

**REPORT OF
THE NORTHWEST TERRITORIES
JUDICIAL REMUNERATION
COMMISSION**

2012

DAVID GILDAY – Chairperson

DAVID MCPHERSON

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INTRODUCTION AND BACKGROUND

This is the decision of the Northwest Territories Judicial Remuneration Commission (the "Commission") made pursuant to section 12.5 of the Territorial Court Act R.S.N.W.T. 1988, c.T-2 (the "Act").

The Commission is charged with conducting an inquiry with respect to the salaries, pension, vacation leave, sick leave and other benefits provided to the Judges of the Territorial Court (the "Judges"). This Commission is responsible for making recommendations to the Minister of Justice (the "Minister") concerning these matters for the period April 1, 2012 to March 31, 2016.

The Commission has, in accordance with the Act, conducted such an Inquiry including the holding of a public hearing and in the course of this Inquiry has received both written and verbal submissions from counsel on behalf of the Judges and on behalf of the Government of the Northwest Territories (the "GNWT"). No submissions were received or heard from the public.

The Commission is required by virtue of section 12.9 of the Act to consider the following factors in making its report and recommendations:

- (a) the nature and extent of the legal jurisdiction of the territorial judges;
- (b) the adequacy of the territorial judges' salaries and benefits having regard to the cost of living and changes in real per capita income;
- (c) salaries and benefits of provincial and territorial judges in other jurisdictions in Canada;
- (d) the working conditions under which the territorial judges carry out their duties;
- (e) economic fairness;
- (f) the economic conditions of the territories;
- (g) any other factors that the Commission may consider relevant to its review.

Judicial Remuneration Commissions across the country were established after the Supreme Court of Canada's decision in the P.E.I. Reference [1997] 3 S.C. R. in which that Court stated that an independent judiciary is the life blood of democracy. It set out the three components of judicial independence – security of tenure, administrative independence and financial security. These principles have been repeated by the Courts in a number of decisions since then - Bodner [2005] 2 S.C.R. 286.

As mentioned above, this Commission is charged with recommending to the Minister what the appropriate salaries and benefits should be for the Judges over the next four years. According to the case law cited above, the Judges and the GNWT must not negotiate these things between themselves. The judiciary must not only be independent – it must be seen by the public to be independent. Only in this way will it be able to maintain the confidence of the public. There must be no political interference with the Judges.

Guided by the submissions of both parties, this Commission has focused primarily on the matter of the Judges salaries. It has reviewed the material submitted to it by the parties pertaining to

pension, vacation leave, sick leave and other benefits provided to the Judges. The Judges state at page 7 of their Initial Submission document that, "...the only compensation issue which needs to be reviewed by the Commission during the 2012 Commission term is the salaries to be paid to the Territorial Court Judges." Similarly, the GNWT states at page 1 of its Initial Submission that, "The GNWT recognizes salary will remain an issue for each inquiry, but is not currently aware of any unresolved issues pertaining to Judges' benefits." The judges at page 5 of their Reply respond to this statement of the GNWT's by saying:

"In paragraph two of the Government Initial Submission, there is a suggestion that all issues concerning the elements of Judges' compensation have been resolved.

This would appear to suggest that all issues that make up the Judges' compensation are static, and do not change. If that was the impression the Government meant to leave, the Judges respectfully submit that is incorrect."

The Judges go on to elaborate at page 5 of their Reply saying that it is incorrect to suggest that all matters making up the Judges' compensation are static and do not change because the Act requires that the Commission conduct an inquiry into all issues of the Judges' compensation and not just salaries and also because as circumstances change, future Commissions may need to change benefits as well.

This Commission does not interpret the GNWT's remarks at page 1 of its Initial Submission (as set out above and as referred to by the Judges in their Reply) to mean that the GNWT views benefits and the other matters of compensation besides salaries as having been resolved in any permanent way nor that the GNWT sees them as being "static". Rather, it is apparent to this Commission that both sides were making submissions intentionally restricted by each of them to the matter of salaries, this time around, and that this in no way inhibits them from speaking to the other aspects of compensation (e.g. vacation leave, pensions etc.) in the future, to future panels of the Commission.

