

REPORT
OF THE
2016 NEW BRUNSWICK
JUDICIAL REMUNERATION COMMISSION

February 2nd, 2018

Deloras M. O'Neill, Chair
Thomas G. O'Neil, Q.C. Commissioner
Vincent L. Duff, CPA, CA-CIRP (Ret'd)

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I. INTRODUCTION

The 2016 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 of the Provincial Court 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 2016 Commission were appointed by Order-in-Council dated November 7th, 2017 as noted below.

Chair	Deloras M. O’Neill Moncton, NB
Commissioner	Thomas G. O’Neil, Q.C. Saint John, NB
Commissioner	Vincent L. Duff, CPA, CA-CIRP (Ret’d) Hampton, NB

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.

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. Québec (Attorney General)*; *Minc v. Québec (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 sixth Judicial Remuneration Commission convened in New Brunswick. The fifth and most recent Commission reported for the period 2012 to 2016. The 2012 JRC recommended a 5% salary increase in 2012, to be followed by 4% increases each year thereafter which would have elevated the New Brunswick Judges' salaries to 7th in the country by 2014. The Province rejected this recommendation ultimately deciding that Judges' salaries would remain frozen at \$204,700 for 2012-2013 and through 2014-2015 and that effective April 1st, 2015 salary would be set at 80% of the Federally appointed Judges.

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").

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. For example, the 2004 Commission report and the Minister's response contain comments in some detail on the relative importance of each of the factors. The 2012 Commission also considered, at some length the issue of weighting the factors enumerated at section 22.03(6) of the Act. The 2012 Commission Report notes that the Province, at that time, advanced the position that "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 suggested that a "comparison with other judiciaries in Canada" was the most important factor for consideration.

The 2012 Commission ultimately found as follows on the issue:

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 endeavor to weigh the factors equitably, in the broadest sense, with an independent mindset.

The present Commission was not asked to embark upon its own analysis of whether the section 22.03 (6) factors are to be assigned relative weight. Nevertheless, it remains the task of this Commission to determine the appropriate weight it gives to each of the factors in formulating its recommendations. The legislation provides no indication of what the relative weighting of factors should be. Accordingly, this Commission proceeds in the manner set out above in the 2012 JRC Report.

II. SUMMARY OF PROCEEDINGS OF THE COMMISSION

By Notice of Appointment (*pursuant to Section 22.02(2)(c) of the Act*) dated September 13th, 2017 the Commission Chair was designated. A letter of acknowledgement of this designation was signed by the Minister on September 27th, 2017. Although the Order in Council appointing the Commission remained pending, the then designated Commission requested a preliminary meeting by conference call with both counsel to discuss procedural and administrative matters only. This meeting was held on **October 20th, 2017**. Representatives from both parties along with respective counsel were present.

During this meeting the designated Commission requested that counsel provide confirmation of the issues they intended to advance before the Commission in a timely fashion so that other procedural matters could be identified and sorted expeditiously. Counsel was advised that until the issues were identified, it would be impossible to determine the administrative needs of the process including whether the Commission would be required to retain legal counsel, whether expert testimony would be required, etc.

Counsel also agreed to a *prospective* time frame for the work of the Commission as follows:

- December 13th: Deadline for Submissions from Counsel
- December 19th and 20th: Public Hearing Dates

Following the October 20th conference call, counsel for the Judges, by way of correspondence dated November 6th, 2017 confirmed that the only substantive issue for their part would be that of salary, with the proviso that if the Province were to raise additional issues, the Judges reserved the right to do so as well.

On November 7th, 2017 the Order in Council appointing the Commission was signed by the Lieutenant-Governor in accordance with paragraph 22.02(2)(b) and 22.02(5.1) of the Act.

A second meeting by conference call was held on November 10th, 2017. The purpose of this meeting was to continue discussion on procedural matters and to request that both sides comply with the earlier request to define and submit their list of issues for the Commission.

Subsequently, by way of correspondence dated November 16th, 2017 counsel for the Province confirmed that it too would advance salary as the sole substantive issue for this Commission. In the same letter, the Province set out its intent to undertake a process to review of the sustainability of the Judges' pension plan by way of a joint committee to be struck sometime before the commencement of work by the next Judicial Remuneration Commission. Finally, the Province suggested some procedural agreements be adopted for the Hearing e.g. acceptance of certain documentary and statistical evidence be accepted without the need for testimony, where that may be appropriate.

The Commissions' response to the Province's correspondence was delivered on November 20th and is summarized as follows:

- The Commission confirmed the Province's agreement on salary as the sole issue
- The proposed review affecting sustainability of Judges' pension plan was not a matter for this Commission
- Procedural simplification would be considered on agreement from the parties

It is important to clarify that the parties' agreement was not limited to *identification* of salary as the sole issue for consideration by the Commission. The agreement extended to include consensus between the parties on the substance of the salary issue itself. By way of correspondence and written submissions, the Judges and the Province agreed that a salary set at 80% of the salaries of Federally Appointed Judges was appropriate and adequately addressed the factors to be considered under The Act.

The reality of this agreement impacted how the Commission was able to proceed in a number of ways including the following:

- Given the joint submission, the prospective timeframe whereby Public Hearings would take place on December 19th and 20th with submission deadline of December 13th was adopted and implemented;
- Neither the Commission or counsel found it necessary to retain or present expert witnesses or testimony

On November 28th, 2017, Public Notice of the hearing was duly published in the Telegraph-Journal, L'Acadie Nouvelle, the Times and Transcript and the Daily Gleaner.

