

REPORT  
OF THE  
2012 NEW BRUNSWICK  
JUDICIAL REMUNERATION COMMISSION

June 4, 2015

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## I. INTRODUCTION

### **The 2012 Commission**

The governing legislation for the Judicial Remuneration Commission (the “Commission”) is the *Provincial Court Act*, c. P-21, R.S.N.B. 1973, as amended, in Part II.1 (the “Act”). One member is nominated by the Minister of Justice (the “Minister”) and a second member is nominated by the Chief Judge in consultation with the New Brunswick Provincial Court Judges Association (the “Judges Association”). These two members nominate a third, who sits as chair of the Commission. The Commissioners of the 2012 Commission were appointed by two different Orders-in-Council as noted below.

The members of the 2012 Commission are:

Chair	Richard Oulton, CPA, CA Rothesay, NB Order in Council 2014-7 January 9, 2014
Commissioner	Robert McFadden, CPA, CA Rothesay, NB Order in Council 2014-7 January 9, 2014
Commissioner	Dana Robertson Moncton, NB Order in Council 2012-378 December 6, 2012

### **Commission Mandate**

Among other things, the Commission is obliged by section 22.03(1) of the Act, to:

- a) conduct an inquiry with respect to
  - (i) the salaries and other amounts paid to the chief judge, the associate chief judge and judges,
  - (ii) the adequacy of pension, vacation and sick leave benefits provided to judges, and
  - (iii) any proposal that seeks to provide for or eliminate a measure that affects any aspect of the remuneration conditions of judges, and
- b) provide to the Minister a report with recommendations in respect of the matters referred to in paragraph (a)

Under section 22.03(4) the Commission is to receive submissions from the Minister, the judges or their representatives and any other interested person or body. Collectively, the Minister (or the Province) and the Judges Association will be referred to in this report as the “Parties”.

The Act in section 22.03(6) further provides that in making its report and recommendations, the Commission is to consider each of the following factors:

- a) the adequacy of judges' remuneration having regard to the cost of living or changes in real per capita income,
  - a.1) the remuneration of other members of the judiciary in Canada as well as the factors which may justify the existence of differences between the remuneration of judges and that of other members of the judiciary in Canada,
- b) economic fairness, including the remuneration of other persons paid out of the Consolidated Fund,
- c) the economic conditions of the Province, and
- d) any other factors the Commission considers relevant to its review.

The Commission is established to make recommendations during the term of its mandate on remuneration matters.

The provisions of the Act do not provide clear guidance on the term of the remuneration period under review. Also, the mandates of the Commissioners are not co-terminus, with the terms of two of the Commissioners extending beyond the normal four-year period under consideration.

Accordingly, the Commission engaged the Parties in a discussion of the appropriate period for the remuneration review under consideration, and sought written submissions from them on this issue.

The Commission concurred with the submissions from the Parties that the period of the salary review of this Commission should be four years from April 1, 2012 to March 31, 2016.

This review period is considered appropriate based on a number of considerations:

- An essential condition for maintaining judicial independence is that there are consistent and regular reviews of remuneration, which a four-year period provides.
- A four-year reporting period is very common among other Judicial Remuneration Commissions in other jurisdictions, including at the federal level.
- In *Reference re: Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, (the "P.E.I. Reference Case") the Supreme Court suggested that commissions report after the lapse of three to five years.
- The mandate of the period of review for past Commissions has often not matched up with the appointment term of the members of the Commission.
- The Parties are in agreement with this term of review.
- It is the period for which the Parties have made submissions.

### **Commission Purpose and Background**

The judiciary is a third branch of government separate from the executive branch and the legislature. The independence of the judiciary is vital to the proper functioning of our democracy. The principle of judicial independence has three components, being security of tenure, financial security and administrative independence. The Commission's role is a result of a significant constitutional obligation of governments to set compensation for judicial officers through an independent, objective and effective commission process. Public confidence in the judiciary depends upon the perception that judges are deciding matters before them in a fair and impartial manner, free from external pressures. The legislative and executive branches of government must not influence or be perceived to influence the judiciary.

However, since Judges are paid from government revenues, decisions regarding their salaries and benefits must be made by the Provincial Legislature. The purpose of the Commission is to interpose a neutral body between the judges and the government to depoliticize the process of determining judicial remuneration. To avoid having the judges and the Minister engaging directly in compensation negotiations, both parties are provided an opportunity to make submissions to the Commission. The Commission considers these submissions and makes recommendations to the Minister.

Upon receipt of the report from the Commission, The Act (s. 22.06(1)) requires the Minister to table the Commission's report within 90 days in the Legislative Assembly if it is then sitting, and if not sitting, when it next sits. If the Minister accepts the report, then it is to be implemented with due diligence. If the Minister rejects the report in whole or in part, then the Minister shall advise the Commission and the Legislature as to which recommendations or parts thereof which are not being implemented. If the Minister does not advise the Commission and Legislature about any recommendations that are being rejected, then the recommendations are deemed to have been accepted.

The Supreme Court of Canada has provided guidelines for the functioning of Commissions and their relationship to government in the P.E.I. Reference Case and in *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judges' Assn. v. Ontario (Management Board)*; *Bodner v. Alberta*; *Conférence des juges du Québec v. Quebec (Attorney General)*; *Minc v. Quebec (Attorney General)*, [2005] 2 S.C.R. 286 ("Bodner"). These guidelines stipulate that the Minister must give serious consideration to the recommendations of the Commission and not depart from those recommendations without providing clear and rational reasons for doing so.

This important point has not only been upheld but most recently clarified in the decision of New Brunswick Court of Appeal (*Provincial Court Judges Association et al. v. The Province of New Brunswick*, 2009 NBCA 56) wherein it was determined that the Minister must provide rational reasons and rely on accurate and current information when filing any response which deviates from the recommendations of the Commission.

Moreover, it is essential that the Commission process be seen as meaningful, credible and effective. This is of great value in attracting qualified candidates who might otherwise not be interested in applying for a Provincial Court position as a result of financial considerations. Also, candidates accept

appointments on the good faith understanding that their remuneration will be adjusted in accordance with a meaningful process and using criteria that are fairly and consistently applied. Judges, once appointed, have limited job mobility and cannot realistically leave their position for something else at a future point in time if remuneration for the role becomes uncompetitive. They must trust in a process that is fair to all concerned, and which ensures judicial independence.

This is the fifth Commission. Previous Commissions were formed in 1998 (reporting in respect of the years 1998 to 2001), 2001 (reporting for 2001-2004), 2004 (reporting for 2004-2008) and 2008 (reporting for 2008-2012). There has been extensive litigation surrounding the Ministers' responses to previous Commission recommendations, culminating in the 2005 Supreme Court of Canada decision and the New Brunswick Court of Appeal case referred to above. Prior to the 2008 report, none of the earlier Commission reports were, initially, fully accepted by the Minister. The 2008 report was the first report to be accepted as submitted.

### **Factors to be considered**

As described under Commission Mandate, section 22.03(6) of the Act outlines the factors the Commission is to consider when formulating its recommendations. These are listed in no particular order.

The first of these is the adequacy of judges' remuneration having regard to the cost of living or changes in real per capita income. The primary factors to be considered here are Statistics Canada indices for changes in the Consumer Price Index ("CPI") and Average Weekly Earnings ("AWE") (formerly IAI) in New Brunswick as well as cost of living adjustments used by Government for civil servants and Members of the Legislative Assembly ("MLAs").

The second factor is the remuneration of other members of the judiciary in Canada as well as the factors which may justify the existence of differences between the remuneration of Provincial Court Judges and that of other members of the judiciary in Canada. The latter includes other provincial court judges and federal court judges. Provincial remuneration commissions do not follow a regular reporting schedule and provincial governments require time to respond to the recommendations. As a result, the relative positions of judicial salaries and benefits may change at various times in a given year and will often be retroactive. Previous Commission reports, other provincial commissions and several court cases have reviewed the many factors that result in differences between jurisdictions. For the most part the differences arise from regional economic and wage level factors.

The third factor to be considered is economic fairness, including the remuneration of other persons paid out of the Consolidated Fund. The Commission is to consider economic fairness for judges in the broadest sense and while doing this, give due consideration to the remuneration of a wide variety of individuals and groups of individuals who are paid from the public purse. The Commission should strive to ensure that judges do receive an adequate salary while at the same time are not seen to receive special treatment nor are seen to be immune from the factors affecting salary adjustments for the civil servants and other individuals paid by the Province.

The fourth factor is the economic condition of the Province. There are a number of elements to this. The Commission needs to consider not only current economic conditions but also whether conditions are improving or deteriorating relative to the past and whether prospects for future years are encouraging, discouraging or uncertain. Comparisons to economic and fiscal conditions of other provinces are also considered very important. These comparisons provide appropriate context for the assessment of how remuneration in New Brunswick compares to other provinces in light of that factor.

Finally, the Commission needs to consider any other factors that are relevant to its review. One often-mentioned factor is the need to attract qualified individuals to the bench. Remuneration must be set at such a level as to ensure that highly qualified candidates are attracted. It should not be just those who are Crown lawyers, or private bar lawyers practicing in criminal law who are the candidate pool. It is in the best interests of enhancing the public's confidence in the court that it be composed of individuals who reflect the diversity of the public it serves, and that it is made up of legal minds from different practice backgrounds, including those from the private Bar.

The Commission must determine the appropriate weight it gives to each of these factors in formulating its recommendations. A fair amount of consideration has been given in the past to the subject of weighting. The 2004 Commission report and the Minister's response contain comments in some detail on the relative importance of each of the factors. As will be seen in the analysis that follows, the Minister, in his submissions, has taken the position that for the term of this Commission, the economic conditions in New Brunswick and economic fairness with other persons paid from the Consolidated Fund should be of paramount consideration. The Judges Association submissions suggest that a comparison with other judiciaries in Canada is most important. There is no indication in the Act of what the relative weighting of the factors should be. In addition, it must be noted that not all are capable of being easily quantified. In the Commission's view, the fairest result is obtained by a careful weighing and balancing of all the relevant factors in the context of the current environment. The Commission must endeavour to weigh the factors equitably, in the broadest sense, with an independent mindset.



## II. SUMMARY OF PROCEEDINGS OF THE COMMISSION

The Commission held its initial meeting on February 5, 2014 and on the same date retained Charles Whelly, Q.C. to act as its legal counsel. As required by the Act the Commission sought the Minister's approval of the hourly rate of Mr. Whelly and received it on March 5, 2014.

Section 22.03(2.2) of the Act requires the Commission to ensure that its expenditures not exceed the amount appropriated for its operations by the Legislative Assembly. On inquiry to the Minister the Commission was advised that no amount had been appropriated, but that the Commission should proceed and be prudent with expenditures.

A pre-hearing meeting was held on April 7, 2014 by the Commission with representatives of the Parties to discuss and agree on numerous subjects related to procedural issues for and leading to the public hearing. This included preliminary filing dates for briefs and rebuttal briefs of each party, location and details regarding the public hearing and overall timing of the process.

The Minister was represented by counsel from the Office of the Attorney General. Throughout this report representations and submissions of the Minister may be referred to as coming from the Minister or the Province. The Judges Association was represented by private counsel.

