

# REPORT OF THE NORTHWEST TERRITORIES JUDICIAL REMUNERATION COMMISSION

2016

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## **INDEX**

<b>Introduction and Background</b>	<b>1</b>
<b>Judges' Submission</b>	<b>3</b>
History	3
Factors to be considered by the JRC	3
The nature and extent of the legal jurisdiction of the territorial Judges	4
The adequacy of the territorial Judges' salaries and benefits having regard to the cost of living and changes in real per capita income	5
Salaries and benefits of provincial and territorial judges in other jurisdictions in Canada	6
The working conditions under which the territorial Judges carry out their duties	7
Economic fairness	7
Economic conditions of the Northwest Territories	8
Any other factors that the Commission may consider relevant to its review	8
<b>Recommendations</b> - the recommendations on salary sought by the Judges	9
Adjustments in 2017, 2018 and 2019	9
The recommendations on annual leave sought by the Judges	9
The recommendations on judicial indemnity sought by the Judges	10
<b>GNWT Submission</b>	<b>12</b>
The nature and extent of the Judges' legal jurisdiction	12

The adequacy of the Judges' salaries and benefits	12
Salaries and benefits of other provincial and territorial judges	12
Working conditions	12
Economic fairness	13
Economic conditions of the Territories	13
Other factors	13
Salary	13
Vacation	14
Judicial Indemnity Policy	14

#### **Reply of the Judges to the Initial Submission of the GNWT** 15

The nature and extent of the Judges' legal jurisdiction	15
The adequacy of the territorial Judges' salaries and benefits having regard to cost of living and changes in real per capita income	15
Salaries and benefits of other provincial and territorial judges	15
Working conditions	16
Economic fairness	16
Economic conditions of the Northwest Territories	16
Other factors	16
Salary	17
Vacation	17
Judicial Indemnity Policy	17

<b>Reply of the GNWT to the Initial Submission of the Judges</b>	<b>18</b>
The nature and extent of the Judges' legal jurisdiction	18
The adequacy of the Judges' salaries and benefits	18
Salaries and benefits of other provincial and territorial judges	18
Working conditions	19
Economic fairness	19
Economic conditions of the Northwest Territories	19
Other factors	20
Salary	20
Vacation	20
Judicial Indemnity Policy	20
<b>Supplementary Reply Submission of the Judges</b>	<b>21</b>
<b>Decision</b>	<b>22</b>
Salary	22
Vacation	22
Judicial Indemnity Policy	22
<b>Reasons for Decision</b>	<b>23</b>
Salary	23
Vacation	31
Judicial Indemnity Policy	34

## INTRODUCTION AND BACKGROUND

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

The JRC 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”). The JRC is responsible for making recommendations to the Minister of Justice (the “Minister”) concerning these matters for the period April 1, 2016 to March 31, 2020.

The JRC 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 JRC 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 lifeblood 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, the JRC 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, the JRC has focused primarily on the matter of the Judges' salaries, annual leave and a policy providing indemnity to the Judges under certain circumstances (the Judicial Indemnity Policy).

## **Judges' Submission**

### **History**

The Judges' initial submission (the "Judges' Submission") to the JRC commences with a brief overview of the role and jurisdiction of the Court and a history of the JRC process in the NWT. In that history it refers to the *PEI Reference* decision of the Supreme Court of Canada (the "SCC") of 1997 including its analysis of the three aspects of judicial independence, those being financial security, administrative independence and security of tenure.

Also in that history, the SCC's 2005 decision in *Bodner* is discussed including its determination that the focus of judicial compensation committees across Canada should be on identifying the appropriate level of remuneration for the judicial office in question and further that this must be done in light of relevant objective factors. It points out in that history that the SCC in *Bodner* decided that the process is flexible and its purpose is not simply to update the previous commission's report.

It goes on to recount the process in the NWT pre 1998 when the Judges' salaries were determined as a result of negotiations between the Chief Judge and the Deputy Minister of the Department of Justice of the GNWT. Eventually a formula for setting the Judges' salaries was agreed upon and that was based on the salary of a NWT Supreme Court Justice less an agreed to amount. Over time that formula was rejected by the Judicial Remuneration Commission of the time and the decision came to be based solely on the factors laid out in the *Act*.

The said history, as set out in the Judges' Submission, goes through the various NWT commissions since 1998 up to and including the last one being, the 2012 commission which recommended a 7% increase in the Judges' salaries which resulted in salaries for 2012 of \$249,582 with annual CPI increases to be applied thereto. By April 1, 2015, the annual salary was \$260,302.

The Judges' Submission emphasizes in its section entitled, The Role and Jurisdiction of this 2016 Judicial Remuneration Commission (page 19), that this JRC specify two things:

1. To whom the recommendation applies: i.e. all Territorial Court judges as at and after April 1, 2016; and
2. The details of each aspect of the recommendation.

### **Factors to be Considered by the JRC**

The Judges' Submission then proceeds to an analysis of the seven factors laid out in the

Act which the JRC must consider in its inquiry. They are:

12.9 In making its report and recommendations, the Commission shall consider the following factors:

- (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.
- S.N.W.T. 1998, c.15,s.1(5); S.N.W.T. 2006, c.8,s.9.

**(a) The Nature and Extent of the Legal Jurisdiction of the Territorial Judges**

The Judges' Submission emphasizes that the Territorial Court's legal jurisdiction is as broad or broader than any other Territorial or Provincial Court in the country. It cites the 1999 JRC's Report, where it stated:

The Commission also notes that the jurisdiction and responsibilities of our Territorial Court Judges are unique and more extensive than those of many Provincial Court Judges in other jurisdictions.

It points out that 90 to 95% of all adult criminal prosecutions in the Northwest Territories are tried in the Territorial Court. Further, the Territorial Court has jurisdiction over prosecutions under the federal and territorial environmental, fisheries, wildlife and other regulatory legislation. The Judges state that the number of regulatory offences has increased considerably in recent years.

