drivers justifying a judicial salary increase fails to account for the economic turmoil caused by the pandemic. It indicates that, even if Alberta’s overall economic strength supports a higher salary increase (but, as tempered by the analysis provided in Reasons A, B, and C), the timing of those increases is inappropriate. According to Reason D, “those increases should not come on the heels of extraordinarily difficult years, when Albertans (and, indeed, the entire world) were still feeling the profound negative consequences of the pandemic.”

[123] Reason D further argues that the 2021 JCC relied on a forward-looking analysis and treated the economic disruption caused by the pandemic as a problem of the past. While there was growth in 2021 and 2022, this merely represented recovery from the “deep hole” caused by the economic contraction of the pandemic years. In other words, the 2021 JCC took too narrow a view by characterizing a period of recovery as a period of economic strength. Reason D relies on expert evidence regarding real GDP growth rates and unemployment rates to support its position.

[124] Reason D concludes that it cannot accept the 2021 JCC’s recommended increases for the “recovery years” of 2021 and 2022.

### **a) The Association’s Position**

[125] The Association submits that Reason D neither adequately justifies departing from the 2021 JCC’s recommendations nor meaningfully engages with the 2021 JCC’s reasoning. Instead, it simply repeats arguments Alberta advanced during the hearings.

[126] In response to Reason D’s assertion that the 2021 JCC’s reasons were forward-looking and treated the pandemic as resolved, the Association submits that both expert reports were prepared at the end of 2022, which means that the data relied on for 2021 and most of 2022 was already known. The 2021 JCC considered economic evidence for all years of its mandate and even specifically recognized that the data for 2021 and 2022 benefited from a remarkable degree of clarity and certainty.

[127] The 2021 JCC also acknowledged the 2020 economic contraction caused by the pandemic and declining energy prices. However, based on the expert economic evidence, it found that Alberta’s economy remained the strongest in Canada, though by a narrower margin. The 2021 JCC also rejected Alberta’s negative characterization of the provincial economy as both incorrect and unsupported by the economic evidence.

[128] With respect to Reason D’s argument that the growth experienced in 2021 and 2022 represented recovery from the “deep hole” caused by the pandemic, rather than true economic expansion, the Association highlights that the 2021 JCC acknowledged this point. It simply did not find it compelling enough to depart from its overall conclusion regarding Alberta’s strong economy.

[129] The Association also disputes Reason D’s assertion that “judicial salaries did not suffer from the effects of the downswing in the first place”, characterizing it as an inappropriate attempt to revisit the 2017 JCC’s recommendations. In any event, the 2020 increases recommended by the 2017 JCC were based on considerations other than Alberta’s anticipated economic strength.

[130] Finally, the Association characterizes Reason D’s reliance on real GDP growth rates and unemployment rates as “selective” and “not explained”. In contrast, the 2021 JCC considered all of the legislated economic indicators, as well as additional economic evidence from the parties’ experts, when determining appropriate judicial salaries.

[131] Reason D’s exclusive focus on real GDP growth rates and unemployment rates also fails to engage with the 2021 JCC’s conclusion that both actual levels of the metric and growth rates within the metric must be considered over the relevant period. The 2021 JCC accepted actual levels of real GDP, real GDP per capita, the employment rate and the labour force participation rate in Alberta for the entire period of its mandate when concluding that Alberta is the economic leader of all other Canadian provinces.

#### **b) Alberta’s Position**

[132] Reason D provides the following justifications for attributing different weight to the pandemic-related economic contraction:

- Most, if not all, of the growth experienced in Alberta’s economy in 2021 and 2022 was not independent growth. It is more properly characterized as “recovery from a devastating decline.”

- While the unemployment rate had stabilized by the time the 2021 JCC issued its Report, it had actually dropped below the national average for the first two and a half years of the mandate.
- Order in Council 358/2022 (“the 2017 JCC Response”), which implemented the 2017 JCC’s recommendations after Alberta was ordered to reconsider, established that pandemic-related economic conditions should be considered during the next commission’s mandate (i.e., by the 2021 JCC).

[133] Alberta acknowledges its Response reiterates arguments. However, it cites *2024 BCCA* for the proposition that the rule against reiteration is subject to the qualification that the earlier submissions must have been substantially addressed by the commission. In Alberta’s view, the 2021 JCC gave insufficient weight to the economic challenges caused by the pandemic. By assigning more weight to this consideration and providing a justification for doing so, Alberta was entitled to reiterate points about the lasting economic impact of the pandemic.

[134] The Association also argued that Reason D attempts to revisit the 2017 JCC’s recommendations in an inappropriate context. Alberta takes issue with this assertion for multiple reasons. First, Reason D refers explicitly to 2021 and 2022, which were not part of the 2017 JCC’s mandate.

[135] Second, *Bodner* directs that the starting point for a commission’s inquiry is the date of the prior commission’s report.

[136] Third, the 2017 JCC Response specifically directed the 2021 JCC to consider the economic consequences of the pandemic. In order to finalize the 2017 JCC process, Alberta decided to defer pandemic-related considerations to the subsequent commission. In doing so, it implemented salary increases for 2019 and 2020, notwithstanding that the pandemic economy was faring much worse in those years than the 2017 JCC had anticipated.

[137] Fourth, the economic growth relied on by the 2021 JCC to justify salary increases in 2021 and 2022 is more accurately characterized as regaining ground lost during the pandemic. Actual growth did not begin until 2023, when metrics started to exceed the pre-pandemic levels.

[138] Fifth, the Association’s claim that Reason D unfairly focused on real GDP growth rates and unemployment rates is merely a disagreement with the weight that Alberta assigned to those factors. Section 5.3(1) of the *2021 JCC Regulation* includes six factors to help guide an assessment of the “generally accepted current and expected economic conditions” under criterion (b). It is Alberta’s position that the first four factors are closely related to employment rates and real GDP rates. These close relationships demonstrate that these are important considerations and provides one justification for Alberta’s reliance. The fifth factor is CPI, which Alberta clearly deals with under Reason B. The last factor, labour participation rates, is closely linked to employment rates. It is not discussed in detail because Alberta’s assessment of this factor did not differ significantly from the 2021 JCC. According to Alberta, it identified and considered all of the relevant economic

metrics and there is no basis for the Association to argue that there is an unexplained or selective focus on real GDP or employment growth rates.

**c) Analysis**

[139] *Bodner* directs that the starting point for any commission is the date of the previous commission's report: see *Bodner* at para 14. Between the release of the 2017 JCC's Report and the start of the 2021 JCC's mandate, a global pandemic caused significant economic decline. These unforeseen circumstances were not considered by the 2017 JCC yet, after the release of the *Ross Decision*, its original salary recommendations were still implemented: see the 2017 JCC Response.

[140] It is obvious that the pandemic significantly altered the economic conditions upon which the 2017 JCC's recommendations for the later years of its mandate were based. As a result, the 2021 JCC was specifically directed to consider the impact of the pandemic during its mandate. The 2021 JCC did consider the pandemic, but it was not the primary focus of its analysis. Rather, it chose to emphasize Alberta's economic strength.