During this pre-hearing meeting it became apparent that the Minister was planning to put forward proposals for significant change to the judges' pension plan. The Minister however, was uncertain as to the details, including whether the model had already been developed for specific application to judges. It was recognized by the Parties and the Commission that significant pension change proposals would lengthen and complicate the process.

At this meeting, the Minister undertook to advise the Judges Association and the Commission of the Minister's position, with as much detail on the pension proposals as possible, by May 1, 2014. The Commission indicated that depending on the position taken by the Minister, it might be necessary to hold a further pre-hearing meeting of the Parties.

There are similar commissions in each province. Each has reported since the last New Brunswick Commission report. The Judges Association was asked to compile and provide the text of all of the provincial reports as well as an analysis of the status of the acceptance of each report by the respective legislatures. These reports were of significant value to the Commission in framing its inquiry.

The Commission requested that the Parties include in the submissions proposals on *per diem* payments referred to in sections 4.5(2) and 7.1(6) of the Act.

The Commission also sought the concurrence of the Parties that the period of salary review would run from April 1, 2012 to March 31, 2016. This was subsequently confirmed.

As a result of this meeting a decision was taken by the Commission that in the absence of significant pension change, a public hearing would be scheduled for late October or early November. Initial briefs

would be filed by the parties by June 15, 2014, and rebuttal briefs to be filed by August 15, 2014. This was communicated to the Parties.

On May 1, 2014 correspondence was received from the Province confirming it would be proposing that the pension plan for New Brunswick's Provincial Court Judges be converted to a shared risk pension plan registered under part 2 of the *Pension Benefits Act*. Key areas of change were outlined in general terms, but no details were provided.

Upon receipt of this information, the Commission convened a meeting and concluded that in light of the definite inclusion of significant pension change, the June 15, 2014 deadline for briefs would not be workable. The Commissioners expressed concern with the lack of detail available to date on the pension change proposals. Accordingly, after due consideration, a communication was sent to the Parties on May 22, 2014 directing them to submit their positions on all issues they wished to address by July 15, 2014, with the continued intention of holding a public hearing in early November 2014. In order to obtain more information about the pension change proposals, the Minister was directed to include all of the details and costs associated with those proposals, including plan text, implementation details and projections of change in pension costs going forward compared to the existing plan(s). Furthermore, with the inclusion of pension change, the Commission indicated that a second pre-hearing meeting would be held to discuss and determine appropriate rebuttal periods and the resources required to deal with that issue and which would allow the process to proceed in a fair manner. The Commission also indicated that if the Minister was unable to provide all of the requested information within the time frame specified, then the Commission would continue the process absent the topic of pension change, with the option open to the Province to deal with that topic at a later time by utilizing the process set out in section 22.04 of the Act.

After a short extension of the submission deadline to July 21, 2014, the Parties did submit their proposals to the Commission. The Minister's submission included many, although not all, of the details associated with its pension change proposals.

Accordingly, the Commission scheduled a second pre-hearing meeting with the Parties which was held on August 19, 2014. At that meeting, the Judges Association made a request to bifurcate the process, separating pension change from the "normal" compensation review. The Judges Association submitted that the information provided on pension change was insufficient to evaluate what specific impact pension change would have on a judge's overall remuneration going forward. In addition, the Judges Association stated that it did not have the resources to properly evaluate the effect of the proposed pension change on its own, thus making the process inherently unfair. The Judges Association also expressed concern that dealing with pension change now would unduly delay the process of basic salary review even further.

The Province indicated that due to the pending provincial election, it would not be able to provide any rebuttal submissions until after October 15, 2014 at the earliest.

After considering the issues raised, the Commission was concerned that the preliminary information provided by the Province on pension change indicated that this would have a very significant impact on

the pension benefits of judges. It concluded that insufficient information had been included with the Province's submission to properly evaluate what the pension proposals would actually mean to the retirement benefits and the overall remuneration of judges. The Commission concluded the issue was a complex one that would require much more information and expert assistance to meaningfully evaluate the proposals. It also concluded that a bifurcation of the process would ultimately lead to duplicated effort and even further delay in the actual submission of the Commission's complete report to the Minister dealing with all the issues that had been raised.

In the meantime, the Judges Association concluded it would require the assistance of an actuary to help evaluate the impact of the pension change proposals and to assist in developing a response by the submission deadline.

Accordingly, on August 27<sup>th</sup>, the Commission communicated with the Parties by letter that it intended to proceed with a schedule to publish a Public Notice of Hearing during the first week of November, 2014, with a deadline for rebuttal submissions by the parties of December 15, 2014, and to hold the hearing by January 13, 2015.

In that letter, the Commission expressed its concern with the delay in the process to date. It also requested a number of additional pieces of information from the Province that it felt was required in order to properly evaluate the impact of the pension change proposals and set a deadline of October 3, 2014 to receive that information.

The Province responded with a supplementary submission on October 3, 2014'. The Commission, after evaluation, found the information continued to be insufficient to completely evaluate the effects of the Province's pension proposals. In addition, the Commission received a communication from the Judges Association indicating its dissatisfaction with the completeness of the information received.

Accordingly, another request was sent on October 27, 2014 to the Province for the additional required information. At this time, the final schedule of the hearing process was also confirmed and communicated as follows:

- Public notice of Hearing to be published the first week of November;
- Public and parties submission deadline of December 23, 2014;
- Deadline for final rebuttal submissions in writing by interested parties January 14, 2015;
- Submission of evidence binders prepared by the parties January 14<sup>th</sup>; and
- Hearing to commence Wednesday January 21, 2015 for up to three days. Hearing to be held at NB Government offices, 435 King Street, Fredericton, NB.

This schedule was acceptable to the Parties.

During the first week of November 2014 notice of the Commission, hearing dates and submission process was published in provincial newspapers.

On November 19, 2014, the Commission sent a follow up letter to the Minister requesting an update on when the additional information requested on October 27<sup>th</sup> would be available.

On November 21, 2014 the additional information requested by the Commission was provided to the Commission and the Judges Association by the Province. The Judges Association indicated it was still awaiting information from the Province with respect to certain detailed data concerning retired judges so that the actuary hired by the Judges Association could do his work.

At this point, given the significant extent of the proposed pension changes, the Commission concluded that it would require the assistance of a pension expert as provided for under section 22.02(3) of the Act. The Commission would look to the expert to provide commentary and advice to the Commission on the pension proposals of the Province, and to assist with the process of determining what points of clarification and further lines of inquiry would be required. The Commission prepared a Request for Proposal, and after evaluating the responses selected Mr. Phillip Churchill of Eckler Ltd. to do the work.

The Commission then sought the approval by the Minister of Eckler's hourly rate as required by Section 22.03(3.01) of the Act.

On December 12, 2014, the Commission and the Judges Association received confidential notice that the Province was, subject to Cabinet approval, intending to withdraw its proposals concerning pension change from the Province's July 2014 submission to the Commission.

Also on December 12, 2014 the Commission received a written submission from the Law Society of New Brunswick.

On December 15, 2014, the Commission received the submission of the Judges Association.

On December 18 and 19, 2014<sup>1</sup> respectively, the Commission received notice from the New Brunswick Branch of the Canadian Bar Association, and from Judge John Maher, Q.C., of the Canadian Association of Provincial Court Judges of their intention to make submissions to the Commission at the Hearing on January 21, 2015.

On December 19, 2014, the Commission received the second submission of the Province. As part of the submission, it was confirmed that the Minister was no longer proposing pension change and the earlier submission on the subject was being withdrawn. The Province indicated that although it remained committed to the importance of sustainable pension plans, more information and time would be required to fully analyse the potential impact of the proposed changes. It indicated that any future proposals to be made would include sharing actuarial and financial advice to the Judges Association and plan members. The Commission notes that any proposed changes to the judges' pension plan are required to be submitted to a Commission under s. 22.04(1). The Province made no changes to its previous submission on proposed salaries and also submitted that 7<sup>th</sup> place was no longer the correct placement for remuneration of judges.

It was also confirmed that with the withdrawal of the pension change proposals, the Minister regarded the Commission's request for approval of the hourly rate for its pension consultant as moot. The Commission responded that although the withdrawal of the pension change proposals changed the scope of work for the consultant, it would still find the assistance of a consultant valuable in assisting

with the evaluation of the current status of the existing judge's pension plan, particularly in comparison with other jurisdictions. After further correspondence, the Minister formally confirmed that the hourly rate for the pension consultant was not approved. Therefore, a consultant was not engaged by the Commission.

On January 16, 2015, information was received from the Province that it was in the process of changing its submission with respect to salaries from what was submitted on July 22, 2014 (and not otherwise referenced in the December 19<sup>th</sup> submission). The Province indicated it would be providing a new submission to the Commission to be delivered on the day of the hearing.

On January 21, 2015 the public hearing commenced at Government Offices at 435 King Street in Fredericton. Over the course of the day, interested parties addressed their submissions, and two witnesses appeared for the Province. An exhibit book was submitted, which contained submissions previously exchanged. At the hearing, the Parties did not provide evidence on other provincial judicial salaries, consumer price index or weekly wage information as had been expected by the Commission. The information was provided subsequently by the Parties in response to a further request from the Commission.

Appearing at the hearing were:

1. Judge John Maher of Alberta representing the Canadian Association of Provincial Court Judges, who made an oral submission to the Hearing;
2. Scott Brittain representing the New Brunswick Branch of the Canadian Bar Association, who made an oral submission in support of the written submission already received;
3. Nancy Forbes, Q.C., and Denis Thériault, appearing on behalf of the Minister ;
4. Clarence Bennett, appearing on behalf of the Judges Association;
5. Evidence was provided by Amy Beswarick, Department of Human Resources, witness for the Minister, and Todd Selby, Department of Finance, witness for the Minister.

Additionally, Chief Judge Pierre Arseneault and Associate Chief Judge Mary Jane Richards were present, Judge Julian Dickson was present on behalf of the Judges Association and Joanne Higgins was present on behalf of the Province.

The public hearing was adjourned at the end of the day on January 21<sup>st</sup>, and after follow up questions and responses was officially terminated on March 7, 2015.

### **III. PRIOR COMMISSION REPORTS**

The Supreme Court of Canada has determined that the work of previous remuneration commissions should form the background and context in which the next commission performs its responsibilities. In order to put this Commission's assessment and recommendations in context, set out below is a summary of the key issues considered and recommendations made by the 2004 and 2008 Commission.

#### **The 2004 Commission Report**

The 2004 Commission report contained majority (two Commissioners) and minority (one Commissioner) recommendations. The Minister, in determining his response, accepted the minority recommendation regarding salaries and the majority recommendations on most other issues.

On the issue of salary, the 2004 Commission (the majority recommendation, rejected by the Minister, but upheld by the Court of Appeal) recommended a substantial increase from the \$150,706 annual salary a judge had been earning as of April 1, 2003.

The 2004 Commission addressed in some detail all the factors to be considered, as set out in section 22.03(6) of the Act, and determined that the "comparison to other provincial court judges to be a primary consideration in formulating its recommendation". It recommended salaries as follows: April 1, 2004-\$172,000; April 1, 2005-\$177,200; April 1, 2006-\$182,500; April 1, 2007-\$186,000.

