

REPORT
OF THE
2020-2024 NEW BRUNSWICK
JUDICIAL REMUNERATION COMMISSION

February 3, 2023

Deirdre L. Wade, K.C., Chair
Thomas G. O'Neil, K.C., Commissioner
Alan E. Craig, Commissioner

Contents

I.	INTRODUCTION.....	3
II.	SUMMARY OF THE PROCEEDINGS OF THE 2020-2024 COMMISSION	10
III.	POSITIONS OF THE PARTIES.....	13
IV.	THE FACTORS FOR CONSIDERATION	19
V.	ISSUES	21
	A. SALARIES	21
	B. PENSIONS.....	43
	C. JUDICIAL ALLOWANCE	57
	D. PER DIEM JUDGES	58
	E. REPRESENTATION COSTS	62
VI.	SUMMARY OF RECOMMENDATIONS	66

I - INTRODUCTION

The 2020-2024 Commission

1. The governing legislation for the 2020-2024 Judicial Remuneration Commission (the “Commission”) is the *Provincial Court Act*, S.N.B. c. P-21 Part II.1 sections 22.01 to 22.06 (the “Act”).
2. Section 22.02 of the *Act* governs the establishment of the Commission. Pursuant to subsection 22.02(2) the Commission shall consist of three members appointed by the Lieutenant Governor in Council.
3. One member is designated by the Minister of Justice (the “Minister”) and a second member is designated by the Chief Judge of the Provincial Court in consultation with the New Brunswick Provincial Court Judges Association.
4. These two members designate a third person, who shall sit as chair of the Commission (subsection 22.02(2)).
5. The Commissioners for the 2020-2024 Commission were appointed by Order-in-Council dated June 30, 2021 and were:

Chair:	Deirdre L. Wade, K.C., Saint John, NB
Commissioner:	Thomas G. O’Neil, K.C., Saint John, NB
Commissioner:	Alan E. Craig, St. George, NB

2020-2024 Commission’s Mandate

6. Subsection 22.02(1.2) mandates the Commission to inquire into the following matters:
 - (a) the salaries and amounts paid to the chief judge, the associate chief judge and judges;
 - (b) the adequacy of pension, vacation and sick leave benefits provided to judges; and
 - (c) any proposal that seeks to provide for or eliminate a measure that affects any aspect of the remuneration conditions of judges.
7. Pursuant to subsection 22.021(1) of the *Act*, the Commission shall submit a report containing its recommendations to the Minister within nine months after the date of the commencement of an inquiry.
8. Under subsection 22.03(4) the Commission shall receive and consider submissions from the Minister, the Judges or their representative and any other interested person or body.
9. Collectively and throughout this report, the Minister (or the Province of New Brunswick) and the Provincial Court Judges Association will be referred to as the “parties”.

10. The 2020-2024 Commission commenced its inquiry on May 30, 2022 at approximately the halfway point of the term of the Commission.

11. The inquiry proceeded over the course of four (4) days at the Delta Marriott Hotel in Saint John. The proceedings were recorded and transcribed by Lindsay Theriault of Port City Steno.

12. In making its report and recommendations to the Minister, subsection 22.021(6) of the Act mandates the Commission to consider the following factors:

- (a) the adequacy of judges' remuneration, having regard to the cost of living or changes in real per capita income;
- (b) 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;
- (c) economic fairness, including the remuneration of other persons paid out of the Consolidated Fund;
- (d) the economic conditions of the Province; and
- (e) any other factors the Commission considers relevant to its review.

13. The Commission is established to make recommendations during the term of its mandate. The term of the 2020-2024 Commission expires on January 1, 2024.

Commission Purpose and Background

14. The judiciary is the third branch of government separate from the executive branch and the Legislature.

15. The independence of the judiciary is vital to the proper functioning of democracy.

16. The principle of judicial independence has three components being security of tenure, financial security and administrative independence.

17. The Commission's role is a result of the significant constitutional obligation of governments to set compensation for judicial officers through an independent, objective and effective Commission process.

18. 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.

19. Because judges are paid from government revenues, decisions regarding their salaries and benefits must be made by the provincial Legislature.

20. The purpose of the Commission is to interpose a neutral body between the judges and government to de-politicize the process of determining judicial remuneration.

21. To avoid having the judges and the Minister engaged directly in compensation negotiations, both parties are provided an opportunity to make submissions to the Commission.

22. The Commission then considers these submissions and submits a report with recommendations to the Minister.

23. Upon receipt of the report of the Commission, subsection 22.021(3) of the *Act* requires the Minister to table the report in the Legislative Assembly within 90 days after it is submitted if the Legislative Assembly is sitting, or if the Legislative Assembly is not sitting, within 21 days after the commencement of its next sitting.

24. Pursuant to subsection 22.06(1) of the *Act*, the recommendations of the Commission may be accepted, in which case they shall be implemented with due diligence, or may be rejected in whole or in part, in which case the Minister shall advise the Commission and the Legislative Assembly as to the recommendations or the parts of the recommendations that are not being implemented.

25. The Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence In Impartiality of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Ekmecic; R. v. Wickman; Manitoba Provincial Judges Association v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3 (the "**PEI Reference Case**") and in *Provincial Court Judges Association of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges Association v. Ontario (Management Board); Bodner v. Alberta; Conférence Des Juges du Québec v. Québec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 S.C.C. 44 ("**Bodner**") provided guidelines for the functioning of commissions and their relationship to government.

26. The Commission is of the view that it is imperative to reiterate portions of the comments of the Supreme Court of Canada in **Bodner** as it pertains to the principle of judicial independence and the fundamental principles of the Commission process. Specifically, the Commission refers to paras. 14 to 18 and 21 to 27 of **Bodner**:

"(1) The Nature of the Compensation Commission and its Recommendations

[14] The *Reference* laid the groundwork to ensure that provincial court judges are independent from governments by precluding salary negotiations between them and avoiding any arbitrary interference with judges' remuneration. The Commission process is an "institutional sieve" (*Reference*, at paras. 170, 185 and 189) - a structural separation between the government and the judiciary. The process is neither adjudicative interest arbitration nor judicial decision-making. Its focus is on identifying the appropriate level of remuneration for the judicial office in question. All relevant issues must be addressed. The process is

flexible and its purpose is not simply to “update” the previous commission’s report. However, in the absence of reasons to the contrary, the starting point should be the date of the previous commission’s report.

[15] Each commission must make its assessment in its own context. However, this rule does not mean that each new compensation commission operates in a void, disregarding the work and recommendations of its predecessors. The reports of previous commissions and their outcomes form part of the background and context that a new commission committee should consider. A new commission may very well decide that, in the circumstances, its predecessors conducted a thorough review of judicial compensation and that, in the absence of demonstrated change, only minor adjustments are necessary. If on the other hand, it considers that previous reports failed to set compensation and benefits at the appropriate level due to particular circumstances, the new commission may legitimately go beyond the findings of the previous commission, and after a careful review, make its own recommendations on that basis.

[16] It is a constitutional requirement that commissions be independent, objective and effective. One requirement for independence is that commission members serve for a fixed term which may vary in length. Appointments to a commission are not entrusted exclusively to any one of the branches of government. The appointment process itself should be flexible. The commission's composition is legislated but it must be representative of the parties.

[17] The commission must objectively consider the submissions of all parties and any relevant factors identified in the enabling statute and regulations. Its recommendations must result from a fair and objective hearing. Its report must explain and justify its position.

[18] A number of criteria that must be met to ensure the effectiveness are identified in the *Reference*. Once the process has started, the commission must meet promptly and regularly. As well there must be no change in remuneration until the commission has made its report public and sent to the government. The commission's work must have a “meaningful effect” on the process of determining judicial remuneration (*Reference*, at para. 175). ...

[21] A commissions report is consultative. The government may turn it into something more. Unless the legislature provides that the report is binding, the government retains the power to depart from the commission’s recommendations as long as it justifies

its decision with rational reasons. These rational reasons must be included in the government's response to the commission's recommendations.

(2) The Government's Response to the Recommendation

[22] If the government departs from the commission's recommendations, the *Reference* requires that it respond to the recommendations.

Uncertainties about the nature and scope of the governments' responses are the cause of this litigation. Absent statutory provisions to the contrary, the power to determine judicial compensation belongs to government. That power, however, is not absolute.

[23] The commission's recommendations must be given weight. They have to be considered by the judiciary and the government. The government's response must be complete, must respond to the recommendations themselves and must not simply reiterate earlier submissions that were made to and substantively addressed by the commission. The emphasis at this stage is on what the commission has recommended.

[24] The response must be tailored to the commission's recommendations and must be "legitimate" (*Reference*, at paras. 180-83), which is what the law, fair dealing and respect for the process require. The government must respond to the commission's recommendations and give legitimate reasons for departing from them or varying them.

[25] The government can reject or vary the commission's recommendations, provided that legitimate reasons are given. Reasons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality. Legitimate reasons must be compatible with the common law and the Constitution. The government must deal with the issues at stake in good faith. Bald expressions of rejection or disapproval are inadequate. Instead, the reasons must show that the commission's recommendations have been taken into account and must be based on facts and sound reasoning. They must state in what respect and to what extent they depart from the recommendations, articulating the grounds for rejection or variation. The reasons should reveal a consideration of the judicial office and an intention to deal with it appropriately. They must preclude any suggestion of attempting to manipulate the judiciary. The reasons must reflect the underlying public interest in having a commission process,

being the depoliticalization of the remuneration process and the need to preserve judicial independence.

[26] The reasons must also rely upon a reasonable factual foundation. If different weights are given to relevant factors, this difference must be justified. Comparisons with public servants or with the private sector may be legitimate, but the use of a particular comparator must be explained. If a new fact or circumstance arises after the release of the commission's report, the government may rely on that fact or circumstance in its reasons for varying the commission's recommendations. It is also permissible for the government to analyze the impact of the recommendations and to verify the accuracy of the information in the commission's report.

[27] The government's reasons for departing from the commission's recommendations, and the factual foundations that underlie those reasons, must be clearly and fully stated in the government's response to the recommendations. If it is called upon to justify its decision in a court of law, the government may not advance reasons other than those mentioned in its response, though it may provide more detailed information with respect to the factual foundation. It has relied upon, as will be explained below."

27. The Supreme Court of Canada stresses 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.

28. 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 was the basis for the Court of Appeal's decision in *Provincial Court Judges Association et al. v. The Province of New Brunswick*, 2009 NBCA 56 (NBCA). Chief Justice Drapeau (as he then was) stated at para. 27:

"27... The government must justify any departure from the Commission's recommendations based on "rational" reasons, which must be set out in the response. The departure must be based "on facts and sound reasoning" (para. 25) and the reason invoked "must also rely upon a reasonable factual foundation" (para. 26). The reviewing court must look "at the soundness of the facts in relation to the position the government has adopted in its response" (para. 37) and show deference for the government's response (para. 40). The court must also look at "the totality of the process and of the response" (para. 38) in determining any application for review."

29. It is essential that the Commission process be seen as meaningful, credible and effective.

30. 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.

31. Throughout the Commission process both parties directed evidence and made submissions on the issue of attracting qualified candidates for appointment to the Provincial Court.

32. Candidates accept appointments to the Provincial Court on the good-faith understanding that their remuneration will be adjusted in accordance with a meaningful Commission 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 the remuneration for the role becomes uncompetitive. They must trust in a process that is fair to all concerned, and which ensures judicial independence.

33. This is the seventh Judicial Remuneration Commission established and convened in New Brunswick. The sixth and most recent Commission reported for the period 2016 to 2020. The 2016 JRC recommended that a Provincial Court Judge's base annual salary continue to be set at 80% of the salary of the federal justices, adjusted annually commencing in 2016, with the continuation of all benefits currently in place. The 2016 JRC recommended the Minister pay 100% of the Provincial Court Judges Association general representation costs incurred to participate in the Commission process.

34. The Province accepted these recommendations.

35. Previous Commissions were established in 1998 (reporting in respect of the years 1998 to 2001), 2001 (reporting for 2001-2004), 2004 (reporting for 2004-2008), 2008 (reporting for 2008-2012), 2012 (reporting for 2012-2016); and 2016 (reporting for 2016-2020).

36. There has been extensive litigation surrounding the Minister's responses to previous Commission recommendations, culminating in the 2005 Supreme Court of Canada decision in *Bodner* and the New Brunswick Court of Appeal case cited in para. 28.

37. It is important to note that the 2012 JRC recommended increases that would see New Brunswick judges earn salaries that rank them seventh in Canada by 2014. The 2012 JRC noted that subsequent recommendations should gradually shrink the gap between the provincial and federal benches.

38. The Province rejected the 2012 JRC's recommendations and decided that the salary for judges would remain frozen for 2012 through 2015 and that effective April 1, 2015 salary would be set at 80% of the salary of the federal Queen's Bench judges.

39. For the 2016 JRC, the Minister accepted and supported the recommendation of the Commission that a Provincial Court Judge's base annual salary continue to be set at 80% of the salary of the federal Queen's Bench judges, adjusted annually.

40. Pension issues were before the 2012 JRC. In its submission to the 2012 JRC the Province proposed significant pension changes. This proposal was withdrawn in December 2014 as part of a revised submission on behalf of the Province. At the time the Minister

indicated that the subject of pension changes might be re-introduced at some future point in time.

41. Pension issues were not before the 2016 JRC.

42. The seventh JRC was delayed in commencing its inquiry due in part to the provincial election in September 2020 and the Covid-19 pandemic.

II - SUMMARY OF THE PROCEEDINGS OF THE 2020-2024 COMMISSION

43. On June 30, 2021 the Order-in-Council appointing the 2020-2024 Commission was signed by the Lieutenant-Governor in accordance with the *Provincial Court Act*.

44. Public notice of the hearings of the 2020-2024 Commission was given via publication in newspapers in the Province together with the Royal Gazette indicating that the New Brunswick Judicial Remuneration Commission appointed pursuant to the *Provincial Court Act* would meet commencing at 9:30 a.m. on May 30 to June 3, 2022.

45. The Submission of the Government of New Brunswick to the Judicial Remuneration Commission was received by the Commission on November 12, 2021.

46. The Submission of the New Brunswick Provincial Court Judges' Association/ Association Des Juges de la Cour Provinciale du Nouveau-Brunswick to the 2020-2024 Judicial Remuneration Commission was received by the Commission on March 31, 2022.

47. A Reply Submission of the Province of New Brunswick to the 2020-2024 Judicial Remuneration Commission was received on May 13, 2022.

48. A written submission from the Law Society of New Brunswick was received by the Commission on May 18, 2022. The Law Society New Brunswick limited its submission to a written brief and did not appear for further submissions at the hearings.

49. In attendance at the commencement of the hearings on May 30, 2022 was the Honourable Judge John Maher of the Provincial Court of Alberta who requested the opportunity to make an oral submission on behalf of the Canadian Association of Provincial Court Judges (CAPCJ). This request was accepted by the Commission and Judge Maher proceeded with the oral presentation on behalf of the CAPCJ.

50. A written summary of Judge Maher's oral presentation was received by the Commission on June 2, 2022.

51. On May 30, 2012, the Commission's public hearings commenced.

52. The Province of New Brunswick was represented by Isabel Lavoie Daigle and Michael Hynes, Solicitors and Agents for the Attorney General of the Province of New Brunswick.

53. The Provincial Court Judges Association of New Brunswick was represented by Clarence L. Bennett and Mark Heighton of the law firm of Stewart McKelvey.

54. During the course of the hearing the following documents were marked as Exhibits:

#1 - Submission of the Government of New Brunswick to the Judicial Remuneration Commission dated November 12, 2021 with appendices and attachments. Appendix 1 is the Economic and Fiscal Submission to the JRC dated September 2021. Appendix 2 is the "Comparison of Existing Pension Plans and Proposed Reform Pension Plan." (2 pages) Attachments include a letter from Yves Plourde of Morneau Shepell to Natalie Kenny dated January 19, 2021 and a letter from Yves Plourde to Natalie Kenny dated January 20, 2021.

#2 - Submission of the New Brunswick Provincial Court Judges' Association to the Judicial Remuneration Commission dated March 31, 2022 with five appendices, including the expert report of Richard Saillant titled "An Analysis of New Brunswick's Fiscal Position", March 23, 2022, and expert report of André Sauvé entitled "Comparative Analysis of Judicial Pension Plans", March 2022, letter from André Sauvé dated March 3, 2022 regarding gross salary equivalency, a document titled "Total Compensation" and prepared by André Sauvé, and a per diem comparison.