[141] Though the levels of certain economic metrics increased in the absolute sense in the early years of the 2021 JCC's mandate, it is not entirely accurate to characterize this as economic strength. In fact, as Reason D points out, the increases experienced in 2021 and 2022 simply returned the metrics to pre-pandemic levels. This indicates economic recovery rather than independent growth.

[142] The Association argues that Reason D's heavy emphasis on the economic consequences of the pandemic is an inappropriate attempt to revisit the 2017 JCC's recommendations. Further, the recommended judicial salaries for 2020 were premised on considerations other than Alberta's economic strength (e.g., they were designed to avoid judicial wage erosion and to maintain Alberta's historic position as a leader in judicial compensation). The implication from this argument is that the economic contraction caused by the pandemic would not have impacted the 2020 salary levels because they were not based on the strength of Alberta's economic indicators in the first place.

[143] While that may be true, the 2020 judicial salaries are not within the 2021 JCC's mandate. Reason D raises the year 2020 only to highlight that the actual economic consequences of the pandemic had not been considered by an Alberta commission prior to the 2021 JCC. As such, I do not agree with the Association that Reason D is trying to revisit the 2017 JCC's recommendations.

[144] Nor do I agree that Reason D has offended the rule against reiteration. *Bodner* recognizes that the rule against reiteration does not prevent a government from assigning different weights to relevant factors, provided sufficient justification is offered for the reweighing exercise: see *Bodner* at paras 23 and 39; see also *2024 BCCA* at para 106. Alberta has justified the heavier emphasis it placed on the economic consequences of the pandemic as a reason for departing from the 2021 JCC's recommendations in 2021 and 2022. This aspect of Reason D is legitimate.

[145] However, there are also aspects of Reason D that lack legitimacy. For example, it asserts that the 2021 JCC’s reasoning is exclusively forward-looking, which resulted in insufficient weight being placed on the economic evidence from the early years of the mandate. This mischaracterizes the 2021 JCC’s reasoning.

[146] The 2021 JCC expressly considered economic evidence for all years of its mandate. Both parties’ expert reports were completed by the end of 2022, which provided definitive data for 2021 and most of 2022. The 2021 JCC chose to focus on the overall economic conditions described in the expert reports. The analysis was based on actual economic evidence for 2021 and 2022 reflected in the reports, not projections. It did not disregard this earlier evidence, rather, it relied on the certainty of available data. Departing from the 2021 JCC’s recommendations by mischaracterizing its reasoning as exclusively forward-looking is, therefore, not a legitimate reason within the meaning of a *Bodner* review.

[147] Further, Reason D’s reliance on only two economic indicators does not constitute a reasonable factual foundation. Alberta chose to amend the *2021 JCC Regulation* to include six distinct factors relevant to the “generally accepted current and expected economic conditions.” It cannot now selectively focus on only two of these factors simply by arguing that they are “closely related” to the others. Moreover, the 2021 JCC directly addressed each factor. By failing to do the same, Reason D does not meaningfully engage with the 2021 JCC’s reasoning.

[148] Accordingly, Reason D has aspects that are legitimate and aspects that lack legitimacy.

#### **X. Reason E: Flawed Foundation of AWE Indexing**

E. *Less weight should be given to following the 2021 jump in federal judicial salaries, given that this was as a result of indexing to Average Weekly Earnings (AWE), which spiked during the pandemic due to the temporary elimination of lower paying jobs from the workforce.*

[149] The relationship between the salaries of federally and provincially appointed judges in Alberta was central to the 2021 JCC’s conclusions under three of the legislated criteria: the roles, duties and jurisdiction of justices and applications judges (criterion (f)), compensation provided to justices and applications judges in other Canadian jurisdictions (criterion (g)), and, the need to attract highly qualified applicants to the bench (criterion (h)).

[150] After reviewing these criteria, the 2021 JCC Report concluded that the judicial salaries in comparable jurisdictions in Canada constituted one of the “main drivers” justifying an increase in Alberta. Specifically, the salaries of provincially appointed judges in Alberta should be between 92% and 94% of federally appointed salaries, which is based on the comparison range that has been used in Alberta since 2013. Further, the gap between the salaries of federally and provincially appointed judges should not be allowed to widen, unless there is a demonstrable reason for doing so.

[151] Federal judicial salaries are indexed to Average Weekly Earnings (AWE) for the prior calendar year. AWE increased by 6.6% in 2021 due to the pandemic related elimination of lower paying jobs from the workforce.

[152] Reason E argues that federal indexing to an AWE spike which is based on job loss and economic hardship does not justify an equivalent increase in provincial judicial salaries. Basing a judicial increase on an indexing approach whose foundation is a clear result of severe economic harm would undermine public confidence in the judiciary.

[153] Reason E recognizes that the 2021 JCC is obliged to consider comparator salaries but notes that it is also empowered to determine how much reliance should be placed on those comparisons. Thus, “if the intent of indexing to AWE is to allow judges to share in good and bad economic times, it is inescapable that the April 1, 2021, increase in federal judicial salaries was fundamentally contrary to that purpose.” In other words, “a pandemic-driven spike in salaries is a demonstrable reason to allow the gap to widen.”

[154] Reason E also disagrees with the designated ratio between federal and provincial salaries that was chosen by the 2021 JCC. It notes that the 2021 JCC did not provide reasons for why it only considered the comparison ranges that existed post-2013, nor did it explain why it would be inappropriate to return to the size of the gap between the salaries that existed prior to 2013 (when provincial salaries were often below 90% of their federal counterparts). Further, it emphasizes that the recommended salary for 2021 was below the chosen range of 92% to 94%, which indicates there is flexibility in the 2021 JCC’s approach to the designated range. According to Reason E, these deficiencies suggest that setting provincial salaries below the 2021 JCC’s designated 92% to 94% range is a reasonable and appropriate approach.

[155] Finally, Reason E acknowledges that it is important for provincial salaries to remain competitive with federal salaries. It confirms that the importance of remaining competitive has been given weight in Alberta’s Response.

**a) The Association’s Position**

[156] The Association advances two main arguments against Reason E.

[157] First, it was appropriate for the 2021 JCC to consider federal judicial salaries, even though they were automatically indexed to AWE. The argument that it was inappropriate to follow federal judicial salaries because of the indexing mechanism was already presented to the 2021 JCC and dealt with in the 2021 JCC Report. In fact, the 2021 JCC expressly acknowledged that it had made note of Alberta’s concerns regarding indexation to AWE.

[158] Further, the fact that the federal salaries are reviewed by the federal commission responds to Reason E’s concern that an increase which is tied to an indication of economic harm would damage public confidence in the judiciary. The federal commission assessed the indexed salaries against the federal statutory criteria, which included a consideration of the prevailing economic

conditions in Canada. It also considered the fact that the 2021 salaries were tied to an AWE spike that reflected unique, pandemic-related economic consequences. Nevertheless, it determined that the indexed salaries were fair and appropriate. The indexed salaries have successfully passed through the institutional sieve of the federal commission; thus, there should be no risk to public confidence in the judiciary.

[159] Second, it was appropriate for the 2021 JCC to conclude that provincial salaries should be set at 92% to 94% of their federal counterparts. The 2021 JCC determined that Alberta's proposal to set provincial salaries at 86% to 88% of federal salaries was not fair or appropriate because it would create too large a gap between federal and provincial salaries and represent too much of a departure from the 92% to 94% range that has been used since 2013.