In its response to the 2004 Commission recommendations, the Minister posited that, given the circumstances at the time of formulating his response, a 7<sup>th</sup> place ranking for New Brunswick judges was fair. The Court of Appeal endorsed this approach and Chief Justice Drapeau stated "...In my view, the Government's approach is fair and contains the seeds of a simplified JRC process for years to come, should there be comparability in the relevant circumstances".

The 2004 Commission made two other recommendations. After reviewing practices across Canada, there was a recommendation to increase the salary supplements paid to the Chief Judge and Associate Chief Judge to 8% and 4% of the salary of a Provincial Court judge, respectively. As well, the 2004 Commission made a recommendation regarding the *per diem* rate to be paid to *per diem* judges of 1/220 of an annual salary and for the daily salary calculation for remand court duties.

#### **2008 Commission Report**

The 2008 Commission report made unanimous recommendations in a number of areas and the report was adopted by the Minister unchanged.

##### **Salaries**

On the matter of salary, the Commission concluded that judges' salaries had been eroded by inflation and had not increased at the same level as those of government employees and MLAs for the time period in question. In order to receive a salary increase comparable to the increases received by others paid out of the Consolidated Fund, it was recommended that a judge's base salary should be adjusted for 2008 and 2009 to reflect the increase in the IAI and be \$199,700 per year effective April 1, 2008 and

\$204,700 per year effective April 1, 2009. This ranked New Brunswick judges 7<sup>th</sup> compared to their counterparts in other jurisdictions for those years. This ranking was consistent with the Minister's position in responding to the 2004 Commission report, with the comments of the New Brunswick Court of Appeal decision regarding the same report and with the position of the Judges Association.

For the 2010-2011 and 2011-2012 fiscal years it was recommended that there be no increase in judges' salary. This recommendation was made in the spirit of a two year wage freeze policy that had been introduced by the government of the day in response to the economic situation facing the province at that time.

### **Remand duties**

The Minister proposed to restrict payment to judges for remand duties, instead giving equivalent time off in lieu of payment.

Removing the option to receive a cash settlement for Remand Court duty time was considered by the Commission to be not sufficiently warranted, and accordingly the Commission recommended that there be no change to the remuneration provisions related to Remand as currently set out in section 18.1 of the *General Regulation-Provincial Court Act*.

### **Vacation**

The Judges Association had submitted that vacation entitlement should be increased to 40 days per year, and that the formula for payment of unused vacation days at time of retirement be changed.

The Commission found that the current vacation day entitlement of 30 days to be appropriate, and that there should be no change to how payment be made for unused vacation days.

### **Pension Plan**

The Judges Association requested the Commission to review the matter of pensions. It was the Judges Association's contention that New Brunswick ranked at the lowest level of all judicial pension plans.

As a result, considerable study and discussion was devoted to the subject of the judges' pension plan.

As a result of the lack of important detail being available, and due to the complexity of analyzing pension plans, the Commission concluded it would require expert assistance, and requested approval of the hourly rate for an independent actuary to advise it. The Minister declined to approve the rate, but in the alternative provided its own expert in the person of Conrad Ferguson, FSA, FCIA of Morneau Sobeco. The Minister engaged Mr. Ferguson to prepare a report comparing the pension plan for judges in New Brunswick with other jurisdictions. His conclusion was that the New Brunswick plan provided one of the lowest benefits of all judicial plans in Canada.

Mr. Ferguson stated in his "Response to the Judges Submission – Pensions" that if the goal was to create a pension plan comparable to that provided by other jurisdictions, the Commission should recommend a 3% accrual rate. He also recommended that if the accrual rate was increased to 3%, then the plan member contribution should increase to at least 8%.

The Commission was not provided with any evidence of factors that may justify differences between the remuneration (in respect of pension benefits) of Provincial Court Judges and that of other members of the judiciary in Canada. Where the pension benefit will also be a function of years of service and final salary, it was concluded that it was appropriate that the rate of benefit (accrual rate) be the same as the majority of other jurisdictions.

Accordingly after study of all the issues and making comparisons to other jurisdictions, the Commission recommended that the Provincial Court Judges Pension plan be amended to have the effect of increasing the accrual rate from 2.75% to 3.0% per year and the judges' contributions to the pension plan be increased from 7.0% to 8.0% of salary per year. The amendments to the plan were to be applied on a prospective basis beginning April 1, 2010.

### **Judicial Allowances**

Proposals on judicial allowances were made by both the Minister and the Judges Association. At the time, New Brunswick was the only province in Canada (other than PEI) that did not have a judicial allowance arrangement for individual judges.

The Minister proposed an annual allowance of \$1,000 which could accrue to \$5,000 for unused amounts. The Judges Association submitted that the annual amount should be \$3,000 with carry forward provisions to a maximum of \$10,000.

The Commission concluded that an annual expense allowance of \$2,500 was warranted for each judge effective April 1, 2010, that any underutilized portion be carried forward to a maximum of \$7,500 and that expenses paid in excess of the annual allowance be carried forward and applied against the following year's allowance.

### **Sabbatical Leave**

The Judges Association proposed that the suitability and viability of a sabbatical leave program be explored. To that end, the Judges Association asked the Commission to authorize the creation of a working group of judges and Department of Justice officials to explore the concept of sabbatical leave and report back to the Commission.

The Minister submitted that it was outside the mandate of the Commission to authorize the establishment of a working group to consider sabbatical leaves and report back to the Commission. The Minister also contended that establishing a sabbatical leave program would be a benefit that was counter to the wage and monetary benefit freeze policy.

The Commission agreed with the Minister's submission that it was outside the mandate of the Commission to authorize the establishment of a working group to consider sabbatical leaves and report back to the Commission, and accordingly made no recommendation in respect of sabbatical leave.

### **Health and Dental Coverage**

In its submissions, the Judges Association sought a more comprehensive health benefit plan with



increased coverage. Specifically it sought increased coverage for dental care (crowns and orthodontic), hearing aids, and eye glasses. The Judges Association suggested that judges tended to be an older group, and their health needs, particularly hearing and vision, differed from the broader group for which the health plan was designed.

Alternately the Judges Association suggested some of these items could be included within the judicial allowance.

In considering this issue, the Commission determined that it would be impractical to extend benefits through adjustments to the group benefit plan. It was noted that most other provinces provide extended vision care and hearing aid coverage by allowing these expenses to be paid out of the judicial allowance. Accordingly the Commission concluded that certain health care costs be included in the judicial allowance recommendation of this report.

The Commission recommended that there be no change in the health benefits provide to judges, except for the recommendation that some expenses be permitted to be paid from the judicial allowance.

### **Life Insurance**

Increased life insurance benefits were proposed at the pre-hearing meeting as one of the issues that would be placed before the Commission. In the July 2009 submission from the Judges Association it was noted that it would be looking for increased benefits, but there were no details given.

Evidence presented at the hearing indicated that the judges' life insurance benefit was up to five times salary to a maximum of \$800,000. The premium to provide coverage equal to one times salary is paid by the Province. Additional coverage to bring the total up to \$500,000 is available to judges, with premiums at the average rate for all employees under the Province of New Brunswick Group Life Insurance Program. Additional coverage beyond \$500,000 and up to \$800,000 is available to judges at an average rate specific to the current judges' group. The insurance premium for coverage above one times salary is paid by judges.

The life insurance benefit issue was not mentioned in either the Judges Association submission to the Commission in September 2009 or in its post hearing brief.

In considering this issue, the Commission noted that the life insurance benefit available to judges is already superior to that of others paid from the Consolidated Fund and that it would be impractical to deviate from the current benefit level. The Commission concluded that no changes were required to the life insurance benefit.

The Commission recommended that no changes be made to life insurance benefits currently available to the judges.

**Representation Costs**

The matter of Representation Costs was discussed at the pre-hearing meeting with representatives of the Judges Association and Province. The Province indicated that it would not contribute to the Judges Association's cost of participating in the Commission process, while the Judges Association maintained that the cost of participating in the Commission process places an inappropriate financial burden on individual judges.

While the Minister argued that the Commission had no jurisdiction in either statute or case law to consider representation costs, the Commission concluded for a number of reasons that it did have jurisdiction.

The Commission also noted that with very rare exceptions, Representation Costs have been paid in other Canadian jurisdictions by government to some degree. As well, the Province had previously made contributions to the Judges Association costs. In 1998 it paid approximately \$10,000, in 2001 it paid something over \$10,000 and in 2004 it paid \$20,000. It also noted that the participation by the Judges Association in the process is required under the Act, and that in a Province like New Brunswick with its relatively small number of judges, the cost of participation would be an unfair burden.

After consideration of the issues, the Commission made a recommendation for the Province to pay 50% of the cost. This was the lowest rate used in other jurisdictions and would cause the Minister to contribute an estimated \$25,000 to the Judges Association for participating in the 2008 Commission process, which was consistent with past practice in terms of amount.

The Commission recommended that the Minister pay 50% of Judges Association Representation Costs incurred to participate in the Commission process, to a maximum of \$30,000.

#### **IV. SUMMARY OF ISSUES BEFORE THE 2012 COMMISSION**

##### **Salaries**

The annual salary of a judge of the Provincial Court has been \$204,700 per year since April 1, 2009. At that point, this salary placed Judges in New Brunswick in 7<sup>th</sup> place in comparison to their counterparts in the rest of Canada. Furthermore, at that time, the salary of a Provincial Court Judge was 77% of that of a puisne federal court judge.

The Judges Association submits that since there has been no appreciable relative change in the economic condition of New Brunswick in comparison to the other Canadian Provinces, the salary level should remain in 7<sup>th</sup> place compared with their counterparts in the rest of Canada. Currently, since April 1, 2011, the salaries of judges in New Brunswick rank last in Canada. As in the submission to the 2008 Commission, the Judges Association contends that the 7<sup>th</sup> place ranking of salaries was supported by the Province and the Court of Appeal in 2009, and that using this ranking again would produce a fair and rational result. The Judges Association assertion is that circumstances have not changed sufficiently, if at all, to warrant a departure from this guideline. It would appear that a 7<sup>th</sup> place ranking, as of April 1, 2012 would have resulted in a salary in the range of \$224,200 to \$230,700, and in 2014 it would be in the range of \$231,500 to \$236,900.

The Minister's initial position (submissions of July 2014 and December 2014) with respect to the 7<sup>th</sup> place argument is essentially that circumstances have changed since the 2008 Commission reported and that a change from 7<sup>th</sup> place was justified. The Minister submitted that the Province's position has been deteriorating in comparison to other provinces, that a 7<sup>th</sup> place ranking is no longer the correct placement for the remuneration of New Brunswick judges and that the current remuneration package has continued to draw highly qualified individuals as potential candidates. The Minister also asserted that a judge's income is reasonable and competitive when considering the cost of living and incomes of other high earners in New Brunswick. The Minister's first submission proposed that judges receive no increases in 2012 and 2013, and an adjustment of 75% of the real GDP growth rate for New Brunswick for calendar 2013 and 2014 on October 1, 2014 and 2015, respectively. Reported GDP growth rate for 2013 and 2014 would provide for a nil salary increase for these years.