Judges Submission

Counsel for the Judges, Mr. Tait, has focused on the matter of salary and summarizes that position at page 37 of his submission dated January 13, 2012, (the "Judges Submission") as follows:

The Judges position on salaries for 2012 Commission term are:

April 1, 2012, increase by \$31,745 (13.6%) – for an annual salary of \$265,000;

April 1, 2013 increase by the annual increase in the Consumer Price Index for Yellowknife (the "CPI") as measured as of April 1, 2013;

April 1, 2014 increase by the annual increase in the CPI as measured as of April 1, 2014;

April 1, 2015 increase by the annual increase in the CPI as measured as of April 1, 2015.

Mr. Tait goes on to add that a consideration of each of the factors listed above as they pertain to the matter of salaries should result in this Commission recommending an increase which takes into consideration the following:

- the Territorial Court Judges have higher civil jurisdiction than any other territorial/provincial court;
- the NWT has the highest cost of living of any location in Canada, and the highest per capita income of any jurisdiction in Canada, a status which it has consistently maintained;
- the Territorial Court Judges have more difficult working conditions than any of their counterparts;
- the Territorial Court Judges' workload has increased and the NWT crime rates continue to rise both in magnitude and severity;
- economic fairness suggests that the Territorial Judges should at least keep pace with their counterparts, particularly their counterparts in comparable jurisdictions;
- the NWT continues to have a robust economy.

Mr. Tait suggests at page 38 of the Judges' Submission that this Commission should recommend that the Judges receive salaries that, "are the highest, or close to the highest of the Provincial/Territorial Court Judges in Canada."

GNWT's Submission

Counsel for the GNWT, Messrs. Proctor and Rutland, summarize the GNWT's position on salary at page 13 of their submission (the "GNWT Submission") also dated January 13, 2012, as follows:

- a modest increase in salary will fulfill the objectives of maintaining judicial independence and continuing to attract and retain highly qualified persons to the Bench.

As Mr. Tait did, they too have done an analysis of the seven factors listed in s 12.9 of the Act as they relate to the matter of salary. This Commission summarizes that analysis as follows:

- since 2008 there has been no change to the legal jurisdiction of the Judges. The change in the monetary limit is simply a change to the dollar value of claims the Judges can hear – the civil jurisdiction is otherwise unchanged;
- the GNWT's position on salary is that a fixed amount increase, rather than an indexed increase, is the preferred method of maintaining the adequacy of the Judges' salaries having regard to increases in the cost of living and real per capita income.
- Messrs. Rutland and Proctor point out that the Judges are currently the fifth highest paid in the country and that the average salary for other territorial/provincial Court judges is 96.2 percent of what the Judges currently make;
- the GNWT's submission suggests that there has been a favourable change in the working conditions of the Judges, especially considering the fact that in 2008 – 2009 the GNWT established a fourth position;
- the GNWT urges this Commission to consider the incomes of government lawyers when assessing the "economic fairness" factor listed in s 12.9 of the Act;
- the GNWT is of the view that the economic conditions of the NWT have declined in recent years;
- the GNWT submits that recruitment and retention are not a problem for the Territorial Court due to the compensation being adequate for these purposes;
- it also submits that the compensation level is sufficient to ensure that the judicial independence of the Judges is not threatened;

The parties have also exchanged Reply submissions in response to each others' submissions as referred to above.

Judges Reply

In their Reply the Judges disagree that the Court's civil jurisdiction is simply that of "financial restitution" and Mr. Tait relies on s. 16 of the Act in this regard. It is submitted that the increase in its monetary jurisdiction will inevitably lead to an increase in the Court's workload.

They also say that annual increases that are tied to the CPI will ensure that such increases are more defensible as having a direct relationship to the prevailing economic conditions. They point to a number of other Canadian jurisdictions which use increases based on the CPI. In response to the GNWT's assertion that increases based on the CPI makes for budgeting difficulties, they say the relative amount of money involved means that the budget of the GNWT would not be affected in any meaningful way.