[160] Reason E claims that the 2021 JCC did not explain why it only considered post-2013 comparison ratios. However, the Association points out that, because of the timing of certain indexed adjustments, there was a dispute between the parties about the relationship between federal and provincial salaries before 2013. However, there was no dispute during the chosen timeframe of 2013-2020. The chosen timeframe also coincides with the decade preceding the 2021 JCC's mandate.

[161] Further, though the 2021 JCC's salary recommendations for 2021 are below the chosen range, this does not imply that there should be flexibility in those figures. Rather, it demonstrates that the 2021 JCC was responsive to Alberta's concerns regarding the indexing mechanism.

#### **b) Alberta's Position**

[162] Alberta argues that it was justified in departing from the 2021 JCC's salary recommendations because they did not reflect the significant impact the pandemic had on the economic experiences of Albertans, did not address the disconnect between the AWE metric and the actual job losses and economic harm experienced in Alberta, and placed too much emphasis on remaining competitive with federal judicial salaries. In fact, Alberta alleges that the 2021 JCC weighed the relationship between federal and provincial salaries so heavily that the comparison became determinative.

[163] Alberta disagrees with the notion that, since the federal salaries have already passed through the institutional sieve of the federal commission, there is no further need to consider if the federal compensation levels are fair and appropriate. It points out that the 2021 JCC is obligated to consider different criteria than the federal commission. Further, if Alberta is not required to accept the recommendations of the 2021 JCC, it is certainly not required to accept the reasoning of the federal commission. According to Alberta, it assessed provincial salaries against the legislated provincial criteria and its Response is owed deference.

[164] Alberta maintains that the 2021 JCC does not explain why it only considered the post-2013 relationship between federal and provincial salaries. In Alberta's view, the 2021 JCC chose to rely

on the ratios that have existed since 2013 because that is the timeframe in which the parties' calculations aligned. By ignoring the pre-2013 ratios, the 2021 JCC did not have to substantively address the divergence between the calculations.

[165] In contrast, Alberta relies on the pre-2013 calculations as clear precedent for the ratios implemented in its Response. It submits that there is nothing improper about this approach, nor is there anything that precludes Alberta from relying on the pre-2013 data. In fact, the 2021 JCC's recommendation for 2021 sets provincial salaries at 91% of federal salaries, which proves that salaries below the 92% to 94% range can sometimes be appropriate.

[166] Alberta's Response ultimately implements provincial salaries that were 87.5% to 89% of federal salaries. According to Alberta, this was higher than the ranges presented in its initial proposal, and it should be shown deference.

### **c) Analysis**

[167] Before the 2021 JCC, Alberta directly argued that basing a judicial salary increase on an indexing approach whose foundation is a clear result of severe economic harm would undermine public confidence in the judiciary. In fact, Reason E specifically recognizes that this exact argument was put before the 2021 JCC. Alberta is not permitted to simply reiterate arguments in its Response, unless it justifies a reweighing of the evidence or the 2021 JCC did not substantially address those submissions in its Report. That is not the case here.

[168] The 2021 JCC Report acknowledges Alberta's argument regarding AWE indexing and specifically states that those concerns have been kept in mind. The 2021 JCC goes on to address these concerns by relying, in part, on the fact that those indexed salaries had already been considered by the federal commission. Alberta disagrees with whether this qualifies as substantially addressing its concern. However, Alberta fails to recognize that the federal commission's consideration of the indexed salaries is only one of the factors that the 2021 JCC considered under criteria (f), (g), and (h).

[169] For example, under criterion (f), which requires consideration of the roles, duties and jurisdiction of provincial Justices and Applications Judges, the 2021 JCC notes that there is significant overlap between the work of federally appointed justices and provincially appointed justices in Alberta:

The 2009 JCC reported on the changing role and jurisdiction of the Court at that time. What was true then continues to be largely true now. There is little difference between the work of Court of King's Bench Judges and Alberta Court of Justice Justices in criminal law with the exception of jury trials. As noted earlier, fully 97% of all criminal cases are fully dealt with in the Alberta Court of Justice. The civil jurisdiction continues to expand. It currently has a limit of \$50,000, which will increase to \$100,000 on August 1, 2023, and existing legislation allows for future

increases to \$200,000. Youth, child protection, and family law are increasingly complex matters. The increasing challenges of unrepresented litigants in all these areas adds to the challenges faced by Justices every day: see 2021 JCC Report at 44.

[170] Further, under criterion (g), the 2021 JCC noted that Alberta’s strong economy justified comparisons with judicial salaries paid in other provinces with similarly strong economic indicators (such as Ontario, Saskatchewan and, to some extent, British Columbia). It also concluded that Alberta’s economic metrics were the highest in the country. It did not accept the government’s assertions that Alberta’s economy had fallen significantly behind the rest of the country, that it was no longer appropriate to compare Alberta’s judicial salaries to other high paying jurisdictions, or that Alberta’s judicial salaries should no longer “lead the pack.” To put it another way, the 2021 JCC recognized that the gap between Alberta and the rest of Canada had narrowed, but it nevertheless concluded that Alberta’s economy remains the strongest in Canada. As such, it did not accept Alberta’s position that the high judicial salaries paid federally and in Ontario and Saskatchewan were inappropriate comparators or that they should be discounted in the 2021 JCC’s analysis under criterion (g).

[171] Criterion (h) recognizes the need to attract highly qualified candidates. Here, the 2021 JCC noted that “appropriate compensation is an important factor in attracting highly qualified applicants”: see 2021 JCC Report at 61. Further, it highlighted that the Court of Justice is competing with the Court of King’s Bench for judicial candidates. As a result, criterion (h) requires that any gap in compensation between federal and provincial appointees must be “fair and appropriate.” Importantly, however, the 2021 JCC specifically rejected the notion that Alberta’s judicial salaries should be automatically indexed to their federal counterparts.

[172] The compensation gap between provincially and federally appointed Justices is most apparent when each court’s total compensation package is considered. Provincially appointed Justices have less vacation entitlement than their federal counterparts, and a less advantageous pension regime. These considerations may impact the potential applicant pool. The 2021 JCC’s mandate did not include making recommendations regarding vacation or pension benefits. However, it specifically noted that these components impact overall compensation. They are important to keep in mind when assessing criterion (h) and determining an appropriate salary.

[173] Ultimately, the 2021 JCC was required to consider the judicial compensation paid in other Canadian jurisdictions. It is a fact that many of those salaries are indexed to AWE. Alberta’s concerns regarding the indexing mechanism were specifically kept in mind during the 2021 JCC’s deliberations. However, the 2021 JCC also gave multiple reasons why, despite the AWE concerns, the percentage relationship between federal and provincial salaries needed to be higher than the numbers suggested by Alberta. These reasons include the modern role and duties of provincially appointed Justices, the relative strength of Alberta’s economy, and the concern about creating a disincentive for potential judicial applicants to the Court of Justice.

[174] In short, despite concerns about AWE indexing, other considerations demonstrate the gap between federal and provincial salaries proposed by Alberta was unjustifiably wide. Reason E did not meaningfully engage with any of these other considerations.