On December 6th, the Commission received the written submission of the Judges Association

On December 11th, the Commission received the written submission of the Province.

On December 13th and 14th respectively, submissions were received from the Canadian Bar Association/NB Branch and the Law Society of New Brunswick. Both organizations indicated their intent to limit their submissions to written briefs and both indicated they would not appear for further submission at the hearings. As such, the Commission accepted their written briefs as presented.

On December 16th, correspondence on behalf of counsel for the Judges association and the Province was received advising that given their submissions revealed no dispute as to what the appropriate salary should be, neither intended to call evidence at the hearing. Both counsel consented to the admission as evidence of all data and facts contained in their respective submissions as if it were tendered *viva voce*. Counsel also indicated that they would arrange attendance of the individuals who contributed to the production of materials contained in the written submissions for the purpose of answering questions. The commission ultimately found the attendance of these individuals to be unnecessary.

On December 19th the public hearing commenced at Government Offices at 435 King Street in Fredericton. At the commencement of the hearing the following documents were tendered as Exhibits:

- Submission of the Provincial Court Judges dated December 6th: Exhibit “A”
- Submission of the Government of New Brunswick dated December 8th: Exhibit “B”
- Written Submission on behalf of the Law Society of New Brunswick: Exhibit “C”
- Written Submission on behalf of the CBA-NB Branch: Exhibit “D”
- Counsels consent regarding admission of all evidence, data and facts contained in their submissions are submitted to the JRC as if tendered *viva voce*: Exhibit “E”

The Provincial Court Judges Association of New Brunswick was represented by Clarence L. Bennett, Esq. and Sheila Lanctôt, Esq., Stewart McKelvey.

The Province of New Brunswick was represented by Denis G. Theriault, Esq., Office of the Attorney General of New Brunswick.

In attendance at the hearing were:

1. Chief Judge Jolène Richard
2. Associate Chief Judge Mary Jane Richards
3. Judge David Walker (Vice Chair-National Compensation Committee, Canadian Association of Provincial Court Judges)
4. Judge Julian Dickson
5. Janet McKenna, on behalf of the Province

No witnesses were called at the Hearing. Counsel made brief oral submissions and took questions from the panel.

In addition to the salary issue, Counsel for both parties addressed the following matters:

- Representation Costs/Potential costs associated with future retention of experts

The Public Hearing was adjourned before noon on the 19th of December and officially closed on January 2nd, 2017.

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.

2008 Commission Report

The 2008 Commission report made unanimous recommendations in a number of areas. The report was ultimately 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 seventh 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 that the Commission 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.

The 2012 Commission Report

Salaries

The 2012 Commission noted the annual salary of a judge of the Provincial Court had been \$204,700 per year since April 1, 2009. At that point, this salary placed Judges in New Brunswick in 7th 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 federal court judge.

The Judges Association submitted that since there had 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 7th place compared with their counterparts in the rest of Canada. Since April 1, 2011, the salaries of Judges in New Brunswick ranked last in Canada. As in the submission to the 2008 Commission, the Judges Association contended that the 7th 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.

In 2012, The Minister initially submitted with respect to the 7th place argument that circumstances had changed since the 2008 Commission reported and that a change from 7th place was justified. The Minister submitted that the Province's economic position had been deteriorating in comparison to other Provinces, rendering a 7th place ranking no longer the correct placement for the remuneration of New Brunswick Judges. The Minister also asserted that a judge's income based on the remuneration package then in place was both reasonable and competitive considering the cost of living and incomes of other high earners in New Brunswick.

At the 2012 hearing the Minister withdrew the submission outlined above 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 6th or 7th place ranking and that this would be a much simplified procedure to follow.

The 2012 Commission ultimately recommended a 5% increase in 2012 followed by 4% increases each year thereafter which would result in ranking New Brunswick Judges salaries 7th in the country by 2014. The Commission noted that its recommendations should gradually shrink, modestly, the salary gap between the Provincial and Federal Judges. The Province rejected those recommendations and decided that the salary for the Judges would remain frozen at \$204,700 for 2012-2013 and through 2014-2015 and that effective April 1st, 2015 their salary would be set at 80% of that of the Federal Judges.

Pension

In the first submission to the 2012 Commission the Province argued in favor 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.

It was noted that because the pension plan is a very significant part of the overall remuneration for a judge, the interest of the Commission in this matter was 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 2012 JRC noted 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 accrual rate is 3%. Judges currently contribute 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 argued that the Commission had jurisdiction to recommend payment of costs and 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 was 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 being 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 believed 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.

The Commission held that the wording of section 22.03(1)(a)(i) of the Act, *opening a inquiry with respect to salaries and other amounts paid to the Chief Judge, the Associate Chief Judge and Judges* was sufficient to include representation costs.

The Commission recommended that the Minister contribute to the Judges' Association representation costs in the amount of 100% of the costs related to the initial proposed pension changes along with 75% of general representation costs.

The Government rejected this recommendation. However the Province indicated it was willing to pay \$30,000 of the general representation costs. The 2012 JRC noted that New Brunswick has a relatively small number of Judges making the cost of participation in this process a greater burden compared to its' provincial counterparts.

IV. SUMMARY OF ISSUES BEFORE THE 2016 COMMISSION

Salaries

The annual salary of a judge of the Provincial Court in New Brunswick has been the equivalent of 80% of Federally Appointed Judges in Canada since April 1st, 2015. Prior to that adjustment salaries were frozen at \$204,700 from 2012.