It goes on to mention that the Territorial Court is responsible for youth justice in the N.W.T., in addition to small claims matters, family matters, child protection matters, ex parte applications and psychiatric assessments. There are also various specialized courts where it plays an important role.

In its conclusion on the factor of the Territorial Court's jurisdiction, the Judges' Submission states at page 31 that:

The jurisdiction exercised by the Territorial Court judges continues to be at least as broad as that exercised by their counterparts in provincial and territorial courts across Canada. Not only is the legal jurisdiction of the Court among the broadest, but unlike in many jurisdictions, all judges must



be familiar with all areas of the Court's jurisdiction.

Clearly, their extensive jurisdiction renders the Judges essential to the effective workings of the justice system in the Northwest Territories. The breadth of their jurisdiction, particularly as compared with that exercised by their counterparts across Canada, supports their requests for compensation that is among the highest paid to judges in other jurisdictions.

b. **The Adequacy of the Territorial Judges' Salaries and Benefits Having Regard to the Cost of Living and Changes in Real Per Capita Income.**

The Judges' Submission contains two charts at page 33, the first showing the annual change in the CPI for Yellowknife for the period 2011 to 2014 inclusive (as measured by Statistics Canada) and the second showing the forecasted annual change for the years 2015 to 2019 (NWT) (forecasted by the Conference Board of Canada). The first chart shows a drop in the annual increase in the CPI from 3.1% in 2011 to 1.7% in 2014. The second shows a predicted increase of 1.3% in 2015 to 2.7% in 2016 dropping to a 2.0% increase by 2019.

The Judges' Submission points to the fact that although the Judges' salaries rose 47.5% between 2001 and 2014, this increase was less than the gains made by workers generally of 57.3% over the same period. During the same period the CPI rose 32.2%.

It relies on data on cost of living differentials between NWT communities and Edmonton provided by the NWT Bureau of Statistics in saying that it is apparent that the cost of living for Territorial Court Judges in the Northwest Territories in 2013 was significantly higher than that of their judicial colleagues in Edmonton.

The Judges go on to say in their submission on this factor, that Statistics Canada no longer tracks real per capita income despite it being referred to in s 12.9(b) of the *Act* and therefore other measures must be referred to in tracking the growth or decline in earnings and income generally. They say that one measure is median total family income and that a comparison of that measure of families across Canada shows that incomes of families in the NWT are consistently higher than in any other jurisdiction across Canada. Another such measure they say is primary household income per capita. That too is substantially higher for the NWT than the average for the rest of Canada. (i.e. \$50,181 in 2013 to \$35,189). They further point to Statistics Canada's average weekly earnings table which shows the earnings of NWT workers significantly outpacing the earnings of their counterparts across the country in recent years and that that differential is increasing.

c. **Salaries and Benefits of Provincial and Territorial Judges in Other Jurisdictions in Canada**

The Judges, in their submission, say that past JRCs have focused particularly on judges' salaries in Ontario, Alberta and Yukon when considering this factor. They refer to the 2001 JRC and its recommendation which made the Judges' salaries the highest in the country at the time. They also refer to the 2004 JRC which recommended salaries of \$197,814, second in the country behind only Ontario. Finally, they rely on the recommendation of the 2012 JRC on salary where it recommended a 7% adjustment. This put the Judges behind only Ontario, Alberta and Yukon. In citing previous JRCs, they take the position that the Judges' salaries should continue behind those paid to judges in Ontario and Alberta and close to that paid to Yukon judges.

Insofar as this JRC and its mandated years of 2016 to 2020, they point to the salaries of Ontario judges for 2014 in the amount of \$279,791 and say that with the increase required by Ontario's regulations this will likely become \$287,289 for 2015, which would already be higher than the \$284,000 the Judges seek from this JRC. They have provided a table of judges' salaries across the country in support of their position. It appears to show that the Judges' salaries currently rank ahead of all of their counterparts across the country except for those in Ontario, Alberta, Saskatchewan and Yukon. They say that their recommendation for a salary of \$284,000 would put the Judges about \$10,000 below that of Alberta judges for 2016 and that would put the two judicial salaries in a relationship comparable to that which existed in 2012 and in 2008.

Finally, the Judges suggest that the JRC consider the salaries paid to judges in Yukon and Saskatchewan. The Judges' Submission states that the proposed \$284,000 is less than 6% above the 2015 Yukon judges salaries and that as the 2016 Yukon JCC process has yet to be completed, it can reasonably be expected that the Yukon salaries will increase in 2016 such that the differential will be less or such that the salary in the Yukon could exceed the proposed 2016 Judges' salaries. They are of the view that as working conditions in the NWT are more onerous than those in Yukon and that as incomes generally are higher in the NWT, the salaries paid to the Judges should be higher than those paid to judges in Yukon.

With respect to the situation in Saskatchewan, the Judges refer the JRC to the fact that Saskatchewan judges will receive an increase for 2016 equal to the percentage increase in the Saskatchewan CPI plus 2%. This, they suggest, would result in a salary of \$283,187 assuming a CPI increase of roughly 2% (Statistics Canada's table No. 326-0020 shows the percentage increase in the CPI between July 2014 and July 2015 as having been 1.8%) and that that figure

would be only slightly lower than the requested amount of \$284,00 for the Judges. As with the situation vis-a-vis Alberta, they say this would result in a similar relationship between the Judges' salaries and those paid to Saskatchewan judges in 2012, the last time the JRC held an inquiry.

**d. The Working Conditions Under Which the Territorial Judges Carry Out Their Duties.**

As they have with past JRCs, the Judges remind this JRC that the conditions under which they work are onerous, more so than those facing their counterparts across the country. They direct the JRC's attention to the challenges and physical conditions they confront while on circuit in addition to the difficult social conditions.

They rely on Statistics Canada's annual Report on police-reported crime statistics across Canada which they say shows proportionately a considerably higher number of reported crimes in the NWT as compared to the other territories of Yukon and Nunavut. The Judges point out that the Crime Severity Index (the CSI) for the NWT was the highest in Canada for 2013. (The CSI is something calculated by Statistics Canada for each jurisdiction in Canada showing how severe the crimes committed in one jurisdiction are when compared to other jurisdictions).