[175] Alberta argues that it is permitted to weigh different factors more heavily than the 2021 JCC. This is true. However, when conducting the re-weighing exercise, *Bodner* requires Alberta to meaningfully engage with the commission's reasoning and to justify the different weights assigned to different factors. Reason E does not do this. Rather, it reiterates arguments already made to and dealt with by the 2021 JCC. The SCC is clear that government reasons which simply reiterate submissions already made to the commission will not meet the standard of rationality: see *BC SCC 2020* at para 85.

[176] Reason E also takes issue with the fact that the 2021 JCC only considered the ratio between federal and provincial salaries post-2013. It argues that the 2021 JCC did not sufficiently justify its selection of this specific time period. I disagree. The 2021 JCC provided two reasons for its reliance on the post-2013 ratios. First, it represents a time period during which the parties' salary calculations align. Second, it reflects a time period during which there was, and continues to be, substantial overlap between the work of the Alberta Court of Justice and the Alberta Court of King's Bench. Further, I note that, by the end of its mandate, the post-2013 numbers represented ten years' worth of data for the 2021 JCC to consider. A full decade prior to its mandate is a practical timeframe that provides enough data to undertake a thorough comparison.

[177] In contrast, Reason E's analysis is based on salary comparison data from 2000 to 2013. Alberta is permitted to emphasize different data than the 2021 JCC but, again, it must justify the difference. When Alberta's Response was issued in October 2023, its chosen time period of 2000 to 2013 was already 10 to 23 years in the past. Choosing this timeframe when there was more recent data available required sufficient justification, which Alberta did not provide. Sufficient justification is especially important when one considers that returning to the pre-2013 ratio represents a material drop from the ratio that has existed for the last decade. This aspect of Reason E does not reflect meaningful engagement with the 2021 JCC's analysis or provide a reasonable factual foundation for departing from the post-2013 ratios chosen by the 2021 JCC.

[178] Alberta also submits that, because the salaries it implemented were higher than the salaries it proposed in its submissions to the 2021 JCC, its Response should be given deference. The mere fact that Alberta's salary position changed between its initial proposal and implementation does not signal meaningful engagement. This is not a rational reason.

[179] Finally, Alberta justifies its lower federal to provincial salary ratios by arguing that they reflect the significant impact the pandemic had on the economic experiences of Albertans, especially in 2021 and 2022. However, as pointed out by the Association, the 2021 and 2022 judicial salaries implemented by Alberta actually represent the highest percentage relationship to federal salaries throughout the entire mandate period (89.1% (2021), 88.2% (2022), 88.1% (2023), 87.5% (2024)). For example, federal salaries in 2021 were set at \$361,000 and Alberta's Response

implemented provincial salaries at \$321,685 for the same year. This means that provincial salaries were set at 89.1% of federal salaries for 2021, which was the highest percentage ratio implemented by Alberta's Response. If Reason E departs from the 2021 JCC's recommendations because the federal salaries in 2021 and 2022 were tied to an artificial AWE spike and were, therefore, too high, then implementing 2021 salaries that provide the highest percentage ratio of the entire mandate seems to undermine this position. The disconnect between Alberta's stated reasons for rejecting the 2021 JCC's recommended salaries and the actual, implemented figures has not been explained.

[180] I find that Reason E does not meaningfully engage with the 2021 JCC's reasoning, nor does it justify its re-weighting exercise. Rather, it impermissibly reiterates arguments already addressed by the 2021 JCC and, as such, fails to provide a rational reason based on a reasonable factual foundation for departing from the 2021 JCC's recommendations. It lacks legitimacy and does not pass the first two stages of the *Bodner* review.

## **XI. Government Response**

[181] After explaining each individual reason, Alberta's Response provides a conclusion and reveals the substituted salary numbers. This information is set out under the heading "Government Response". It notes that its determination of judicial salaries is not formulaic and must consider all factors. It then cites *Ell v Alberta*, 2003 SCC 35 at para 29 [*Ell*] for the proposition that the factors must be "interpreted in light of the public interests they were intended to serve". It identifies "public confidence in the judiciary" as the chief public interest.

[182] This section of Alberta's Response does not provide additional justification for departing from the 2021 JCC's recommendations. Rather, it serves as a summary of the already articulated reasons for departure. As such, it is not necessary to reconsider this section under the first two stages of the *Bodner* test. Instead, Alberta's substituted salary figures and its public interest framework will be examined under the *Bodner* global view analysis.

## **XII. Third Stage of the *Bodner* Test: The Global View Analysis**

[183] The third stage of the *Bodner* test requires a holistic view of the entire process. The SCC articulates the third stage as follows:

31 Viewed globally, has the Commission process been respected and have the purposes of the Commission – preserving judicial independence and depoliticizing the setting of judicial remuneration – been achieved.

[184] At this stage, "the focus shifts to the totality of the process and of the response": see *Bodner* at para 38. An individual flaw will not invalidate the response if both the totality of the process and the government's reasons are otherwise acceptable: see *Bodner* at para 83.

**a) The Association's Position**

[185] The Association submits that Alberta disrespected the 2021 JCC process and undermined the constitutional purpose of the commission. It advances seven reasons why the 2021 JCC process and Alberta's Response fail to satisfy the third stage of the *Bodner* test.

[186] First, Alberta's Response centers its analysis on a public interest goals framework, thereby introducing improper considerations and politicizing the commission process. For example, over the Association's objections and without prior consultation, Alberta made significant revisions to the mandatory legislated criteria in the *2021 JCC Regulation*. Alberta specifically noted that these changes were meant to ensure that public interest factors relevant to judicial compensation would be fully addressed but, despite the Association's repeated requests, Alberta never provided an explanation of what these public interest factors entailed.

[187] Further, Alberta identifies fiscal responsibility as one of the public interest goals, which is an inherently political concept. By focusing on a public interest goals framework, Alberta failed to consider judicial compensation on its own merits and failed to deal with the judicial office appropriately.

[188] Second, Alberta's Response does not substantively engage with the 2021 JCC's analysis and does not justify its reweighing of the evidence. Further, it consistently mischaracterizes the 2021 JCC's reasoning, which suggests a lack of good faith and shows disrespect for the commission process.

[189] Third, Alberta relies on evidence and argument that it did not present to the 2021 JCC. For example, the 2021 JCC determined that criterion (c) did not, of itself, support a judicial salary increase. Reason A of Alberta's Response contends that the 2021 JCC should have concluded that criterion (c) supports a tempering of judicial salary increases. However, Alberta's submission before the 2021 JCC actually argued that criterion (c) supported a modest increase. In other words, the 2021 JCC went further than Alberta's own submissions when evaluating criterion (c) and then was criticized in Alberta's Response for not going far enough.

[190] Fourth, Alberta substituted salary figures using its base wage approach to the price of labour metric. By focusing exclusively on this metric in both its submissions and its Response, Alberta did not meaningfully engage with the 2021 JCC's reasoning or the required criteria. According to the Association, this demonstrates that Alberta approached the process with a closed mind.

[191] Fifth, Alberta's substituted salaries constitute a significant departure from the 2021 JCC's recommendations which, when considered together with the other reasons, indicates disrespect for the process.