Both the Province and the Judges agree that salaries set at 80% of the Federal Judges, with annual adjustment to match the percentage is adequate for the purposes of this Commissions four year mandate. This would keep the New Brunswick Judges at roughly 8th place among their provincial and territorial counterparts for 2016 and 2017.

As will be referenced throughout this report, both parties agree that their joint proposal on salary is appropriate taking into account all of the factors the Commission must consider in formulating it's report and recommendations as set out in the Act at section 22.03(6).

During the Public Hearing, counsel was asked to address the issue of whether interest should be applied to any amount of retroactive payment owed to the Judges as a result of salary adjustment dating back to April 1st, 2016. Neither party addressed the matter in written submission, nor was the Commission asked to consider interest as an issue. However, given the retroactive amounts remain outstanding, the Commission determined it should hear from the parties on the matter. Counsel, in consultation with their clients, took time to consider matter and in answer reported that there would be no claim for interest on retroactive payments.

Representation Costs

Representation costs are those costs incurred by the Judges Association in legal fees and possibly, if required disbursement and costs associated with such expenditures as expert witness fees in order to make submissions to the Commission. The legislation mandating the Commission inquiry process requires that Judges participate and it is generally accepted that meaningful participation requires legal representation. Previous Commissions have been asked to determine whether there is authority for the Commission to recommend payment of costs. However, neither party before this Commission calls into question the jurisdiction of the Commission to recommend contribution to the Judges' Representation Costs.

It is further noted that because salary is the only substantive issue before us, there has been no requirement on the part of the Judges to retain the services of an actuary or any other experts. Therefore, the submission with respect to costs is limited to legal fees.

V. 2016 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 June 2015 for the period from April 1st, 2012 to March 31st, 2016. In its report it recommended a 5% increase in 2012, and 4% increases each year thereafter which would rank New Brunswick Judge's salaries 7th in Canada by the year 2014. While this recommendation was not accepted by the Province, effective April 1st, 2015 the salary was set at 80% of the salary amount paid to Federal Judges. This amounted to an increase of almost 21% and a salary of \$256,880 providing 1.78% increase for 2016. Both the Province and the Provincial Court Judges' Association agree that salaries set at 80% of the salary of Federal Judges is adequate for the purposes of this Commission's 4 year mandate.

Factors to Consider

This Commission is required to consider the following factors listed in section 22.03(6) of the *Provincial Court Act*:

- 22.03(6) In making its report and recommendations, the Commission shall consider 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.

6. Considering the adequacy of Judges' remuneration having regard to the cost of living or changes in real per capita income.

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".

Cost of Living

The Consumer Price Index (CPI) is a well known index used as to compensate for inflation in wage and pension agreements. It is a helpful tool in determining the adequacy of judicial remuneration in relation to the cost of living or changes in real per capita income in New Brunswick. In terms of evidence on this point, the Commission has before it the following Statistics Canada data on the CPI demonstrating cost of living changes in this Province from 2012 to 2016.

Products and product groups 15	2012	2013	2014	2015	2016
All-items	122.0	123.0	124.8	125.4	128.2
Food	137.3	138.5	141.1	147.9	150.6
Shelter	125.8	126.8	129.2	129.5	131.7
Household operations, furnishings and equipment	113.3	115.8	118.1	120.2	123.8
Clothing and footwear	94.6	97.8	97.0	97.3	97.9
Transportation	122.6	123.1	124.6	119.6	122.2
Health and personal care	112.7	109.5	109.5	111.2	113.5
Recreation, education and reading	108.1	107.4	108.6	110.5	113.2
Alcoholic beverages and tobacco products	154.1	158.7	165.0	167.5	180.6
All-items excluding food	118.9	119.8	121.5	121.1	123.9
All-items excluding energy	117.3	118.4	120.1	122.5	125.9
Percentage Change (year-to-year)					
All-items	1.7	0.8	1.5	0.5	2.2
Food	3.4	0.9	1.9	4.8	1.8
Shelter	0.6	0.8	1.9	0.2	1.7
Household operations, furnishings and equipment	2.3	2.2	2.0	1.8	3.0
Clothing and footwear	-1.7	3.4	-0.8	0.3	0.6
Transportation	2.5	0.4	1.2	-4.0	2.2
Health and personal care	0.8	-2.8	0.0	1.6	2.1
Recreation, education and reading	0.2	-0.6	1.1	1.7	2.4

Alcoholic beverages and tobacco products	3.8	3.0	4.0	1.5	7.8
All-items excluding food	1.4	0.8	1.4	-0.3	2.3
All-items excluding energy	1.5	0.9	1.4	2.0	2.8

For the period covered by the Table above (2012-2016) there was a total increase in cost of living in New Brunswick of 6.7%. By April 1st, 2015 the judges' salaries were set at 80% of Court of Queen's Bench judges' salaries amounting to an increase of 21%. The Commission therefore finds that the joint position on salary, *submitted* by the parties herein, adequately addresses cost of living as a factor for consideration.

Changes in real *per capita* income

The 2012 Commission found that, by 2015 the salaries of Provincial Court Judges in New Brunswick had “been considerably eroded by inflation” and on that factor an increase in salary appeared to be warranted. By contrast, the current Commission has no evidence before it to indicate that there has been any change in real per capita income since the last reporting period. The below table shows income *per capita* per Province from 2006 to 2016 consistently placing New Brunswick in 8th place. Consequently, this Commission finds the joint position on salary accords with the intent of this factor.