Finally, the Judges emphasize that the decreasing ability to use Justices of the Peace to deal with a variety of offences and judicial types of tasks increases the onerous conditions under which they work. More and more, the Judges are required to deal with very frequently committed offences which were previously handled by Justices of the Peace.

**e. Economic Fairness**

The Judges urge the JRC to weigh the following points in considering this factor:

- the economic fairness of the Judges' compensation in light of the compensation paid to judges of the Supreme Court of the Northwest Territories, who are the group within the Northwest Territories performing the most similar work to Territorial Court judges and which Court competes with the Territorial Court for applicants; and
- the economic fairness of the manner in which the Judges' salaries compare with the salaries paid to judges in other jurisdictions in light of the way in which the earnings of professionals and employees generally compare with the earnings of their counterparts in other jurisdictions.

They argue that the greater the gap between the Judges' salaries and those of Supreme Court judges, the greater the likelihood highly qualified applicants will refrain from applying for provincial/territorial appointment. They further argue that the gap between the two should not be allowed to become too large out of fairness considerations.

Regarding the incomes of professionals and others across the country, the Judges rely on Statistics Canada's Table 281-0027 in saying that for years now the incomes of professionals in the NWT have been higher than those of professionals anywhere else in the country with the exception of Alberta. Another graph in the Judges' Submission shows the average weekly earnings of persons employed in public administration in the NWT to be considerably higher than those of their counterparts across the country.

**f. Economic Conditions of the Northwest Territories**

The Judges argue that as past JRC's have not given the GNWT's financial position much consideration when assessing this factor, neither should this one. They say the focus should instead be solely on the economic conditions of the NWT.

The Judges argue that although the Northwest Territories' economy is still recovering from the global recession of 2008/09, it remains much stronger than it was fifteen years ago. They refer to The Conference Board of Canada's Economic Forecast in saying that despite a prediction for the year 2015 of a 2% decrease in GDP, due to decreased diamond production and slumping mineral prices, the fact is that 2014 was an exceptional year of growth for the NWT which experienced GDP growth of 6.8%. They argue that devolution should assist economic conditions in the NWT.

As for the years of this JRC's mandate, 2016 - 2020, the Judges rely again on the Conference Board of Canada and its Summer 2015 forecast in which it predicts NWT GDP growth of 1.7% in 2016, 8.4% in 2017, 8.2% in 2018 and 5.9% in 2019. They argue that the future prospects for the mining industry in the NWT are good and that employment rates in the NWT will be up in the next few years.

Finally, they again point out that average weekly earnings in the NWT are higher than the average across the country and that that gap has widened considerably in recent years.

**g. Any Other Factors that the Commission May Consider Relevant to its Review.**

The Judges point out that past JRCs have considered judicial independence as

an important factor.

## **Recommendations**

### **The recommendations on salary sought by the Judges are:**

- That, effective April 1, 2016, the annual salary for the Judges shall be increased to \$284,000;
- That, effective on April 1<sup>st</sup> in each of 2017, 2018 and 2019, the annual salary for the Judges shall be increased by a percentage equal to the percentage increase in the Consumer Price index for Yellowknife (the CPI) over the preceding calendar year;
- That the Chief Judge shall continue to receive the \$15,000 Chief Judge's Differential each year in addition to the puisne judge salary;
- That these recommendations shall apply to all who are judges as at or after April 1, 2016.

The Judges' Submission reiterates in this section that the economic conditions of the NWT should not unduly affect its salary recommendations. It points to the Report of the Alberta JCC provided on March 30, 2015, and the fact that that JCC declined to focus on the recent drop in the price of oil as the deciding factor which outweighs all others in our recommendations. Finally, they say that the overall gains in the economy over the last 15 years and the predictions for solid economic growth in the Northwest Territories throughout the period of this JRC's mandate support the Judges' proposals.

### **Adjustments in 2017, 2018 and 2019**

The Judges seek annual adjustment of the Judges' salaries to be made on April 1 of each year and to be based on the percentage change in the CPI for Yellowknife over the preceding calendar year. They point to previous JRCs which have used this approach to ensure that the Judges' salaries maintain pace with the cost of living and inflation over the mandate of those JRCs. They point out that other jurisdictions across the country take this same approach to ensuring that judges' salaries are not eroded over the upcoming years.

### **The Recommendations on Annual Leave Sought by the Judges are:**

- That, effective April 1, 2016, all Territorial Court judges shall be entitled to 40 days of annual leave per annum; and
- That this recommendation shall apply to all who are Territorial Court judges

as at April 1, 2016.

Currently the amount of annual leave a Judge receives is:

- Less than 10 years of judicial service: 31.5 days
- 10 years or more, but less than 20 years: 35.0 days
- 20 years or more: 40.0 days

The Judges argue that all of them should receive the same amount of annual leave regardless of the number of years on the Bench because they all have to endure the same adverse working conditions and they all perform the same complex work. They ask the JRC to look at the situation in other jurisdictions across Canada and they specifically direct attention to Ontario and Nunavut where judges receive 40 days of vacation annually. In Yukon they get 35 days. Federal judges working in the NWT get 35 days. In the remaining jurisdictions it is 30 days. The Judges reiterate that in all of those other jurisdictions the working conditions are not as difficult as in the NWT and this is especially the case with respect to circuit work faced by the Judges. They say this is one of the reasons they should receive more annual leave than those judges receiving 30 and 35 days in other jurisdictions across Canada.

The Judges argue that in each of the next three years this would mean a total of 27 additional days of vacation for members of the Court combined. They say the 2016 cost of their recommendation on annual leave would be \$36,504 for 2016 as it would involve utilizing Deputy Judges to fill in for those Judges on annual leave for the increased days.

**The Recommendation on Judicial Indemnity sought by the Judges is:**

- That effective April 1, 2016, the Government shall be bound by a Judicial Indemnity Policy (the "Indemnity"). For greater certainty, the Judges propose that the Indemnity would apply to Proceedings commenced on or after April 1, 2016.