[192] Sixth, Alberta's Response continues a historical pattern of unjustified rejection of commission recommendations. Since the first commission was established in 1998, eight commissions have been convened in Alberta. Two of those commissions resulted in the acceptance

of joint submissions. Of the remaining six, Alberta has only accepted the commission's recommendations twice. According to *BC SCC 2020*, a historical pattern of rejection may signal the government's disrespect for the commission process: see *BC SCC 2020* at para 85.

[193] Finally, Alberta created a substantial delay in the 2021 JCC process. While the Association concedes that Alberta passed a regulation to establish the commission on time (April 1, 2021), it did not implement the full, substantive version, including the mandatory criteria, until September 29, 2021. The work of the 2021 JCC could not proceed until the entire regulation was passed.

[194] Even then, Alberta's conduct caused further delays. It legislated the timelines, controlled the commissioners' appointments and had complete authority over the process. Despite this, it did not identify its nominee for commissioner until March 28, 2022, and this was only done because the Association indicated it would file an application for mandamus if Alberta did not advise of its nominee on or before April 1, 2022. Then, Alberta did not appoint the chairperson until July 28, 2022, which was almost 15 months into the mandate period. Alberta also did not respond to the 2021 JCC Report until October 26, 2023, which was more than two and a half years into the four-year mandate period.

[195] The *Ross Decision* rejected the Association's argument about delay in the context of the 2017 JCC because the legislated timelines had been met. The Association argues that situation is different than the current case because the 2017 JCC's regulation was not implemented using a two-step approach. Further, according to the Association, the *Ross Decision* ignores the fact that, unlike most other provinces, Alberta's legislation does not contain timelines governing the appointment of commissioners or the delivery of the commission's report. Alberta cannot decline to legislate a timely process and then use the lack of legislated timelines to avoid its constitutional obligations under the commission process.

[196] For all of these reasons, the Association submits that Alberta has not met the third stage of the *Bodner* test.

#### **b) Alberta's Position**

[197] Of the seven arguments advanced by the Association, Alberta denies that it failed to engage with the 2021 JCC's reasoning, failed to justify a different weighing of the evidence or undermined the process by relying on evidence or arguments that were not presented to the 2021 JCC. It groups the remaining arguments into three broad categories: (i) politicizing the idea of public interest, (ii) implementing unfair salaries, and (iii) impermissible delay.

[198] With respect to the Association's arguments regarding the politicization of the public interest, Alberta points out that it is constitutionally required to consider the public interest. Recognizing this obligation and calling the considerations "public interest factors" does not politicize the process. Further, the concept of the public interest must be broadly understood, and the importance of the public interest was explicitly recognized by the 2021 JCC.

[199] The concept of public interest is not restricted to the objectives of the commission process (e.g., the depoliticization of the remuneration process and the preservation of judicial independence). Instead, public interest can appropriately include fiscal considerations. Fiscal considerations recognize that it is impossible to determine appropriate judicial compensation without regard to details such as Alberta's financial position or public sector comparator salaries. Referring to these fiscal considerations as public interest factors does not inject politics into the commission process.

[200] Since a commission is required to consider the public interest, there was nothing improper about Alberta updating the legislated criteria in order to reflect the same. The criteria also align with legislated factors in other jurisdictions.

[201] In response to the Association's arguments that the substituted salaries are unfair, Alberta denies that it implemented salaries based on a base wage price of labour approach. Instead, its Response explains how the 2021 JCC failed to adequately consider economic factors such as public sector compensation or Alberta's economic experience during the pandemic recovery.

[202] Further, Alberta's Response expressly recognizes that provincial salaries should remain competitive with federal salaries and confirmed that this consideration was given weight. It did not disagree with or reject the 2021 JCC's findings with respect to the nature of the judicial role or the importance of attracting qualified candidates to the bench. In fact, by expanding the salary figures from its initial proposal, Alberta demonstrates that criteria (f), (g), and (h) were factored into its Response.

[203] Alberta submits that the Association's reliance on the *Ross Decision* for the proposition that substituted salaries that significantly depart from the commission's recommendations demonstrate disrespect for the process was improper. Rather, the *Ross Decision* makes it clear that the extent of the departure in the context of the 2017 JCC was significant only because of the other indicators of the government's lack of respect for the process. In general, the extent of the departure from the commission's recommendations does not automatically equate to disrespect.

[204] In response to the Association's assertion that there has been a historical pattern of rejection of the commission's recommendations, Alberta points out that the government has actually accepted four out of the last seven commission reports. It is improper for the Association to exclude the acceptances that were the result of a joint submission. In any event, governments are allowed to deviate from the commission's recommendations. Disagreement does not signal disrespect.

[205] Ultimately, the substituted salaries represented a 77% increase from Alberta's original proposal. This is not a scenario where the government rejected the recommendations and implemented the exact same numbers from their initial submission. Such a substantial increase from Alberta's starting position is fair and reasonable and does not demonstrate disrespect.

[206] With respect to the Association's arguments regarding impermissible delay, Alberta contends that the delay in appointing the chairperson was not attributable to Alberta. It concedes that the appointment of its nominee could have proceeded more quickly, but that this "single quibble" does not equate to an impermissible or fatal delay.

[207] Alberta asserts that the Association’s criticism regarding the absence of legislated timelines in the *2021 JCC Regulation* is unwarranted. Alberta notes that the Association had ample time to provide extensive feedback on the contents of the *2021 JCC Regulation* and did not raise the issue of timelines. In any event, Alberta did not have a duty to consult the Association prior to enacting the *2021 JCC Regulation*. It did so as a demonstration of good faith. Alberta further points out the Association has not challenged the validity of the *2021 JCC Regulation*, so it is inappropriate to imply that the *2021 JCC Regulation* is deficient due to lack of timelines.

[208] There was 26.5 months between the creation of the 2021 JCC and the release of the 2021 JCC Report. Similarly, there was 25.5 months between the creation of the 2017 JCC and the release of the 2017 JCC Report. In the context of the 2017 JCC, the *Ross Decision* dismissed the Association’s argument that this length of time demonstrated disrespect for the process. The comparison to the 2017 JCC timeframe also proves that the two-step approach to the enabling regulation did not meaningfully delay the 2021 JCC process.

[209] To conclude, Alberta emphasizes that the goal of the third stage of the *Bodner* test is to examine the commission process as a whole. It must be determined whether Alberta has engaged with the 2021 JCC in a meaningful way and provided a rational response to the 2021 JCC’s recommendations. The third stage is not designed as an opportunity to find fault with any aspect of the process.

**c) Analysis: Global View**

[210] I will begin the global view analysis by assessing the totality of Alberta’s Response. Then, I will address the parties’ arguments regarding the politicization of the public interest, the unfairness of the substituted salaries, and the impermissible delay.

[211] I have reviewed Reasons A through E in Alberta’s Response. Except for one aspect of Reason D, I have concluded that the reasons do not pass the first two stages of the *Bodner* test. My overall conclusion is that Alberta did not meaningfully engage with the 2021 JCC’s reasoning and did not justify the different weights it assigned to the mandatory criteria.