		2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
1	Alberta	63,141	62,518	62,081	57,321	59,254	62,114	63,027	64,665	66,031	62,567	59,249
2	Saskatchewan	48,383	49,658	51,485	47,915	49,372	51,263	51,182	53,464	53,949	52,748	51,499
3	Newfoundland and Labrador	44,873	50,080	49,085	43,689	45,643	46,683	44,513	46,739	46,212	45,252	46,088
4	British Columbia	38,034	38,758	38,515	37,071	37,615	38,462	38,998	39,601	40,410	41,330	42,454
5	Ontario	40,568	40,574	40,201	38,598	39,324	39,882	39,956	40,117	40,809	41,486	42,037
6	Manitoba	33,929	34,614	35,628	35,254	35,761	36,268	36,867	37,450	37,563	37,944	38,268
7	Quebec	33,312	33,848	34,197	33,559	33,877	34,176	34,198	34,369	34,758	34,810	35,213
8	New Brunswick	32,508	32,786	32,970	32,348	32,861	32,821	32,441	32,384	32,394	33,148	33,582
9	Nova Scotia	30,175	30,676	31,261	31,276	32,020	32,109	31,810	31,818	32,085	32,401	32,531
10	Prince Edward Island	30,006	29,953	30,069	29,899	30,186	30,279	30,412	30,992	31,330	31,550	31,947

7. Economic fairness, including 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”. This requires the Commission to assess the salary of Provincial Court Judges in comparison with salaries paid to others from the public purse, or more specifically, out of the Consolidated Fund. The analysis is contextual in nature requiring consideration of factors such as the guarantee of judicial independence, impartiality and other means by which Judges are distinguished from other public servants.

Overall, economic fairness is to be considered in the broadest sense, giving due consideration to the remuneration of a wide variety of individuals and groups also paid from the public purse. The goal is to ensure Judges are paid adequately but at the same time are not seen to receive special treatment or enjoy immunity from factors affecting salary adjustments for other civil servants. The Province submits that it’s ability to grant wage increases to employees including those paid out of the consolidated fund is invariably linked, in policy terms to economic performance by the Province. In it’s written submission, the Province provides detail on current compensation trends for other employees paid out of the Consolidated fund as outlined below:

F.7 Salaries of non-bargaining public service lawyers range from \$45,188 to \$122,928(October 1, 2017). Management Lawyers range from \$113,100 to \$149,084 (October 1,2017). Both received a 1%increase in 2015, 2016 and 2017 and will receive an additional 1% in 2018.
Salaried Physicians
F.8 Salaries for general practitioners range from \$179,322 to \$195,754 (April 1, 2017). The group received a 1% increase in 2016 and 2017, and will receive 1% in 2018 and 2019. Salaries for certified physicians range from \$248,092 to \$274,170 (April 1, 2017). The group received a 1% increase in 2016 and 2017, and will receive 1% in 2018 and 2019.
Fee-for- service Physicians
F.9 Fee-for- service physicians received a 2% increase in 2014 and 2015; a 1% increase in 2016 and 2017 and will receive an additional 1% in 2018 and 2019. A new agreement was signed in August 2017.
F.10 The net average earnings for a physician earning fee-for- service as a general practitioner (who received more than \$60,000) during fiscal year 2016-2017 was\$239,838. The net average earnings for a physician earning fee-for- service as a specialist (who received more than \$60,000) was \$460,991. Fee-for- service physicians receive as part of their fee, compensation meant to cover overhead costs.
F.11 Recruitment and retention of physicians are significant issues in New Brunswick. As of October 2017, there are 38.5 available positions in New Brunswick for both fee-for-service and salaried physicians.

The Judge's submit that the Commission's role is to avoid the political nature of compensation decisions and therefore little emphasis should be placed on salaries paid to other public servants. Notwithstanding that argument, some evidence is provided by the Judges to assist in the comparative analysis. This consists of a summary of compensation amounts paid to provincial employees (other than Judges) in the Department of Health, Horizon Health Network, Investment Management Corporation, Vitalité Health Network and Service New Brunswick as illustrated in the following extract from the Provinces Blue Book (2016):

Salary Range	Number of Employees Paid at or over this amount
Over \$350,000	11
\$300,000 - \$349,999	51
\$250,000 - \$349,999	122
\$200,000 - \$249,999	60

This Commission finds that fairness to others paid out of the public purse is an important factor in our considerations. Previous Commissions have reported extensively under the "economic fairness" heading. As an example, the 2012 JRC was faced with competing arguments on the issue of salary increases which required consideration of substantial evidence. The current Commission is presented with a more streamlined approach given the parties have agreed on salary and related matters including annual salary adjustment.

Nevertheless, it remains the task of this Commission to conduct its own analysis of the 'economic fairness' factor in the context of the evidence before it in addition to the joint submission. In light of the data provided by the parties, and taking note of the additional submissions, the proposed resolution pertaining to Judge's salaries in no way departs from the statutory requirement pertaining to economic fairness set out at section 22.03(6) (b) of the Act.

3. Comparison to Other Members of the Judiciary s22.03(6) (a.1)

The next factor which the Commission is to consider 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 Commission is required to consider, comparatively the salaries of Provincial Court Judges across the country as well as Federal Judges. The Commission has before it a good deal of submission and evidence to allow a meaningful analysis of these comparisons.

With respect to Provincial Court Judges' salaries in other Provinces and territories, the following Table demonstrates an overview showing New Brunswick Judges ranking in 8th place as of 2015/16.