#3 - Reply submission of the Province of New Brunswick to the 2020 Judicial Remuneration Commission dated May 13, 2022.

#4 - Submission on behalf of the Law Society of New Brunswick dated May 18, 2022 signed by Ms. Carley Parish, Q.C., President of the Law Society.

#5 - Document book of the Province of New Brunswick containing six documents and numbered sequentially from page 1 to page 66.

#6 - Document book of the Provincial Court judges containing eighteen documents and numbered sequentially from page 3 to page 737.

#7 - Document used by Amy Beswarick for her assessment of the eighty percent rate.

#8 - Median annual rates of return of pension plans for the last twelve years.

#9 - Life expectancy for the population of New Brunswick.

#10 - Actuarial Valuation as at April 1, 2019 for Funding Purposes, Report Prepared April 2020 (Morneau Shepell document).

#11 - C.D. Howe Institute Commentary "Trouble on the Bottom Line: Canada's Governments Must Produce More Reliable Budgets."

#12 - CV of André Sauvé.

#13 - "Comparative Analysis of Judicial Pension Plans" presented by André Sauvé.

#14 - CV of Richard Saillant.

#15 - Excerpts from the book Over the Cliff?: Acting Now to Avoid New Brunswick's Bankruptcy.

#16 - Letter from Denis Thériault, Senior Lawyer with Legal Services, Province of New Brunswick, to Ms. Deloras O'Neill dated November 16, 2017.

#17 - Letter from Clarence Bennett of Stewart McKelvey to the Office of the Attorney General, Legal Services, to the attention of Denis Thériault dated November 23, 2017 with attached email cover sheet.

#18 - Copy of an unsigned letter from Deloras O'Neill, Chair JRC, to Denis Thériault, Senior Lawyer, PNB Legal Services, dated November 20, 2017.

#19 - November 12, 2021 submission of the Government.

#20 - Appendix 2 amended to the Province of New Brunswick's submission of November 12, 2021.

#21 - Chapter 6 to Richard Saillant's book, Over the Cliff?: Acting Now to Avoid New Brunswick's Bankruptcy.

#22 - Document for judges' salaries across Canada from 2011 as at April 2022.

#23 - Text of presentation to the 2020 New Brunswick Judicial Remuneration Commission by Judge John Maher, May 30, 2022.

55. The following persons were called as witnesses:

1. Amy Beswarick - Executive Director of Total Compensation and Benefits (Unit) - Department of Finance and Treasury Board;
2. Leonard Lee-White - Retired Assistant Deputy Minister of Finance and Treasury Board;
3. Todd Selby - Economist - Department of Finance and Treasury Board;
4. André Sauvé - Actuary;
5. Richard Saillant - Economist and Public Policy Consultant;
6. Associate Chief Judge Brian McLean;
7. The Honourable Judge Julian A.G. Dickson;
8. The Honourable Judge Paul E. Duffie; and
9. The Honourable Judge Pierre W. Arseneault.

56. Others attending at the hearings included:

1. Chief Judge Marco R. Cloutier;
2. The Honourable Judge David C. Walker;
3. The Honourable Judge Mary Jane Richards;
4. The Honourable Judge Natalie H. LeBlanc;
5. Janet McKenna; and
6. Nathalie Kenny.

57. Legal counsel presented oral argument to the Commission on June 2, 2022 and took questions from the Commissioners. Thereafter, the parties both presented written summaries of their respective oral arguments to the Commission.

58. The Commission sought the approval of the Minister of Justice and Public Safety to retain an actuary to advise the Commission. Such approval was received on May 16, 2022.

59. The Commission did not retain the services of an actuary as the issues and evidence were presented by the parties in such a manner that the retention of an actuary to advise the Commission was felt to be unnecessary.

60. The public hearing was adjourned following oral arguments at the end of the day on June 2, 2022.

III - POSITIONS OF THE PARTIES

The Province of New Brunswick

61. The Province of New Brunswick asserted that the current level of salary for Provincial Court judges was very reasonable in the New Brunswick context. It was felt to be competitive for even the highest earners and adequate to attract highly qualified candidates.

62. The Province says that the Commission should place the present compensation package in the context of the prevailing economic conditions of the Province as well as the economic circumstances and reasonable expectations of the New Brunswick community. On this point the Province maintained that while comparisons between the compensation of the Provincial Court judges in New Brunswick and those of other Provincial Courts in Canada can be made, it is more appropriate to consider New Brunswick's economic situation.

63. The Province relied on the following in respect of New Brunswick's economic circumstances:

- a. In 2020, real GDP in New Brunswick contracted by 3.7%, the largest decline on record based on comparable data back to 1982.

- b. Economic growth will be supported by the vaccine rollout over much of 2021 and the gradual lifting of public health restrictions. However, the arrival of Covid-19 variants and the pace of the vaccine rollout may elevate uncertainty in the forecast, suggesting the provincial economy will not return to pre-pandemic levels until late 2022 or into 2023.
- c. Multi-year outlooks showed continued challenges in restoring balance to New Brunswick's finances, and provided important context for considering the best path forward once the economy is on a stable footing. (Source: 2021-22 Budget Speech)
- d. Revenue was projected to be \$289.7 million higher than budgeted largely attributable to one time federal funding and increased projections for provincial taxes. (Source: First quarter fiscal and economic update)
- e. Revenues were higher than budgeted by \$40.1 million attributable to an increase in federal transfers related to Covid-19 offsetting a decline in own source revenues. (Source: 2020-2021 Public Accounts)
- f. For the Province to significantly improve its fiscal situation, it will need to find a way to restrain spending, consider revenue increases or a combination of both in the future. (Source: Auditor General - 2019-2020 Public Accounts)

64. The Province asserted that a comparison between the salaries paid to Provincial Court judges in New Brunswick and the judges of the Court of King's Bench was not relevant based mainly on the fact that King's Bench judges are paid by the Federal Government and must be drawn from all jurisdictions in Canada.

65. The Province maintained that the actual monetary amounts of the present compensation package for Provincial Court judges were sufficient to preserve the role, dignity and quality of Provincial Court judges and to reflect the esteem that the office deserves.

66. The Province argued that the present compensation package for Provincial Court judges respects the principles of financial security and security of tenure.

67. The Province submitted that the JRC should make the following recommendations:

- 1. That a retroactive salary increase of 2% be provided effective April 1, 2020.
- 2. That a retroactive salary increase of 2% be provided effective April 1, 2021.
- 3. That an additional 2% increase be provided effective April 1st for each of the two (2) following years covered by the mandate of the 2020-2024 JRC.
- 4. That in order for the Judges' pension benefits to be sustainable, secure and affordable, the Judges' pension be reformed as follows:
 - i. The Judges join a pension plan based on a shared risk model registered under Part 2 of the *Pension Benefits Act*;

- ii. The Judges' accrual rate would be at 1.4% of salary up to YMPE and 2% for salary above the YMPE up to the *Income Tax Act* maximum (\$172,221 in 2020) and integrated with the CPP;
 - iii. Retirement benefits on the portion of earnings in excess of the income tax limit would be provided under a Supplemental Employee Retirement Program (SERP);
 - iv. The judges would contribute about 9% of their salary towards retirement benefits (combination of contributions to the pension plan based on a shared risk model and a Supplemental Employee Retirement Program (RCA);
 - v. Indexing of benefits would be conditional on the performance of the pension plan;
 - vi. Guarantee of base benefit already accrued but not future-based benefits;
 - vii. Calculation of base benefit on an enhanced career average; and
 - viii. Unreduced pension available at age 65 for the portion accrued after the date of the change.
5. Rates for per diem judges should remain unchanged.
 6. No changes to the judicial allowance.
 7. The Province accepts to pay 50% of the Association's general representation costs to a maximum amount of \$30,000.

The Provincial Court Judges' Association ("PCJA" or "the Association")

68. Overall PCJA submitted that the Province's submission would result in a reduction in total compensation to the judges of approximately 20%. With respect to salary, PCJA maintained that inflation was conservatively expected to increase by 17.4% over the course of the Commission's mandate with the Province proposing an increase of only 8% for salary over the Commission's mandate. The pension reform proposal would reduce the accrual rate from 3% to 2%, resulting in a reduction of pension value of 22.1% or \$58,326 per year. In order to compensate for that reduction, a judge retiring at age 65 would need to save on average an additional \$82,300 per annum.

69. PCJA argued that by failing to present any evidence to the Commission that answers the question of why such a dramatic proposal was necessary, the Province did not come before the Commission in good faith.

70. The Association asserted that the evidence presented by the Province should be considered wholly insufficient when considered in light of the mandate of the Commission and the criteria of the *Act*.

71. PCJA submitted that the Province committed to the 2012-2016 JRC that it would do the work necessary to consider changes to the judicial pension and that it failed to do so. Despite this commitment, PCJA maintains that the Province came before the 2020-2024 JRC with essentially the same contentious pension proposal that has been at issue for over a decade. PCJA argued that this was indicative of the Province's bad faith before the 2020-2024 Commission.

72. PCJA submitted that financial security is the concept that judges must be free and free from the appearance of economic manipulation by government and that judicial compensation must not fall so low that there exists a perception of susceptibility to political pressure through economic manipulation. Compensation is to be decided on objective criteria which are those factors codified in ss. 22.021(6) of the Act.

73. PCJA asserted that the Commission's mandate was engaged on two points, specifically the adequacy of the judicial pension and salary as reflected in ss. 22.02(1.2) of the Act.

74. With respect to ss. 22.02(1.2)(a) of the Act the PCJA reiterated that the proposed increase of 8% over the mandate of the JRC amounted to a salary reduction in real dollars and that the proposal mirrors a wage mandate for civil servants of the same amount, on the basis that judges ought to be treated the same as civil servants. PCJA maintained that the Province's evidence revealed that the wage mandate was tied to CPI and that the amount of 8% was based on outdated data. PCJA asserted that the real number was expected to be between 17% to 20%.

75. For ss. 22.02(1.2)(b) of the Act, the PCJA identified that the key question is whether the pension is adequate and not whether it is a defined benefit plan or a shared risk plan. PCJA submitted that given that the purpose of the Act is to properly compensate judges and to ensure judicial independence, the plain meaning of ss. 22.02(1.2) read harmoniously with this purpose, must be to ensure that the judicial pension alone is adequate to ensure financial security in retirement. PCJA argued that in order to be adequate, a pension needs to compensate for 70% to 80% of pre-retirement income and further the Province of New Brunswick pension proposal amounts to an average judge receiving only 40% pre-retirement income.

76. In regards to the criteria of ss. 22.021(6) of the Act, PCJA maintained:

- ss. 22.021(6)(a) - adequacy of remuneration, having regard to the cost of living or changes in real per capita income - if the salaries of judges are not increased to reflect the increasing cost of living, they are effectively reduced in real dollars because of a decrease in purchasing power. By failing to offer increases that keep pace with inflation, the Province has proposed a decrease in compensation.
- ss. 22.021(6)(b) - 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 - The Province's proposal would see New Brunswick judges become the most poorly compensated judges in the country by a significant margin. The judicial pension is equally as important as salary when setting remuneration and comparing it with judges in other provinces. In order to ensure financial security and promote

consistency in remuneration, Provincial Court judges' salary should continue to be linked with King's Bench salaries. The province advocated for this approach in the last two JRCs but departed from this precedent before the 2020-2024 Commission without presenting any legitimate basis for doing so. The pension is an equally important component of judicial compensation and in order to properly compare with other jurisdictions, pension must be factored in.

- ss. 22.021(6)(c) economic fairness, including the remuneration of other persons paid out of the Consolidated Fund - reducing the judicial pension does not achieve equality with others paid from the public purse, instead it target judges with a reduction in compensation that is not experienced by any other group in the civil service. The use of civil servants as a comparator group is necessarily limited. Other judges are the most appropriate comparator group. The Province's proposal would lead to unequal treatment and as such offends judicial independence. The Province are targeting judges with a pension reduction that disproportionately reduces their compensation vis-à-vis the rest of the public service.
- ss. 22.021(6)(d) - the economic conditions of the Province - the Province is in a significantly better economic position during the mandate of the 2020-2024 Commission than it was during the mandate of the 2016-2020 Commission and as such the ability to pay has improved. The JRC should focus on the economic conditions existing during its mandate and not engage in an exercise in fiscal forecasting. The PCJA submitted that since the ability to pay has improved, the Province can afford to increase the linkage of King's Bench judges' salary from 80% to 85%.
- ss. 22.021(6)(e) any other factors the Commission considers relevant to its review - the PCJA argues that the Province did not submit or adduce evidence of any other factors that are relevant to this review.

77. In addition to the issues engaging the Commission's mandate and the criteria of ss. 22.021(6) of the Act, the PCJA identified certain legal issues with the Province's compensation proposal including:

- The Board of Trustees system for a shared risk pension plan is unconstitutional citing *Newfoundland and Labrador Association of Provincial Court Judges v. Newfoundland and Labrador*, 2018 NLSC 140.
- Judges who have applied and have been successful in achieving appointment to the Provincial Court did so in reliance on the existence of the current judicial pension and the Province should be prevented from unilaterally withdrawing that benefit. Citing *Mackin v. NB*, 2022 SCC 13.
- The effect on recruitment and retention.
- The pension proposal reduces compensation below an acceptable level threatening the minimum guarantee of remuneration required to ensure financial security.

- Politicization of the process - the PCJA argues the Province's proposal is politically motivated and creates the unreasonable perception of political interference.

78. The Association submitted that the JRC should make the following recommendations:

1. Rejection of the Province's proposal for pension reform as it is unconstitutional and a challenge to judicial independence.
2. In the alternative, if the Commission accepts the premises pension reform proposal, then the Commission's decision on salary be deferred so that additional hearings can occur in order to determine the appropriate amount of substitute compensation.
3. Link Provincial Court judges' salaries to 85% of the federal King's Bench judges' salaries.
4. Per diem recommendations:
 - (a) Section 7.1(6) of the *Provincial Court Act* be amended to reflect an adjusted per diem rate of 1/220 of full-time salary in order to create a uniform rate;
 - (b) Per diem judges should have access to a judicial allowance of \$2,500.00 per year (subject to approval of the Chief Judge) to be used to purchase necessities such as updated Criminal Codes (yearly) and the replacement of judicial clothing as required;
 - (c) With the approval of the Chief Judge, per diem judges be entitled to attend a yearly educational conference and have all expenses covered to the same extent as full time judges; and
 - (d) Section 7.1(3) of the *Provincial Court Act* be amended to increase the yearly budget for per diem judges.
5. Increase the judicial allowance to \$5,000.00 per year. Cell phone expenses and costs of home security systems be reimbursed. The Chief Judge be given a budget from which to reimburse judges for the replacement of judicial attire.
6. Increase existing reimbursement rates of actual travel expenses beyond existing civil service kilometer rates of \$0.41 per kilometer.
7. The Provincial Court Judges' Association be reimbursed for 100% of its legal and expert costs.

79. With respect to representation costs, PCJA asserts that they are entitled to 100% reimbursement for their legal fees and disbursements. PCJA argues that the conduct of the Province during this Judicial Remuneration Commission and the scope of the issues before the Commission forced the Association to incur considerable legal expenses in order to properly respond. These costs are borne entirely by 20 to 30 individuals. The Provincial Court Judges' Association cites the 2012-2016 JRC Report where it was noted that in future

hearings involving changes in pension benefits expert and legal fees for the Association ought to be reimbursed at 100% (Exhibit 6, Tab 4, pp. 96-98).

IV - THE FACTORS FOR CONSIDERATION

80. Subsection 22.021(6) of the Act outlines the factors the Commission shall consider in making its report and recommendations.

81. The first factor is the adequacy of judges' remuneration, having regard to the cost of living or changes in real per capita income. Evidence presented in connection with this factor included known and projected inflation data.

82. Additionally, PCJA argued that ss. 22.021(6)(a) of the Act has been interpreted to require, at a minimum, salary increases that account for any cost-of-living increases citing para. 66 of *Provincial Court Judges' Association of New Brunswick v. New Brunswick (Minister of Justice)* (supra).

83. The second factor for consideration 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 judges and that of other members of the judiciary in Canada. The Commission was of the view that other members of the judiciary in Canada includes Provincial Court judges in other jurisdictions and federally appointed Judges.

84. It was noted that Provincial Remuneration Commissions do not follow a regular reporting schedule and Provincial governments require time to respond to 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 the jurisdictions.

