

**Government's Response
to the
Report of the 2012 New Brunswick
Judicial Remuneration Commission**

Introduction

This Response of the Government of New Brunswick to the Report of the 2012 New Brunswick Judicial Remuneration Commission dated June 4, 2015 is a requirement of the Judicial Remuneration Commission process under the *Provincial Court Act*. This process stems from a decision of the Supreme Court of Canada (SCC) in September 1997 in the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* case. In its decision the SCC ruled that jurisdictions are constitutionally obligated to establish independent, effective and objective remuneration commissions to make recommendations regarding adjustments to judges' salaries. The Court also held that Provinces are constitutionally required to justify any departure from these recommendations, if need be, before a court of law.

In February 1998, the New Brunswick *Provincial Court Act* was amended to provide for a Judicial Remuneration Commission (JRC) with a mandate to conduct an inquiry; make a report and recommendations on salaries; examine the adequacy of pension, vacation, and sick leave benefits; and, examine other items concerning remuneration. Under the legislation, a JRC is appointed for a term of four years. The present JRC was constituted with the appointment of the final 2 members in 2014. It consists of a nominee of the Government, a nominee of the Judges and a Chair chosen by the other two nominees.

Initial submissions were made to the JRC by the Province and the Provincial Court Judges Association (PCJA) in July 2014. In November 2014, the JRC invited interested parties and the general public to make submissions on the matters under its mandate. The Province and the PCJA each made an additional submission in December 2014 and the JRC held hearings in January 2015, at which time the Province made a third submission. After considering this information, the JRC submitted its Report to the Minister of Justice on June 4, 2015.

Framework for Decision-Making

Judicial independence is a long recognized principle of the Canadian democratic system of government. It helps preserve the integrity of our legal order by assuring the public that they will have access to fair and impartial arbitrators when disputes arise involving it and their fellow citizens or the other branches of government. The trust, confidence and respect that the public

holds for the administration of justice is invaluable in upholding the rule of law and the legitimacy of our public institutions. The Government of New Brunswick strongly believes in the importance of these principles and values and is committed to preserving them in their entirety.

Judicial independence protects against the arbitrary interference from the other branches of government in those aspects of the judicial function that are likely to have a meaningful impact on the impartiality of the judges. It is a means of ensuring the impartiality of the judiciary by protecting judges from removal without justification (security of tenure), ensuring them a fair and reasonable standard of living (financial security) and allowing them to manage their judicial duties with a limited amount of governmental involvement (administrative independence).

Financial security, the aspect of judicial independence that is the subject of this Response, guarantees a certain amount of stability in the remuneration and other monetary benefits of judges. In addition, it provides them with a level of salary that will uphold the status and dignity of the judiciary in the community and ensure that judgments are not given in exchange for financial benefits. Judicial independence also prohibits negotiations or discussions on financial issues between the judiciary and the other branches of Government which are likely to give rise to a perception that the impartiality of judges would be exchanged for improved working conditions. For these reasons, remuneration and other financial benefits are not to be set until an independent and objective commission has had the opportunity to review the matter and to formulate recommendations on this matter.

As the Supreme Court confirmed in 2005, the Constitution does not compel a government to accept the recommendations of a judicial remuneration commission. However, if a government decides not to follow the recommendations it must bear the burden of showing rational reasons for rejecting them. It is accepted that a government must give weight to the recommendations and must explain why it did not accept them. The Government response must focus on the recommendations. Government must: articulate legitimate reasons for departing from the Commission's recommendations; demonstrate that the reasons rely on a reasonable factual foundation; and demonstrate that the Commission's process has been respected and its purposes (preserving judicial independence and depoliticizing the setting of judicial remuneration) have been achieved.

Based on these principles, the Government of New Brunswick's response to the JRC's recommendations is as follows:

Recommendation #1

The Commission recommends that a judge's base annual salary be increased to \$215,000 effective April 1, 2012, \$223,600 effective April 1, 2013, \$232,500 effective April 1, 2014 and \$241,800 effective April 1, 2015.

Government Response

Government rejects the JRC's recommendation on salary.

The New Brunswick Court of Appeal and past JRCs have recognized coming to a simplified method of determining judicial salaries is desirable. Chief Justice Drapeau, speaking for the Court of Appeal in 2009, strongly supported that objective:

...I am of the view that the Government's stated objective of placing the Judges in 7th place nationally cannot be impeached on the grounds of irrationality. Indeed, and as I have often emphasized, perhaps more often than necessary, that approach has much to commend itself and may well prove most beneficial of future salary-related debates before the JRC.¹

The Province submits that despite the merits of this approach, and the support for it expressed by the Court of Appeal, the Judges and others, setting salaries in a forward looking manner to achieve a consistent 7th place ranking is very difficult. There is no uniformity of time frames, or significant overlap in mandates, which leaves jurisdictions trying to find the appropriate ranking for themselves without all of the information required to do so. The process used by Prince Edward Island of setting salaries using the average of salaries in other jurisdictions, for example, further complicates the determination of the correct ranking.

Federally appointed Court of Queen's Bench judges have salaries set by a similar process governed by the federal *Judges Act*. This legislation currently provides for annual adjustments to federally appointed judges' salaries on April 1st of each year in accordance with a set formula.

¹ *Provincial Court Judges Association et al. v. The Province of New Brunswick*, 2009 NBCA 56, at para 33.

This calculation is tied to the changes in the Industrial Aggregate, a measure of national weekly salaries produced by Statistics Canada.