In response to the GNWT's claim that the Judges are among the best paid in the country, the Judges say that their relative position has slipped to fifth in recent years and that there is no good reason for this development. Mr. Tait argues that this is reason enough for a "restorative" increase to \$265,000.

Insofar as the working conditions of the Judges are concerned, Mr. Tait agrees with the GNWT that there is a distinction between working conditions and workload.

In response to the suggestion by the GNWT that this Commission use the salaries of government lawyers as a comparator, the Judges argue that this is not appropriate because these lawyers are not judicial officers. Furthermore, those lawyers can negotiate their own salaries – unlike the Judges. They go on to point out that lawyers can engage in any other form of trade or profession outside their primary employment while the Judges cannot.

Mr. Tait is of the view that the financial position of the GNWT is not an appropriate consideration for this Commission. He argues that simply because the GNWT uses its discretion to allocate funds to one purpose, that cannot mean that for the purpose of determining the Judges salaries it can then say it has insufficient funds to pay them at a certain level. This, Mr. Tait says, would threaten judicial independence contrary to the requirements of the PEI Reference decision of the Supreme Court of Canada. The Judges suggest that the GDP of the NWT is projected to grow in the future and that that is the sort of thing that this Commission should be considering when looking at the matter of "economic conditions of the NWT" as set out in s 12.9 of the Act.

GNWT's Reply

The GNWT, in its reply points out that with an assumed annual increase in the CPI of 2.5% for the next three years, the total increase to the Judges' salary over that period would be \$52,120.52 if the Judges requested 13.6% increase plus annual CPI increases to that were granted by this Commission. It says that such an increase is not appropriate nor is it necessary to ensure judicial independence.

It argues that relying on the CPI for increases instead of simple flat-rate annual increases is problematic, removes predictability and presents difficulties as far as budgeting goes.

The Government reiterates, in responding to the notion that the number of bail hearings is up, that workload is not a relevant factor for Commission consideration.

It relies on a previous Commission's finding that the current remuneration of the Judges adequately compensates for the increased cost of living in the North and on the fact that the Judges receive a Northern Allowance greater than that received by their counterparts in the Yukon.

Insofar as the salaries and benefits of other Provincial and Territorial Judges are concerned, the GNWT responds to the Judges' Submission by pointing out that each jurisdiction across Canada

has its own unique criteria for determining what its Judges' compensation should be. It also contends that the Judges currently receive a salary above the national average for provincial and territorial court judges, and as such are not in danger of falling below a minimum level.

The GNWT in its reply takes the position that working conditions and workload are two very different things and that only the former is relevant to this Commission's task. It points out that not all circuit court work is carried out under onerous conditions – there being Court Houses in Hay River, Fort Smith and Inuvik. Behchoko has road access from Yellowknife and the Court party returns at the end of each day. It says that things are not as onerous as they once were.

Its Reply at page 11, makes note of the fact that with respect to the difference between the Judges' salaries and those of Superior Court Judges, the latter "are set nationally and are influenced by factors such as the need to recruit and retain highly qualified candidates in such large urban centers as Vancouver, Calgary, Toronto and Montreal, where the remuneration of lawyers is higher".

Regarding the Judges' position on the economic conditions of the Territories, at page 12 of its Reply, the GNWT states that it, "does not dispute that the Judges should be paid as well as their counterparts, and they are currently among the better remunerated in Canada, but the economic conditions in the NWT are such that an increase in the realm requested by the Judges is disproportionate and cannot reasonably be paid."

Finally, with respect to "other factors", the GNWT's Reply makes it clear that it is of the view that recruitment and retention are not a problem given the current compensation of the Judges and that neither is any lack of judicial independence on the part of the Judges.

Commission's Decision and Reasons

This Commission has carefully considered the submissions and replies of the parties and their presentations made at the public hearing concerning this matter held in Yellowknife on February 25th 2012. It has also considered the written submission of the NWT branch of the Canadian Bar Association.