At the hearing the Minister withdrew that submission and in the alternative suggested a salary set at 80% of the salary of the judges of the Court of Queen's Bench ("QB Judge"), effective April 1, 2015. The April 2015 QB Judge's salary was yet to be determined (as it escalated in relation the Canadian AWE for 2014) but could be estimated to escalate 2.8% over the 2014 salary. The Provincial Court judge's salary would remain at \$204,700 until April 2015. The Minister contended that this would achieve either a 6<sup>th</sup> or 7<sup>th</sup> place ranking and that this would be a much simplified procedure to follow.

## **Pension**

In the first submission of July 22, 2014, the Province argued in favour of significant pension change. After a period of considerable information gathering, this proposal was withdrawn as part of a revised submission dated December, 2014, with the Minister indicating that the subject may be re-introduced at some future point in time.

During the hearing, no suggestion was made by either the Judges Association or the Minister that any changes be contemplated to the pension plan as it currently exists.

As the pension plan is a very significant part of the overall remuneration for a judge, the interest of the Commission in this matter is to review the current status of the plan to see if there has been any appreciable shift in the value of the benefit in comparison with other plans in the country.

The current pension plan for the Provincial Court judges is a defined benefit plan, which guarantees a predetermined pension on retirement. The amount of the annual pension is roughly calculated as the judge's final three years' average income times a percentage that is equal to the accrual rate times the number of years of service, with escalation for future inflation. The current accrual rate is 3%. Judges are currently contributing 8% of their salary annually to the pension fund. The Provincial Court Judges' Pension Act describes the plan and amount to be contributed to the pension fund. The government's annual cost to support the judges' pension plan is estimated to be 32% of salary.

## **Representation Costs**

Representation costs are those costs incurred by Judges Association in legal (representation) fees and expert witness fees to make submissions to the Commission. The legislation setting up the Commission inquiry process requires the participation of the judges. In nearly all other Canadian jurisdictions the governments provide some level of funding to judges. The Judges Association feels that the Commission has the jurisdiction to recommend payment of costs and has asked the Province to cover 100% of the costs, with the total to be taxed by the Commission, if requested by the Province.

The initial position of the Minister was that there is no requirement for the Province to cover the costs of the Judges Association. However this position was amended by the Minister's third submission of December 2014, wherein the Province indicated it was prepared to consider covering general representation costs on terms similar to what was provided for by the 2008 Commission, which was 50% of the representation costs and disbursements up to \$30,000. In addition, given the substantial change in position by the Province with regard to pension change, the Province agreed that the Judges Association should be reimbursed for reasonable actuarial costs it incurred in order to respond to the Province's July 2014 submission on pension change. The Province requested an estimate of representation costs, including actuarial costs, from the Judges Association for consideration of how much of those costs can be reasonably be covered by the Province. While the Commission believes that the estimate requested has been provided to the Minister, to date the Commission is not aware of the specific total that the Minister is proposing to pay. The Minister continues to contend that the Commission does not have authority to recommend any payment of Representation Costs.

## **V. COMMISSION CONSIDERATION OF THE ISSUES**

As noted above, the Commission is obliged to inquire into salaries, adequacy of pension, vacation and sick leave benefits and any other proposed changes to remuneration conditions of judges.

### **Salaries**

The previous Commission reported in February 2010 for the period from April 2008 to March 2011. In its report it recommended an April 2008 salary for judges of \$199,700, and \$204,700 per year effective April 1, 2009. The Commission further recommended that a judge's base salary remain at \$204,700 for the 2010-2011 and 2011-2012 fiscal years in keeping with a general two wage freeze program initiated by the Province. This Commission, by the time it reports, will be over three years in arrears in making a recommendation for the April 2012 salary level for judges. This means that judges will have received no increase for just over 6 years.

#### **1. Considering Inflation**

The Act requires the Commission to review judicial salaries considering five factors, the first of which is, as stated in section 22.03(6)(a), "having regard to the cost of living or changes in real per capita income".

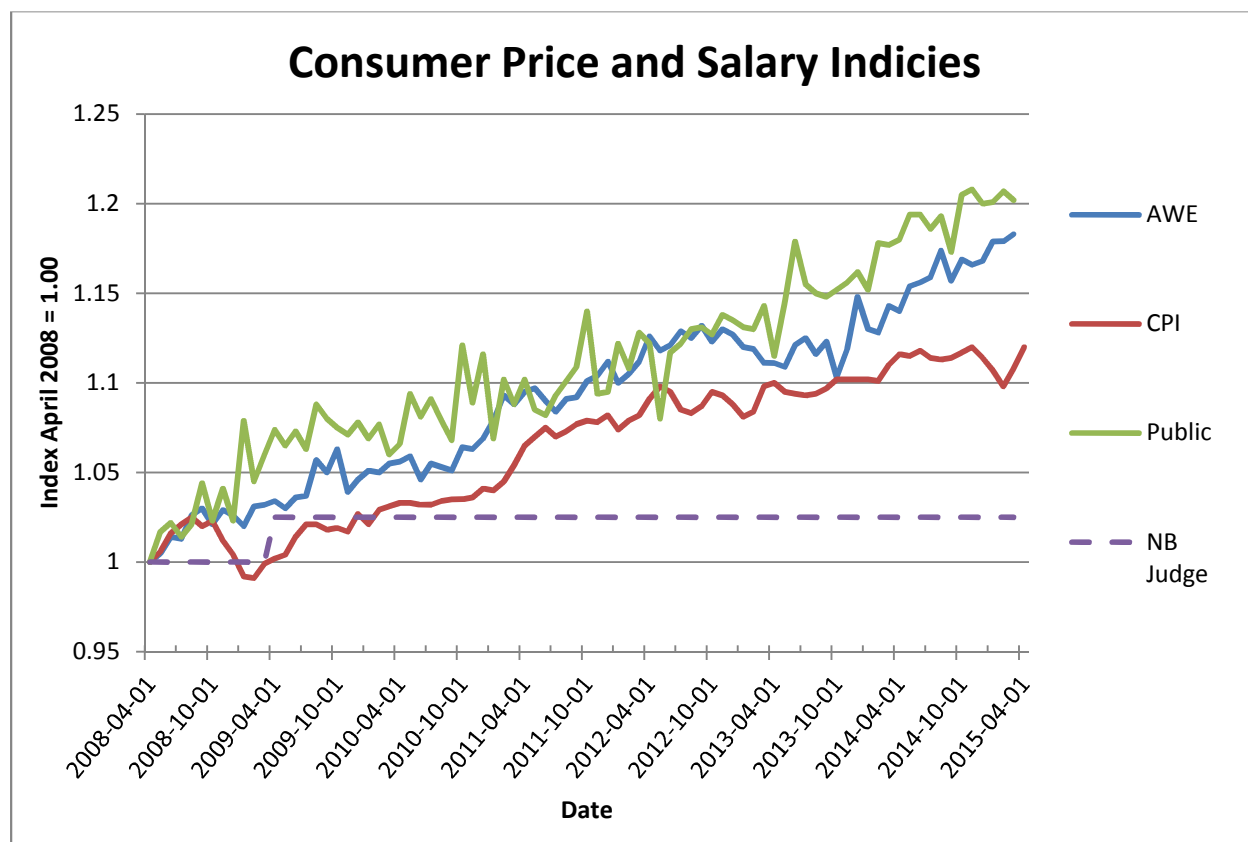
There are indicies provided by Statistics Canada that provide guidance on determining inflationary increases.

The CPI is a well-known index used to compensate for inflation in many wage and pension agreements. While the CPI is not exactly a "cost of living index", it is one of the tools the Commission has to work with.

Increases in real per capita income can be measured more definitively. Statistics Canada provides the AWE, which measures the average weekly earnings for all employees in New Brunswick. This appears as the blue line in Chart A. A subset of that index measures the average weekly earnings of all Public Administration employees in New Brunswick (federal, provincial and municipal). This appears as the green line in Chart A.

Chart A shows the relative increases in each of these indicies, since April 2008 compared to changes in a provincial court judge's salary.

**Chart A: AWE - Average Weekly Earnings for New Brunswick ; CPI - Consumer Price Index for New Brunswick; Public - AWE – Average Weekly Earnings for New Brunswick Public Administration employees; NB Judge – Salary (before this Commission recommendation). For all April 2008 = 1.00**



Judges' salaries have been considerably eroded by inflation, and are not close to the increase in the AWE in New Brunswick. By April 2015, judges' salaries have been eroded 16 % compared to the AWE, by 18% compared the AWE for public administration employees and by 10% compared to NB CPI.

Considering inflation, the Commission finds that the salaries of judges have fallen considerably behind, and on that factor an increase would appear to be warranted.

As will be illustrated below in Chart C, QB Judges and the average salary of other provincial court judges appear to have increased by inflationary amounts in the period 2008 to 2015.

## 2. Fairness to others paid out of the Consolidated Fund

A factor which the Commission is to consider is, as stated in section 22.03(6)(b), "economic fairness, including the remuneration of other persons paid out of the Consolidated Fund".

Government employees have traditionally received an ‘economic adjustment’, in April and October. In 2012 the economic increase was 2%.

In 2013, for a three-year period, the government implemented a new method of calculating the economic adjustment, being an increase on October 1<sup>st</sup> of 75% of the increase in real GDP for New Brunswick for the previous calendar year. The Minister has indicated that for management, non-bargaining employees and deputy ministers, this adjustment was 0% in October 2013, and 0% in October 2014, as real GDP was negative in 2012 and unchanged for 2013. The government has estimated a 0.8% increase in GDP for 2014 in its 2015-2016 economic outlook document released as published by the Department of Finance in March 2015. The Commission assumes that this would translate to a .6% (75% of .8%) economic adjustment effective October 1, 2015. In March 2015, the Royal Bank of Canada provincial forecast also predicts NB GDP growth for 2014 to be 0.8%.

The Commission notes that economic adjustments are not the only source of increases for government employees. Indeed, as was stated policy for the two year wage freeze effective April 1, 2009, “Annual merit increases, re-earnable increments, promotions and reclassification activities are not included in the wage freeze, and are to be dealt with as usual during the freeze period” (Deputy Minister, Office of Human Resources, March 17, 2009 Memo). Information received from the Minister in a supplemental submission dated October 3, 2014 to the Commission confirmed that this was the case. It was particularly noted that on April 1, 2008 there was an increase to senior group employees, pay bands 8-11 and the introduction of pay band 12. This was done to sync salaries with the public sector market, and the increases ranged from 3.4% to 5%. While this particular adjustment was made prior to the time period under consideration by the current Commission, it is relevant in that it demonstrates that it is often appropriate to make adjustments on the basis of factors other than economic circumstances, in this case to be competitive with labour markets generally. It was confirmed that annual merit increases and pay for performance lump sum amounts are awarded to employees on their anniversary date. The Commission does not have specific information from the Minister that clearly outlines what the specific percentage government employees’ salaries have increased due to these other factors. As noted, the Commission does have information from Statistics Canada as to the AWE increases in New Brunswick for public employees (see Table 1).