Puissina Judges Salaries Across Canada
June 2017

Jurisdiction	2005/ 06	2006/ 07	2007 08	2008/ 09	2009/ 10	2010/ 11	2011/ 12	2012/ 13	2013/ 14	2014/ 15	2015/ 16	2016/ 17	2017/ 18	2018/ 19	2019/ 20
Federal [1]	237,400	244,700		252,000	260,000	267,200	271,400	288,100	295,500	308,000	308,000	314,100	315,300	IAI	IAI
Ontario [6]	219,979	228,338		234,503	242,007	248,057	252,274	262,113	267,355	274,574	279,791	287,345	290,793	298,348	
Alberta [4]	220,000	220,000		220,000	220,000	250,000	259,000	267,500	267,731	273,000	279,825	288,621	293,991	2017 JCC	2017 JCC
Saskatchewan [5]	165,190	195,000		198,000	204,552	220,916	229,753	238,943	248,010	254,458	260,819	272,295	282,184	200848	2017 JCC
Yukon [12]	195,407	199,901		215,742	222,214	228,880	235,746	242,819	250,103	257,606	262,758	268,013	2016 JCC	2016 JCC	CPI + 1.5%
Northwest Territories	201,766	206,404		209,255	215,254	221,254	227,254	233,254	240,582	252,414	256,055	260,302	272,000	278,828	CPI + 1.5%
Prince Edward Island [10]	174,904	186,349		196,144	204,835	213,360	216,268	223,774	230,080	239,472	243,338	250,050	257,734	Net Average	
Manitoba	168,000	173,040		178,230	192,166	201,774	211,862	218,000	224,104	230,155	239,000	248,277	254,263	2017 JCC	2017 JCC
New Brunswick [8]	177,200	182,500		186,000	199,700	204,700	204,700	204,700	204,700	204,700	204,700	204,700	204,700	204,700	204,700
Quebec [7] (from July 1 to June 30)	210,954	217,533	217,533	217,533 + 3.198 for CPI	220,872 + 3.339 for CPI	221,270	225,737	227,468	230,723	236,722	238,779	241,955	250,000	251,600	CPI for PQ
British Columbia [2] [3]	161,250	198,000		202,356	220,000	225,500	231,138	231,138	231,138	242,464	246,650	249,504	244,112	273,000	277,095
Nova Scotia [9]	172,000	176,300		180,708	197,000	202,010	207,577	214,000	216,183	222,993	231,500	234,500	238,151	238,151	238,151
Newfoundland & Labrador [11]	165,230	188,535		173,591	177,063	197,425	203,348	209,448	215,732	215,732	215,732	215,732	215,732	215,732	215,732

All Salaries run from April 1 to March 31 in each fiscal year, except as noted for Quebec.

(1) Assumes IAI will continue for federally appointed judges, pursuant to section 25 of the Judges' Act.

(2) The British Columbia salary rates in red for 2014/15 to 2016/17 are as per the Government's Response to the 2013 JCC's Report

and are lower than the 2013 JCC's recommendations, which were as follows for the years 2014/15, 2015/16 and 2016/17 respectively: \$241,500, \$245,122, and \$250,024. The Government's response was quashed on judicial review and the matter was referred back to Government for reconsideration.

The Government appealed and the Court of Appeal also determined that the matter should be referred back to Government for reconsideration. That has yet to occur.

(3) The 2016 BC JCC Report was tabled, but the Government has yet to respond. The figures in blue are the recommended salaries.

(4) It is expected that the 2017 Alberta JCC will sit in late 2017 and make recommendations for the period April 1, 2017 to March 31, 2020.

(5) The next Saskatchewan JCC will be held in fall 2017, and will make recommendations for the period 2018/19 to 2020/21.

(6) No Ontario JCC has yet reported for the fiscal years commencing April 1, 2014 and following. Judicial salaries are adjusted annually based on the IAI, and those figures are shown in green. The figure shown for 2017 in *italics* is estimated based on IAI statistics but has not yet been confirmed. Salaries may change again once the 2014 JCC reports.

(7) The Quebec salaries are effective on July 1st of each year, not April 1st as in the other jurisdictions.

(8) The 2012 JCC recommended the following salaries: \$215,000 in 2012; \$223,600 in 2013; \$232,500 in 2014 and \$241,800 in 2015. The Government rejected that and froze salaries in 2012, 2013 and 2014, with an increase to 80% of the federal salary in 2015. The appointment process for the 2016 New Brunswick Judicial Remuneration Commission has commenced but no hearing dates have been set.

(9) The Nova Scotia figures shown in red are the salaries imposed by the Government, which rejected the 2017 Tribunal's salary recommendations. The Tribunal recommended \$240,021 for 2017 and increases based on the NS CPI over preceding calendar year in each of 2018 and 2019. An application for judicial review has been filed and the matter is expected to be heard in late 2017.

(10) In PEI, successive commissions have recommended that PEI judges should be paid a salary equal to the national average. The figure for 2017/18 has yet to be determined. The salaries are determined by averaging the salaries actually paid in each jurisdiction except Nunavut. The calculation is usually finalized in the fall for the preceding April 1st.