The Judges argue that they need to be indemnified by the GNWT in a number of circumstances including the following:

- a judicial complaint being made against one of them under s 29.1 to 31.8 of the Act;
- inquiries into wrongful convictions such as the one that occurred in 2005/06 with judges in Newfoundland & Labrador with the Lamer inquiry;

- situations where the Judges may be called upon to defend their judicial immunity;
- complaints before administrative tribunals;
- situations where a Judge is asked to testify about something relating to his or her work as a lawyer prior to his or her judicial appointment;

The Judges point out in their Submission that a number of other Canadian jurisdictions have adopted judicial indemnity policies including Manitoba, Alberta and Newfoundland & Labrador.

## **The Government of the Northwest Territories Submission**

In its introduction to its submission (the "GNWT Submission") the GNWT refers to the SCC's decision in the *PEI Reference* case and points out that the three items needing to be addressed by this JRC are salaries, vacation and a proposed judicial indemnity policy. It then goes on to an analysis of the factors laid out in the *Act*.

### **a. The Nature and Extent of the Judges' Legal Jurisdiction**

The GNWT says there has been no change in the nature and extent of the Judges' legal jurisdiction since the last inquiry and that they continue to hear the majority of the criminal and regulatory matters in the NWT, as well as certain family law matters and civil claims of a limited dollar amount.

### **b. The Adequacy of the Judges' Salaries and Benefits**

It submits that the salaries and benefits are clearly adequate to maintain judicial independence. The GNWT points out that between 1998 and 2013 the salary of a Judge increased by 75.5% from \$143,881 to \$252,514, the same percentage increase as occurred with the average employment income of NWT residents for that period of time which rose from \$33,476 to \$58,744. The Government says the salaries are not only adequate to maintain judicial independence but also appropriate.

### **c. Salaries and Benefits of Other Provincial and Territorial Judges**

The Government provides a table showing that the Judges' salaries are currently fifth behind those paid to judges in Ontario, Alberta, Saskatchewan and Yukon and takes the position that the JRC should not over emphasize this one factor as it would diminish the significance and weight of the other factors required by the *Act* to be considered by the JRC. It also relies on the conclusions of the 2012 JRC when it said that all of the factors set out in the *Act* are equally important and that judicial remuneration is not a national ranking system.

It also states that any argument to the effect that the Judges' salaries should be higher due to the perceived higher cost of living in the North is countered by the fact that they are paid a northern allowance of \$3,450 over and above their salaries which is not shown in the figures in their submission on this point.

### **d. Working Conditions**

The GNWT says that there has been little change in the last four years to the working conditions of the Judges and that the addition of a fourth judge in 2009



has presumably reduced the amount of time on circuit for each individual judge.

**e. Economic Fairness**

The GNWT briefly reviews the conclusions of certain past JRCs respecting the use of the salaries of lawyers employed by government in the NWT and/or the salaries of judges across the country as comparators when considering economic fairness and it points out that the 2012 JRC rejected both of these ideas while the 1999 and 2001 panels took a different approach in suggesting that the Judges' salaries be compared with those of lawyers having an equivalent number of years' experience. It goes on to say that a salary comparison with senior lawyers from the private bar is impractical, if not impossible. It concludes by arguing that the current composition of the Court is evidence of the economic fairness of the compensation that the Judges receive. It says that all four Judges were appointed within the last twelve years, and each Judge came to the Court as an experienced lawyer at the top of his or her respective area(s) of practice.

**f. Economic Conditions of the Territories**

The GNWT refers the JRC to GDP figures compiled by the NWT Bureau of Statistics from 2007 to 2014 which show that GDP is down 15% from its peak in 2007 despite modest increases in 2012, 2013 and 2014 and that it is still below its 2003 level. It points out that during the same period Judges' salaries have increased by 42.3% (since 2003) and by 24.4 % (since 2007). It also refers to the 2015 budget address of the Minister of Finance of the GNWT which forecasted flat total revenue growth for the Government over the next five years while expenditures were anticipated to rise by 8.4%.

It acknowledges that past JRCs have distinguished between the economic state of the GNWT and economic state of the NWT when considering this factor but it says that it is clear that the economic conditions of the NWT drive the fiscal circumstances of the GNWT and that the outlook for those circumstances over the short-to-medium term are bleak.

**g. Other Factors**

The GNWT refers to the promotion of recruitment and retention and the need to promote judicial independence as factors which could be considered but that it has in fact addressed these already in its submission under (b) and (e) respectively.

**Salary**

The GNWT's initial position on salary as set out in the GNWT Submission is that a

modest increase in salary to prevent erosion through increases in cost of living will fulfill the objectives of maintaining judicial independence and continuing to attract and retain highly qualified judges.

## **Vacation**

Regarding the Judges' request that annual leave be increased to 40 days and that all of the Judges be entitled to that amount regardless of years served on the Bench, the GNWT points out that it was the Judges, back in 2004, who asked that the amount of annual leave be made dependent on the number of years served. It goes on to argue that the Judges receive more annual leave than most of their counterparts in the other provinces and territories and that the annual leave amounts mentioned in the GNWT Submission do not even include the extra five days of paid mandatory leave over Christmas which means they actually get 36.5 days, 40 days and 45 days of vacation annually depending on length of service.

It directs our attention to the fact that the Alberta Judicial Compensation Committee recently rejected a request by Alberta judges that their annual leave be increased to the eight weeks given Ontario judges and in doing so said that the increase in annual leave sought by the judges represented an indirect but significant increase to compensation, and that such an increase was not justified in the circumstances. That committee recommended no change from the 30 days of annual leave currently provided to judges in Alberta.

Finally, it argues that an increase in the Judges' annual leave would represent a significant increase in compensation and that it would entail significant extra cost to the Government as it would have to bring in deputy judges from other jurisdictions and that would mean additional travel and honoraria expenses for it.