The Minister has indicated that bargaining public service lawyers received the following general economic salary increases: April 1, 2011 - 1%, October 1, 2011 – 1%, April 1, 2012 – 1%, October 1, 2012 – 1%. The last collective bargaining agreement expired on March 31, 2013. Management lawyers and non-bargaining lawyers are included in management and the non-bargaining group. Previously, after the wage freeze policy was announced, government lawyer positions were reclassified, which ultimately led to salary increases. Again, the Commission is unaware of how merit increases, re-earnable increments, or possible classification changes may have specifically affected this group, although there were no freeze on merit increases during this time.

Another fact that the Commission found relevant in evaluating this factor is the decision by the Province to change the civil service retirement allowance arrangement. Formerly, management and non-bargaining employees of the Province accumulated a retirement allowance over time which was

normally paid out at retirement. The Province made a change such that retirement allowances no longer accumulate, and employees were offered a payout in lieu of the allowance, or they could defer the accumulated amount until retirement. The Commission was informed by the Minister that 3,825 of the 4,500 employees affected chose an immediate payout in lieu of the allowance. This payment aggregated \$68.7 million, and represented a very significant cash payment to the affected employees, which directly enhanced their take home pay during the period of time under review.

Salaries of MLAs were reviewed by the MLA Compensation Review Commission and reported on in November 2007. Accepting the recommendations of the Review Commission, MLAs received a 3.5% increase in January 2008 and (after adjustment for allowances) a 3.93% increase in April 2008. MLA's salaries were subject to a wage freeze starting April 2009 and were to be indexed (using the IAI) beginning in January 2011 (Legislative Assembly Act section 25(1.1)). However, the government announced a continuation of the freeze for 2011 and 2012. MLAs are now subject to the 75% of GDP growth arrangement, and for the October 2013 adjustment received 0%. It has been reported that salaries of MLAs will be subject to an independent review later this year.

The Commission takes note of the recent announcement of the Premier and cabinet ministers taking a 15% and 10% cut respectively in the supplemental amount paid over their base MLA salary effective April 1, 2015.

Economic adjustments for salaried physicians and specialists were 0% for April 1, 2012 and 2013, 1% for each of April 1, 2014 and October 1, 2014, and 2% for April 1, 2015.

In the first submission, the Minister argued that judges should receive no increases for 2012 or 2013 due to the fact that there was no increase in GDP growth for calendar 2011 or 2012. Furthermore, adjustments of 75% of real GDP growth for calendar 2013 and 2014 would be applied effective October 1, 2014 and 2015, respectively. The Minister's position was that this approach would be in keeping with the treatment of others paid out of the public purse.

In the final submission of January 2015, the Minister argued a different approach, proposing no increases for 2012 through 2014, and an increase to 80% of the salary of a QB Judge effective April 1, 2015. In this proposal, the Minister abandons his first submission set out in the preceding paragraph, implicitly suggesting that the salaries of other judges, both federal and provincial, represents a very important factor.

The Commission finds that there is merit in recognizing that fairness to others paid out of the public purse is an important factor, and recognizes the need for the Province to show restraint in this regard. However, to suggest there should be no increase for judges over a span of six years is clearly inequitable considering that there have in fact been both economic and other increases to various other groups paid out of the public purse over this period of time. The Commission agrees with the argument inherent in the Minister's final submission that the financial condition of the Province is not the only factor that should be relevant in determining equitable salaries for judges. To suggest so is to imply that the other factors have no weight at all, which is clearly not the case. One very important link to consider is the increase in the wages of the average New Brunswicker, in the form of the AWE increase. While



economic increases may have been limited for government employees, the average wage in New Brunswick (which includes government employees), has risen steadily over this period of time. Indeed, the AWE subindex for provincial public employees in New Brunswick clearly shows that this measure has steadily increased during this period of time as well.

**Table 1 Survey of Employment, Payrolls and Hours (SEPH) (Stats Can 281-0027) New Brunswick AWE provincial public administration employees**

Year	Index	Annual increase
2008	925	
2009	1,006	8.8%
2010	1,019	1.3%
2011	1,062	4.2%
2012	1,065	0.3%
2013	1,012	3.4%
2014	1,130	2.6%

### 3. Comparison to Other Judiciary

The next factor which the Commission is to consider is, as stated in section 22.03(6)(a.1), “the remuneration of other members of the judiciary in Canada as well as factors which may justify the existence of differences between ...” those judges and the Provincial Court Judges.

The evidence provided to the Commission on salaries of other members of the judiciary in Canada is provided in Table 2 and illustrated in Chart B.

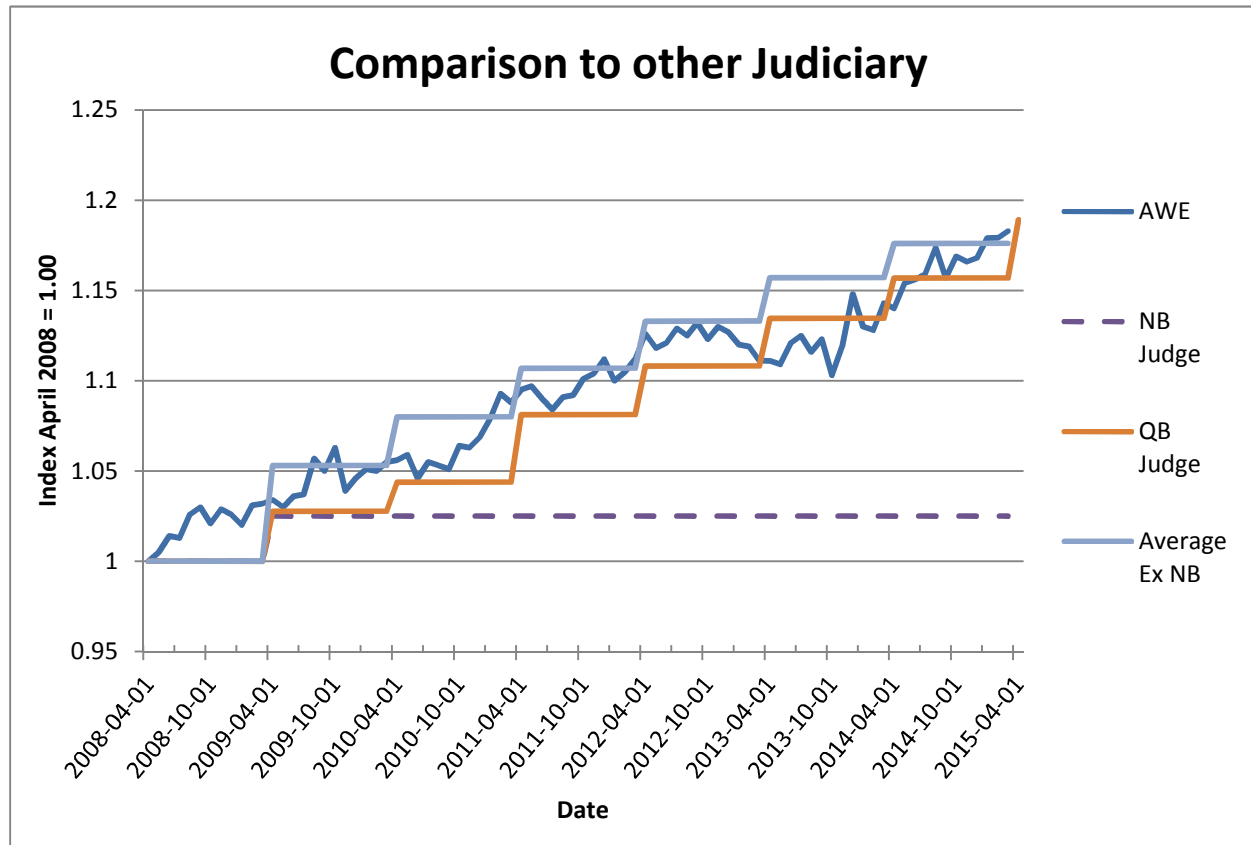
**Table 2: Historic analysis of judicial salaries by jurisdiction as at April 1 each year**

	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>
Province							
ON	242,007	248,057	252,274	262,113	267,355	274,574	279,791
BC	220,000	225,500	231,138	231,138	231,138	234,605	236,950
QC	224,211	221,270	225,737	227,488	230,723	236,722	238,379
SK	204,552	220,916	229,753	238,943	248,010	254,458	260,819
AB	220,000	250,000	255,000	257,500	263,731	263,731*	263,731*
PE	204,835	213,360	216,268	223,774	235,080	239,472	243,538
NS	197,000	202,910	207,577	214,000	216,183	222,993	231,500
MN	192,166	201,774	211,862	218,000	224,104	230,155	230,155*
NL	177,063	197,425	203,348	209,448	215,732	215,732*	215,732*
Average ex NB	209,093	220,135	225,884	231,378	236,895	241,382	244,511
NB	199,700	204,700	204,700	204,700	204,700**	204,700**	204,700**
NB Rank	7th	7th	9th	10th	10 <sup>th</sup>	10th	10th
Other jurisdictions							
YK	222,214	228,889	235,746	242,818	250,103	257,606	262,758
NWT	215,246	221,255	227,255	233,255	249,582	252,414	256,055
QB Judge	260,000	267,200	271,400	281,100	288,100	295,000	300,800

\* salaries are pending updates from commission reports and legislative approvals.

\*\*NB salaries prior to any adjustment arising from this report.

**Chart B: AWE - Average Weekly Earnings for New Brunswick; Federal Judge – QB Judge salary; Average EX NB – Average salary of provincial court excluding NB: NB Judge – Salary (before this Commission recommendation). For all April 2004 = 1.00**



Much reference has been made by the parties to a seventh place ranking for New Brunswick judges in comparison with other provinces. This concept had its seeds in the Minister's response to the 2004 Commission report, wherein he indicated that it would be appropriate for New Brunswick judges to be in 7<sup>th</sup> place nationally, that being a position consistent with the Province's overall fiscal and economic condition in comparison to other provinces at that time. However, the actual implementation of the minority report of that commission failed to actually accomplish that ranking.

The Minister's response to the 2004 Commission was litigated, eventually ending up at the New Brunswick Court of Appeal. In the Court of Appeal decision, Chief Justice Drapeau concluded (at paragraph 47):

The recommendations of the Majority Report set the Judges' base salary, on average over a four-year mandate of the 2004 Commission, in 7<sup>th</sup> place among the 10 provinces. The recommendations in the Minority Report place the Judges' base salary in last place nationally. In my view, the Government's overall approach – with a benchmark of a 7<sup>th</sup> place ranking –

complies with the test of rationality articulated in the *P. E. I. Reference* and refined in *Bodner*. However, its selection of the recommendations in the Minority Report to give effect to that commendable approach fails the test of rationality.

The Judges Association in its submission argue that the judges' salaries should be returned to 7<sup>th</sup> place nationally, as its contention is that the relative economic position of New Brunswick compared to the other provinces has not changed since the time that guideline was first suggested. The Judges Association commissioned Dr. Richard McGaw of the Department of Economics at the University of New Brunswick to prepare a report analyzing the salaries of judges in New Brunswick, including the economic situation of the Province. In his report, Dr. McGaw provided metrics indicating that the relative economic circumstances in New Brunswick have not changed appreciably since the placement of judges' salary in the 7<sup>th</sup> position.