[212] For example, in Reason A, Alberta suggests that the 2021 JCC did not give sufficient weight to the evidence regarding public sector compensation changes because it was deterred by the inherently political nature of fiscal policy decisions. In fact, the 2021 JCC specifically recognized that the government was operating under a policy of significant fiscal restraint and used that to inform its conclusion that criterion (e) did not support a judicial salary increase. By alleging that the 2021 JCC did not give sufficient weight to this criterion, despite direct evidence to the contrary, Reason A mischaracterizes the 2021 JCC’s reasoning and does not meaningfully engage with its analysis.

[213] Reason B adopted an entirely different approach to the consideration of CPI data than Alberta presented at the 2021 JCC hearings. It then relied almost exclusively on its “sheltering rationale” to justify treating CPI as an implicit judicial salary cap. As a result, it failed to

meaningfully engage with the 2021 JCC’s reasoning regarding criterion (c), the cost of living, or CPI.

[214] In Reason C, Alberta focuses heavily on the 2021 JCC’s use of FWI data and argues that the 2021 JCC lacked sufficient evidence to rely on FWI as a metric for the price of labour. However, it fails to acknowledge that FWI was only part of the data underpinning the 2021 JCC’s conclusions regarding criterion (b). The 2021 JCC provided extensive reasons for preferring Dr. Tombe’s expert evidence and his full compensation approach to the price of labour. By failing to acknowledge the complete factual matrix supporting the 2021 JCC’s conclusions, Reason C does not meaningfully engage with the 2021 JCC’s reasoning, nor does it sufficiently explain its rationale for assigning different weight to certain economic evidence.

[215] There were aspects of Reason D that were legitimate. For example, Alberta sufficiently justified the heavier emphasis it placed on the economic consequences of the pandemic as a reason for departing from the 2021 JCC’s recommendations in 2021 and 2022. However, there were also aspects of Reason D that lacked legitimacy. It mischaracterized the 2021 JCC’s assessment of the relevant economic evidence as exclusively forward-looking, thereby failing to demonstrate meaningful engagement with the 2021 JCC’s reasoning.

[216] Finally, Reason E focuses almost exclusively on AWE as an inappropriate indexing mechanism. However, it fails to meaningfully engage with the additional reasons the 2021 JCC provided for concluding that the gap between federal and provincial judicial salaries proposed by Alberta was too large. In addition, Reason E does not adequately justify the different weights it assigns to different factors. Rather, it simply reiterates the AWE arguments that Alberta already presented to the 2021 JCC.

[217] As recognized in the *Ross Decision*, it is “a serious concern” that, on several occasions, Alberta’s Response fails to give weight to or fails to meaningfully engage with the 2021 JCC’s reasoning. A government response that fails to demonstrate meaningful engagement does not achieve the commission’s purpose or show respect for the process: see *Ross Decision* at para 209.

[218] Further, I agree with the Association that Alberta’s Response fails to deal with the judicial office appropriately. In *BC SCC 2020*, the SCC emphasized that “...a government that does not take into account the distinctive nature of judicial office and treats judges simply as a class of civil servant will fail to engage with the principle of judicial independence...”: see *BC SCC 2020* at para 85. Similarly, a government response that compares judicial salaries to others funded by the government and to the “average” Albertan, but that does not “consider the distinctive nature of the judicial office, even though this is a required consideration under constitutional law” will also fail to engage with the judicial role appropriately: see *Ross Decision* at para 211.

[219] Alberta’s Response actively compares judicial compensation to public sector compensation or to the experience of the “average” Albertan. However, despite the fact that the distinctive nature of the judicial role is a required constitutional consideration and is implicit in criteria (a), (f), and (g) of the *2021 JCC Regulation*, it is not mentioned in Alberta’s Response.

This is a clear indicator that Alberta’s Response does not deal with the judicial office appropriately, which demonstrates disrespect for the commission process.

[220] Related to this failure to deal with the judicial office appropriately is Alberta’s fixation on the base wage approach to the price of labour. The judicial percentage increases implemented by Alberta’s Response are almost identical to the weighted average annual change in wage settlements in Alberta generally:

	2021	2022	2023	2024
<b>IMPLEMENTED JUDICIAL SALARY PERCENTAGE INCREASE</b>	1.0%	2.0%	3.0%	3.0%
<b>WEIGHTED AVERAGE ANNUAL CHANGE IN ALBERTA WAGE SETTLEMENTS</b>	0.7%	1.8%	2.8%	2.9%

[221] During oral submissions, Alberta argued that it was “a leap” to assume the government focused exclusively on the base wage method simply because of the figures shown in the chart. This information was taken from a publicly available document, but only one page of the report was included in the Association’s materials. According to Alberta, the other pages of the report indicate that it was published on October 31, 2023, while Alberta’s Response was released on October 26, 2023.

[222] The implication seems to be that Alberta’s decision regarding judicial salaries was made before this general wage information was available, which suggests that the Response was not focused on the base wages received by other Albertans. However, October 31, 2023, is merely the document’s publication date. There is no suggestion that the government did not have access to that information internally before its decision on judicial salaries was released.

[223] The striking similarity in these numbers raises the possibility that Alberta has chosen the substituted judicial salaries in order to align with the base increases received by other Albertans. In fact, Alberta’s Response specifically states that “the overriding concern is not fairness as measured amongst judges, but fairness between Alberta judges and Albertans as a whole.” There is no point in having a commission process if the outcome is predetermined by what other

Albertans receive. In this way, Alberta has both failed to ensure the effectiveness of the 2021 JCC process or to achieve depoliticization.

[224] Finally, throughout its submissions, Alberta focuses on its entitlement to reject the 2021 JCC’s recommendations. It is true that commissions are consultative only. Governments have the ability to disagree with the commission and to depart from its proposals. However, coupled with this ability is a corresponding constitutional obligation to provide reasons that sufficiently justify a departure from the commission’s proposals.

[225] The *PEI Reference* is very clear that “the reports of the commission must have a meaningful effect on the determination of judicial salaries”: see *PEI Reference* at para 175. Further, the fact that a report is not binding does not mean that a government is “free to ignore it”: see *PEI Reference* at para 178. Governments must take the commission process seriously: see *PEI Reference* at para 179. If a government chooses to depart from the commission’s proposals, “it must be prepared to justify this decision, if necessary in a court of law”: see *PEI Reference* at para 180. Further, “an unjustified decision could potentially lead to a finding of unconstitutionality”: see *PEI Reference* at para 180.

[226] The *Bodner* review is not about a government’s entitlement to disagree with a commission. Rather, it is about whether the government’s reasons for departing from the commission’s recommendations meet the requisite *Bodner* standard. Alberta’s focus on such an entitlement is an improper interpretation of the guidance and instructions provided by the SCC.

[227] Alberta’s Response was required to justify its disagreement with the 2021 JCC’s salary recommendations by providing sufficient reasons that meet the *Bodner* test. It did not satisfy this requirement. By mischaracterizing the 2021 JCC’s analysis, failing to meaningfully engage with the 2021 JCC’s reasoning, ignoring the distinctive nature of the judicial office, neglecting to identify legitimate reasons based on a reasonable factual foundation and, on one occasion, impermissibly reiterating arguments, Alberta has failed to discharge its constitutional obligation. This failure demonstrates disrespect for the commission process.