85. The third factor for consideration 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.

86. This does not involve simply comparing dollar for dollar the salaries of judges with those of other persons paid out of the Consolidated Fund. The role and responsibilities as judges are recognized as *sui generis* or unique (Report of the First Quadrennial Judicial Compensation and Benefits Commission, May 31, 2000 (Drouin Commission Report) at para. 13 and paras. 105-106 of *Judges of the Provincial Court of Manitoba et al. versus Her Majesty the Queen*, 2012 MBQB 79 (Justice Oliphant)) and as such the Commission must strive to ensure that judges receive an adequate salary while at the same time are not seen to be receiving special treatment nor are they seen to be immune from the factors affecting salary adjustments for civil servants and other individuals paid by the Province.

87. The fourth factor for consideration is the economic conditions of the Province.

88. With respect to the fourth factor the Commission must 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. The economic impacts of the Covid-19 pandemic cannot be ignored. 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.

89. Finally, the Commission needs to consider any other factors that are relevant to its review. One 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 individuals who are Crown Prosecutors or private bar lawyers practicing criminal law who are in the candidate pool. The goal should be to ensure that the compensation paid to Provincial Court Judges is adequate to attract competent lawyers who will uphold the values, status and dignity of the important functions of the judiciary. It is in the best interest 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 lawyers from different practice backgrounds, including those from the private bar.

90. None of these factors will be determinative. All must be considered and weighed.

91. With past Commissions a fair amount of consideration has been given to the question of weighing of the factors.

92. The 2012 Commission considered at some length the issue of weighing the factors enumerated at s. 22.03(6) (now ss. 22.021(6)) of the Act.

93. 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 in their submissions from 2012 suggested that a "comparison with other judiciaries in Canada" was the most important factor for consideration.

94. The 2012 Commission ultimately concluded as follows regarding the weighing of the factors for consideration:

"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.**"

(emphasis added)

95. Although the 2016-2020 Commission was not asked to embark on its own analysis of whether the legislated factors are to be assigned relative weight it did state:

“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 weighing of the factors should be. Accordingly, this Commission proceeds in the manner set out above in the 2012 JRC report.”

96. In argument before the 2020-2024 Commission the Province maintained that the Commission must weigh the factors for consideration equally. PCJA asserted that it was not necessary to weigh all the factors the same.

97. Notwithstanding these seemingly contradictory assertions from the parties the current Commission has proceeded as suggested by the 2012 Commission. That is, the fairest result will be obtained by a careful weighing and balancing of all relevant factors in the context of the current environment endeavoring to weigh the factors equitably, in the broadest sense, with an independent mindset.

98. Additionally, we would point out that the Commission has relied extensively on past Commission reports, in particular the reports of the 2012 and 2016 Commissions. Although the past reports are not binding on subsequent Commissions, we are guided by the comments of the Supreme Court of Canada in *Bodner* (supra) at para. 15:

“[15] Each Commission must make its assessment in its own context. However, this rule does not mean that each new Compensation Commission operates in a void, disregarding the work and recommendations of its predecessors. The reports of previous Commissions and their outcomes form part of the background and context that a new Compensation Committee should consider. **A new Commission may very well decide that, in the circumstances, its predecessors conducted a thorough review of judicial compensation and that, in the absence of demonstrated change, only minor adjustments are necessary.** If on the other hand, it considers that previous reports failed to set compensation and benefits at the appropriate level due to particular circumstances, the new Commission may legitimately go beyond the findings of the previous Commission, and after a careful review, make its own recommendations on that basis.”

(emphasis added)

V - ISSUES

A. Salaries

Introduction

99. As the Provincial Court Judges’ Association state in their submission, Provincial Court Judges are “the face of criminal justice in New Brunswick”.

100. The Provincial Court is a statutory court created by the Legislature, which confers its jurisdiction upon it. The Provincial Court is for the most part the criminal court of first instance. The jurisdiction of the Provincial Court is restricted to municipal by-laws, provincial offences and federal statute offences (e.g. the Criminal Code and the Controlled Drugs and Substances Act). It hears criminal trials, preliminary inquiries and the vast majority of bail hearings. For trials, Provincial Court judges sit without a jury. Data provided by GNB Justice Services and cited in the Provincial Court Judges' Association submission suggests that 99% of all criminal matters are heard in Provincial Court.

Year	Criminal Files Provincial Court	Criminal Files Court of Queen's Bench
2017-2018	4,639	24
2018-2019	4,439	17
2019-2020	3,891	21

101. On average each courtroom hears an average of 1,160 charges per year.

102. The Association submitted that recent legislative changes in Canadian criminal law have continued an incremental shift toward the Provincial Court taking jurisdiction over virtually all criminal matters resulting in an expanding workload for Provincial Court Judges. Examples included Bill C-75 in 2019 which saw the hybridization of a significant number of previously indictable offences, an increase in the maximum penalty for summary conviction offences and restrictions on the use of preliminary inquiries and Bill C-46 in 2018 resulting in comprehensive changes to the law concerning impaired driving offences.

103. There are no Justices of the Peace in New Brunswick. This means that Provincial Court Judges conduct virtually all judicial interim release hearings (bail hearings).

104. Provincial Court judges in New Brunswick are responsible for the issuance of search warrants. Provincial Court judges approve search warrants at all hours of the day and on weekends requiring judges to be "on call" at times. Approving a search warrant requires a review of the warrant, supporting documentation and the application of legal principles to the facts as presented to confirm approval.

105. Evidence was presented to the Commission that demonstrated that the number of warrants processed by the judges has steadily increased from 2017 through 2021. From 974 warrants processed in 2017 to 1,593 warrants processed in 2021.

106. The Provincial Court consists of the Chief Judge, the Associate Chief Judge, plus 22 full-time judges, 9 supernumerary judges and 3 per diem judges (as of March 31, 2022). Evidence was presented that by January 1, 2025 there will only be 3 supernumerary judges as the other 6 will have reached the age of 75 years and will no longer be eligible to sit.

107. The workload of a Provincial Court judge consists of hearing cases, writing decisions, research where appropriate, responsibilities as Justices of the Peace and various

administrative tasks. Provincial Court judges do not have access to the assistance of law clerks for research and benefit from limited administrative support.

108. Other concerns respecting the workload of Provincial Court judges include: (i) the rise in the number of self-represented litigants; (ii) the increasingly complex nature of sexual assault trials; and (iii) the increased frequency of pre-trial resolution conferences.

109. The Commission heard evidence respecting the impact of the pandemic on the work of the Provincial Court. Associate Chief Judge MacLean spoke at length regarding the challenges the Provincial Court faced as a result of Covid-19 including technology issues, coordination and delay issues and uncertainty as to whether criminal trials could be scheduled and completed promptly as required by decisions from the Supreme Court of Canada. Retired Judge Dickson echoed Associate Chief Judge MacLean's concerns and stated that the challenges made it impossible to complete your docket of cases at times resulting in delays, scheduling and rescheduling issues and always being behind. Judge Dickson indicated that the issues presented by Covid-19 were factors in his decision to retire as of December 15, 2021.

The 2008 Commission

110. The 2008 Commission made unanimous recommendations in a number of areas that were ultimately adopted by the Minister unchanged.

111. On the matter of salary, the 2008 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 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 Court of Appeal in *Provincial Court Judges' Association et al. v. The Province New Brunswick* (supra) in connection with the 2004 JRC report and with the position of the Provincial Court Judges' Association.

112. For the 2010-2011 and 2011-2012 fiscal years it was recommended that there be no increase in Judges' salaries. 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.

The 2012 Commission Report

113. The 2012 JRC noted that the annual salary of a judge of the Provincial Court had been \$204,700 per annum since April 1, 2009. At that point, this salary placed judges in New Brunswick in seventh place in comparison to their counterparts in the rest of Canada. At that time, the salary of a Provincial Court judge was 77% of that of a federally appointed judge (a Court of King's Bench Judge).

114. The PCJA 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 seventh 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 Association contended that the seventh place ranking of salaries was supported by the Province and the Court of Appeal decision (supra), and that using this ranking again would produce a fair and rational result.

115. In 2012, the Minister initially submitted with respect to the seventh place argument that circumstances had changed since the 2008 Commission and that a change from seventh place was justified. The Minister submitted that the Province's economic position had been deteriorating in comparison to other Provinces, rendering a seventh place ranking no longer the correct placement for the remuneration of New Brunswick's 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 the Province.

116. 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 then Court of Queen's Bench effective April 1, 2015. The April 2015 Queen's Bench judge salary was yet to be determined (as it escalated in relation to 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 sixth or seventh place ranking and that this would be a much simplified procedure to follow.

117. The 2012 Commission recommended a 5% increase in 2012 followed by 4% increases each year thereafter which would result in ranking New Brunswick judges at 7% in the country by 2014. The Commission noted that its recommendations should gradually shrink, modestly, the salary gap between the Provincial and Federal Judges.

118. The Province rejected the 2012 Commission's 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 1, 2015 their salary would be set at 80% of that of the Federal Queen's Bench Judges.

The 2016 Commission

119. Coming into the 2016 JRC, the annual salary of a judge of the Provincial Court of New Brunswick had been the equivalent of 80% of federally appointed judges since April 1, 2015. Prior to that salaries were frozen at \$204,700 from 2012.

120. Before the 2016 JRC both the Province and the Association agreed that salaries set at 80% of that of a federally appointed Queen's Bench Judge with annual adjustment to match the percentage was adequate for the purposes of the 2016 Commission's four-year mandate. This would keep New Brunswick's judges at roughly eighth place among their provincial and territorial counterparts for 2016 and 2017.

121. Both parties had agreed that their joint proposal on salary was appropriate taking into account all of the factors the Commission must consider in formulating its report and recommendations.

122. While recognizing the merits of the seventh place ranking approach, both the Province and the Provincial Court Judges' Association submitted that achieving this is very difficult. The Province noted 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 having all of the information required to do so. Also, the unique process utilized in Prince Edward Island whereby salaries are set using the average of salaries from other jurisdictions further complicates the determination of the correct ranking.

123. The Provincial Court Judges' Association agreed and along with the Province argued that a formula based on 80% of the salary of a Federally Appointed Judge would likely achieve a ranking of around seventh place.

124. The 2016 JRC agreed with the parties that the relativity of salary between the Provincial Court and the then Court of Queen's Bench was an appropriate comparison. The 2016 Commission agreed that the percentage approach set at 80% (vis-à-vis Federally Appointed Judges salaries) as jointly submitted properly addressed the necessary comparison to other judges salaries.

125. The 2016 Commission recommended to the Minister that a Provincial Court Judge's base annual salary continue to be set at 80% of the Federal Justices, adjusted annually commencing in 2016.

The 2020-2024 Commission

126. The Province advocated for the following:

- a retroactive salary increase of 2% to be provided effective April 1, 2020;
- a retroactive salary increase of 2% to be provided effective April 1, 2021;
- an additional 2% increase to be provided effective April 1st for each of the two following years covered by the mandate of the 2020-2024 Commission.

127. The above proposal represents a departure from the existing salary provisions that have been in effect since April 1, 2015 being that Provincial Court Judges have their salaries set at 80% of that of a federally appointed King's Bench Judge.

128. The Province's position is that comparing salaries paid to Provincial Court Judges and Judges of the Court of King's Bench is problematic.

129. The Province asserts that the "salaries of federally appointed judges are based on economic conditions and lawyers earnings in major Canadian cities, which differ from those in New Brunswick" and that the salaries of Provincial Court judges in other Provinces are based on the economic conditions, lawyers' earnings and the need to attract candidates to the bench from major Canadian cities such as Vancouver, Calgary, Winnipeg, Toronto, Ottawa,

Montréal, Québec City and Halifax, where earnings and expectations are substantially higher than in New Brunswick.

130. Further, the Province maintains that linkage or parity with federal salaries surrenders New Brunswick's decision-making authority meaning that judicial salaries are based either wholly or partly on economic factors in other parts of Canada, the ability of other governments to pay, and the need to make judicial salaries attractive to candidates in the richest urban areas.

131. Likewise, the Province submits that setting salaries in a forward-looking manner to achieve a consistent seventh place ranking is problematic given that there is no uniformity of time frames, or significant overlap in mandates, which leaves jurisdictions trying to find the appropriate ranking for themselves without all the information required to do so.

132. Additionally, the Province maintained that:

- relative to the average New Brunswick family, judges in New Brunswick enjoy a salary that is competitive when compared to other Provinces;
- relative to the highest earners, judges in New Brunswick have a salary that is above average and competitive;
- when comparisons are made that recognize the lifestyles, economic conditions and cost-of-living of respective Provinces, judges' salaries in New Brunswick are competitive.

133. In response, the Provincial Court Judges' Association proposed that Provincial Court judges' salary be set at 85% of that of a federally appointed King's Bench judge.

134. The Provincial Court Judges' Association argued, *inter alia*, that:

- with inflation conservatively expected to increase by 17.4% over the course of the Commission's mandate the Province's proposed increase of 8% over the time frame leads to a substantial reduction in real salary;
- the Province's proposal mirrors a wage mandate for civil servants of the same amount, on the basis that judges ought to be treated the same as civil servants;
- in order to ensure financial security and promote consistency in remuneration, Provincial Court judges' salary should continue to be linked to the salaries of federally appointed King's Bench judges;
- the Province has advocated for this approach in the last two JRC's and now departs from this precedent without presenting any legitimate basis for doing so;
- the Province is in a significantly better economic position during the current JRC than it was during the previous JRC and as such the ability to pay has improved.

Since the ability to pay has improved, the Province can afford to increase the percentage of linkage from 80% to 85%;

- the Commission should focus on the economic conditions of the Province during its mandate and not engage in an exercise in fiscal forecasting.

135. The mandate of the Commission requires that we deal with the salaries and amounts paid to the Chief Judge, the Associate Chief Judge and Judges. We cannot do so without considering all the factors enumerated in ss. 22.021(6) of the Act.

136. Before proceeding with our analysis of the ss. 22.021(6) factors, we noted that the Provincial Court Judges' Association urged the Commission to consider the combined effect of the Province's submission with respect to judicial salaries together with the proposal for pension reform. PCJA maintained that the pension for Provincial Court judges was "an equally important component of judicial compensation". In addition to raising certain legal issues with the Province's pension reform proposal PCJA did attempt to address the ss. 22.021(6) factors for consideration vis-à-vis both the Province's salary proposal and the pension reform proposal.

137. The Province on the other hand addressed the ss. 22.021(6) factors for consideration in regards to its salary proposal but not its pension reform proposal.

(a) Cost of Living or Changes in Real Per Capita Income

138. The Consumer Price Index (CPI) is a well-known index used 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.

139. The Province offered evidence of a projected cumulative CPI increase of 6.1% over the period of the JRC's mandate (2020-2024).

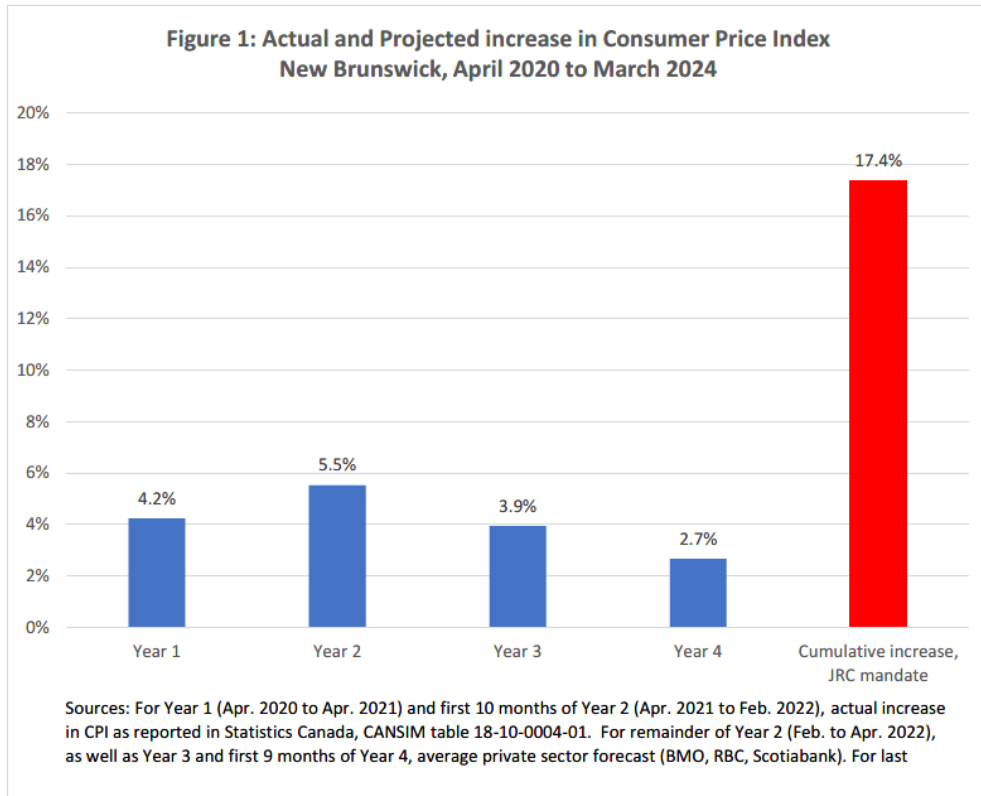
140. The Province's proposal for salary increases equates to 8% over the period of the JRC's mandate. As such the Province's proposed salary increases would be 1.9% above what the Province projects will be the overall increase in CPI during the JRC's mandate.