The Minister, on the contrary, argued in his first and second submissions that conditions have in fact changed, and that New Brunswick is once again in the grips of a serious economic crisis, especially as measured by Gross Domestic Product (GDP). Since 2009, GDP growth in New Brunswick has shown the weakest performance among the provinces. In addition, the Minister stated that both GDP per capita and household income per capital rank 9<sup>th</sup> for 2012. For this reason, judges' salary should no longer be ranked as 7<sup>th</sup> in Canada.

The Commission did not find the Minister's submission persuasive, after considering its own comparison of New Brunswick's economic condition to that of other provinces, which follows in the next heading.

In his third and final submission, the Minister gives recognition to the previously established guideline of 7<sup>th</sup> place nationally, but contends that setting salaries prospectively to achieve a 7<sup>th</sup> place ranking is very difficult, essentially because it is not possible to know what future Commissions of other provinces will recommend in years to come. In this submission, the Minister recommends a salary set at 80% of that of a QB Judge, which would, in his estimation, result in a 6<sup>th</sup> or 7<sup>th</sup> place ranking.

The Commission finds that New Brunswick judges have clearly fallen to last place in the country. In fact, they are now almost 12% below the next lowest paid judges, and 17% below the average 2013/14 levels. On this factor alone, the Commission finds that an adjustment to judges' salaries is appropriate.

Another comparator which is relevant is the remuneration of a QB Judge. The salary of a puisne federal court judge is the same across the country, and is recommended by a federal commission with annual increases based on the Canadian Industrial Average Index. Historically, there has been a gap between the salary of a federally appointed judge and that of a provincial court judge in all the provinces and territories.

In his first submission, the Minister contended that comparison with the salaries of the Court of Queen's Bench is inappropriate. The Minister has continually submitted that federal judicial salaries are not relevant since they are set to satisfy conditions in major Canadian cities and do not represent economic conditions in New Brunswick. In his third submission, the Minister proposes to link the 2015-16 salary of a Provincial Court Judge to 80% of the salary of a QB Judge. Dr. McGraw, in his report, asserts that while

it might be argued that the level of salary is an inappropriate comparison, the relativity of salary between the Provincial Court and the Court of Queen's Bench is an appropriate comparison. The Commission agrees with this assertion in part, and finds that a comparison of the relative level of change in remuneration between the two benches over time to be a relevant factor to consider.

#### **4. Economic conditions, provincial ranking, and comparison to other provinces**

The fourth factor which the Commission is to consider is, as stated in section 22.03(6)(c), "the economic conditions of the Province".

The Minister contended in his submission that the global economic down turn in late 2008 and in 2009 has had a continuing effect on the New Brunswick economy, greater than for other provinces. This is particularly evident when using GDP measures. However no province in Canada was exempt from the downturn and all jurisdictions struggle with deficits, and continue to implement and search for economic stimulus programs to promote recovery. In New Brunswick, it is projected that significant fiscal deficits will continue to be realized and it has been forecast that it will take several years to return to balanced budgets. The financial outlook for New Brunswick, presented in the Budget, indicated the Department of Finance was forecasting real GDP growth of .8% for 2014. The Commission notes that since that forecast, actual GDP growth for New Brunswick has been measured by Statistics Canada as zero for 2014. The outlook for 2015 was considerably brighter with a 1.8% growth estimate, with an expectation that a stronger domestic economy in 2015 will be supported by an improvement in investment activity, led by capital spending by all levels of government and private sector investments. In addition, international trade and demand for provincial exports will be strengthened thanks to a weaker Canadian dollar. Forestry exports should post a healthy gain as US housing starts build momentum. New Brunswick's heavy dependence on energy exports will dampen some of this gain due to lower prices for refined oil products. With respect to the impact of lower prices for refined oil products, the Commission notes comments recently attributed to UNB economics professor David Murrell that while the export price for refined products may be lower, the value added in oil (as raw material is also imported at a lower price), is the same or higher, and that an increase in export volumes and value added may well result. The Commission was also presented with economic forecasts prepared by the Royal Canadian Bank forecasting real GDP growth to average 1.9 percent. The consensus was that economic conditions should start to improve.

To determine if there had been a significant change in New Brunswick's circumstance relative to the other provinces, the Commission examined a number of economic indicators compiled and published by the Royal Bank of Canada: Program expenses relative to GDP; Program expenses per capita; Net debt to GDP ratio; Net debt per capita. The Commission also reviewed the data supplied by the Minister, where most of the interprovincial comparisons were also derived from Royal Bank of Canada information.

The Commission also reviewed the economic data and the commentary presented by Dr. Richard McGaw in the report commissioned by the Judges Association. Measures included GDP per capita by province, real and nominal, household income per capita and average weekly earnings by province, among others.

It is clear from these measures that using simple GDP change from year to year, or even using GDP per capita as a sole economic indicator for determining salaries of judges for the years in question is not appropriate. A Provincial economy is a complex thing and several measurements are required to determine relative health and how that health changes over time.

In addition to those noted above, the Commission considered the following factors:

1. Real household disposable income per capital for NB ranked 9<sup>th</sup> in 2009, and 7<sup>th</sup> in 2013. (Stats Canada). This represented an improvement of 11% for this period of time.
2. Net debt per capita for NB ranked 5<sup>th</sup> in 2008-2009, and 6<sup>th</sup> in 2014. The latest Royal Bank of Canada projection for 2014-15 ranks NB 7<sup>th</sup>. It should be noted that the ranking of the range from 5<sup>th</sup> to 7<sup>th</sup> of this measure for most years is very tight. This is virtually unchanged.
3. In program expenses relative to GDP, NB ranks 9<sup>th</sup> in 2008-09, and 9<sup>th</sup> in 2013-14. Most provinces have changed very little over the years in comparison with each other on this measure.
4. In program expenses per capita, NB ranked 6<sup>th</sup> in 2008-09, and 5<sup>th</sup> in 2013-14. This is a slight improvement.
5. For New Brunswick average weekly earnings have changed from \$760.47 in 2010 to \$832.23 in 2014. This is an increase of 9.44% over this period of time, or 2.36% per year. In comparison with other provinces, New Brunswick ranked 8<sup>th</sup> in 2010, and 8<sup>th</sup> in 2014, unchanged. (Stats Canada)
6. For the ratio of debt charges to revenue, NB comes in 6<sup>th</sup> for 2013-14 at 8.53%, compared with 6<sup>th</sup> in 2008-09 at 8.32%.

For the years 2009-10 through 2014-15 the Commission concludes that by these measures New Brunswick's ranking compared to other Canadian provinces did not change appreciably. By the Commission's calculation New Brunswick consistently ranks seventh throughout those years.

**Table 3 NB Provincial Ranking by Selected Indicators – ranking amongst Canadian provinces reported by Royal Bank of Canada**

<b>NB Provincial Ranking by Selected Indicators</b>											
<b>Fiscal Years</b>											<b>Projected</b>
	<b>2004-05</b>	<b>2005-06</b>	<b>2006-07</b>	<b>2007-08</b>	<b>2008-09</b>	<b>2009-10</b>	<b>2010-11</b>	<b>2011-12</b>	<b>2012-13</b>	<b>2013-14</b>	<b>2014-15</b>
<b>Program expenses relative to GDP</b>	8	8	9	8	9	8	9	8	9	9	9
<b>Program expenses per capita</b>	7	7	7	7	6	6	5	5	5	5	6
<b>Net debt to GDP ratio</b>	6	6	6	6	7	5	6	6	6	6	8
<b>Net debt per capita</b>	4	4	4	5	5	6	6	6	6	6	7
<b>Average Rank by year</b>	6.3	6.3	6.5	6.5	6.8	6.3	6.5	6.3	6.5	6.5	7.5
<b>Four year rolling average</b>				6.4	6.5	6.5	6.5	6.4	6.4	6.4	6.7

This is not to say that New Brunswick does not find itself in challenging economic times, but it appears that all provinces share these challenges.

The Commission finds that considering the relative economic condition of the province, the seventh place ranking continues to be valid for 2012 through 2016.

## **5. Other factors**

The fifth factor which the Commission is to consider is, as stated in section 22.03(6)(d), “any other factors the Commission considers relevant to its review”.

Both the Minister and the Judges Association addressed whether judges’ salaries were sufficient to attract qualified candidates to the bench. The Judges Association presented survey information of major firms in New Brunswick that indicated taxable incomes for 2013 ranging from \$293,347 to \$307,906 depending on seniority range.

Judge Maher, speaking on behalf of the Canadian Association of Provincial Court Judges, identified the importance of the belief that there was a fair and adequate process in place to ensure just and timely preservation of an appropriate salary. He also commented that it is important for the salary to be set at a level that is sufficient to attract a broad range of talents and backgrounds as potential candidates to the pool. The pool of candidates should not be restricted to crown prosecutors or the criminal defense bar.

The Government submitted that there were, since the fall of 2011, ten candidates who rated “Highly Acceptable” and another 18 who rated “Acceptable” through the assessment and interview process. The Commission concluded that while there may be a number of qualified potential candidates for the bench, the Commission is mindful of Judge Maher’s comments and the need to be reasonably competitive with the private bar.

## **6. Conclusion and Recommendation**

Judges’ salaries have been considerably eroded by inflation. They have fallen considerably behind their counterparts in other jurisdictions, such that they are firmly in last place. Judges have not received an increase for just over six years. The Commission finds that an increase in salary to bring Judges back into a relative standing comparable to what has been the case in the past to be appropriate, considering all the factors. In the table below is a comparison of the submissions of the Judges Association, the Minister, and the recommendations of the Commission.