## **Judicial Indemnity Policy**

The GNWT is not opposed in principle to adopting a policy to indemnify Judges.

## **Reply of the Judges to the Initial Submission of the GNWT**

The Reply of the Judges (the “Judges’ Reply”) states that while the GNWT’s Submission purports to address all of the factors set out in s. 12.9 of the *Act*, on the matter of salary it actually reflects only two of them: adequacy and economic fairness.

It then responds to the GNWT’s treatment in the GNWT’s Submission of each of the seven factors set out in s 12.9 of the *Act*.

### **a. The Nature and Extent of the Judges’ Legal Jurisdiction**

The Judges say that contrary to the GNWT’s Submission, it is important that the JRC consider not only changes that have occurred in the Judges’ legal jurisdiction but also the breadth of that jurisdiction which speaks to their unique role in society and their overall importance to the justice system and that it consider the manner in which the jurisdiction of the Judges compares with that exercised by judges in the other provinces and territories.

### **b. The Adequacy of Judges’ Salaries and Benefits Having Regard to Cost of Living in Real Per Capita Income**

The Judges’ Reply reiterates its view that it is important that the JRC consider the changes in cost of living and incomes since the 2012 JRC issued its report and that it also consider predictions regarding these indicators for the years within its mandate. It refers to the predictions contained in its original submission as supporting its position that the Judges should be paid a salary that is among the highest of judicial salaries across Canada.

It also distinguishes its position from that of what it says is the GNWT’s position with respect to the appropriate level of compensation to be paid to the Judges. It says that adequate compensation is that which meets the bare minimum sufficient to provide financial security for judges but that appropriate compensation reflects consideration of all seven of the factors set out in s. 12.9 and it relies on the SCC’s decision in *Bodner* in this regard.

### **c. Salaries and Benefits of other Provincial and Territorial Judges**

The Judges’ Reply submits that, contrary to the GNWT’s Submission at the bottom of page six thereof that the Judges were expected to argue a significant increase in salary is required so that they can keep pace with their counterparts in Ontario and Alberta, the fact is that a salary increase is supported by the reasoning of past JRC’s and by all of the relevant factors set out in s 12.9 of the *Act*.

In response to the GNWT's assertion, that any argument to the effect that the Judges' salaries should be higher due to the perceived higher cost of living in the North is countered by the fact that they are paid a northern allowance of \$3,450 over and above their salaries, the Judges' Reply points out that judges in some other jurisdictions (Yukon, Saskatchewan, Manitoba, Newfoundland & Labrador) also receive northern allowances of various types.

**d. Working Conditions**

The Judges acknowledge that there has been little change in working conditions over the last four years but point out again that those working conditions continue to be onerous especially when compared to those facing other judges across the country.

**e. Economic Fairness**

The Judges' Reply responds to the GNWT's position that this factor is about the need to attract and retain experienced and capable judges and that the current composition of the Bench shows that this factor has been satisfied by the level of salary and benefits provided to the Judges. But the Judges say it is really about the retention of those currently on the Bench and the attraction of future applicants and that it is therefore important for the JRC to consider how the compensation paid to the Judges compares with that paid to s. 96 judges. It states that those judges receive \$308,600 as at April 1, 2015.

**f. Economic Conditions**

The Judges' Reply on this factor refers briefly to the GNWT's comparison of the present economic conditions to those prevailing in 2008 and 2009 and its comparison of the percentage increase in the Judges' salaries since 2003 and 2007 and it states that a more in-depth analysis is contained in its original submission.

**g. Other Factors**

The Judges' Reply distinguishes between the Judges' position and that of what it says is the GNWT's position regarding the promotion of judicial independence as an additional factor to be considered by the JRC. It says the JRC must base its recommendations on all of the factors, only one of which is that compensation must be adequate having regard to the cost of living.

## **Salary**

The Judges' Reply responds to what the Judges see as being the GNWT's position and that that position (i.e. that there should be adjustments based only on changes in the cost of living in each year of the JRC's mandate) is based only on two of the factors identified in s. 12.9, those being, the adequacy of territorial court salaries and benefits having regard to the cost of living and changes in real per capita income and economic fairness. It says that its original submission sets out a salary proposal supported by all of the factors and the reasoning of past JRCs.

## **Vacation**

In response to the GNWT's assertion that the current amount of annual vacation time should not be changed and its reference to the fact that its senior managers, including Deputy Ministers, are entitled to vacation leave based on the number of years served, the Judges say that most Deputy Ministers have at least 15 years of continuous employment with the Government and therefore they start in their position with 35 days of vacation leave. Similarly, with the Judges, they are relatively senior members of the Bar when appointed and should therefore be entitled to the higher rate of vacation leave and further that since they all do the same work under the same conditions they should get the same amount of vacation leave.

Regarding the five days of mandatory leave over the Christmas season, the Judges say that these are not in fact five days of mandatory leave for the Judges and that this was decided by the 1999 JRC. They say that there is no linkage between the Judges' holiday schedules and the requirement of the civil service to take holidays at Christmas and accordingly these days should not be considered as part of the comparison.

With respect to the GNWT's argument that increasing vacation leave would create considerable extra cost, the Judges say that the Deputy Judge who sits most often resides in Yellowknife, meaning that there is no extra cost beyond the per diem salary rate and that any Deputy Judges brought from the south are most often assigned to circuit work as that is their preference and that their travel costs on circuit would have been incurred by a full-time Judge in any event.

## **Judicial Indemnity Policy**

The Judges' Reply confirms that the parties continue to consider this item.

## **Reply of the GNWT to the Initial Submission of the Judges (the GNWT Reply)**

The GNWT Reply emphasizes the bleak economic conditions of the Territories and urges the JRC to attach the greatest weight to these conditions and it asserts that due to these bleak circumstances the Judges' salary should remain constant for the four years of the JRC's mandate and that there should be no increased annual leave as sought by the Judges.

The request that salary should remain constant over the upcoming four years is a change from the original GNWT position as set forward in the GNWT's Submission, that being - a modest increase in salary to prevent erosion through increases in cost of living.