141. The Association offered evidence that between April 2020 and February 2022, inflation had already run faster than what the Province projected for the entire four-year period of the Commission's mandate.

142. The Association presented evidence from Statistics Canada to the effect that CPI for New Brunswick grew by 4.2% between April 2020 and April 2021 (CANSIM, table 18-10-0004-01) and between April 2021 and February 2022 it was up by a further 4.8% for a cumulative increase of 9.2% between April 2020 and February 2022.

143. The Commission was of the view that inflation would remain elevated relative to historical trends over much of the remainder of the JRC's mandate due in part to fallout from the pandemic and sharply increasing energy costs impacted by the war in Ukraine.

144. The Association presented evidence that CPI for New Brunswick would increase by 17.4% over the duration of the JRC’s mandate.



145. This means that the real salary of a Provincial Court Judge under the Province’s salary proposals has the potential to be lower at the end than at the start of the JRC’s mandate.

146. The Province provided two (2) tables showing Household Income per Capita, Canada and Provinces in 2019 and 2020.

Household Income per Capita, Canada and Provinces, 2019

Geography	Household Income (\$ millions)	Population	Household income per capita (\$)	Rank	As a % of Canada
Canada	1,939,439	37,593,384	51,590		100.0
Newfoundland and Labrador	26,405	523,476	50,442	4	97.8
Prince Edward Island	6,910	157,262	43,939	10	85.2
Nova Scotia	44,682	969,747	46,076	7	89.3
New Brunswick	35,113	776,868	45,198	8	87.6
Quebec	416,426	8,501,703	48,981	6	94.9
Ontario	758,803	14,544,718	52,170	3	101.1
Manitoba	61,874	1,369,540	45,179	9	87.6
Saskatchewan	57,523	1,172,302	49,068	5	95.1
Alberta	252,310	4,361,694	57,847	1	112.1
British Columbia	270,796	5,090,955	53,192	2	103.1

Source: Statistics Canada Tables 36-10-0226-01,17-10-0009-01

Household Income per Capita, Canada and Provinces, 2020

Geography	Household Income (\$ millions)	Population	Household income per capita (\$)	Rank	As a % of Canada
Canada	2,050,659	38,037,204	53,912		100.0
Newfoundland and Labrador	26,691	521,364	51,195	6	95.0
Prince Edward Island	7,373	161,329	45,702	10	84.8
Nova Scotia	47,184	981,889	48,054	7	89.1
New Brunswick	36,632	783,204	46,772	9	86.8
Quebec	440,245	8,578,300	51,321	5	95.2
Ontario	807,937	14,745,712	54,791	3	101.6
Manitoba	65,516	1,380,648	47,453	8	88.0
Saskatchewan	61,330	1,179,300	52,005	4	96.5
Alberta	257,430	4,420,029	58,242	1	108.0
British Columbia	291,244	5,158,728	56,457	2	104.7

Source: Statistics Canada Tables 36-10-0226-01,17-10-0009-01

147. The tables show that the household income per capita in New Brunswick in 2019 was \$45,198 and \$46,772 in 2020. New Brunswick ranked in eighth place in Canada in 2019 and ninth place in Canada in 2020. No evidence of household income per capita in 2021 was before the Commission nor was there evidence of projected levels of household per capita income over the duration of the JRC’s mandate.

(b) 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

148. The following is a table of the latest salaries of Provincial Court Judges in Canada, as of the dates indicated:

Jurisdiction	Salary	Effective Date
Ontario	\$ 320,742	April 1, 2020
Saskatchewan	\$ 316,971	April 1, 2021
Alberta	\$ 293,991	April 1, 2016
British Columbia	\$ 276,000	April 1, 2020
Manitoba	\$ 272,908	April 1, 2019
Prince Edward Island	\$ 276,677	April 1, 2019
New Brunswick	\$ 263,920	April 1, 2019
Québec	\$ 263,000	July 1, 2019
Newfoundland and Labrador	\$ 251,506	April 1, 2019
Nova Scotia	\$ 242,090	April 1, 2020

149. This table shows the salaries of New Brunswick's Provincial Court Judges as of April 1, 2019 to be \$263,920.

150. The salary is a result of the Province's acceptance of the recommendations of the 2016 JRC that the salaries of Provincial Court Judges be set at 80% of federally appointed King's Bench Judges. In fact, before the 2016 JRC both the Province and the Provincial Court Judges' Association agreed that salaries set at 80% of that of a federally appointed Queen's Bench judge with annual adjustment was adequate compensation.

151. The Province now says that comparisons with the Court of King's Bench is irrelevant and should be avoided, as the basis underlying the decisions on salary levels for appointment to each Court are very different.

152. The Province substantiates its position as follows:

- linkage or parity with federal salaries surrenders New Brunswick's decision-making authority;
- linkage means that judicial salaries are based either wholly or partly on economic factors in other parts of Canada, the ability of other governments to pay, and the need to make judicial salaries attractive to candidates in the richest urban areas;
- only two other jurisdictions (Saskatchewan and Ontario) link Provincial Court judges salaries to the salary of federally appointed judges;
- the criteria used to establish salary for judges at the federal level do not apply to the provincial level in part because the salaries of federally appointed judges are based on economic conditions and lawyers' earnings in major Canadian cities, which differ from those in New Brunswick.

153. The Province acknowledges that we must take comparability into consideration as ss. 22.021(6)(b) of the Act require us to consider "the factors which may justify the existence of differences between the remuneration of judges and that of other members of the judiciary in Canada", however the Province urges comparisons that are made on a fair basis taking into account the lifestyles, economic conditions and costs of living in each jurisdiction.

154. The Province says that while the salary of a Provincial Court judge in New Brunswick is lower than some other Canadian jurisdictions, the salary of a judge in New Brunswick, after taking into account the cost of living and the economy in New Brunswick in comparison to other jurisdictions is competitive with other Canadian judiciaries. The status of a judge relative to the population of New Brunswick is as competitive when measured against the status of their counterparts in other jurisdictions.

155. The Province also argues that setting salaries in a forward-looking manner to consistently achieve a seventh place ranking for New Brunswick Provincial Court judges is problematic and not accurate as there is no uniformity of time frames, or significant overlap in mandates of provincial JRC's which leaves jurisdictions trying to find the appropriate ranking for themselves without all the information required to do so.

156. On this factor the PCJA maintain that in order to ensure financial security and promote consistency in remuneration, Provincial Court Judges' salaries should continue to be linked with King's Bench Judges' salaries

157. PCJA points to the Province having advocated for this approach in the last two JRC and the departure from the precedent without presenting any legitimate basis for doing so.

158. PCJA noted that several Provinces have adopted linkage with King's Bench salaries (including Ontario at approximately 93 to 95% and Saskatchewan at 95%). Saskatchewan has legislation which creates the presumption of linkage.

159. The PCJA submitted that the failure to link with the salary of King's Bench judges is leading to litigation in other Provinces including British Columbia, Newfoundland and Labrador, Alberta and Nova Scotia.

160. The PCJA argued that linkage with the salaries of federally appointed judges ensures consistency and fairness and avoids litigation.

161. The PCJA says that pension is an equally important component of judicial compensation and in order to properly compare with other jurisdictions, the pension must be factored in. PCJA states that the existing judicial pension is comparable, but not more generous than judicial pensions in other jurisdictions. [Appendix C-2 - Comparative Summary of Pension Benefits found at Tab B of Exhibit 2, pages 18-25].

162. PCJA acknowledges that it is very difficult to consistently set salary to ensure a seventh place ranking. This is because other Provinces are either in litigation or at different points of their JRC mandates.

Discussion

163. The Province has provided information showing that the salary of a Court of King's Bench Judge effective April 1, 2020 was \$338,800 and that the salary rose to \$361,100 effective April 1, 2021. Effective April 1, 2022 the amount was \$372,000.

164. The Province estimates the federally appointed King's Bench Judges rates to be \$381,505 effective April 1, 2023 and \$391,043 effective April 1, 2024. The rates for 2023 and 2024 will depend on the cost of living increases awarded. The Province's figures project the cost of living increase at 2.5%.

165. The Province also provided evidence that federally appointed Court of King's Bench Judges have salaries set by a similar process to the Province's, governed by the *Judges Act* (Canada). This legislation currently provides for annual adjustments to federally appointed judges salaries on April 1st of each year in accordance with a set formula. This calculation is tied to changes in the industrial aggregate index, a measure of national weekly salaries or average weekly earnings produced by Statistics Canada.

166. The Commission had before it sufficient evidence to allow a meaningful analysis of the comparative salaries of Provincial Court Judges across the country together with their

comparative pension plan. The Commission also received the above-noted information regarding the salaries of federally appointed Judges.

167. The Commission acknowledges that the salaries of federally appointed Judges must be by necessity higher than those of the majority of Provincial Court Judges across the country. This is so in order to take into account economic conditions throughout the country and lawyers' earnings in major Canadian cities, which differ from those in New Brunswick.

168. Obviously, the cost of living in Toronto or Vancouver is considerably higher than that of any judicial location in New Brunswick.

169. The Commission believes that by setting the salaries of Provincial Court Judges as a percentage of the salary of federally appointed Judges these differences, geographic or otherwise, are addressed.

170. The Commission had before it evidence that Commissions across the country have shown a preference for recommending salaries that show a correlation with the salaries of federally appointed Judges. The evidence demonstrated that linkage or correlation avoids litigation and subsequent allegations of unfairness and bad faith.

(c) Economic Fairness, Including the Remuneration of Other Persons Paid Out of the Consolidated Fund

171. This factor for consideration requires the Commission to assess the salaries of Provincial Court Judges in comparison with salaries paid to others out of the Consolidated Fund.

172. As noted by the 2016 JRC 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 public servants.

173. 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 out of the Consolidated Fund. 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.

174. The Province maintains that the Government of New Brunswick supports the principles of equitable treatment of persons paid out of the public purse as enunciated by Chief Justice Lamer in the *PEI Reference Case* (supra) at para. 156 and argues that insofar as the general economic increases granted to Deputy Ministers and non-bargaining employees in the public service reflects the current and projected economic conditions in the Province and the ability of the Province to pay, the Province believes that, in order to avoid singling out Provincial Court Judges for differential treatment, their salary changes should be comparable to those granted to Deputy Ministers and non-bargaining employees over a comparable period of time.

175. The Provincial Court Judges Association argues that notwithstanding that the *Act* requires the Commission to consider the remuneration of other civil servants, the use of civil servants as the comparator group is limited. The Association argues that the most obvious

comparator group is Judges and that the Province's submissions evinces a misunderstanding of Chief Justice Lamer in the *PEI Reference Case*.

176. The Association maintains that the Province's salary proposal would not achieve "equitable treatment" but rather would lead to unequal treatment and as such offends judicial independence.

177. The Association asserts that these are not "difficult economic times" and the Province is not uniformly reducing salaries across the public service with the goal of deficit reduction.

178. The Province provided details on current compensation trends for other employees paid out of the Consolidated Fund as follows:

- The Government's current wage mandate provides for 8% wage increases over a four-year period.
- Management and non-union employees received a total increase of 10% adjustment over 5 years (2% a year) beginning on April 1, 2019.
- Deputy Ministers' salaries range from \$147,576 to \$194,532 (October 1, 2019). Salary increases from the non-bargaining pay review are typically applied to Deputy Ministers. Deputy Ministers received a 2% a year increase for 5 years.
- Salaries for the Crown Counsel Association on July 1, 2019 ranged from \$53,144 to \$132,366. This bargaining group received 0.5% bargained increases on January 1, 2020 and 0.25% on July 1, 2020. The Crown Counsel Collective Agreement expired on September 30, 2020. It was announced on May 18, 2022 that a tentative deal was reached, but no details were provided to the Commission pending ratification of the tentative agreement by the Crown Counsel Association.
- Salaries of the Crown Prosecutors' Association ranged from \$54,600 to \$136,032 on October 1, 2019. The contract expires on September 30, 2023. The bargaining group received 2% a year over 5 years.
- Salaries of non-bargaining public service lawyers range from \$47,502 to \$129,220 (October 1, 2019). Management lawyers ranged from \$118,872 to \$156,702 (October 1, 2019).
- Salaries for general practitioners, effective April 1, 2019, range from \$182,963 to \$199,680. Salaries for certified specialist physicians range from \$253,058 to \$279,682 (April 1, 2019). Salaried physicians recently settled their contract for 2% in 2020 and 1.5% increases in 2021, 2022, 2023 and 2024.
- Fee-for-service physicians received a 2% increase in 2020 and a 1.5% increase in 2021, 2022, 2023 and 2024.
- The net average earnings for a physician earning fee-for-service as a general practitioner (who received more than \$60,000 in fee-for-service billings) during

fiscal year 2020-2021 was \$255,602. The net average earnings for a physician earning fee-for-service as a specialist (who received more than \$60,000 in fee-for-service billing income) was \$473,467. Fee-for-service physicians receive compensation meant to cover overhead costs as part of their fee.

- As of April 1, 2021, there were 181.5 vacant positions in New Brunswick for both fee-for-service and salaried physicians, which includes general practitioners and specialists.
- Salaries of elected officials have been frozen since 2015 and the freeze will continue until 2022. A committee is currently reviewing salaries of elected officials with anticipated recommendations in September of 2022.
- Of the 25 collective agreements there are 13 settled agreements and 12 that are expired (as of May 30, 2022).

179. The Association urges the Commission to exercise considerable caution when considering the remuneration of others paid from the public purse.

180. The Association states that there are substantial differences between civil servants and members of the judiciary. As an example, an employee who is subject to a 1% general wage increase may still be eligible for compensation increases from step increases based on years of service, merit-based compensation, or by promotion to a new job classification. Judges are ineligible for any of these pathways to increased remuneration.

181. The Association highlighted that successive JRC's and the Courts have espoused the unique nature of Judges and the need to consider them separately from the civil service.

182. The Association argues the limited value of a comparison with the remuneration of other persons paid out of the Consolidated Fund.

Discussion

183. The Commission agrees with the conclusion of the 2016 JRC that fairness to others paid out of the Consolidated Fund is an important factor in our considerations.

184. The analysis is contextual in nature with the goal of ensuring that Judges are paid adequately but at the same time are not seen to be receiving special treatment or enjoy immunity from factors affecting salary adjustments for other civil servants.

185. We have taken the objective of the analysis of the factor into consideration in making our recommendation regarding salary. We have not engaged in a dollar-for-dollar salary comparison. We have used the evidence presented in our consideration of whether the proposals of the parties are either reasonable or unreasonable in the overall context of remuneration of individuals paid out of the Consolidated Fund.

(d) Economic Conditions of the Province

186. As noted in para. 88, the Commission must consider not only the current economic condition of the Province but also whether conditions are improving or deteriorating relative to the past and whether prospects for future years are encouraging, discouraging or uncertain. The economic impacts of the Covid-19 pandemic cannot be ignored. 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.

187. Considerable evidence was presented to the Commission respecting the economic conditions of the Province.

188. The Province's submissions included an Economic/Fiscal Submission to September 2021, an Economic/Fiscal Submission to May 2022 and a Reply Submission dated May 13, 2022 (paras. 36 to 39 of Exhibit 3) which included a link to the Province's year end financial statements for the fiscal year ending March 31, 2021.

189. The Association's submissions included an analysis of New Brunswick's fiscal position for the period from April 1, 2020 to March 31, 2024 prepared by Richard Saillant, Economist and Public Policy Consultant.