**Table 4 Comparison of Salary recommendation**

Salaries – Previous Review Period		% Inc.
2008	\$199,700	7.4%
2009	\$204,700	2.5%
2010	\$204,700	0.0%
2011	\$204,700	0.0%

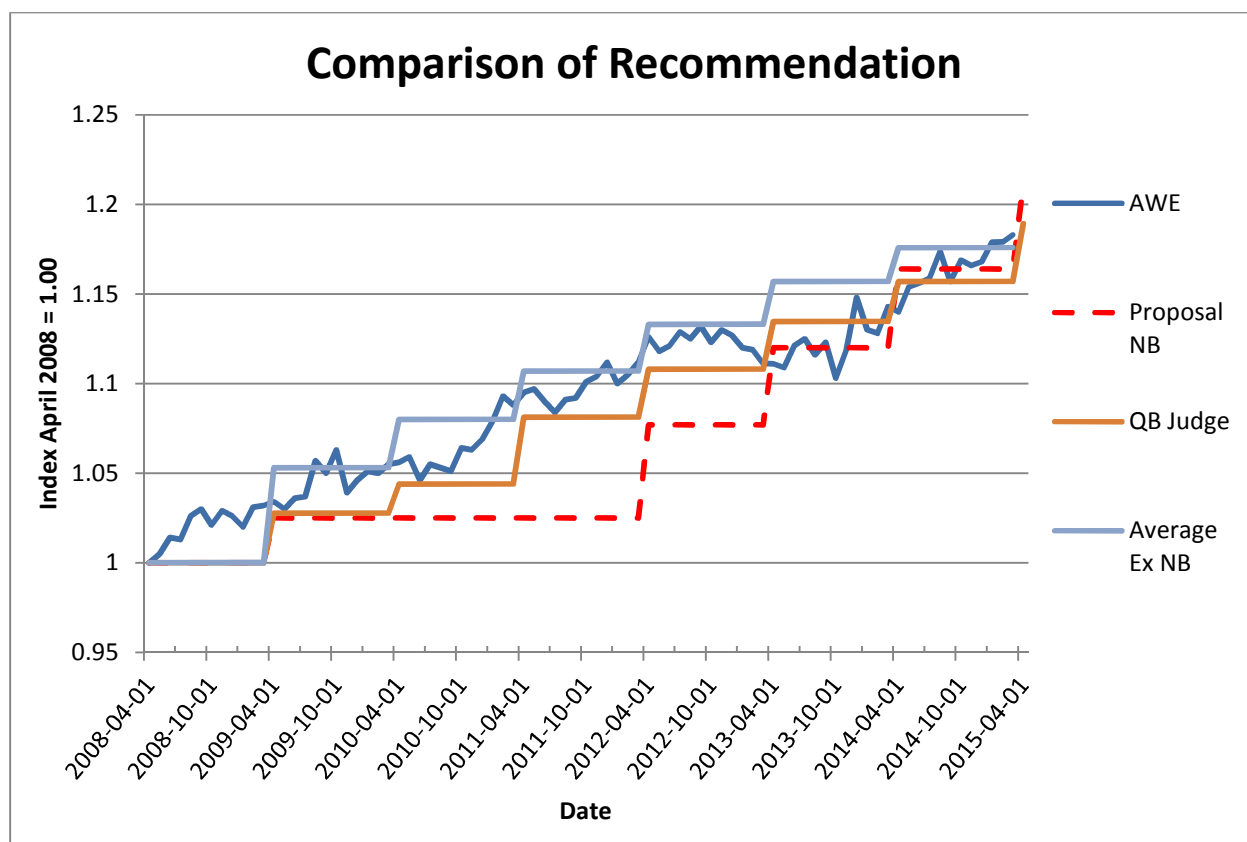
Table for Current Review Period - Recommendations							
Commission Recommendation				Judges Association		Province	
Year	Salary	% Inc.	Ranking	Salary	% Inc.	Salary	% Inc.
2012	\$215,000	5.0%	10 <sup>th</sup>	\$235,000	14.8%	\$204,700	0.0%
2013	\$223,600	4.0%	8 <sup>th</sup>	\$240,000	2.1%	\$204,700	0.0%
2014	\$232,500	4.0%	7 <sup>th</sup>	\$245,000	2.1%	\$204,700	0.0%
2015	\$241,800	4.0%		\$250,000	2.0%	\$247,000	20.7%
Average % Inc/Yr		4.5%			5.5%		5.2%
Overall % Increase.		18.1%			22.1%		20.7%

For 2014, this will rank New Brunswick judges 7<sup>th</sup> compared to their counterparts in other jurisdictions for that year. The Commission notes that Newfoundland and Labrador has not reported for the years 2013 and 2014. This ranking is consistent with past practice, the Minister's position in responding to the previous Commission report, his final submission to this Commission and the comments of the New Brunswick Court of Appeal. It is consistent with New Brunswick's economic condition compared to other provinces.

The Commission would like to note that it has used a 5% increase for 2012 to provide a very modest level of catch up, which is required as a result of the salary freeze for the immediately two preceding years and which resulted in New Brunswick's ranking falling to last place. The Commission has used a 4% increase for the other years, which is very close to the level of general increase as reported by the AWE index for NB provincial employees and for workers in New Brunswick generally. The recommendations bring New Brunswick judges back to the 7<sup>th</sup> place ranking, but do so gradually, reflecting the general economic situation in New Brunswick and general restraint. It also gradually shrinks modestly the gap between the salary of a Provincial Court Judge in New Brunswick and that of a QB judge to a level closer to the longer range historical gap to that position.

The Commission believes that it was able to apply a fair and equitable weighting to the prescribed factors in arriving at its conclusion and recommendation.

**Chart C: AWE - Average Weekly Earnings for New Brunswick; Federal Judge – QB Judge salary; Average EX NB – Average salary of provincial court excluding NB: Proposal NB – this Commission recommendation for salary of NB judge. For all April 2004 = 1.00**



**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.**

The 2004 Commission recommended that the Chief Judge and the Associate Chief Judge receive an additional salary of 8% and 4% respectively, of the judges' base salary. This differential was also recommended by the 2008 Commission. The Chief Judge did not make any representation for a change in the differential. The 2012 Commission considered reported changes in the differential for the chief judge in other jurisdictions and concluded there is no reason to deviate from this recommendation.

### **Pension Plan**

The pension plan for the judiciary is a very important part of the compensation package. The Commission believes it is one of the key draws for recruiting new judge candidates. Indeed, a good pension plan is essential, as most judges are appointed at later stages in their careers, when it would be

very difficult to sustain retirement planning at a level that would be considered satisfactory, particularly for candidates who had higher earnings (or potential) in private practice than would exist as a salaried judge. High earners in private practice often have the opportunity to utilize various corporate structures that are attractive from a tax efficiency point of view, and the continued use of these structures is not possible once appointed a judge.

As part of the 2008 Commission recommendations, some changes were made to enhance the pension plan for judges to bring it more in line with the benefits being enjoyed by other members of the judiciary in other provinces. These recommendations included an increase in the accrual rate from 2.75% to 3.0%, and an increase in the contribution required by judges from 7% to 8%. As the actual benefit when it is paid is based on years of service and final salary, there was no reason to differ in how the benefit is actually calculated from that of most jurisdictions. The actual benefit paid will be proportional to salary, which is set at an appropriate level in comparison to other jurisdictions over time. Therefore, the benefit will also be proportional to that of other jurisdictions over time.

As noted above, in April 2014, at the pre-hearing meeting with the Parties, the Minister's representatives indicated that the Province was planning to put forward proposals for significant change to the Judges' pension plan. After considerable correspondence and additional meetings as outlined in the "Proceedings" section of this report, the Province provided its second submission on December 19, 2014, in which it was confirmed that the proposal for pension change was being withdrawn.

However, as the pension plan is a very significant part of the overall remuneration package for judges, the Commission determined that it would be necessary to conduct at least a survey review of the adequacy of the current plan in comparison with other jurisdictions.

As was pointed out in the "Proceedings" section, a consultant was sought to assist with this process, but the funding of the rate was denied by the Minister. In the alternative, the assistance of the Minister was sought to obtain the necessary comparative information, which was provided.

It is worth noting that information was also provided during the earlier pre-hearing discussions and correspondence that indicated the Provincial Court Judges' Registered Pension Plan was not in deficit. The remainder of the Province's pension obligation is paid out of the Consolidated Fund of the Province.

As a summary of the pension benefit currently provided to judges, there are two pension plans: a) the 'old' plan applies to judges appointed before February 18, 2000; and b) the 'new' plan which is available to all judges. At the time of retirement, a judge eligible for benefits under the 'old' plan can select under which plan to receive benefits. On the recommendation of the previous Commission, the new plan now has a 3% accrued benefit rate (also referred to as accumulation rate) and an 8% member contribution rate.

The Commission was also provided with a "survey of Provincial and Family Court Judges' Benefits 2013" prepared by the Nova Scotia Pension Agency and a summary analysis of that report prepared by Morneau Shepell, prepared for the Minister at the Commission's request, which allowed the Commission to make comparisons.

**Table 5 Provincial and Family Court Judges' Benefits 2013 summary prepared by Morneau Shepell****Table 1A Key Pension Plan Features**

<b>Jurisdiction</b>	<b>PE</b>	<b>NB</b>	<b>QC*</b>	<b>AB</b>	<b>MB</b>	<b>SK</b>
Years Average Salary	3	3	3	3	3	3
Current benefit rate						
- first 15 years and attain age 65	3.00%	3.00%	3.00%	3.00%	3.00%	3.00%
- subsequent years	3.00%	3.00%	3.00%	3.00%	3.00%	3.00%
Maximum Pension	65%	65%	65%	70%	70%	70%
Contributions up to YMPE	8.09%	8.00%	7.00%	7.00%	7.50%****	5.00%
Contributions above YMPE	9.75%	8.00%	7.00%	7.00%	7.50%****	5.00%
Inflation Protection Base	CPI	CPI	CPI	100% of AB CPI	66.67% of CPI	75% of 1 <sup>st</sup> 5%, 50% of Excess

**Table 1B Key Pension Plan Features**

<b>Jurisdiction</b>	<b>BC</b>	<b>NT</b>	<b>YK</b>	<b>NL</b>	<b>NS**</b>	<b>ON</b>
Years Average Salary	3	3	2	1	3	1
Current benefit rate						
- first 15 years and attain age 65	3.00%	3.00%	3.00%	3.33%	3.50%	3.73%
- subsequent years	3.00%	3.00%	3.00%	3.33%	3.50%	1.00%
Maximum Pension	70%	70%	70%	66.66%	70%	n/a
Contributions up to YMPE	8.77%	6.00%	7.00%	9.00%	8.40%	7.00%
Contributions above YMPE	8.77%	6.00%	7.00%	9.00%	10.9%	7.00%
Inflation Protection Base	CPI***	CPI	CPI	60% of CPI (max. 1.2%)	75% of CPI	Same CPI increase as Public Sector Plan

\* QC has a minimum pension of 55% of three year average salary if the judge retires after having attained an age + service index of 80

\*\* NS benefit is integrated with CPP

\*\*\* CPI indexing in BC is contingent on a negotiated cost arrangement, but historically, plan increases have been 100% of CPI and we have assumed 100% of CPI in the future

\*\*\*\* Scheduled to increase to 8% of pay in 2015

The Commission's review of the New Brunswick Judges Pension Plan (new plan) in comparison with other jurisdictions indicated that, while in some respects at the low end of benefits provided, it is still competitive and appropriate in its current form, and no changes would be recommended.

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

### **Judicial Allowances**

Judicial allowances are a discretionary expense account that can be used to pay costs judges incur in performing their duties. The use of judicial allowances is common in most other jurisdictions. A judicial allowance for New Brunswick was first established as part of the 2008 Commission report. Allowable costs include attendance at judicial/legal conferences, professional association membership dues, computer equipment, software and training, and hearing or visual enhancement expenses not covered by health plans. The Chief Judge approves expenses from the allowance and the government administers the distributions and reporting. The allowance is currently set at \$2,500 per annum, and any underutilized portion in any given year can be carried forward to a maximum of \$7,500.

Judicial allowances have not been raised by either party as a matter for discussion, and as the Commission's review of the reported changes in other jurisdictions indicates that the limits and nature of expenses allowed are reasonable, the Commission concluded that there was no need to recommend any changes.