It then goes on to analyze the factors vis-a-vis the Judges' Submission.

### **a. The Nature and Extent of the Judges' Legal Jurisdiction**

The GNWT's Reply reiterates that there has been no change to the Judges' legal jurisdiction over regulatory offences notwithstanding the assertion by the Judges in their submission that the number of regulatory offences has increased considerably in recent years.

### **b. The Adequacy of Judges' Salaries and Benefits**

The GNWT responds to the Judges on this factor by saying that due to the increases in the Judges' salaries between 2001 and 2014 a significant buffer against inflation has been built up and that therefore the Judges' salaries could go unchanged for a significant period of time and yet continue to be adequate to maintain judicial independence.

### **c. Salaries and Benefits of other Provincial and Territorial Judges**

In response to the Judges' argument that they should be the highest paid or among the highest paid in the country, the GNWT says firstly that they already enjoy a number of financial benefits not enjoyed by other Canadian judges including the low income tax rate in the NWT, the northern resident's deduction and the lack of a territorial sales tax. The GNWT is of the view that, based on the tables set out in the Judges' Submission, the Judges would continue to be among the better compensated judges in the country even without a salary increase. In conclusion, the GNWT says that the bleak economic conditions of the NWT are a more significant change than the salary increases of judges in the higher paying jurisdictions and that it is these economic conditions rather than the desire to keep up with salary increases elsewhere which should be integral to the salary to be recommended by the JRC.

**d. Working Conditions**

The GNWT responds to the Judges' analysis of this factor primarily by reiterating the 2012 JRC conclusion that the Judges' working conditions are, if anything, better than they were in the past. The GNWT also disputes the Judges' assertion that the NWT circuit court system is easily the most challenging in the country and points to the table contained in the Judges' Documents at Tab 2 and argues that that table shows that it is very unlikely that provincial court judges entirely avoid the circuit conditions as described in the Judges' Submission. It points out that all of the Judges reside in Yellowknife which has generous amenities and this is unlike the situation in other jurisdictions where some judges must live in remote communities. It refers to the fact that Deputy Judges were used for circuit work for 89 of the 422 days the Court sat on circuit.

**e. Economic Fairness**

The GNWT says that despite the Judges' argument to the effect that it should take into consideration the salaries of Supreme Court judges when assessing the salaries of the Judges, past JRCs have not done this and that therefore it wouldn't make sense to do it under this factor. They say any comparison with other professional incomes would also be unhelpful.

**f. Economic Conditions of the Territories**

A large portion of the GNWT's Reply is spent on an analysis of this factor and it is to the effect that over the past eight years the NWT's economy has declined significantly such that it is 15% lower than it was prior to the recession which commenced in 2008. It disputes the Judges' assertion that the economy is expected to grow significantly over the next four years. It refers to the Territorial Outlook Economic Forecast of the Conference Board of Canada, Summer 2015, the document relied on by the Judges in making this assertion, where it states in the first sentence of the Introduction to the section specifically pertaining to the NWT, that, "The outlook for the Northwest Territories economy is weak in both the short and longer term." It also references various other negative statements about the prospects for the NWT economy contained in the said document.

Regarding the Conference Board of Canada's prediction that the NWT will have GDP increases in 2016-2019, the GNWT says that that prediction is insupportably optimistic and misleading due to a number of factors.

Regarding the Judges' suggestion that devolution will improve the economic condition of the NWT, the GNWT's Reply makes it clear that in its view, devolution

will not in fact create wealth and it was not created for that purpose.

As for the Judges' suggestion that there are mining projects in the works and that these will have positive impacts on the economy of the NWT, the GNWT's Reply states that many of these are wishful thinking as they are dependent on financing and financing has been difficult to obtain over the past five years. The GNWT also points out in response to the optimism of the Judges' Submission on this factor, that such optimism assumes a rebound in commodity prices.

### **Other Factors**

The GNWT notes that the promotion of recruitment and retention of Judges and the need to promote judicial independence are addressed under other headings in the GNWT's Initial Submission.

### **Salary**

As mentioned above, the GNWT's Reply contains a change in its position on salary and it is now of the view that the JRC should recommend a net-zero adjustment to Judges' remuneration for the next four years. By this it means that should the JRC recommend a salary increase there should also be an equal decrease to some other benefit the Judges receive such that there is no increase in cost to the GNWT.

### **Vacation**

The GNWT maintains its position that the current annual leave provided to the Judges is adequate and appropriate but that it would not object to a return to the previous allotment of 31.5 days regardless of seniority. It also disputes the Judges' assertion that costs would not be largely affected and it says travel expenses to import Deputy Judges from across Canada are considerable.

### **Judicial Indemnity Policy**

The GNWT supports the creation and implementation of such a policy.



### **Supplementary Reply Submission of the Judges**

As a result of the GNWT changing its position on the matter of salary from that contained in the GNWT's Submission to that set out in the GNWT's Reply, the JRC provided the Judges with a further opportunity to respond to that new position and the GNWT agreed to the Judges having this additional opportunity to respond.

The Judges say in their supplementary reply submission (the Supplementary Reply) that the change in the GNWT's position on salary is based on political considerations and not the objective criteria set out in the *Act*. They say that the involvement of the department of Human Resources in the GNWT's Reply and the GNWT's change to a net zero increase in salaries, can only mean the GNWT is positioning itself for collective bargaining with its public service.

They also say in the Supplementary Reply that the GNWT is conflating two distinct (albeit related) concepts: the economic conditions in the NWT and the financial position of the GNWT. They point out that the first is identified in s 12.9(f) of the *Act* while the second is not and that past JRCs have not given the second much consideration. They conclude by urging the JRC to reject the revised position of the GNWT on salary.

## **Decision**

### **Salary**

The Judges ask for a 9.1% increase in their salaries from \$260,302 to \$284,000 effective April 1, 2016. The GNWT argues that there should be no increase to the existing salary and neither should there be any increases over the four year mandate of the JRC, 2016 - 2020. The GNWT further argues that should the JRC decide to increase the salaries it should also decrease some benefit provided to the Judges sufficient to offset the said increase so that the net cost to it would be zero.