#### **i. Politicization of the Public Interest**

[228] The bulk of the Association’s arguments under this heading relate to Alberta’s base wage approach to the price of labour. Whether Alberta invokes certain public interest goals as part of its conceptual framework is completely separate from whether it is inappropriately focused on a base wage approach to the price of labour. I have already addressed the base wage approach and how it impacts the third stage of the *Bodner* review. Here, I consider whether Alberta’s remaining public interest goals violate the purpose and objective of the commission process.

[229] The concept of the public interest is discussed many times throughout the relevant SCC jurisprudence. In general, I agree with Alberta that there is nothing improper about keeping the public interest in mind. The SCC confirmed that “changes to or freezes in remuneration can only be justified for reasons which relate to the public interest, broadly understood”: see *PEI Reference* at para 183, emphasis added. Further, if there are across-the-board salary measures that include

judges, they “will typically be designed to effectuate the government’s overall fiscal priorities, and hence will usually be aimed at further some sort of larger public interest”: see *PEI Reference* at para 184, emphasis added. Thus, not only is the public interest relevant, but public interest goals can include fiscal considerations.

[230] In other words, the SCC suggests that a public interest lens is appropriate and that fiscal priorities are relevant to determining that public interest. I do not agree with the Association that this general, conceptual approach is improper or that it demonstrates disrespect for the process.

[231] The Association also argues that Alberta’s amendments to the regulated criteria in the *2021 JCC Regulation* were intended to reflect this public interest framework and were done without appropriate prior consultation. As such, the amendments were not only politically motivated, but dismissive and disrespectful of the judiciary.

[232] I do not agree with the Association on this point. It is entirely within Alberta’s purview to amend the mandatory criteria included in the commission’s enabling regulation. Further, Alberta is not required to consult with the judiciary beforehand. The fact that Alberta chose to seek judicial input on the draft regulation was a show of good faith and does not demonstrate disrespect for the commission process.

## ii. Unfair Substituted Salaries

[233] The 2021 JCC recommended a 16.95% cumulative judicial salary increase over the course of its mandate. Alberta implemented a 9.29% cumulative increase. This is a significant departure from the 2021 JCC’s recommendations.

[234] I agree with Alberta that the *Ross Decision* does not establish a blanket rule that a substantial departure from a commission’s salary recommendations will always demonstrate an overall disrespect for the process. However, it does establish that all of the circumstances must be considered and that the extent of the departure may become significant if the facts reveal other indicators of disrespect: see *Ross Decision* at para 218. Thus, I must assess whether the extent of Alberta’s departure from the 2021 JCC’s recommendations is significant in this case by considering it against the other aspects of Alberta’s Response.

[235] Alberta’s Response focuses heavily on how the salaries of Alberta justices compare to the salaries of other Albertans. There was no attempt to recognize the distinctive nature of the judicial role or to deal with the judicial office appropriately. Further, the substituted salaries reduce Alberta’s judicial salaries below the judicial salaries in Ontario, Saskatchewan and British Columbia, even though the 2021 JCC found that these were appropriate comparator jurisdictions and that Alberta’s economy was the strongest out of them all. Alberta did not adequately explain why the base wages received by other Albertans are more relevant than judicial salaries from the appropriate comparator provinces.

[236] Alberta points out that this was not a case where the commission’s recommendations were rejected and a salary freeze was instituted (like what happened in the 2017 JCC). In fact, according

to Alberta's calculations, the implemented salaries reflect a 77% increase from the government's initial proposal. While this may be true, a salary freeze was never proposed by either party. Further, the fact that Alberta augmented its original proposal does not address the fact that it failed to meaningfully engage with the 2021 JCC's analysis regarding the unique judicial role and appropriate judicial salary comparators. While the government is owed deference on a *Bodner* review, such deference is proportional to the government's overall participation in the process: see *Bodner* at para 83; see also *Judges of the Provincial Court (Man) v Manitoba et al*, 2013 MBCA 74 (CanLII) at paras 64-73.

[237] The government's historical pattern of rejection is also relevant. According to the SCC, a government that consistently rejects commission recommendations may demonstrate disrespect for the process and undermine the commission's objectives: see *BC SCC 2020* at paras 84-85.

[238] There have been eight judicial compensation commissions held in Alberta, including this one. Two have resulted in joint submissions, two have resulted in the government's acceptance of the salary recommendations, and four have resulted in the government's rejection of the commission recommendations. One of the rejections relates to the 2021 JCC and is the subject of this application. The remaining three rejections have all been overturned on judicial review: see *Alberta v Alberta Provincial Judges' Association*, 1999 ABCA 229 at para 130; see also *Alberta Provincial Judges' Association v Alberta*, 2004 ABQB 611 at para 144; see also *Ross Decision* at para 259.

[239] Alberta argues that commission reports are consultative only and governments are entitled to reject the recommendations. However, as discussed earlier, this must be balanced with the government's responsibility to provide reasons that sufficiently justify any such rejection. In my view, it is significant that the Alberta government has not yet been able to provide reasons for rejection or departure that have withstood judicial scrutiny: see *2024 BCCA* at para 130.

[240] Considered together with all of the circumstances, I find that the extent of Alberta's departure from the 2021 JCC's recommendations and its historical pattern of insufficient reasons for rejection are significant in this case.

### iii. Impermissible Delay

[241] The *Ross Decision* found that, in the context of the 2017 JCC, a timeline of 25.5 months between the creation of the commission and the release of the report did not create impermissible delay. This was particularly true when considered against the fact that the government had met all of the legislated timelines.

[242] Here, there was 26.5 months between the creation of the 2021 JCC and the release of the 2021 JCC Report. I agree with Alberta that this demonstrates that the two-step approach to the *2021 JCC Regulation* did not meaningfully increase the time required for the 2021 JCC to complete its work. Further, Alberta is entitled to determine the content of the *2021 JCC Regulation*. It chose not to include timelines, and that is its prerogative. The legislated timelines that do exist (namely, the requirements to convene a judicial compensation commission every four years and

to respond to the salary recommendations within 120 days) have been met. Therefore, the overall timeline associated with the 2021 JCC does not constitute impermissible delay.

**d) Conclusion: Global View Analysis**

[243] Alberta's Response did not demonstrate meaningful engagement with the 2021 JCC's reasoning, did not recognize the distinctive nature of the judicial office, and did not disclose an attempt to deal with the judicial role appropriately. While Alberta did not engage in impermissible delay or politicize the public interest, its reasons for departing from the 2021 JCC's recommendations were generally insufficient. As a result, the extent of its departure from the recommended salaries was deemed significant. Ultimately, the purpose of the commission was not achieved.

[244] Considered globally, Alberta's Response does not pass the third stage of the *Bodner* test.

**XIII. Remedy**

[245] Since Alberta's Response fails the *Bodner* review, I must consider the appropriate remedy. The Association submits that this Court should order implementation of the 2021 JCC's recommendations. Further, section 5.9 of the *2021 JCC Regulation*, which prohibits the Court from ordering implementation, should be read down so that it does not preclude that remedy. Alberta argues that the matter should be referred back to the Lieutenant Governor in Council for reconsideration.