### **Benefit Plans**

Benefit plans have not been raised by either party as a matter for discussion. The previous Commission reviewed this subject in some detail, and as it felt the plan was comprehensive with the ability to cover certain items out of the judicial allowance, the current Commission concluded that there was no requirement to review in detail the subject as part of this report.

### **Life Insurance Benefits**

Life insurance was not an issue that was brought before the Commission by either party. It is the view of the Commission that no changes are required.

### **per diem Rate**

The Parties did not include in the submissions proposals on *per diem* payments referred to in sections 4.5(2) and 7.1(6) of the Act as requested by the Commission at the pre-hearing meeting. The Parties' responses on the matter were the subject of follow up questions and responses after the hearing.

There are two instances referred to in the Act when a judge is paid on a *per diem* basis. When a judge from another province is appointed on a temporary basis, section 4.5(2)(c) of the Act states that the judge is to be paid at a daily rate of 1/251 of a New Brunswick judge's salary. In Section 7.1(6) of the Act, a retired New Brunswick judge ("*per diem* Judge") may perform judicial duties and be paid at a daily rate of 1/251 of a judge's salary.

Section 7.1(3) of the Act places a fiscal limit on the use of *per diem* Judges at 5% of the total salaries of the twenty-six appointed judges. There are currently only two *per diem* Judges in New Brunswick.

Section 18.1(1) of the General Regulation 84-104 under the Act specifies that for a judge performing remand duties, a judge's daily salary is 1/220 of a judge's annual salary.

The 2004 Commission recommended that the *per diem* rate referred to in Section 7.1(6) be 1/220 of a judge's annual salary. The Minister rejected the recommendation and the matter formed part of the Judges Association appeal in the courts. The decision of the Court of Appeal did not refer to the *per diem* rate issue.

In other jurisdictions, the appropriate daily rate for a *per diem* Judge appears to be based on one of two views; the court's sitting days basis and a judge's sitting days basis. Notionally, the court's sitting days are 52 weeks times 5 days less 10 holidays equals 250 days. Corresponding, a judge's sitting days would be 250 days less 30 vacation days equals 220 days. The variance between 220 days and 207.5 days corresponds to the different holiday and vacation entitlements by jurisdiction.

In other provinces, 5 of 8 appear to use the 'judge's sitting days basis'. Of the 3 provinces that use the 'court's sitting days basis', the Commission notes that the 2012 Judicial Compensation Committee in Manitoba recommended the *per diem* rate be 1/218 but the recommendation was rejected by the legislature.

**Table 6 Comparison of provincial *per diem* rates**

Jurisdiction	<i>per diem</i> amount Factor of full salary
BC	Not applicable
AB	1/207.5
SK	1/220
MN	1/248
ON	1/209
QC	1/248
NB	1/251
NS	1/219
PE	1/220
NL	1/248
NWT	1/210

The Judges Association did not provide any comment on the *per diem* rate in its submissions and considered it inappropriate to respond to the Commission request after the hearing.

The Minister's response to the Commission request on the *per diem* rate contends that the New Brunswick *per diem* rate is adequate and consistent with compensation for such judges in other jurisdictions. Further, the Minister asserts that *per diem* Judges do not have an employer-employee relationship with the Crown and do not earn vacation credits.

Contrary to the Minister's submission, the Commission concludes that a *per diem* rate of 1/220 would be consistent with the majority of other provinces. The Commission further concludes that *per diem* Judges under section 7.1 of the Act have the same relationship with the Crown as do other sitting judges. Further, it is appropriate the one day's pay for a *per diem* Judge should be equivalent to a judge's daily salary for a sitting judge performing remand duty.

**The Commission recommends that *per diem* rates referred to in sections 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.**

### **Representation Costs**

The matter of Representation Costs was discussed at the pre-hearing meeting with representatives of the Judges Association and Province. The Province indicated at that time that it had no obligation to contribute to the Judges Association's cost of participating in the Commission process. The Judges Association indicated it would be seeking full coverage of its costs. The Minister has since indicated the Province would cover the Judges Association expert costs relating to the withdrawn pension proposals, and is willing to consider a contribution to other costs on a basis similar to what was done for the 2008 Commission, which was 50% of representational costs and disbursements up to \$30,000.

As set out in the Summary of Proceeding section of the report, the previous (2008) Commission had issued a decision that the matter of Representation Costs could be raised at the hearing.

The Judges Association has consistently maintained that the cost of participating in the Commission process is placing a financial burden on individual judges, especially in a small province such as New Brunswick with a limited number of judges to share the cost. The judges are mandated by the Act to prepare a submission to the Commission. The Judges Association also points out that most other jurisdictions have governments which do contribute significantly to the costs incurred by judges in the commission process. The Judges Association further point out that the Minister has contributed to the Judges Association costs to appear before previous Commissions.

The Minister has contended the issue of Representation Costs is outside the mandate of the Commission. To that end the Minister previously made a submission to the Commission with respect to its mandate that the guiding principle for the establishment of Judicial Remuneration Commissions were set out in the *PEI Reference* and *Bodner*. In neither case was it suggested by the Supreme Court of Canada that the costs of a Judges Association or any other party should be contributed to or paid for by government.

The Minister submitted that the jurisdiction of the Commission under the Act is limited to issues of remuneration such as salaries, pensions, vacation, sick leave benefits, etc. Representation costs incurred in the Commission process is not a matter of remuneration, according to the Minister. Finally, the Minister submitted that, based on case law, there is no responsibility on the government, regardless of past practice, to contribute to the costs of the Judges Association or any party wishing to appear and make representations to the Commission.

Evidence was presented that in the past funds were paid to the Judges Association in relation to its cost before previous Commissions. In 1998 the Province paid approximately \$10,000, in 2001 it paid something over \$10,000, in 2004 it paid \$20,000, and in 2008 it paid approximately 50% of costs to a maximum of \$30,000.



### 1. Jurisdiction to consider Representation Costs

The Commission notes that section 22.03(1)(a)(i) obliges the Commission to conduct an inquiry with respect to “the salaries and other amounts paid to the chief judge, the associate chief judge and judges”.

The Commission notes the same issue was considered by the British Columbia Commission. The BC Act refers to “all matters respecting remuneration and allowances and benefits to judges”. The BC commission concluded this was sufficient authority to make recommendations on costs. It notes that “the judiciary is the third branch of government, yet does not have the executive branch’s access to the government’s resources.”

In the Commission’s view, the wording “other amounts” is sufficient to include Representation Costs.

The Commission notes that the Judges Association is obliged to participate in the inquiry conducted by the Commission. This is implicit in the Commission’s obligation under section 22.03(4) to receive and consider submissions from, among others, judges or their representative. While in most of the judicial remuneration processes in Canada it is required that judges make submissions of some sort, there are regimes in five provinces (British Columbia, Saskatchewan, Manitoba, Nova Scotia and Newfoundland and Labrador) and in the federal process where participation of judges is not absolutely required. Since the judges are required to expend funds in a process designed to govern the determination of their remuneration, it is no stretch to conclude that representation costs are indeed directly a matter of remuneration.

The Commission reviewed practices across Canada regarding recommendation of payment of Representation Costs. With very rare exceptions, Representation Costs have been paid by government to some degree, either as a result of agreement between the judges and government or as a result of a recommendation from the relevant body making the compensation recommendation. This occurred even where judges’ participation was not required.

The courts have considered Representation Costs. In *Newfoundland Assn. of Provincial Court Judges v. Newfoundland* (1998), 160 D.L.R. (4th) 337 (Nfld. S.C.), Roberts, J. held that there was a constitutional obligation to pay the judges’ Representation Costs. This finding was overturned by the Newfoundland Court of Appeal, although it too noted the unfairness that would result from the judges not receiving some funding. Although the Supreme Court of Canada in *R. v. Campbell*, [1999] 2 S.C.R. 956 stated that the Court need not comment on the issue, the Court did say that the reasons of Roberts J. for government payment of Representation Costs may be appropriate.

The Commission also notes that the 2001 Commission, which submitted its report in April 2001, applauded the government’s proposal to pay 50% of the judges’ reasonable expenses in appearing before that Commission.

This Commission has concluded, as did the 2008 Commission, that it has jurisdiction to make a recommendation in respect of Representation Costs.

## 2. Funding Representation Costs

Of the other jurisdictions, only PEI does not fund in some manner all or a portion of the judiciaries' Representation Costs. There are little to no Representation Costs incurred or paid in PEI since, following recommendations of various commissions over the last twenty years, judges salaries there have been set at the average of provincial court salaries across Canada. In Quebec, different commissions have taken different approaches to the issue.

In the jurisdictions which do contribute to Representation Costs, the range of contribution varies from 50% to 100% of costs incurred. The average contribution rate is about 80%. One province, Manitoba, pays a percentage of incurred costs but has a maximum on its contribution. The lowest contribution rate occurs in Nova Scotia where a 50% contribution was determined by agreement of the parties.

The process for judicial remuneration commissions across the country is similar. Judges in each jurisdiction have similar tasks preparing submissions regardless of whether there are 250 judges or just 25 in the province.

If funding is not provided by the Minister as in the other provinces then the Representation Costs must be funded by the judges themselves. In a province like New Brunswick with its relatively small number of judges, the cost of participation could be much more of a burden compared to their counterparts.

The Judges Association has submitted that its Representation Costs for this Commission process are approximately \$118,000. Of this, \$79,200 is for counsel (\$16,000 of which is related to pension change proposals), \$10,732 is for the costs of the Richard McGaw report, and \$960 relates to the Feeney survey, and \$27,300 is for the pension consultant, Andre Sauve.

The Commission considers that it was essential for the judges to be a participant in this process. The participation of the judges and the Minister assisted the Commission in fulfilling its mandate. Significant additional costs were incurred by the Minister's initial inclusion of the pension change proposals which in the end were unnecessary due to the withdrawal of the proposals.

The Minister has offered to cover 100% of the costs relating to pension change, and consider general representation costs on the same basis as the prior Commission (50% of cost to maximum of \$30,000).

After reviewing practices in other provinces, and considering the specific circumstances of the current process, the Commission has concluded that the Minister should contribute to the Judges Association Representation Costs in the amount of 100% of the costs incurred related to pension change plus expert fees (McGaw and Feeney) and 75% of the other general representation costs. The Commission finds this recommendation to be comparable to the reimbursement of costs in other jurisdictions and computes this as follows:

**Table 7 Representation Costs**

Item	Pension Change Costs  At 100%	General Representation Costs  At 75%	Total
Stewart McKelvey Fees	\$16,230	\$62,968	\$79,198
McGaw Fees	\$10,732		\$10,732
Feeney Fees	\$960		\$960
André Sauve – Pension	\$27,314		\$27,314
Totals	\$55,236	\$62,968	\$118,204
Covered by Province	\$55,236	\$47,266	\$102,502
Covered by Judges	0	\$15,702	\$15,702

**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.**

## VII. SUMMARY OF RECOMMENDATIONS

The Commission recommends that:

1. 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;
2. no changes be made to the Provincial Court Judges Pension plan;
3. the *per diem* rates referred to in sections 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; and
4. 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.



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June 4, 2015