The Commission has decided that the Judges' salaries will be increased by \$16,328 effective April 1, 2012, resulting in an annual amount of \$249,582. On April 1 of each following year, up to and including 2015, Judges' salaries will be increased by an amount equal to the CPI calculated for the preceding calendar year ending on December 31st. The Commission acknowledges that the Chief Judge is to continue receiving the \$15,000 administrative allowance in addition to the base salary, said allowance not to have the CPI applied to it annually.

The Commission agrees with the Judges that an annual increase based on the change to the CPI will help the Judges maintain their relative position amongst their counterparts across the country and it recognizes that there appears to be a trend by Remuneration Commissions across Canada towards basing annual increases on the CPI. The Commission does not accept the position of the

GNWT that an increase based upon CPI is too unpredictable and difficult to account for in the budgetary process, noting it is the same process approved by the Legislative Assembly for its own members. The Commission believes, after considering all of the factors required by s 12.9 of the Act, that such an increase is appropriate.

The Commission is of the view that a \$31,745 initial increase is simply too high and not required for the purpose of maintaining judicial independence. However, it does not agree with the GNWT that a flat rate increase of \$24,000 spread over the next four years in annual increments of \$6,000 will appropriately compensate the Judges over that period. The Judges have argued for a "restorative" initial increase of the said amount due to what they say is the gradual lowering of their position vis-a-vis their counterparts across the country and while the members of the Commission agree that their position has slipped somewhat, the fact is that they continue to be amongst the highest paid Territorial or Provincial Court Judges in Canada and therefore a more modest increase is called for. This Commission after considerable deliberation amongst its members has concluded that a more appropriate number is the \$16,328 figure referred to above. This will put them behind only Ontario, Alberta and Yukon.

As mentioned above, this Commission has reviewed all of the arguments and counter arguments concerning the factors set out in s 12.9 of the Act put forward by counsel for the parties and has the following comments regarding same:

(a) The nature and extent of the legal jurisdiction of the Territorial Judges.

This Commission believes the increase in the civil jurisdiction of the Court to \$35,000 does not actually mean that the "nature" of the jurisdiction of the Court has changed. The Commission recognizes that this increase represents a change in the "extent" of the civil jurisdiction in terms of the amounts it is now authorized to adjudicate upon, but at this early stage of the implementation of this change there is no way to assess what impact this increase will have on the Court.

(b) The adequacy of the Territorial Judges' salaries and benefits having regard to the cost of living and changes in real per capita income.

This Commission recognizes the fact that the N.W.T. has the highest per capita income in the country and that its cost of living is amongst the highest in the country. However, it believes that the recommended remuneration of the Judges compensates for the increased cost of living in the North and it notes the fact that the Judges receive a Northern Allowance of \$3,450.

(c) Salaries and benefits of provincial and territorial judges in other jurisdictions in Canada.

The Judges believe this to be the most important single factor in the determination of what the Judges salaries should be. They note that the Judges have slipped to fifth position amongst their counterparts across the country from having been first after 2000-01. They say that there is no good reason for this having happened. The GNWT states that a strict ranking system is not

required and relies on the comments of the 2004 Commission to the effect that being the highest paid Provincial/Territorial Court Judges is not a relevant consideration and was not a factor in that Commission's deliberations.

The Commission understands this factor to be important to the Judges but agrees with the GNWT that judicial remuneration is not a national ranking system. Rather, the Commission views all of the factors set out in section 12.9 as being equally important in its decision-making process and that while all factors must initially be considered individually, it is then up to the Commission to assess their collective impact on the matter of appropriate judicial compensation for that particular four year period.

This Commission believes that the increase it has decided upon as set out above adequately takes into consideration the salaries of provincial and territorial judges across Canada as required by 12.9(c) of the Act. It maintains the Judges as being amongst the highest paid in the country, a result of applying the factors set out in section 12.9.

(d) The working conditions under which the Territorial Judges carry out their duties.