It is the Government's position that Provincial Court Judges should receive a salary adjustment that sets the salary for Provincial Court Judges at 80% of the salary of the Judges of the Court of Queen's Bench. This should achieve either a 6th or 7th place ranking, with a much simplified process, and sufficient certainty and security to protect the principles of judicial independence.

The salaries of Provincial Court Judges across the country, while not directly linked to the federal judicial salaries, do show significant correlation with the salaries of federally appointed judges. Ontario, Alberta and Saskatchewan pay judicial salaries in excess of 85% of the federal salaries. Quebec, British Columbia and Prince Edward Island are generally in the neighbourhood of 80% of the federal salary. Manitoba, Nova Scotia and Newfoundland pay between 75-78%.

The Province believes the salary for the Judges should remain at \$204,700 for each of the years 2012-13 through 2014-15 and that, effective April 1, 2015, the salary should be set at 80% of the salary payable to Judges of the Court of Queen's Bench, including any adjustment made pursuant to the *Judges Act*. The current salary payable to Court of Queen's Bench Judges is \$308,600 which would result in the salary for Provincial Court Judges to be set at \$246,880. The Associate Chief Judge's salary would be \$256,755 and the Chief Judge's salary would be \$266,630.

Recommendation #2

The Commission recommends that no changes be made to the Provincial Court Judges Pension plan.

Government Response

The Government accepts the recommendation of the JRC with respect to the Provincial Court Judges Pension Plan.

Recommendation #3

The Commission recommends that the per diem rates referred to in section 4.5(2) and 7.1(6) of the Act be increased to 1/220 of the annual salary of a judge effective April 1, 2012.

Government Response

Government rejects the JRC's recommendation on *per diem* rates.

As noted by the JRC, there are 2 instances under the *Provincial Court Act* when a judge, other than a full-time sitting judge, may be paid on a *per diem* basis. Both are paid a daily rate of 1/251 of a Provincial Court judge's salary. The judges referred to under subsection 4.5(2) are visiting judges from another province temporarily appointed to hear matters in New Brunswick. The judges referred to under subsection 7.1(6) are retired New Brunswick Provincial Court judges.

The JRC noted in its report that Provincial Court judges who perform weekend remand services are paid at a daily rate of 1/220 of a judge's annual salary. Full-time judges performing weekend and holiday remand work earn vacation credits and this is included in determining how much full-time judges are paid.

Retired judges receive a pension and the *per diem* payment is in addition to their monthly pension amount. They do not have an employer-employee relationship with the Crown and they do not earn vacation credits. Therefore, factors such as vacation credits should not be included in the formula determining their daily stipend and the rate should be lower than what is paid to a full-time sitting judge for remand work.

Similarly, judges from other provinces who are appointed to sit in New Brunswick on a temporary basis earn a full salary and benefits in their home province. The *per diem* rate paid is in addition to their regular salary. These judges do not earn vacation credits or other benefits paid the New Brunswick judges so the *per diem* rate should be reflective of this.

Neither Government nor the PCJA made a submission on the issue of the rate of pay for *per diem* judges. The parties provided information on the issue at the request of the JRC. It is Government's position that there was no basis for recommending changes to the *per diem* rate if both parties were satisfied with the status quo. Furthermore, it is the Government's belief that

the current *per diem* rate of 1/251 of a Provincial Court judge's salary is adequate and does not impact judicial independence.

Recommendation #4

The Commission recommends that the Minister pay 75% of Judges Association general Representation Costs incurred to participate in the Commission process and 100% of the fees associated with the pension change proposals, plus the expert witness fees;

Government Response

Government rejects the JRC's recommendation.

Like the guiding cases in the SCC, the *Provincial Court Act* has limited the jurisdiction of the JRC to issues of remuneration (i.e. salaries, pension, vacation, sick leave benefits, etc...). Representational costs incurred in the process of determining judicial remuneration are not a matter of remuneration. It therefore cannot be argued that there is any responsibility on Government to contribute to the costs of the PCJA or any other party wishing to appear or make representations to the JRC.

Notwithstanding the above, in its second submission to the JRC, made in December 2014, the Province agreed that the Provincial Court Judges Association should be reimbursed for reasonable actuarial costs incurred to respond to the Province's July 2014 submission on pension, which was later withdrawn. The Province has since paid these costs, in the amount of \$ 27,314

In addition to the actuarial costs incurred, the PCJA incurred Representation Costs to respond to the Province's pension proposal. The Province agrees to pay 100% the Representation Costs related to the pension submission, in the amount of \$16,230.

However, the Province rejects the JRC recommendation that it pay 75% of all general Representation Costs in addition to 100% of the expert witness fees.

The Province is prepared to pay 50% of the PCJA general costs to a maximum of \$30,000, over and above the pension-related costs outlined above. The general costs incurred by the PCJA

were \$74,660. Given that 50% of these costs is more than \$30,000, the Province is prepared to pay \$30,000.

Conclusion

As noted above, a government is not compelled to accept the recommendations of a judicial remuneration commission but must provide rational reasons for rejecting them if it decides to do so. The Province is of the opinion that the reasons set out in this response provide adequate rationale for rejecting the recommendations of the 2012 Judicial Remuneration Commission.

In considering the recommendations of the JRC and in developing this response, the Province has kept in mind the need to preserve judicial independence and feels that the proposed response ensures the Judges a continued fair and reasonable standard of living, thereby providing financial security.