190. Todd Selby an Economist with the Department of Finance and Treasury Board and Richard Saillant testified before the Commission.

191. The Province asked the Commission to consider all of the following:

- Current surpluses are dependent primarily on federal transfers in response to the Covid-19 pandemic and cannot be relied upon as an indicator of the Province's fiscal situation.
- The Province's wage mandate of an 8% wage increase over a four-year period is in response to the Province's surpluses.
- Both the Global and Canadian economies have been negatively affected by the pandemic, the war in the Ukraine and inflation related issues.
- New Brunswick's real GDP growth, employment growth, employment rate and household income per capita remained poor in relation to other provinces.
- Net debt to GDP has been increasing according to New Brunswick's Audit General (Exhibit 5, Tab 6, pp. 53 and 55).
- The short-term fiscal surpluses belie longer term economic problems.
- Changes in federal transfers can eliminate surpluses.
- Demographic challenges persist and are increasing.

192. The Association argues that the Province is in a significantly better economic position during the mandate of the current JRC than it was during the mandate of the 2016 JRC and as such the Province's ability to pay has improved.

193. The Association asserts that the current Commission should focus on the economic conditions during its 2020-2024 mandate and not engage in exercise in fiscal forecasting.

194. The Association asked Commission to consider all of the following:

- The Province has seen the two largest surpluses in its historical record (Exhibit 2, Appendix A, page 12) and (Exhibit 5, Tab 5, pages 18-19).
- Net debt to GDP is the most reflective of fiscal position and there has been a steady increase that is expected to continue during the mandate of the JRC (Exhibit 2, Appendix A, pages 13-14) and (Exhibit 5, Tab 5, pages 18-19).
- The previous year's improvement in net debt to GDP is the most important single year improvement in fiscal position in at least three decades (Exhibit 2, Appendix A, page 13).
- New Brunswick was the only Province to see a reduction in net debt to GDP in 2021 (Exhibit 2, Appendix A, page 15).
- In 2020, New Brunswick saw its economy contract by 3.2% due primarily to the Covid-19 pandemic (Exhibit 5, Tab 5, page 2).
- Compared with other provinces, only Nova Scotia and PEI saw smaller drops in their GDP in 2020 due to the pandemic (Exhibit 5, Tab 5, page 2).
- In 2021, New Brunswick's economy grew by 5.3%, the largest increase since 1999 (Exhibit 5, Tab 5, page 2).
- New Brunswick's economy has exceeded its pre-pandemic levels (Exhibit 5, Tab 5, page 2).
- GDP is expected to continue to grow through 2022-2023 (Exhibit 5, Tab 5, page 10).
- Net-Debt to GDP is expected to continue to fall through 2022-2023 (Exhibit 5, Tab 5, page 21) and (Exhibit 2, Appendix A, page 16).
- The Province is projecting a surplus for the last two fiscal years of the current JRC mandate (Exhibit 5, Tab 5, page 21).

195. The Commission recognizes that the fiscal year April 1, 2020 March 31, 2021 was difficult for the Province. The Covid-19 pandemic was an unanticipated and unpredictable global event that caused the Province's real GDP Growth to contract by 3.2 % in 2020.

196. However, it would appear that the Province’s Real GDP Growth expanded in 2021 by 5.3%. Real GDP Growth in 2021 was the largest increase since 1999.

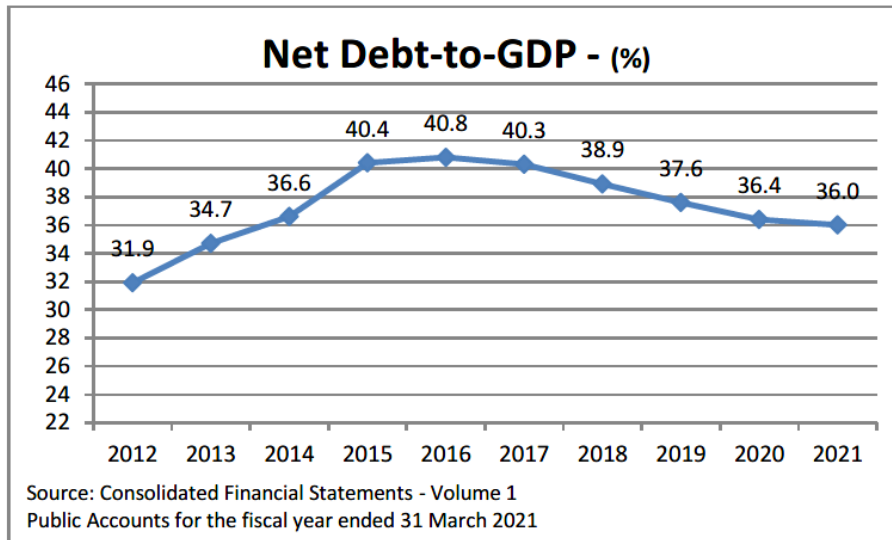
197. The following chart demonstrates that for the period 2018-2021 provincial growth ranked 6th among the provinces, representing an improvement in economic activity of 1.1% on average annually over the period.

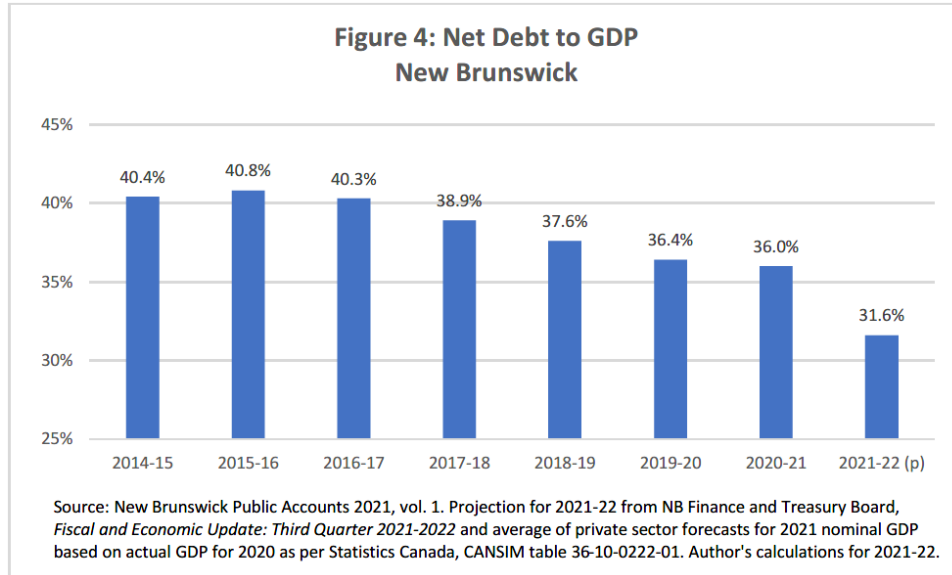
Real GDP Growth (%)						
Geography	2018	2019	2020	2021	2018-2021	Rank
Canada	2.8	1.9	-5.2	4.8	1.1	
Newfoundland and Labrador	-2.6	3.3	-5.4	1.2	-0.9	9
Prince Edward Island	1.7	4.7	-1.7	6.6	2.8	1
Nova Scotia	1.9	3.0	-2.5	5.8	2.0	3
New Brunswick	1.2	1.3	-3.2	5.3	1.1	6
Quebec	2.9	2.8	-5.5	5.6	1.5	4
Ontario	3.4	2.0	-5.1	4.6	1.2	5
Manitoba	2.0	0.4	-4.6	1.2	-0.2	7
Saskatchewan	1.8	-1.1	-4.9	-0.3	-1.1	10
Alberta	2.2	-0.1	-7.9	5.1	-0.2	8
British Columbia	3.6	3.1	-3.4	6.2	2.4	2

Source: Statistics Canada, Tables 36-10-0222-01, 36-10-0402-01, 36-10-0434-03

198. This chart also shows that the contraction of the New Brunswick economy during the first nine months of the pandemic was not as severe as that of other provinces such as Newfoundland and Labrador, Québec, Ontario, Alberta and British Columbia.

199. The Commission was provided with net debt as a proportion of GDP data.

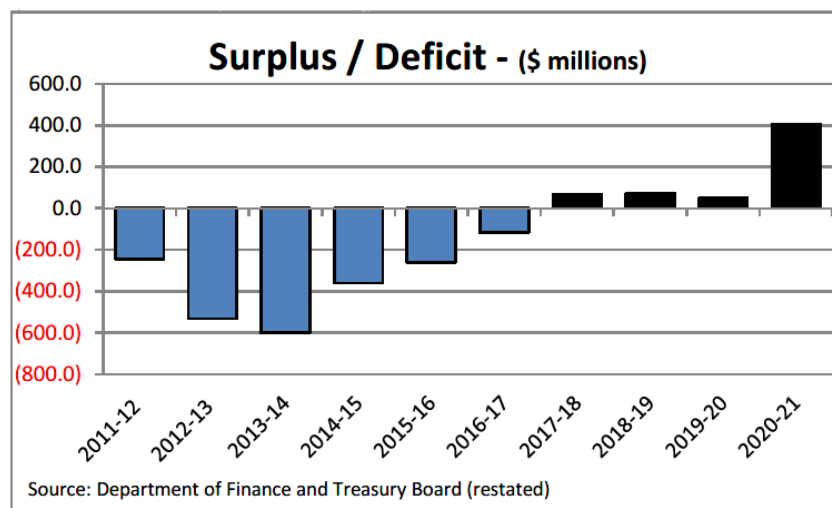




200. The net debt to GDP ratio shows the relationship between net debt and the economy. The economists explained that if the ratio is declining, growth in the economy is exceeding growth in net debt, resulting in improved sustainability. And conversely, an increasing net debt to GDP ratio indicates net debt is increasing faster than growth in the economy and serving to reduce the Province's financial stability.

201. The above charts indicate that from 2016 through 2021 the ratio has fallen annually reflecting improved fiscal results for the Province and growth in the economy, improving stability.

202. Evidence was presented regarding the Province's surplus and projected surpluses for the duration of the Commission's mandate.



203. For the fiscal year 2020-2021 the Province had a surplus of \$408.5 million. This was the fourth consecutive annual surplus.

204. The Province's economists indicated that the surplus of \$408.5 million meant that the Province was able to pay for its current services out of the total revenue obtained for the year and provide an opportunity to reduce net debt.

205. Mr. Selby indicated that the Province's quick and decisive actions in response to the pandemic limited the impact that Covid-19 had on the Province's financial results. Increased costs of health care and safety spending to protect and support New Brunswick throughout the pandemic were offset by operational savings realized during closures and by increases in Covid-19 related transfers from the federal government.

206. Mr. Selby concluded that as a result of all of the above, the Province's 2020-2021 annual surplus of \$408.5 million was higher than initially budgeted.

207. Mr. Saillant's evidence was that the Province has "*a track record of projecting fiscal outcomes that are significantly worse than those ultimately realized and this projection bias must be taken into account when assessing the reliability of the provincial government's forward guidance*".

208. The Province argued that the current surpluses are dependent primarily on federal transfers in response to the pandemic and cannot be relied upon as an indicator of the Province's fiscal situation. Short-term fiscal surpluses belie longer-term economic problems and changes in federal transfers can quickly eliminate surpluses.

209. The Association in turn argued that the Province lacked credibility with respect to its representations regarding the economic conditions of the Province. The Association argued that the economic conditions of the Province were known for the first half of the Commission's mandate (2020 and 2021) and urged the Commission to accept the data that showed that despite a downturn in the economy in 2020 due to the pandemic, the economy has in fact rebounded to its pre-pandemic levels with forecasting data for 2022-2024 showing that the Province's fiscal position is expected to improve.

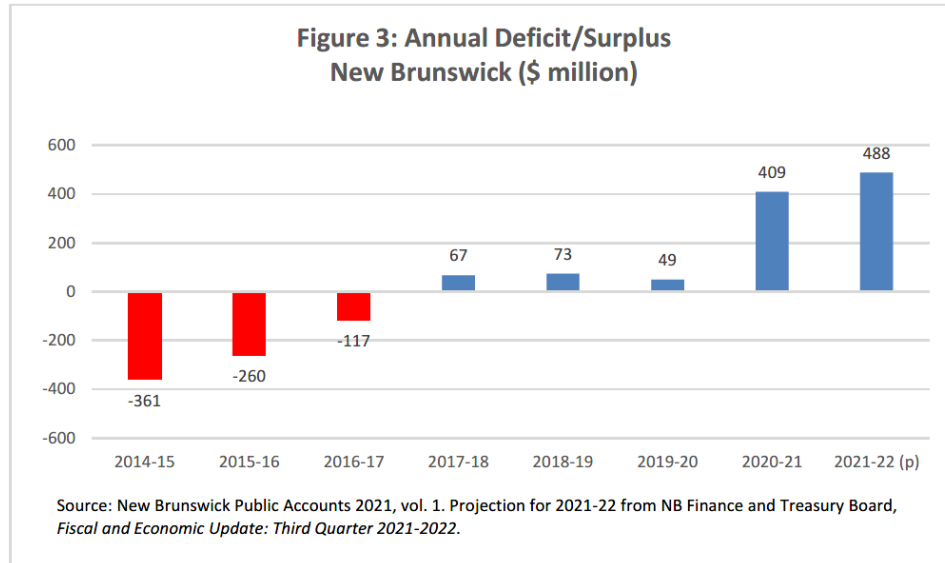
210. Proceeding with the hearing at the halfway point of the mandate of the 2020-2024 Commission has allowed us to some extent to access actual data representing the economic conditions of the Province for the first two years of the Commission's mandate.

211. We acknowledge and accept the evidence of the economists that 2020 was a difficult year for New Brunswick's economy due to the Covid-19 pandemic. We also agree that it appears by all accounts that the Province's economy has rebounded to pre-pandemic levels.

212. Forecasting the future is always an exercise in speculation however it appears to the Commission that New Brunswick's fiscal position is stable and that the Province was in a better fiscal position at the start of this Commission's mandate than at the start of the mandate of the 2016-2020 JRC.

213. Mr. Saillant's evidence was that during the mandate of the 2016-2020 Commission the Province saw its fiscal balance improve by \$309 million, net debt and net debt per capita were mostly stable over the 2016-2020 period and the reduction of net debt to gross domestic product (net debt to GDP) improved markedly.

214. Further, for fiscal year 2020-2021 the Province recorded a surplus of \$408.5 million. The third quarter economic update for the fiscal year 2021-2022 projected a surplus for fiscal year 2021-2022 of \$487.8 million.



215. Current forecasts for GDP growth also demonstrate improvement in the Province’s fiscal position. The forecast being that the net debt to GDP ratio is set to decrease from 36% to 31.6%. See the second chart at para. 199 above.

216. This is further confirmed in tabled budget documents for fiscal year 2022-2023. The Province projects a surplus of \$35.2 million and a net debt to GDP ratio decreasing from 31.9% for 2021-2022 to 30.1% in 2022-2023, demonstrating continued growth in the economy of the Province.

217. Again, the Province maintains that its current fiscal position is the result of “one time federal transfers” that are not expected to continue, that we should consider the vulnerability of the Province to changes in federal government transfers and that demographic changes such as an aging population persist and are increasing.

218. The Association presented evidence that the Province’s share of federal transfers is stable and has never fallen below 34% of the provincial budget at any point in the last three decades. As well the Association presented evidence that the bulk of federal funding to New Brunswick comes from the Canada Health Transfer (CHT), the Canada Social Transfer (CST) and the Equalization Program and that federal funding under these three transfer programs is known until the end of the fiscal year 2022-2023. In fiscal year 2022-2023 these three transfers are set to grow by \$141 million or 4.0%. (para. 53 of Tab A of Exhibit 2)

219. Having considered the extensive economic evidence presented by the parties, the Commission concludes that the Province has rebounded from the effects of the pandemic, the current fiscal position of the Province is strong with a substantial surplus, an improved net debt to GDP ratio indicating growth in the Province’s economy and that this strong economic position is likely to continue through the end of the 2020-2024 JRC’s mandate.

(e) Other Factors that are Relevant

220. The fifth factor which the Commission is directed by the Act to consider is “any other factors that are relevant to its review.”

221. The Commission has identified the need to attract qualified individuals to the bench as a factor that is relevant to its review.

222. Remuneration must be set at such a level as to ensure that highly qualified candidates are attracted. It should not be just those individuals who are Crown Prosecutors, government lawyers or private bar lawyers practicing criminal law who constitute the candidate pool.