**a) The Association's Position**

[246] The Association acknowledges that *Bodner* directs that the appropriate remedy will typically be to return the matter to the government for reconsideration: see *Bodner* at para 44. However, it submits that, in the circumstances of this case, referral is inappropriate because of the risk that Alberta will once again decide to reject the 2021 JCC's recommendations.

[247] The Association points out that there are many instances where Canadian courts have ordered implementation after a government fails a *Bodner* review. For example, courts have ordered implementation where the government acted in bad faith or failed to achieve depoliticization of the process, where, once an improper rationale was eliminated, there was no further basis on which to reject the recommendations, or where there would otherwise be significant delay in completing the process.

[248] The Association argues that these factors are also present in this case. First, given Alberta's conduct and failure to depoliticize the process, implementation is the only effective remedy. Second, the delay in the 2021 JCC process favors implementation. Timeliness is critical to the effectiveness of the commission process, and a remedy that would result in further delay is inconsistent with the governing constitutional principles. Third, implementation is appropriate

because, if the improper considerations relied on by Alberta are removed, there is no basis for rejecting the 2021 JCC's recommendations.

[249] However, if the matter is referred back to Alberta for reconsideration, the Association requests the Court to issue directions pursuant to section 5.9 of the *2021 JCC Regulation*. Those directions should state that Alberta may not reject the 2021 JCC's recommendations for the same reasons already contained in the Response. Further, if the reconsideration does not occur within 120 days, the original recommendations should become effective.

#### **b) Alberta's Position**

[250] Alberta submits that the Association's arguments do not justify the extraordinary remedy of implementation. Referral back to the government is the typical remedy, which is confirmed by both the *2021 JCC Regulation* and the *Bodner* framework. While there have been cases across Canada that have ordered implementation, it is a high threshold. Further, *Bodner* specifically cautions that courts should not order implementation unless it is permitted by the legislation. The *2021 JCC Regulation* does not provide implementation as a remedy; therefore, the matter should be referred back to Alberta for reconsideration.

[251] Alberta argues that there is no evidence of bad faith in Alberta's Response, and certainly none that would warrant the exceptional remedy of implementation. Similarly, there is no evidence of impermissible delay that raises timeliness concerns. In any event, Alberta has options available to it when deciding how to respond to a determination that its reasons have failed the *Bodner* review, and it is up to Alberta to decide which approach it prefers.

#### **c) Analysis**

[252] *Bodner* is clear that, in most cases, the appropriate remedy is to refer the matter back to government for reconsideration. Implementation remains the exception, not the rule. I find no compelling reason to depart from *Bodner's* clear guidance or to grant the exceptional remedy of implementation.

[253] While Alberta's Response did fail the *Bodner* review, there is no basis to suggest that Alberta acted in bad faith. I have also already found that Alberta has not engaged in impermissible delay. The Association relied on the same cases regarding the role timeliness should play in assessing the appropriate remedy that it cited in the context of the 2017 JCC's *Bodner* review. As stated in the *Ross Decision*, "timeliness concerns are not yet as extreme as in the cases referred to by the Association and are not sufficient to alter my view that referral back is the appropriate remedy": see *Ross Decision* at para 256. I agree with this statement. An additional 120 days for Alberta to reconsider and respond to the 2021 JCC's recommendations does not create timeliness concerns.

[254] Finally, and most persuasively, I agree with Alberta that there is a range of rational responses available to the government upon reconsideration. Constitutional principles establish different roles for each branch of government. The role of the judiciary is to review the content of

Alberta's Response, not to determine the appropriate level of judicial compensation. It would be improper for this Court to impose an outcome based on speculation over the potential content of Alberta's reconsidered response.

[255] Thus, following the direction from *Bodner*, I conclude that referral back to the government is the appropriate remedy in these circumstances. As a result, Order in Council 182/2023 is set aside and, pursuant to section 5.9(1) of the *2021 JCC Regulation*, the 2021 JCC Report is referred back to the Lieutenant Governor in Council for reconsideration.

[256] According to section 5.9(2) of the *2021 JCC Regulation*, the Lieutenant Governor in Council has 120 days to release its reconsidered response. There is a range of possible responses, and it is improper for this Court to restrict the government's options by issuing directions about the content of the reconsidered decision. As such, I decline to grant the additional orders and directions requested by the Association.

#### **XIV. Constitutional Validity of Section 5.9 of the 2021 JCC Regulation**

[257] Section 5.9 of the *2021 JCC Regulation* specifically prohibits the Court from ordering implementation. Under that provision, referral back is the only available remedy. The Association argues that section 5.9 is unconstitutional because a regulation cannot restrict the Court's powers to order an appropriate remedy for a constitutional breach. As such, section 5.9 should be read down to permit implementation. In response, Alberta submits that the Association has not provided sufficient notice to challenge the constitutional validity of section 5.9 and, in any event, there is no basis to find the provision unconstitutional.

[258] Section 5.9 of the *2021 JCC Regulation* provides:

##### **Judicial review**

##### **5.9(1) If**

- (a) the Lieutenant Governor in Council decides, with reasons, not to accept any of the recommendations in whole or in part,
- (b) the Association or any judge or applications judge brings an application for judicial review of that decision, and
- (c) that application is successful,

the Court may not make the recommendations binding on the Crown but may refer the recommendations to the Lieutenant Governor in Council or to the Commission for a reconsideration.

(2) If the Court makes the reference under subsection (1), the Lieutenant Governor in Council or the Commission, as the case may be, has 120 days from

the day that the application was granted to reconsider the recommendations in accordance with the directions, if any, of the Court.

[259] The *Ross Decision* considered an identical provision: see *Ross Decision* at para 258. It concluded that the constitutional status of the impugned provision did not need to be determined because *Bodner* already directed the appropriate remedy. Further, it held that the issue of constitutionality should be addressed in an application where the parties have had the opportunity to make submissions about the purpose and effect of the provision. The same considerations exist here; there is no reason for this Court to depart from or overrule the *Ross Decision* on this point.

[260] It is a well-established principle that if an issue can be decided on either constitutional or non-constitutional grounds, the correct approach is to resolve it based on the non-constitutional grounds. I have already concluded that, based on *Bodner*, referral back to Alberta for reconsideration is the appropriate remedy. Since the referral remedy is not restricted by section 5.9 of the *2021 JCC Regulation*, it follows that there is no need to consider whether the impugned provision is unconstitutional.

[261] Given this conclusion, I also do not need to determine whether sufficient notice of the constitutional question was provided.

## **XV. Conclusion**

[262] Alberta's Response has failed the *Bodner* review. As such, Order in Council 182/2023 is set aside. In accordance with section 5.9 of the *2021 JCC Regulation*, the 2021 JCC Report is referred back to the Lieutenant Governor in Council for reconsideration. I decline to grant the additional orders and directions requested by the Association.

[263] If the parties cannot agree on costs, they may provide written submissions of no more than seven pages, excluding appendices, within 60 days of this decision.

Heard on the 22<sup>nd</sup> and 23<sup>rd</sup> of May 2025 and the 2<sup>nd</sup> day of July 2025.

**Dated** at the City of Edmonton, Alberta this 27<sup>th</sup> day of February 2026.

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**Donald Lee**  
**J.C.K.B.A.**

**Appearances:**

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