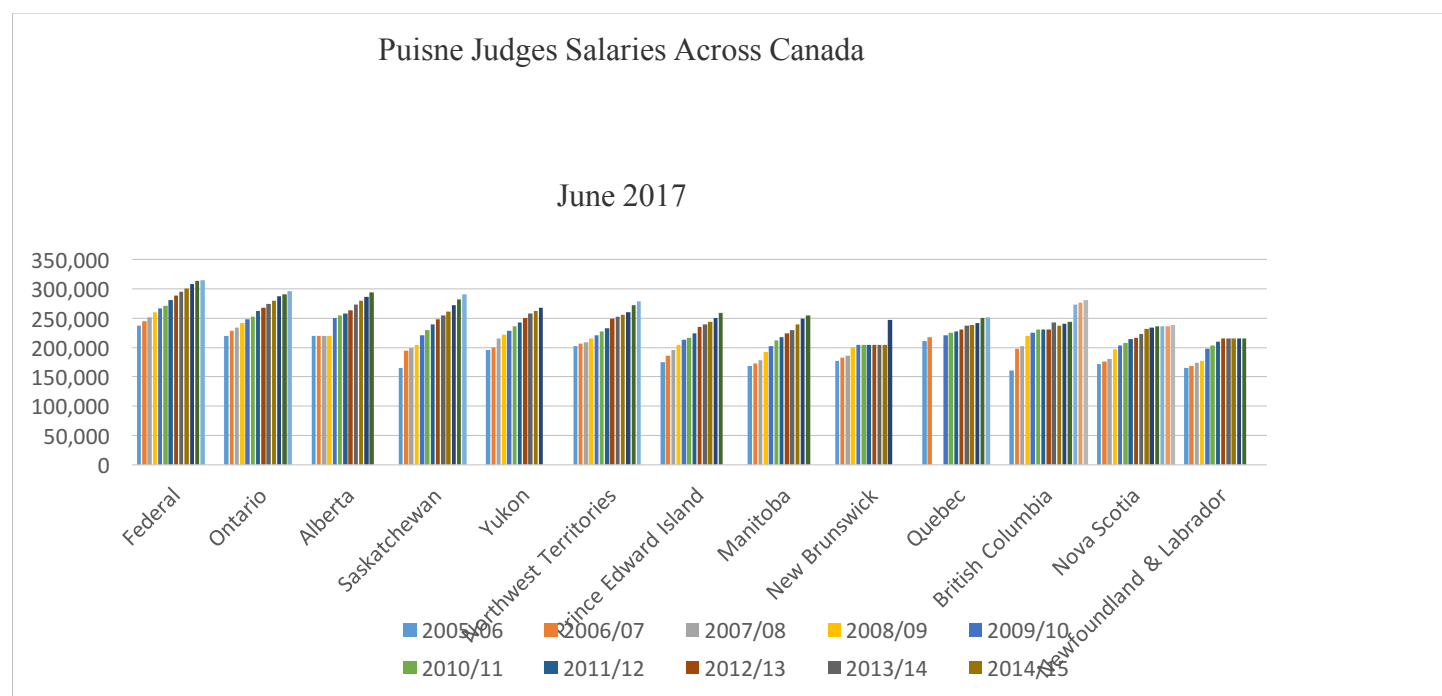
(11) The figures in red reflect the Government of NL's decision to reject the salary recommendations of the 2014 Wicks Tribunal and impose a four-year freeze on judicial salaries.

The Wicks Tribunal recommended the following salaries for 2013, 2014, 2015 and 2016: \$222,204; \$228,870; \$238,102; and \$247,546. An application for judicial review was heard by Mr. Justice Easor in early December 2016 and the decision is pending.

(12) The Yukon JCC for 2016 has been appointed but has not yet conducted its hearings.

The Table above also shows salaries paid to federally appointed Judges. The following presents the comparative data in graph form as of June 2017.

Graph of Salaries for Provincial Court Judges



In their submissions both parties address the idea of *ranking* for New Brunswick Judges in comparison with other Provinces.

- E.13 The New Brunswick Court of Appeal and past JRCs have recognized coming to a simplified method of determining judicial salaries is desirable. Chief Justice Drapeau, speaking for the Court of Appeal in 2009, strongly supported that objective:

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

- E.14 Further on the issue of simplified process, the Chief Justice also stated that placing the Judges at 7th place "contains seeds of a simplified process: and "it offers a framework that carried great promise in reducing, if not eradicating, the troubling animosity that invariably accompanies the JRC process"
(p. 14 Province's Submission)

While recognizing the merits of the 7th place ranking approach, both parties submit that achieving this is very difficult. In support of this, the Province notes in its submission that with regard to JRC mandates across the country, there is no uniformity of time frames which results in various jurisdictions trying to find the appropriate ranking for themselves without, perhaps having all of the information required to do so. Also, the unique process utilized in PEI, for example, whereby salaries are set using the average of salaries from other jurisdictions further complicates the determination of correct ranking.

For its part, the Judges Association agrees, and along with the Province asserts that a formula based on 80% of the salary of a Federally Appointed Judge will likely achieve ranking of around 7th place. The below Table compare the salaries of Federal Judges to New Brunswick Provincial Court Judges from 2004 to 2017.

Year	QB Salary	NB Salary	Difference	Percentage
2004	\$232,300	\$159,599	\$72,701	68.70%
2005	\$237,400	\$172,000	\$65,400	72.45%
2006	\$244,700	\$177,200	\$67,500	72.42%
2007	\$252,000	\$182,500	\$69,500	72.42%
2008	\$260,000	\$199,700	\$60,300	76.81%
2009	\$267,200	\$204,700	\$62,500	76.61%
2010	\$271,400	\$204,700	\$66,700	75.42%
2011	\$281,100	\$204,700	\$76,400	72.82%
2012	\$288,100	\$204,700	\$83,400	71.05%
2013	\$295,500	\$204,700	\$90,800	69.27%
2014	\$300,800	\$204,700	\$96,100	68.05%
2015	\$308,600	\$246,880	\$61,720	80%
2016	\$314,100	\$251,280 (proposed)	\$62,820 (proposed)	80% (proposed)
2017	\$315,300	\$252,240 (proposed)	\$63,060 (proposed)	80% (proposed)

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

The Commission agrees that the relativity of salary between the Provincial Court and the Court of Queen's Bench in New Brunswick is an appropriate comparison. We further agree that the percentage approach (vis a vis Federal Judges salaries) as jointly submitted properly addresses the necessary comparison to other judges salaries.