223. The goal should be to ensure that the compensation paid to Provincial Court judges is adequate to attract competent lawyers from all practice areas who will uphold the values, status and dignity of the important functions of the judiciary.

224. 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 that it serves, and is made up of lawyers from different practice backgrounds, including those from the private bar.

225. The Province provided the Commission with evidence that the government maintains a roster of approximately 30 individuals who have been assessed and identified as either highly recommended or recommended for appointment to the Provincial Court. Once assessed and recommended, candidates remain on the roster for 3 years. The exact number of individuals on the roster at any given time can vary.

226. As applications for appointment to the bench are confidential, no information as to the background of the individuals who have been assessed is known.

227. The Province says that the “current remuneration package has continued to be sufficient to draw highly qualified candidates who are interested in appointment to the Provincial Court”.

228. On this point the Province did not lead any evidence regarding the impact, if any, that there might be on the recruitment of candidates for appointment to the bench if the Province’s salary and pension proposals are adopted by this Commission.

229. The Association maintains that if the Province’s proposals for salary and pension are adopted by this Commission they will have a “chilling effect on the recruitment” of suitable candidates for appointment to the Provincial Court.

230. The Association argues that the Province’s proposals for salary and pension will render the position of a Provincial Court Judge unattractive to the best candidates and will present as a tangible reason for a potential candidate to remain in private practice or to seek appointment to the Court of King’s Bench instead.

231. The Association maintained that highly qualified private practice lawyers are not applying to the Provincial Court. The Association asserted that:

“...Since January 1, 2016, only one appointment of 13 has come from private practice. Additionally, 9 of the past 13 appointments have come from the Public Prosecution’s Branch which potentially raises a real issue of public perception about the maintenance of judicial independence. The Provincial Court has always prided itself on being a blend of appointees from the private bar and public service, this is no longer the current trend.”

232. The perception that the Provincial Court is potentially becoming a bench composed primarily of former Crown Prosecutors is a factor the Commission must take into consideration in making its recommendations.

233. Public perception is another factor for consideration by the Commission. It is important that the public perceives the work of the Provincial Court as being equally as important as the work of the Court of King’s Bench. One way of achieving this objective is to link the salaries of Provincial Court Judges to those of federally appointed King’s Bench judges.

234. Likewise, in the Commission’s view linkage of the salaries with appropriate adjustments creates certainty and assists in fostering respect for the Commission process.

Discussion Regarding Salaries

235. Subsection 22.021(6) of the Act outlines the factors the Commission shall consider in making its report and recommendations.

236. None of the factors will be determinative. All must be considered and weighed. There is no indication in the Act as to what the relative weighing of the factors should be.

237. This Commission would reiterate the comments of 2012 Commission that:

“... 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.”

238. We have evaluated and assessed each of the factors that the Act directs us to consider.

239. We have not undertaken this exercise in a void. The reports of previous Commissions, particularly those of the 2012 and 2016 Commissions and their outcomes have formed a part of the background and context that we have likewise considered.

240. As previously mentioned, the 2020-2024 Commission commenced its inquiry on May 30, 2022 at approximately the halfway point of the term of the Commission.

241. We have also had the benefit of seeing the Province’s economic and fiscal response to the Covid-19 pandemic.

242. Of all the factors considered and evidence presented the following were of substantial significance in formulating our recommendations regarding salary:

- the relativity of salaries between the Provincial Court and the Court of King's Bench is an appropriate comparison.
- the percentage approach set at 80% (vis-à-vis federally appointed judges' salaries) properly addresses the necessary comparison to other judges' salaries.
- setting salaries to consistently achieve a seventh place ranking for New Brunswick's Provincial Court judges is next to impossible to do. Although this may have been a laudatory objective with past Commissions, in our view, it is no longer appropriate nor can a seventh place ranking be achieved or consistently maintained.
- this Commission has identified the need to attract qualified and quality individuals as candidates for appointment to the bench. We believe that the linkage of the salaries of Provincial Court judges to those of the federally appointed King's Bench judges is one way to do this.
- likewise we are of the view that linkage of the salaries creates certainty for all involved including the Province, the current Judges of the Provincial Court as well as lawyers who may be considering applying for an appointment to the Provincial Court.
- linkage assists in fostering respect for the Commission process. Linkage avoids litigation and subsequent allegations of unfairness and bad faith.

243. Finally, we have concluded that throughout the Commission process the Province did not explain why it is necessary to deviate from the established and existing linkage of the salaries of Provincial Court Judges to those of King's Bench Judges in favour of the provincial wage mandate for all public sector employees.

244. Our view was that the current economic conditions of the Province as well as the encouraging future economic prospects lead us to conclude that there is no pressing economic reason(s) to deviate from the established and existing linkage.

B. Pensions

245. The Province proposes significant changes to the pension plan of New Brunswick Provincial Court Judges. As was expected, the Provincial Court Judges' Association vigorously opposed these changes.

Background

246. Provincial Court Judges appointed on or before February 18, 2000 are entitled to a pension under either the *Provincial Court Judges' Pension Act* SNB c. 106 (the "New Plan") or

the *Provincial Court Act*, supra, (the “Old Plan”). The decision as to which plan to select is made at the time a benefit is paid from the plan.

247. Provincial Court Judges appointed after February 18, 2000 participate in the New Plan only.

248. Both the Old and New Plans are defined benefit pension plans. Simply put, a defined benefit pension plan is a type of pension plan in which an employer promises a specified pension payment, lump sum or a combination thereof on retirement. The pension amount depends on an employee’s earnings history, tenure of service and age, rather than on investment returns.

249. The *Provincial Court Judges’ Pension Act* describes the plan in detail and the amounts to be contributed to the pension fund.

250. The 2012 JRC noted that the pension plan 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%.

251. At the time of the 2012 JRC, the Province’s annual cost to support the Judges’ pension plan was estimated to be 32% of salary.

252. Before the 2020-2024 Commission, the Province at para. G.5 of the Province’s submission (Exhibit 1) stated that as a percentage of total payroll for judges, the Province’s share for the pension plan is about 42% of payroll. Or for every dollar contributed by a Judge, the Province pays approximately \$5.77.

253. It was noted that Provincial Court Judges appointed after February 18, 2000 participate in the plan and accrue pension benefits at a rate of 3% per year for service after April 1, 2010, subject to a maximum pension of 65% of salary.

The 2008 Commission

254. For the 2008 Commission, PCJA requested a review of pensions. PCJA contended that New Brunswick ranked at the lowest level of all judicial pensions.

255. Conrad Ferguson, FSA, FCIA of Morneau Sobeco was engaged by the Province to prepare a report comparing the pension plan for Judges in New Brunswick with other jurisdictions. Mr. Ferguson’s conclusion was that the New Brunswick pension plan provided one of the lowest benefits of all judicial plans in Canada.

256. Mr. Ferguson stated 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 and if the accrual rate was increased to 3%, then the plan member contributions should increase to at least 8%.

257. The 2008 Commission was not provided with any evidence justifying the differences between the pension benefits of Provincial Court Judges in New Brunswick and those of other members of the judiciary in Canada.

258. The 2008 Commission concluded that where the pension benefit will also be a function of years of service and final salary, it was appropriate that the rate of benefit (the accrual rate) be the same as the majority of other jurisdictions.

259. After studying the issues and making comparisons to other jurisdictions, the 2008 Commission recommended, and the Province accepted, 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 contributions to the plan by the Provincial Court Judges be increased from 7% to 8% of salary per year. The amendments to the plan would be applied on a prospective basis beginning April 1, 2010.

The 2012 Commission

260. In its first submission to the 2012 Commission, the Province argued in favour of significant changes to the pension plan.

261. After a period of considerable information gathering, the Province's proposal was withdrawn as part of a revised submission brought forward in December of 2014. At that time the Minister/Province did indicate that the subject may be reintroduced at some point in the future.

262. During a hearing before the 2012 JRC no suggestion was made by either of the parties that any changes were being contemplated to the pension plan as it then existed.

The 2016-2020 Commission

263. By way of correspondence dated November 16, 2017 the Province confirmed that salary was the sole substantive issue for the 2016-2020 JRC.

264. In this correspondence, the Province expressed an intention to undertake a process to review the sustainability of the Judges' pension plan by way of a joint committee to be struck sometime before the commencement of the next Judicial Remuneration Commission (the 2020-2024 JRC).

265. The Province's correspondence of November 16, 2017 was introduced as an Exhibit (Exhibit 16) before the current JRC. With respect to the Province's intentions regarding pensions, legal counsel for the Province, Mr. Denis G. Thériault, stated:

"It is the intention of the Province to undertake a review of the sustainability of the judges' pension plan, an exercise that has been undertaken and is being undertaken for other provincially-funded pension plans. It is proposed that a committee, with representatives from the Province and from the Provincial Court, be struck to undertake this work with a view to having it completed prior to the beginning of the next JRC. The results of

the review would then be available for consideration as part of the next JRC.

The federal government has introduced enhancements to the Canada Pension Plan (CPP), which will come into effect on January 1, 2019. At that time, both the Province and Provincial Court Judges will be obligated to make additional contributions to CPP with a related increase in CPP benefits payable. The enhancements and premiums to CPP are being phased in over seven years so the impact will change over that period. We propose that these enhancements be integrated with the judges' pension plan and the combined benefits remain at the current level. This integration will also be considered as part of the pension review referred to above."

266. It was confirmed on November 20, 2017 that the proposed review affecting sustainability of pensions was not a matter for the 2016-2020 JRC (Exhibit 18).

267. Thus, pensions were not addressed as part of the report and recommendations of the 2016-2020 JRC save and except for the following at page 28 of the 2016 New Brunswick Judicial Remuneration Commission's report:

"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."

268. On November 23, 2017, Clarence L. Bennett, solicitor for the Provincial Court Judges' Association, responded to the Province as follows (Exhibit 17):

"In our view, the information provided with respect to a possible committee is inadequate. We cannot provide any meaningful advice to our client about participation in a committee until further information is provided. Specifically, if the Province is serious about the implementation of a review, we require a detailed proposal on the mandate of the committee, its terms of reference, composition and some detail on the information that will be made available to the committee with respect to the management of the fund.

Our clients will be cooperative and are open to meaningful dialogue about issues surrounding their pension but it is apparent to us that the concept of a committee is simply an idea presented by the Province at this juncture and a more thoughtful and substantive proposal will be necessary before our client can take a position on the extent, if any, to which they will be participating.”

269. Retired Judge Dickson in his testimony before the current Commission stated that no response was ever received by the PCJA in response to the letter of November 23, 2017 (Exhibit 17) nor did the PCJA follow-up with the Province respecting participation in a review of the sustainability of the judges’ pension plan.

The Province’s Proposal for Pension Reform

270. The Province’s proposal with respect to changes to the judges’ pension plan is as follows:

Item	Current <i>Provincial Court Act (PCA)</i> and <i>Provincial Court Judges’ Pension Act (PCJPA)</i>	Proposed with future service in Proposed pension plan and a Retirement Compensation Arrangement (RCA)
Indexing	<ul style="list-style-type: none"> • PCA - CPI, capped at 6% • PCJPA – CPI, capped at 5% 	Conditional indexing with cap removed. The <i>Pension Benefits Act (PBA)</i> requires a minimum expected 75% of CPI over 20 years.
Base benefit	Secured assuming PNB’s future ability to pay.	<p>No PNB guarantee for future benefits, which will depend on performance of the proposed pension plan. The PBA requires a minimum probability of 95% that the base benefit will be maintained over 20 years.</p> <p>The NBSPP requires a minimum probability of 97.5% that the base benefit will be maintained over 20 years.</p> <p>Accrued benefits at time of conversion will be secured by the PNB.</p>

Accrual rate	3%	1.4% up to YMPE 2% above YMPE
Pension	<ul style="list-style-type: none"> • PCA – if retire before age 65 = 60% x Final Salary. If retire after age 65 = 60% x Final Salary less 0.7% per year of service x average of YMPE for the last 3 years • PCJPA - 2.75% x 3 Year Average Salary x years of pensionable service prior to April 1, 2010 plus 3% x 3 Year Average Salary x years of pensionable service on or after April 1, 2010. Maximum pension payable of 65% of 3 Year Average Salary. 	<p>Past benefits retained and conditionally indexed based on performance of the pension benefit plan.</p> <p>Future benefits based on annual accrual of 1.4% up to YMPE and 2% accrual above YMPE and conditionally indexed each year thereafter, with bridge of 0.6% up to YMPE payable to age 65.</p>
Integrated with CPP	<ul style="list-style-type: none"> • PCA - integrated • PCJPA - not integrated 	Integrated
Pension calculation	Best 3 years	Enhanced Career Average
Vesting period	<ul style="list-style-type: none"> • PCA - various • PCJPA - 2 years 	2 years
Eligibility for unreduced pension	<ul style="list-style-type: none"> • PCA – Age 65 and 10 years' service or age 60 and 25 years' service • PCJPA - Age 60 with 2 years' service 	Age 65 with 2 years' service
Total cost of benefit (% of total payroll)	<p>About 49.4 % of total payroll:</p> <ul style="list-style-type: none"> • Contributing judges: 7.3% of total payroll (8% of salary) • PNB: 42.1% % of total payroll 	<p>About 25.0 % of total payroll:</p> <ul style="list-style-type: none"> • Contributing judges: 9.1 % of total payroll (9.9% of salary) • PNB: 17 % of total payroll
Governance	<ul style="list-style-type: none"> • Plan Governor - Minister of Finance & Treasury Board • Fund trustee – Minister of Finance & Treasury Board 	<ul style="list-style-type: none"> • Independent Board of Trustees • RCA administered by PNB • Governance of former Judges' plans to remain the same
Investment	Vestcor Inc.	Vestcor Inc.
Plan administration	Vestcor Inc.	Vestcor Inc.
Regulation and risk management	Not subject to the <i>Pension Benefits Act</i> and without legislated risk management requirements	<ul style="list-style-type: none"> • For pension benefit plan portion, subject to PBA with robust risk management requirements • RCA in accordance with requirements
Early retirement reduction	3% per year that retirement precedes age 60. No reduction for retirement at age 60 or after.	<ul style="list-style-type: none"> • 5% per year that retirement precedes age 65.

Arguments of the Parties

271. The Province's submissions with respect to the pension proposal related to the objectives of sustainability, adequate security, affordability, transparency and equity.

272. At para. G.10 of the Province's Submission, the Province stated that the proposal "*is believed to be respectful of the Supreme Court of Canada's rulings on "fair" and "adequate" judicial compensation.*"

273. In argument, the Province cited *Beauregard v. Canada* [1986] 2 SCR 56 to support their contention that changes diminishing the value of a judges' pension plan does not threaten judicial independence if there is no evidence that the law bringing about these changes was enacted for an improper or colourable purpose, or if there was no discriminatory treatment of judges vis-à-vis other citizens.

274. Further, the Province cited the *PEI Reference Case* (supra) at para. 150 where the Supreme Court of Canada rejected the argument that *Beauregard v. Canada* stands for the proposition that judges' salaries may not be reduced. The Province argues that the rejection of the proposition that judges' salaries may not be reduced applies equally to pensions.

275. The Province asserts all of the following in connection with the above noted pension proposal:

- The Judges' current plans are generous: a defined benefit plan within an accrual rate of 3% and retirement at 60 with a full pension is rare in both New Brunswick and Canada.
- With respect to funding, the Province contributes \$3.6 million per year which amounts to 42% of payroll: for every dollar contributed to the plan by a Judge the taxpayers pay \$5.77.
- Private and public sector plans of this nature have been found to have serious problems with respect to sustainability, security of benefits and affordability.
- New Brunswick has long been a "have not province" plagued by weak economic data due to lack of industry and available natural resources and demographics. The Commission should not focus on recent fiscal surpluses.
- Other issues causing difficulties in funding defined pension plans include the Province's median age is older than all other provinces but for Newfoundland and will be increasing over time, people live longer, lower interest rates and volatile investment returns affect sustainability.
- Given these factors the Province looked at options for broad reform of all of its tax payer funded pension plans.