The JRC has decided, based on all of the material before it and on the submissions of the parties at the public hearing of November 12, 2015, to recommend an increase in the salaries paid to the Judges. This JRC recommends that, commencing April 1, 2016, the Judges' salaries will be increased by \$11,698, resulting in an annual amount of \$272,000. On April 1 of each following year, up to and including 2019, Judges' salaries will be increased by an amount equal to the CPI for Yellowknife calculated by Statistics Canada for the preceding year ending December 31 plus an additional 1.5 percentage points.

The Chief Judge shall continue to receive the \$15,000 Chief Judge's Differential each year in addition to the puisne judge salary. There shall be no annual increases applicable to this \$15,000.

These recommendations shall apply to all who are Judges as at or after April 1, 2016.

### **Vacation**

The JRC has decided that no change in the existing entitlement to annual leave is required. That is, the Judges shall continue to be entitled to vacation in each year as follows:

- Less than 10 years of judicial service: 31.5 days
- 10 years or more, but less than 20 years: 35.0 days
- 20 years or more: 40.0 days

### **Judicial Indemnity Policy**

The JRC recommends that, effective April 1, 2016, the Government shall be bound by a Judicial Indemnity Policy as jointly tabled by the parties. The Indemnity would apply to Proceedings commenced on or after April 1, 2016.

For the actual policy, see the attached schedule.

## **Reasons For Decision**

### **Salary**

As mentioned above, the GNWT argues that there should be no salary increase and further that if the JRC does recommend any increase it should also reduce some benefit provided to the Judges sufficient to make the actual cost to government equal to zero.

The Judges argue for a 9.1% increase from the 2015/16 salary of \$260,302 to \$284,000 as at April 1, 2016 with annual percentage increases commencing April 1<sup>st</sup> of each subsequent year to April 1<sup>st</sup>, 2019, to be based on the change in the Yellowknife CPI as calculated by Statistics Canada for the preceding calendar year.

The JRC will address firstly the GNWT's position on salary. As can be seen from the preceding summary of the GNWT's Submission and the GNWT's Reply, the government changed its initial position from suggesting a modest increase in salary, to prevent erosion through increases in cost of living, to arguing for a net zero increase over the four years 2016 - 2020.

The Judges' claim that the change in the GNWT's position is political and further that it must be motivated by the GNWT's upcoming negotiations with its union. At page 3 of its Supplementary Reply it states:

It is well known that the GNWT is at the end of a number of 4-year collective agreements and is about to enter negotiations with its public service employees. The only reasonable conclusion is that, since August, the Department of Justice has received its marching orders from the departments of Finance and Human Resources. Those orders: ask for a wage freeze for the judges because we are going to be trying to negotiate a wage freeze for the public service.

Although the Judges, in their Supplementary Reply, go through a detailed analysis of why they conclude the GNWT's change in position must be due to its upcoming union negotiations, they did not present any actual evidence to support this argument either in the written submissions or at the public hearing. In connection with the change in position on salary, or what he said was not so much a change in position but rather one of degree, counsel for the GNWT said at the hearing (page 20 - Transcript):

The request was not made, as suggested by the Judges' Supplementary Reply, for the purpose of posturing for negotiations with the Public Service. I am quoting from the Reply there. Instead, we were encouraged to trust that you, the Judicial Remuneration Commission, would not overreact to the perceived harshness of a request that the Judges' salaries remain at their current level and that you would instead recognize and respect the need for restraint in these challenging times.

Regardless of the particular reason for the GNWT's change in position on salary, the JRC does not agree with its revised position that there be no increase over the next four years. Accordingly it has agreed with the Judges that salaries should be increased, but not by the amount sought by the Judges.

The GNWT emphasized throughout its written submission and at the hearing that the future economic circumstances for the NWT are bleak. It argues repeatedly that it is this change and not the fact that judges' salaries across the country continue to increase annually that should be foremost in the minds of the members of the JRC and that those bleak circumstances should dictate that the JRC recommend no increase whatsoever in the Judges' salaries over the next four years. At the hearing counsel for the GNWT argued that (page 21 - Transcript):

What we are arguing is that, with two exceptions, the factors are largely or entirely unchanged from those factors that resulted in the current salary. The two factors for which circumstances have changed are the salaries and benefits of other Provincial and Territorial Court Judges in Canada and the economic conditions of the Northwest Territories.

At the public hearing counsel for the Judges argued (page 25 - Transcript) that the GNWT's overall approach had a consistent theme to it, that with the exception of the matter of judges' salaries in other jurisdictions and the state of the economy, they argue there has been no change in respect of the other factors identified in s 12.9 of the *Act* and that therefore since these factors have been considered in the existing compensation, this JRC need not consider them afresh now. Counsel went through the GNWT Reply and its analysis of all of the factors and directed attention to all of the references by the GNWT to the fact that there had been no change since the last inquiry in 2012 and that previous JRCs had already taken this or that factor into consideration and thus it was already built into the salary level.

Judges' counsel then referred the JRC to the SCC decisions in *PEI Reference* and *Bodner* and said that those decisions dictate that each Commission must conduct its own inquiry and make its own assessments of the factors laid out in the legislation in its own context. Counsel argued that those decisions require that each JRC not simply update the previous JRC's report but that they should make their own assessment each time around.