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 Province does not specifically address this factor or suggest how the Commission should formulate its report or recommendation on economic conditions. It does provide an Appendix entitled to its written submission entitled *Economic/Fiscal Information*. The Appendix provides detailed economic data from which one may draw informed conclusions about the economic state of the Province and its ranking amongst other Provinces. Notably, the Province reports that the New Brunswick economy has shown improvement in recent years, including for the period covered by the term of this Commission to date. To illustrate the matter, data is provided at page 4 of the *Appendix* which shows total growth in the provincial economy before 2015 as the weakest in the country. Economic growth in the Province took a turn, it would appear in 2015 as demonstrated by the Statistics Canada Table below demonstrating that in 2015 the economic growth ranking for New Brunswick had risen to 3rd place.

Real GDP Growth (%)					
Geography	2014	2015	2016	Average 2014-2016	Rank
Canada	2.9	1.0	1.4	1.8	
Newfoundland and Labrador	-0.9	-1.7	1.9	-0.2	9
Prince Edward Island	0.3	1.3	2.3	1.3	5
Nova Scotia	1.1	1.4	0.8	1.1	7
New Brunswick	0.1	2.4	1.2	1.2	6
Quebec	1.8	1.0	1.4	1.4	4
Ontario	2.7	2.9	2.6	2.7	2
Manitoba	2.1	1.3	2.2	1.9	3
Saskatchewan	2.1	-1.0	-0.5	0.2	8
Alberta	6.2	-3.7	-3.7	-0.4	10
British Columbia	3.7	3.5	3.5	3.6	1

Source: Statistics Canada, table 384-0038

According to its most recent fiscal update, (p. 25 *Appendix*), the Province has reduced its deficit forecast, by more than \$56m and reports that “all forecasters, including the Department of Finance have revised their 2017 forecasts for New Brunswick **upwards** (*emphasis added*).”

The Commission must also consider whether there has been a significant change in New Brunswick’s circumstance relative to the other Provinces. Much of the evidence on inter-provincial comparison is derived from Statistics Canada. A number of economic indicators were considered including Real GDP Growth, by Province (2016), Real GDP per capita and Household Income-Canada and Provinces (2016).

According to the Provincial budget for 2017-18, the following is relevant:

- Since 2015 there has been continued improvement on the budgeted deficit
- The provincial economy is expected to show continued growth in 2017
- Private Sector forecasters have increased real GDP forecasts up to 1.4% up from the Province’s 2017 projection of 0.8%

According to the Royal Bank of Canada’s most recent report titled “*Provincial Fiscal Tables*” New Brunswick is projected to return to a balance in its budget by fiscal 2020-21.

In its submission, the Judges also cite a number of Statistics Canada publications including:

- Program expenses relative to GDP (relative to individual governments)
- Program expenses per capita
- Net Debt to GDP ratios
- Net debt per capita

The Judges submit that, “overall economic conditions in the Province of New Brunswick remain relatively the same as they were at the time the 2012 Commission reported and there is a substantial probability of future growth”.

Based on their respective submissions, including the budgetary and other materials provided by the Province, it appears the Parties agree on the relative economic conditions in New Brunswick. Taking this apparent agreement into account and considering all of the materials provided and reviewed we find again that the joint proposal on salary properly reflects relative economic conditions in the province.

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

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

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”.

The commission was not specifically asked to consider additional or “other factors” specifically. However, we do note that there are aspects of the current salary configuration that are favorable above and beyond the actual payment figures. First, because salaries are now based on a percentage calculation of a Federal Judges salary, there is predictability with respect to both amounts and adjustments fixed annually. This affords a more workable formula and avoids some of the challenges that go along with adoption of a “ranking” system. Both counsel agreed that a “ranking” approach is problematic for various reasons including the lack of uniformity among the Provinces and Territories in conclusion of their remuneration reviews.

In addition, the Commission is mindful of the fact that remuneration is not limited to salary for Provincial Court Judges in New Brunswick. Prior Commissions have reported extensively on details of the remuneration package including judicial allowances, pension plan, vacation allotment, health and dental coverage and life insurance options (see summary of benefits outlined by the 2008 Commission p.8 of this report). As noted, this Commission was not called upon to review matters other than salary. However, the overall compensation and benefit allotment in itself is a factor for consideration in evaluating the appropriateness of the joint submission on salary.

The Commission includes consideration of these additional factors in making recommendations.

REPRESENTATION COSTS

i. Jurisdiction to consider Representation Costs

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.

We note the findings of the 2012 Commission on the matter of whether the JRC has jurisdiction to consider representation costs. In 2012, the Minister advanced the position that the Commission’s mandate was limited to issues of remuneration such as salaries, pensions, vacation, sick leave benefits, etc. and that costs incurred in the Commission process did not constitute remuneration as contemplated by the Act. The Commission rejected the Minister’s argument on the issue of jurisdiction noting the following factors: Section 22.03(4) of the Act provides the Judges Association is *obliged* to participate in the inquiry conducted by the Commission. Further, the 2012 Commission found that the wording of section 22.03(a)(i) of the Act, opening an inquiry with respect to “*the salaries and other amounts paid to the paid to the Chief Judge, The Associate Chief Judge and Judges*” was sufficient to include representation costs.