- Even if one questions the necessity or wisdom of the pension reform, there is no evidence other than that this was a good faith effort to address real concerns with the existing pension plans and the responsible use of tax dollars.
- Broader pension reform, including reform of the judges' plans, can in no way be portrayed as targeting judges in particular.
- 95% of taxpayer-funded pension plan members in New Brunswick are in reformed pension plans.
- The independence of the judiciary requires not only that judges not be discriminated against to their detriment, but that they cannot be treated favourably.
- Part of the reason the proposed plan would reduce the judges' pension income in certain cases is because they have enjoyed a preferential 3% accrual rate. This is not consistent with private and public sector pension plans.
- While there are costs to the judges, the judges would benefit from knowing their plan is subject to independent oversight and stress testing and meet the criteria of sustainability, security of benefits and affordability.
- The proposed pension does not deprive judges of an adequate retirement. Subsection 22.021(6) of the Act only requires that the Commission consider "the adequacy" of judges' remuneration.
- There is no evidence a reformed pension plan would discourage recruitment or result in less highly qualified candidates for appointment to the Provincial Court.
- Judges generally have had respectable and lengthy legal careers, and pension benefits are supplemental to savings to the date of appointment.
- Existing entitlement is maintained, retired judges and those with 22 years of service are essentially unaffected.

276. The Association opposes the Province's pension reform proposal. The Association asserts:

- The Province's pension proposal reduces the accrual rate from 3% to 2% resulting in a reduction of pension value of 21.1% or \$58,326 per year. In order to compensate for that reduction, a judge retiring at age 65 would need to save on average an additional \$82,300 per annum.
- By failing to present any evidence that answers why such a dramatic proposal is necessary at this time, let alone why it is necessary at all, the Province has not come before the Commission in good faith.

- The Province committed to the 2016-2020 JRC that it would do the work necessary to consider a change to the judicial pension and it failed to do so. Despite this commitment, the Province comes before the current Commission with essentially the exact same contentious pension proposal that was initially before the 2012 JRC and withdrawn. This is indicative of bad faith on the part of the Province.
- The key question under the *Act* is whether the pension is adequate and not whether it is a defined benefit plan or a shared risk plan.
- There is nothing in section 22.02(1.2) of the *Act* or elsewhere that indicates that the Commission is meant to consider the pre-appointment retirement savings of prospective judges when deciding whether the pension is adequate.
- Given that the purpose of the *Act* is to properly compensate judges and to ensure judicial independence, the plain meaning of subsection 22.02(1.2), read harmoniously with this purpose, must be to ensure that the judicial pension alone is adequate to ensure financial security in retirement.
- If the pension reform proposals are implemented the Provincial Court judges would have the worst pension of any judges in the country.
- The existing judicial pension is comparable, but not more generous than, judicial pensions in other jurisdictions.
- Reducing the judicial pension does not achieve equality with others paid from the public purse, rather it targets Provincial Court judges with a reduction in overall compensation that is not experienced by any other group in the civil service.
- These are not the “difficult economic times” referenced by Chief Justice Lamer in the *PEI Reference Case* at para. 196 and the Province is not uniformly reducing salaries across the public service with the goal of deficit reduction instead the Province are targeting Provincial Court judges with a pension reduction that disproportionately reduces their overall compensation vis-à-vis the rest of the public service.
- Judicial Remuneration Commissions are responsible for determining all aspects of judicial compensation including the judicial pension. The Province’s proposal would see control over important aspects of the judicial pension including the contribution rate, indexing and benefit amounts, shift to a Board of Trustees. The Board of Trustees would be comprised of equal parts government representatives and union representatives. This would create the untenable perception and the real risk that judges would be vulnerable to economic manipulation from both the government and the largest unions in the Province. This pension approach was previously rejected as unconstitutional by the Newfoundland and Labrador Supreme Court in *Newfoundland and Labrador Association of Provincial Court Judges v. Newfoundland and Labrador*, 2018 NLSC 140.

- Judges who have applied and been successful in achieving appointment did so in reliance on the existence of the current judicial pension and the Province should be prevented from unilaterally withdrawing that benefit.
- The Province's pension proposal would have a chilling effect on recruitment of qualified candidates willing to apply for an appointment to the Provincial Court.
- The Province's pension proposal creates a situation where judicial pensions are drastically reduced and no longer secure. Since the Provincial Court judges are no longer being offered "an adequate" pension, the minimum guarantee of remuneration required to ensure financial security is threatened. This is compounded by the fact that the pension is removed from the jurisdiction of future Judicial Remuneration Commissions.
- In order to be adequate, a judicial pension needs to compensate for 70% to 80% of pre-retirement income.

The Evidence Presented on the Pension Reform Proposal

277. We think it is important to highlight the considerable evidence the parties brought before this Commission on the pension reform issue.

278. The 2020-2024 Commission had before it and has considered all of the following documentary evidence respecting the pension reform issue:

- Exhibit 1 – The Submission of the Province of New Brunswick contained an Appendix (Appendix 2) which was a comparison of existing pension plans and proposed reform pension plans. Attachments to Appendix 2 included two letters. The first from Yves Plourde of Morneau Shepell to Natalie Kenny, Senior Pension Advisor, Finance and Treasury Board dated January 19, 2021 and a second letter from Yves Plourde to Natalie Kenny dated January 20, 2021. The January 19, 2021 letter provided updated calculations to estimate the additional savings required by Judges to fund similar retirement income under the Current Plan versus a 2014 Proposed Plan for Provincial Court Judges in New Brunswick as proposed in the Government's submission to the Judicial Remuneration Commission in July 2014. The letter dated January 20, 2021 provided projected pensions for a judge after retirement under the Current Plan and under a 2014 Proposed Plan, assuming that they were for their whole career under either the Current Plan or the 2014 Proposed Plan in order to compare pensions over an entire career. These letters were also contained as Tabs 4 and 5 respectively to Exhibit 5.
- Appendix 2 to Exhibit 1 the comparison of existing pension plans and proposed reform pension plans was updated by the Province following Mr. Leonard Lee-White's testimony. The Amended Appendix 2 was marked as Exhibit 20 and is reproduced in its entirety in this report at para. 270.
- Exhibit 2 - The Association's Submission contained three Appendices specifically directed to the Pension Reform issue; namely: Appendix B was a comparative

analysis of Judicial Pension Plans prepared by André Sauv  and dated March 2, 2022; Appendix C was a letter from Andr  Sauv  to Clarence Bennett, legal counsel for PCJA, dated March 3, 2022 wherein Mr. Sauv  estimated the portion of salaries that should be set aside each year by a judge to provide retirement pension benefits sufficient to compensate for the reduction in the value of the judicial pension benefits that would result from the Government's pension reform proposal. Appendix D was a document prepared by Andr  Sauv  and titled Total Compensation. This document purports to show a net reduction in Total Annual Compensation from 2019 to 2023 of \$37,482.

- Exhibit 8 – Median Annual Rate of Return of Pension Plans for the last 12 years.
- Exhibit 9 - Life Expectancy for the population of New Brunswick.
- Exhibit 10 - Actuarial Valuation as at April 1, 2019 for Funding Purposes, Report prepared April 2020 (Morneau Shepell document).
- Exhibit 12 - CV of Andr  Sauv .
- Exhibit 13 – A “Comparative Analysis of Judicial Pension Plans” presented by Andr  Sauv .
- Exhibit 16 - Letter from Denis Th riault, Senior Lawyer with Legal Services, Province of New Brunswick, to Ms. Deloras O’Neill dated November 16, 2017.
- Exhibit 17 - Letter from Clarence Bennett of Stewart McKelvey to the Office of the Attorney General, Legal Services, to the attention of Denis Th riault dated November 23, 2017 with attached email cover sheet.
- Exhibit 18 - Copy of an unsigned letter from Deloras O’Neill, Chair JRC to Denis Th riault, Senior Lawyer, PNB Legal Services, dated November 20, 2017.

279. During argument before the Commission, Mr. Bennett submitted a document that compared the Province’s 2012 JRC Submission on Pension Reform to the Province’s 2020-2024 JRC Submission on Pension Reform in support of his contention that the two proposal 10 years apart were essentially similar. The document was not marked as an exhibit but was considered by the Commission.

280. The economic and fiscal evidence outlined previously was likewise relied upon by the parties to support their respective arguments on the question of pension reform.

281. Mr. Leonard Lee-White, a retired assistant deputy Minister of Finance and Treasury Board testified before the inquiry.

282. Much of Mr. Lee-White’s direct evidence was historical relating to public service pension plans in New Brunswick particularly since 2008-2009. He testified with respect the differences between defined benefit and shared risk pension plans, stressing elements such as sustainability, adequate funding, transparency and governance.

283. Mr. Lee White conceded that he was not involved in any part of the decision-making process in connection with the Province's Submission to the 2020-2024 Commission requesting pension changes. Mr. Lee-White's involvement commenced approximately 2 weeks prior to the commencement of the inquiry.

284. The Province did not call Yves Plourde or Natalie Kenny as witnesses before the inquiry.

285. The Association called Mr. André Sauvé an actuary from Montréal with experience with respect to judicial pension plans.

286. Mr. Sauvé testified that he was retained by the Provincial Court Judges' Association to review the Province's Pension Plan reform proposal and then to compare the current existing plan to judicial pension plan arrangements across Canada. Mr. Sauvé testified as to the Province's pension reform proposal and its impact on judges' contributions and benefits.

287. On the question of the adequacy of the proposed pension plan Mr. Lee-White testified that as a rule of thumb an adequate pension is around 70% of your pre-retirement income. He testified that with a 2% accrual rate over a career of 35 to 40 years an individual would have a pension that would give them somewhere between 70 to 80% of their pre-retirement income.

288. Mr. Lee White acknowledged that most Provincial Court judges are appointed to the bench at the mid-point of or even later in their legal careers. In the event that the Province's pension plan reform proposals are implemented, to retire with around 70% of pre-retirement income it would be necessary to consider or factor in the pre-appointment savings or pension benefits of the judge.

289. On cross-examination Mr. Lee-White agreed that a pension plan that only provided 40% of pre-retirement income would not be an adequate pension at retirement.

290. Mr. Sauvé in his evidence provided an opinion that the shared risk model proposed by the Province did not provide for an adequate pension for Provincial Court judges. He conceded that the proposed plan could be adequate for civil servants but not for a Provincial Court judge retiring after 20 years on the bench and receiving a pension of 40% of pre-retirement income. Mr. Sauvé stated that the rationale for the proposed shared risk model being adequate for civil servants but not judges is the different career path of a civil servant who is typically hired at a younger age and has longer years of service.

Discussion

291. Subsection 22.02(1.2)(b) of the Act provides that the Commission shall deal with the adequacy of pension, vacation and sick leave benefits provided to judges.

292. The Commission is of the view that the adequacy of the pension provided to Provincial Court judges differs from issues of sustainability, adequate security, affordability, transparency and equity for pension plans for public sector employees.

293. The 2008 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% per year and

the contributions to the plan by the Provincial Court Judges be increased from 7% to 8% of salary per year. This recommendation followed a report by Conrad Ferguson of Morneau Sobeco that was commissioned by the Province that concluded that the New Brunswick pension plan for judges provided one of the lowest benefits of all judicial pension plans in Canada.

294. The Province accepted the recommendations of the 2008 Commission and amendments to the Plan became effective April 1, 2010.

295. A mere two years later with the 2012 Commission the Province first proposed significant changes to the pension plan for Provincial Court Judges.

296. This Commission has concluded that the changes initially proposed in 2012 are substantially similar to the proposed changes that are now before the 2020-2024 Commission.

297. This Commission has concluded that the changes initially proposed in 2012 were response to various challenges the Province of New Brunswick faced with respect to the viability of defined benefit pension plans that came to light in and around 2007-2008.

298. The changes initially proposed in 2012 were withdrawn as part of a revised submission brought forward to the 2012 JRC in December of 2014.

299. Changes to the pension plan for judges were not before the 2016 Commission. Instead the Province indicated an intention to undertake a review of the sustainability of the judges' pension plan. The Province proposed that a Committee with representatives from the Province and the Provincial Court be struck to undertake this work. No such committee was struck.

300. If the Province of New Brunswick wishes to bring a pension reform proposal before the JRC, it is the expectation of this Commission that the Province will fulfill its undertaking and complete the review of the sustainability of the judges' pension plan as was proposed in 2017.

301. Mr. Sauvé in his evidence indicated that other Provinces have and are exploring methods of financing the unfunded portions of a defined benefits pension plan that could clearly be part of the work of the Committee reviewing the sustainability of the New Brunswick judicial pension plan.

302. It is the view of this Commission that the Province has not demonstrated to the satisfaction of this Commission why the proposed changes to the pension plan are necessary.

303. The Province's witness, Leonard Lee-White, in both his direct evidence and on cross-examination stated that an adequate retirement income would be around 70% of pre-retirement income for an individual with a 35 to 40 year career with an accrual rate of 2.00%.

304. Mr. Sauvé in his evidence concluded that the proposed pension plan was not an adequate pension for New Brunswick Provincial Court Judges but might be for New Brunswick civil servants who have a different career trajectory.

305. Provincial Court Judges are unique. They are not civil servants. Civil servants have very different career paths or trajectories from those of Provincial Court Judges.

306. A judicial career traditionally starts much later than the career of most civil servants. The average age for an appointment to the bench is 48 years. The average age of retirement for Provincial Court Judge in New Brunswick is 68 years. This envisions a 20 year career on the bench. The careers of most civil servants are much longer from 35 to 40 years.

307. Once appointed there is no real opportunity for a judge to leave the bench and resume his or her legal career or otherwise.

308. To provide for an adequate pension on retirement a Provincial Court Judge must contribute to the plan for the entire duration of his or her time on the bench.

309. The finances of a judge pre-appointment to the bench are not considered nor should they be when we are called upon to decide whether the pension plan reform proposal of the Province is adequate.

310. This Commission is of the view that if implemented the Province's pension plan reform proposal will have a detrimental effect on the recruitment of qualified and quality candidates for appointment to the Provincial Court. We would expect that if implemented only candidates with a pre-existing pension plan (one that could be integrated with the Provincial Court Judge's plan) would apply for appointment to the Provincial Court. The proposal if implemented would in our view eliminate qualified candidates from the private practicing bar.

311. In order for a judicial pension plan to be adequate we are of the view that the plan must be tailored to the unique aspects of an appointment to the bench and must provide a retiring Provincial Court judge with a retirement income of 65% to 70% of his or her pre-retirement income.

312. A judicial pension that only provides for 40% of pre-retirement income and does not allow for retirement until age 65 is not in this Commission's view an adequate judicial pension.

313. We have significant concerns with respect to whether the Province's pension plan reform proposal is constitutional. It would appear to us that with the Province's proposal certain aspects of the judicial pension are shifting to management and control by a Board of Trustees. We are of the view that if the Province proceeds with the proposed pension plan reform that in the future there will be no place for the JRC to determine any aspects of the judicial pension.

314. We believe that a similar pension plan was rejected as unconstitutional by the Newfoundland Supreme Court in the *Newfoundland and Labrador Association of Provincial Court Judges v. Newfoundland and Labrador* decision (supra).

315. This Commission has not sought a legal opinion regarding the constitutionality of the Province's proposed pension plan reform. Should a similar proposal with aspects of the management and control of the judicial pension shifting to a Board of Trustees come before the future JRC we would recommend a legal opinion as to the constitutionality of employing a Board of Trustees to manage and control the pension for judges be sought.

C. Judicial Allowance

316. The judicial allowance was established under the 2008 JRC at a rate of \$2,500 per year with allowable carry over to a maximum of \$7,500.

317. The judicial allowance has not changed since the 2008 JRC.

318. The 2008 JRC recognized the importance of a judicial allowance that is used for the purpose of covering expenses which are not generally reimbursed by the Chief Judge. The 2008 JRC made the following statements regarding the extent and types of expenses the judicial allowance is intended to cover:

“[...] The nature and extent of expenses to be paid should be similar to the arrangements in comparable provinces such as Nova Scotia and Manitoba. Specifically, these include attendance at judicial/legal conferences, professional association membership dues, computer equipment, software and training, and hearing or visual enhancements expenses not covered by health plans.”

319. As we understand the Association's position they are requesting an increase in the judicial allowance to \$5,000 per year and that cell phone expenses and home security systems should be included as expenses for which they may use their annual judicial allowance.

320. The Association also asked the Commission to increase the existing reimbursement rates for actual travel expenses beyond the existing civil service kilometer rate of \$0.41 per kilometer.

321. The Commission received in evidence a memo from the Government of New Brunswick indicating kilometer allowance increases effective May 1, 2022 and will not comment further on the Association's request to increase the existing reimbursement rates for actual travel expenses beyond the existing civil service kilometer rates.

322. The Province notes that the Association is silent in its submission on the issue of carrying over of the judicial allowance and the amount at which any carry over should be capped.