The Judges rely on the fact that much of their work is done on circuits outside of Yellowknife, requiring them to be regularly away from home for variable lengths of time working in communities where accommodations are not always the best which sometimes leads to long commutes to and from said communities each day. They point out that while certain other jurisdictions also have circuit work, the N.W.T. has much more circuit work than these other jurisdictions. They refer to the fact that the number of matters the Territorial Court deals with in a year has more than doubled since 2001.

The GNWT reiterates that the matter of the number of circuits is really a workload issue and as such not relevant. At the same time it says that with the addition of a fourth Judge and the ability to use deputy judges it is reasonable to conclude that each of the Judges will be travelling on circuit less often. It relies on statistics that show the number of sitting days outside Yellowknife has decreased since 2009. It suggests that not all circuit work takes place under onerous conditions.

The Commission takes the view that the working conditions of the Judges are certainly no worse than in the past and in fact have probably improved somewhat in recent years. Notwithstanding the foregoing, it must be recognized that working conditions of the Judges are more onerous than those of their counterparts in the rest of Canada.

(e) Economic fairness;

The GNWT suggest that the salaries of the Judges be compared to those of lawyers in government service in the NWT. The Judges strongly disagree with this idea for the reasons set out above in the Judges' Reply section. They are also of the view that economic fairness dictates

that they be returned to the position they historically occupied in comparison with their colleagues across the country.

The Commission agrees that the suggested comparison with government lawyers is not appropriate primarily for the reasons stated by the Judges as referred to above. As for the Judges contention that the economic fairness factor requires that the Judges' salaries be fair vis-à-vis those of their counterparts across the country, this Commission has reviewed the Reports of past panels of the NWT Judicial Remuneration Commission and can find only one reference to economic fairness in relation to the salaries of other judges and that is in the Report of the 2004 Commission at page three thereof. However, it is not clear from that reference that that panel was specifically endorsing the idea that it must consider those other judges' salaries when looking at this factor of "economic fairness". This Commission does not believe such a consideration is appropriate under this heading. We say this because we are required by subsection (c) of 12.9 to review the salaries and benefits of other territorial and provincial judges and we do not believe it was the intent of the legislature that we consider those items twice.

(f) The economic conditions of the Territories.

The financial position of the GNWT is not a relevant factor, say the Judges, because it makes its own choices regarding the allocation of its resources and it cannot then claim that there are insufficient funds for the salaries of the Judges. Rather, we are encouraged by Mr. Tait to consider the fact that the GDP of the NWT is projected to grow in the future. The GNWT says the GDP of the NWT has decreased by 20% since 2007 while the Judges' salaries have increased by 11.4% over the same period.

The Commission has looked back at previous Commission Reports to see whether those Commissions considered the financial position of the GNWT as part of their analysis of this factor and it has found that past Commissions have not given this aspect much consideration and it has followed that approach again this year. Neither did it find the argument of the GNWT regarding the decrease in the GDP of the Territories over recent years to be compelling when it came to this factor and the salaries of the Judges.


Certainly, based on the material put before it, the economy of the Territories isn't what it was five or ten years ago but the Commission is not convinced that conditions are to the point where they should be given undue weight in the determination of the Judges salaries.


(g) Other relevant factors


The Judges would like us to consider the salaries of Supreme Court Justices under this heading. It appears from Reports of previous Commissions that this has been done on occasion. We are not saying that such a consideration is not relevant, but for this panel of the Commission, at this specific point in time, it does not warrant close consideration as we believe we have looked at all of the factors that are relevant for this particular four year period and have come to an appropriate and satisfactory decision on the matter of the Judges' salaries.

Similarly, the GNWT believes that matters such as recruitment and retention of judges are relevant and should be analyzed and applied in this exercise. Again those topics might well be relevant for a future panel but it is clear that there is presently no problem whatsoever in recruiting excellent candidates nor in retaining them.

Dated the 17th day of April, 2012.



David Gilday (Chair)

David McPherson

Gerald Avery