Neither party before this Commission raised the matter of our jurisdiction to consider representation costs. As a result, and taking into account the findings of the 2012 Commission we find the matter of jurisdiction to consider representation costs to be settled in the affirmative and we proceed on that basis.

ii. Funding Representation Costs

The Judges submit a number of factors for the Commission's consideration of representation costs. These include:

- The judiciary does not participate in this process by choice, rather it is mandated to do by the governing legislation;
- If the judges were required to fund their participation, absent contribution from the province individual remuneration would be negatively impacted;
- New Brunswick has a relatively small membership on the Provincial Court, yet the procedural and substantive nature of the Commission process here is of similar complexity to other larger and more populous provinces with correspondingly greater Provincial Court membership; and
- Unlike the Province, the judges do not have access to resources such as "in-house" counsel, civil service expertise available to assist in formulation and presentation of submissions to the Commission

During oral submission at the hearing, counsel for the Province cited the 2008 JRC recommendation of a 'formula' of sorts whereby contribution to the judges' representation costs would be based on 50% of those costs up to a maximum dollar figure of \$30,000.00. Further, Counsel was clear that this approach was not submitted as fixed formula here but rather, in these circumstances it's adoption would result in a fair contribution to representation costs incurred by the judges as per this JRC process.

At the same time, it was appropriately noted by counsel and accepted by the Commission that contribution levels across the country are wide ranging amongst provinces where contribution is made (PEI being the only province that does not contribute based on it's unique process).

The 2012 JRC found that the average contribution of provinces at that time was about 80%. That Commission recommended the Province pay 75% of the general representation costs or legal fees along with 100% of costs associated with pension change proposals and expert witness fees. In fact, the Province agreed to pay 100% of the costs associated with the proposed (later withdrawn) pension changes. The Province also reimbursed the judges' association for 100% of the reasonable actuarial costs it incurred in order to respond to the pension issue. However, the province ultimately rejected the recommendation that it pay 75% of the judges legal fees or general representation costs but agreed to contribute an amount of \$30,000.00 to those costs.

In formulating our recommendation on this point, the Commission has considered all of the submissions advanced by the parties as well as the findings and recommendations of past JRCs which examined the matter from a cross country perspective.

This Commission has no evidence before it to indicate that a shift has occurred in average contribution levels in other provinces since the 2012 Commission reported.

It is also clear that our ability to make recommendations on representation costs is discretionary in nature. In exercising this discretion each JRC must consider the particulars of the manner in which its particular process was conducted. This Commission notes, again that it was presented with a streamlined process where issues were simplified to the extent possible and in fact narrowed to one substantive issue – that of salary. Further, not only did the parties agree on issue identification, they also presented jointly on how the Commission would be asked to formulate its recommendations on the issue.

This allowed this JRC to conduct its mandate without the need for retention of Commission counsel or expert witness input. Likewise, the Judge's Association was able to proceed without having to hire experts. All of this amounts to considerable efficiency resulting in significant cost saving for the province.

Under the heading of Representation Costs, this Commission is left to consider the matter of general representation costs or legal fees reasonably incurred by the judge's association. Counsel for the judges noted at the hearing that legal fees would likely not exceed \$30,000.00 (although we note this is not presented as a firm figure).

The combination of considerations outlined above are particular to this JRC. It should be made clear that we do not propose to make a recommendation as to a strict formula for adoption in future. However, for this Commission period, we find it fair and equitable to recommend that the Province pay 100% of the judge's representation costs.

Potential Future Costs/Fees

We wish to comment briefly on ongoing matters. First, we note that by the Order in Council dated November 7th, 2017 the members of this Commission are appointed for a term of service to expire January 21st, 2021. This Commission will have jurisdiction for the next three and will be in place for the next set of hearings.

In preliminary meetings prior to the formal Hearing, the Province indicated that there may be some discussions over pensions to be dealt with at future hearings. It is the view of this Commission that any expert costs with respect to changes in pension benefits would be proper representation costs/fees and would be 100% reimbursable as expert fees. Also, since this can be a complex area which would be initiated by the province, it is the further view of this Commission that reasonable legal fees would also be 100% reimbursable. This is not a final recommendation on the issue, but it does reflect our current view on the matter. If either party wishes further direction, they may apply back to this panel for further direction during our term as Commissioners.

SUMMARY OF RECOMMENDATIONS

The Commission recommends that:

- 1. A provincial court judge's base annual salary continue to be set at 80% of the Federal Justices, adjusted annually commencing 2016, with continuation of all benefits now in place.**
- 2. The Minister pay 100% of the Judges's Association's general representation costs incurred to participate in this Commission process.**

In conclusion, the Commission wishes to thank Counsel and the parties for the manner in which these proceedings were conducted.

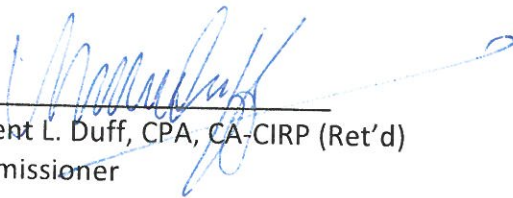
Dated at Moncton, New Brunswick this 2nd day of February, 2018



Deloras M. O'Neill
Chair



Thomas G. O'Neil, QC
Commissioner



Vincent L. Duff, CPA, CA-CIRP (Ret'd)
Commissioner