323. The Commission supports the request for an increase in the allowable annual judicial allowance.

324. The existing judicial allowance has been in effect since 2008. 12 years has elapsed since the 2008 JRC and the commencement of the 2020-2024 JRC. Prices, costs and expenses have all increased over this same 12 year period. The Association offers evidence that prices have increased by a cumulative of 24.12% citing the annual average change in the Consumer Price Index (CPI) and the CPI excluding energy, 2007 to 2021, Statistics Canada, CANSIM table 18-10-0005-01.

325. The Commission recognizes that the cost to attend educational programs particularly if those programs require travel and accommodation outside of the Maritime Provinces have increased significantly since the 2008 JRC.

326. The Commission likewise recognizes the importance of Judges having the opportunity to attend educational programs like those offered by the National Judicial Institute, the Federation of Law Societies, CAPCJ Annual Education Conferences, etc.

327. The Commission acknowledges and commends the Province for recently providing five (5) additional days of leave to Provincial Court Judges for educational purposes and increasing the Chief Judge's budget to support participation in education programs.

328. With respect to cell phones we understand that Judges are entitled to take advantage of the Government of New Brunswick service contract. This permits a Provincial Court Judge to seek reimbursement of a fixed amount per annum for the phone, data and voice plans. However, Judges often acquire phones and data and voice plans that exceed the fixed amount per annum allowed under the Government of New Brunswick service contract. The Judges seek to have the excess costs reimbursable as a component of the judicial allowance.

329. The Province submits that a standard approach should be taken for cell phones for Judges and that if the models and plans provided for by the Province are no longer considered sufficient for their purposes, all costs related to all cell phones for Provincial Court Judges - the purchase, data and voice plans, technical support, security and maintenance - be managed through the Office of the Chief Judge and paid for out of their judicial allowance.

330. The Commission supports the proposal of the Province for the handling of cell phones and data and voice plans for the Judges of the Provincial Court.

331. The Association requested the scope of the judicial allowance be expanded to cover the cost of home security systems, citing the particular safety concerns faced by Judges.

332. The Commission is satisfied that the existing method of assessing security concerns on a case-by-case basis when specific threats arise is sufficient and the Chief Justice may approve security system expenses under a Judge's judicial allowance.

D. Per Diem Judges

333. The Provincial Court Judges' Association placed the issue of the rate of pay for per diem judges before the 2020-2024 Commission.

334. The rate of pay for work performed by a per diem Judge is set at 1/251 of a Provincial Court Judge's salary.

335. A Provincial Court Judge performing on-call remand work is compensated at 1/220 of a Provincial Court Judge's salary.

336. The Association argues that the current per diem rate does not properly reflect the nature of the work performed by per diem judges, which is the same as a judge performing

on-call remand duties. The Association argues that the same per diem rate of 1/220 should apply to both judges performing on-call remand duties and to the work of a per diem judge.

337. The Province asserts that the focus should be on the role of a per diem judge rather than the nature of the work and that the role of a per diem judge supports the distinct per diem rates paid to a per diem judge versus a Provincial Court judge performing on call remand duties.

Background

338. The Commission understands that in 2003, the *Provincial Court Act* was amended to replace the system of supernumerary judges with a panel of retired judges paid on a per diem basis (see *An Act to Amend the Provincial Court Act*, SNB 2003, c. 18, Bill 50, 5th Sess, 54th Leg. Royal Assent April 11, 2003).

339. Judges appointed before April 2, 2002 may still elect supernumerary status. Judges appointed after April 2, 2002 when retired can only continue to sit where, in the opinion of the Chief Judge, additional judges are urgently required to conduct the business of the Court. The Lieutenant Governor in Council is required to establish a panel composed of judges who have retired or resigned, who have not reached the age of 75 years and who have given notice to the Chief Judge of their intention to be available for judicial duties (see ss. 7.1(1) and 7.1(2) of the Act).

340. The per diem rate for a judge selected to perform duties under ss. 7.1(2) of the Act is set by ss. 7.1(6) of the Act. Remuneration for the expenses of a judge selected to perform duties under ss. 7.1(2) of the Act is set out by ss. 7.1(7) of the Act. These subsections state:

“7.1(6) A person who is selected under subsection (2) shall be paid a daily rate of 1/251 of a judge’s salary, other than the chief judge’s or associate chief judge’s salary, and shall be paid one-half of the daily rate for one-half day’s work or less.

7.1(7) A person who is selected under subsection bracket (2) shall receive such reimbursement for expenses in respect of the person’s services as a judge as are prescribed by regulation.”

341. The Commission received evidence that there were, as of March 31, 2022, nine (9) supernumerary judges and three (3) per diem judges. By January 1, 2025 there will only be three (3) supernumerary judges as the other six (6) will have reached the age of 75 years and will no longer be eligible to sit. There are no longer any sitting judges who are eligible to elect supernumerary status.

342. Associate Chief Judge MacLean and Judge Arseneault in particular provided the Commission with considerable evidence of the significant and important role that both the supernumerary judges and the per diem judges play in the proper and efficient functioning of the Provincial Court of New Brunswick.

Submissions to the 2020-2024 JRC

343. The Association argues that the per diem system now achieves the same purpose as the supernumerary system, that is, it affords the Chief Judge the same flexibility to call on a per diem judge to fill gaps and ensure access to justice is maintained.

344. The Association maintains and the Commission agrees that the work of a per diem judge is indistinguishable from the work of a full-time sitting judge or a judge performing on-call remand duties.

345. Per diem judges are necessary in many situations and that without a per diem system the ability of the Provincial Court to function effectively and efficiently and to provide timely access to justice will be impacted.

346. The Association states that is important that the per diem rate is sufficient to attract judges, properly reflects the nature of the work a per diem judge performs and that New Brunswick lags behind other Provinces in adjusting their per diem rate. The Association offered the following table to support their position that New Brunswick lags behind other Provinces in adjusting the per diem rate. The Association maintains that the table compares similar ad hoc/retired judges' programs in the other Provinces and territories.

<u>Province</u> ¹⁰⁹	<u>Rate</u>
Alberta	1/207.5
British Columbia	Supernumerary
Manitoba	1/218
Newfoundland and Labrador	1/248
Nova Scotia	1/218
North West Territories	1/210
Ontario	1/209
Price Edward Island	1/220
Saskatchewan	1/220
Yukon	1/235
Quebec	\$1,026.29

347. For its part, the Province says that the use of per diem judges cannot be directly compared to the use of supernumerary judges. The Province states that while there are guarantees in the Act with respect to the number of days supernumerary judges must sit, there are no such guarantees for per diem judges.

348. The Province noted that officials with the Department of Justice and Public Safety work regularly with the Chief Judge to ensure that the Provincial Court operates efficiently and effectively with the appropriate complement of judges.

349. As to the per diem rate the Province noted the following:

- the focus should be on the role of the judge rather than the nature of the work.
- the role of a per diem judge supports the distinct per diem rates paid.
- full-time judges doing remand duty have the option of electing to receive an extra vacation day or to be paid for 75% of the daily rate, which is set at 1/220 of the judge's annual salary.
- full-time judges earn vacation credits as part of their remuneration and the associated per diem rate for a full-time judge performing on-call remand duties is calculated based on a rate that takes those vacation credits into account.
- per diem judges are retired judges who are in receipt of a pension. The per diem payment is over and above the pension. They do not have an employer- employee type of relationship with the Crown and they do not earn vacation credits.
- the rate paid to per diem judges is the same rate paid to out-of-Province judges appointed on a temporary basis under the Act to sit in New Brunswick and who are in receipt of a full salary from their home Province.

350. The table of rates paid to per diem judges in the other Provinces and territories shows that the per diem rate in New Brunswick is less than every other jurisdiction in the country.

351. The Commission is of the view that per diem judges are essential to the effective and efficient functioning of the Provincial Court of New Brunswick and will continue to be essential as the number of supernumerary judges declines over the next 2.5 years.

352. We are of the view that the work of a per diem judge is no different from that of a full-time sitting judge.

353. The low per diem rate, in fact the lowest in the country, has the potential to impact the per diem judge program in this Province and to impact the proper functioning of the Provincial Court system. There very well could be retired judges who opt not to participate in the per diem judges program because of the low per diem rate. With the exception of Newfoundland and Labrador at a per diem rate of 1/248, New Brunswick's rate is considerably lower than those of other jurisdictions, whose rates vary from a high of 1/207.5 in Alberta to 1/235 in the Yukon.

354. The Association also requests:

- (i) a judicial allowance of \$2,500 per year (subject to the approval of the Chief Judge) to be used to purchase necessities, such as an updated Criminal Code (yearly) and the replacement of judicial clothing is required;
- (ii) with the approval of the Chief Judge, per diem judges should be entitled to attend a yearly educational conference and have all expenses covered to the same extent as full-time judges; and
- (iii) that ss. 7.1(3) of the *Provincial Court Act* be amended to increase the yearly budget for per diem judges. The current yearly budget is 5% of the salaries of 26 judges, including the Chief Judge and the Associate Chief Judge.

355. The Province's position is that as there is no guarantee of sitting days for per diem judges, there should be no guarantee of ongoing training post-retirement nor other related expenses.

356. The Province argues that there should be no amendments to the Act. The Province submits that it is not within the Commission's mandate to determine the allocation of resources available to the Provincial Court and the question of the budget allocation for per diem judges fall outside the scope of the Commission's authority.

357. The Commission is of the view that our mandate as stated in ss. 22.02(1.2) of the Act extends only to making recommendations regarding the salaries and amounts paid to the Chief Judge, the Associate Chief Judge and Judges. The terms Chief Judge, Associate Chief Judge and Judge are defined terms (see ss. 1(1) of the Act). The term "Judge" means a Judge appointed under ss. 2(1) of the Act and includes a Chief Judge and an Associate Chief Judge. Per diem judges are not included in this definition. None of the provisions of section 7.1 or 7.2 extend the provisions of the Act relating to the Judicial Remuneration Commission to per diem judges.

358. However, the Province concedes that the Commission has the authority to make recommendations on the rate of salary and other benefits payable to judges, including those serving as per diem judges.

359. As such the Commission will limit its recommendations pertaining to per diem judges to the salary (i.e. the per diem rate) and will not address either amendments to the Act or the question of budget allocations.

E. Representation Costs

360. The 2016 JRC found the matter of jurisdiction to consider representation costs to be settled in the affirmative. We would refer specifically to the following statement found at page 26 of the 2016 JRC report:

"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.”

361. In the proceeding before the 2020-2024 Commission, the Province submitted that the assertion that the *Act* authorizes and requires the Commission to award costs is incorrect.

362. The Province argues that Judicial Remuneration Commissions are creatures of statute and are to be established and act in accordance with the statute. The *Provincial Court Act* limits the jurisdiction of the Commission to issues of remuneration such as salary, pensions, vacation, sick leave benefits, etc. Representational costs incurred in the process of determining judicial remuneration are not a matter of remuneration and therefore there can be no responsibility on the government, regardless of past practice, to contribute to the costs of the Provincial Court Judges’ Association or any other party wishing to appear and make representations to the Commission.

363. The Provincial Court Judges’ Association did not make submissions with respect to jurisdiction. Instead, the Association proceeded on the assumption that the jurisdiction to consider representation costs was settled.

364. Additionally, the Provincial Court Judges’ Association point to the following factors considered by the 2016 JRC in support of a recommendation for representation costs:

- the judiciary does not participate in this process by choice, rather it is mandated to do so by the legislation.
- if the judges are 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.
- 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.

365. We accept that all of the above apply equally to the 2020-2024 Commission and substantiate a recommendation that the Provincial Court Judges are entitled to representation costs.

366. The question becomes in what amount or in what percentage of costs are they entitled to.

367. Notwithstanding its arguments regarding no jurisdiction on the part of the Commission to recommend representation costs, the Province has indicated that it is prepared to consider general representation costs on terms similar to what was provided for since the 2008

Commission. Specifically, the Province indicates it is willing to pay 50% of the Association's general representation costs to a maximum of \$30,000.

368. The Provincial Court Judges' Association advances the position that it is entitled to 100% reimbursement for its legal fees and disbursements.

369. The Provincial Court Judges' Association rely on the following in support of their request for 100% reimbursement of its legal fees and disbursements.

- the Province departed from what the Association says was “established practice of linkage” of Provincial Court judges salaries with federally appointed King's Bench judges.
- the Province proposed a “drastic and costly overhaul” of the judicial pension.
- the Province's salary proposal and pension reform proposal created a substantial amount of work for the Association and its counsel and necessitated the Association retaining two experts - one of whom was tasked entirely with an examination of the Province's pension reform proposal.
- significant reimbursement of costs incurred in the JRC process is the norm, not the exception. The Association provided details each of the following:
 - in BC the 2019 JRC recommended that 100% of the judges' representation costs should be paid.
 - in Alberta the government by Regulation and Ministerial Order is required to pay 100% of the reasonable costs incurred by the Judges' Association up to a maximum of \$150,000.
 - in the Northwest Territories the Commission recommended 100% reimbursement of costs.
 - in Manitoba the 2017 JRC recommended 75% of the Judges' Association's reasonable legal costs to a maximum aggregate payment of \$45,000 and 100% reimbursement of disbursements, including the cost of experts to a maximum of \$22,500.
 - in Saskatchewan the government pays 75% of costs.
 - in Newfoundland and Labrador the 2014 and 2017 JRC's recommended payment of two-thirds of the reasonable legal fees and 100% of expert witness fees.
 - in Ontario following the 2013 Commission the government reimbursed the Association \$405,000 in legal costs and \$85,000 in disbursements.

- the 2016 Commission recommended the government pay 100% of the Association's general representation costs incurred to participate in the Commission process.

370. It should be noted that the 2016 Commission was substantially less complex than the current Commission with the parties making a joint recommendation that the salaries of Provincial Court Judges be set at 80% of the salaries of federally appointed King's Bench Judges.

371. The Association reiterated that the 2016 Commission noted that should future Commissions involve changes in pension benefits then the Association's expert and legal fees ought to be reimbursed at 100%:

“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.” (2016 Commission Report at p. 28)

372. In formulating our recommendation on the Association's request for representation costs, the Commission has considered all of the submissions of the parties as well as the findings and recommendations of past JRC's in particular the 2008, 2012 and 2016 Commissions (as summarized in the 2016 Commission Report).

373. No evidence was presented by the Province that the percentage amounts of representation costs awarded by Commissions throughout this country was other than as represented by the Association in their submission.

[Remainder of page intentionally left blank]

VI - SUMMARY OF RECOMMENDATIONS

374. The Commission recommends:

1. A Provincial Court Judge's base annual salary continue to be set at 80% of the salary of the federally appointed justices, adjusted annually commencing in 2020, with the continuation of all current benefits in place except as remunerated below.
2. The Province's request for changes to the Judges' pension plan as outlined at para. 270 of this Report is dismissed at this time as the Province has not established to the satisfaction of this Commission that the pension reform proposals provide the Provincial Court Judges with an adequate pension as required by ss. 22.02(1.2)(b) of the *Provincial Court Act* and this Commission expects the Province to fulfil its undertaking to the 2016 Commission to complete the review of the sustainability of the Judges' pension plan as was proposed in 2017.
3. The allowable annual judicial allowance be increased to \$5,000 per year with an allowable carry over to a maximum of \$10,000.
4. The Province's submission for a standard approach for cell phones for judges be implemented. If the plans provided for by the Province are no longer considered sufficient for the Association's purposes, then all costs related to cell phones for Provincial Court Judges including the purchase, data and voice plans, technical support, security and maintenance be managed through the Office of the Chief Judge and paid for out of a judge's judicial allowance.
5. The Commission is satisfied that civil service kilometer rates for travel expenses are adequate and no additional reimbursement is required.
6. The Commission is satisfied that the existing method of assessing security concerns faced by Provincial Court Judges on a case-by-case basis is adequate. If a specific threat arises, the Chief Justice may continue to approve security system expenses under a judge's judicial allowance. No changes to this policy are recommended.
7. The rate of compensation for per diem judges be increased to reflect what a sitting Provincial Court judge earns on a per day basis.
8. Representation Costs - the Province pay 100% of the Provincial Court Judges' Association's general representation costs and disbursements incurred to participate in the 2020-2024 Commission process.

[Signature page follows]

Dated at Saint John, New Brunswick this 3rd day of February, 2023.



Deirdre L. Wade, K.C.
Chair



Thomas G. O'Neil, K.C.
Commissioner



Alan E. Craig
Commissioner