The JRC is of the view that simply because there has been little or no change in a particular factor since the inquiry by the JRC in 2012 does not mean that it should reduce the attention it gives to that particular factor or factors in its analysis leading to its recommendations. Further, it does not agree with the GNWT that if there has been little or no change to a particular factor over the last four years that that means the factor has been adequately taken into account in determining the current salaries paid to the

Judges. (Page 7 - GNWT's Reply)

As mentioned previously, the GNWT submits that the change in the economic circumstances of the NWT should outweigh the changes to judges' salaries across the country. However, as noted in the Judges' Submission and the Judges' Supplementary Reply, it is not the economic conditions of the GNWT but the economic conditions of the Territories which are relevant under s 12.9(f) of the *Act*. The GNWT argues that it is the economic conditions of the Territories which drive the fiscal circumstances of the GNWT and that the short-to-medium term outlook for both the NWT and the GNWT is bleak. However the JRC takes note of the fact that there is no specific mention of the economic conditions of the GNWT in s 12.9. However, the economic condition of the GNWT constitutes one component of the economic condition of the NWT as a whole and therefore can be considered by the JRC, along with other components of the economy. The JRC believes that the economic circumstances of the GNWT should not necessarily be given a disproportionate weight relative to that of the other elements of the economy.

In the Judges' Reply (page 7) and at the hearing (page 34 - Transcript), counsel for the Judges took issue with the GNWT's submission in the GNWT's Reply (page 3) that:

Clearly past salary increases have built up a significant buffer against inflation, particularly as a relatively small portion of Judges' salaries is required for the necessities of life. This buffer, and the fact that Judges' annual salaries are over \$190,000 higher than the average employment income of Northwest Territories residents, indicates that the Judges' salaries could go unchanged for a significant period of time and yet continue to be adequate to maintain judicial independence.

Counsel says that it is the JRC's task to recommend a salary that is appropriate and not one that is simply adequate for the purpose of maintaining judicial independence. Counsel again relies on the *PEI Reference* decision of the SCC and its analysis of the separate concept of adequacy.

This JRC is of the view that it is required by s 12.5(2) of the *Act* to recommend salaries and benefits that are appropriate and that the reference in s 12.9(b) to the word adequate is limited to the consideration by it of the potential for erosion in the Judges' salaries over the upcoming four years as a result of the cost of living and changes in real per capita income. This JRC agrees with the Judges that to freeze the Judges' salaries would ensure that the value of those salaries would erode against the cost of living and would also ensure that the Judges would lose ground against others in the economy over the next four years.

Since counsel for the GNWT devoted so much of their submission on the state of the NWT economy and the state of the GNWT economic situation and their conclusion that the current states of both and the outlooks for both are bleak, this JRC believes it is incumbent on it to review the GNWT's assertions in this regard and the counter

arguments put forth by the Judges' counsel. In a nutshell, the GNWT says the current state of the economy and the future outlook is bleak. The Judges acknowledge that there have been difficulties and that the NWT economy is still recovering from the global recession of 2008/09, but they say it remains much stronger than it was fifteen years ago. They refer to The Conference Board of Canada's Economic Forecast in saying that despite a prediction for the year 2015 of a 2% decrease in GDP due to decreased diamond production and slumping mineral prices, the fact is that 2014 was an exceptional year of growth for the NWT which experienced GDP growth of 6.8%.

The Judges point to the Conference Board of Canada's predictions of GDP growth over the next four years and say further that average weekly earnings in the NWT are higher than the average across the country and that that gap has continued to widen in recent years. They are of the view that things are simply not as bad in the NWT as the GNWT tries to make them out to be.

The GNWT on the other hand relies on GDP figures compiled by the NWT Bureau of Statistics from 2007 to 2014 which show that GDP is down 15% from its peak in 2007 despite modest increases in 2012, 2013 and 2014 and that it is still below its 2003 level.

This JRC notes that both sides rely on forecasts by various organizations of GDP growth and that it questioned the GNWT, in writing, after the public hearing on November 12, 2015, about the efficacy of relying on GDP as the best measure of economic activity in the NWT. The GNWT's response indicated that GDP is a better measure for the larger, more diverse economies in the provinces than it is for NWT economic activity, because of the small, open nature of the NWT economy and the dominance of the resource sector within that economy. It went on to say that there is no single best measure for economic activity in the NWT and that it is necessary to survey a variety of indicators. It then surveyed such a variety of indicators including GDP, income measures, labour market indicators, retail sales, population and own source revenues of the GNWT. In virtually all of these categories the NWT was at the bottom or very near to it in terms of the rate of growth over the period 2010 - 2014.

This JRC also asked the GNWT whether it agreed with the Conference Board's forecast for the period 2016 - 2020. The GNWT said that the Conference Board had had only five years' experience in doing NWT economic forecasts, that the Conference Board had consistently revised its NWT forecasts downward and that this is an indication that its model tends to overestimate NWT economic performance. In general it said that the Conference Board's Territorial Outlooks tend to err on the side of projecting excessive economic growth and that it considers the Conference Board's Territorial Outlook (Summer 2015) for 2016 - 2020 to be particularly optimistic for various reasons, including the fact that most of the economic benefit from mine construction (if any) leaks out to other jurisdictions.

In one final question to the GNWT concerning economic matters, the JRC asked, what is

the relationship between the economy of the NWT and fiscal arrangements between the GNWT and the federal government? The opening paragraph of its answer stated:

The GNWT is not closely linked to the territorial economy in a fiscal sense, because of its reliance on federal transfers for almost three-quarters of its total revenues. Consequently, the GNWT does not use the GDP forecasts in forecasting revenues for the simple reason that it is not a variable in determining the nearly 75 per cent of GNWT revenues that come from federal transfers - mainly Territorial Formula Financing (TFF) arrangements, Canada Health Transfer, Canada Social Transfer and several smaller federal transfers.

The GNWT's response to this question appears to be saying that overall, with the exception of some effect from population changes, the state of the economy of the NWT, from time to time, does not have all that much to do with the state of the GNWT's finances. For example, in discussing the relationship between the TFF and the economy, it says:

However, for the most part, TFF increases (are) for reasons external to the NWT economy's performance - mainly growth in provincial/local government spending.

Further in its answer the GNWT states:

A large portion of increases (decreases) in own-source revenues will be offset by a corresponding decrease (increase) of TFF, resulting in only minimal adjustments in the GNWT's total revenues. In this way, the GNWT's total revenues are divorced from economic growth patterns.

The Judges were given an opportunity to comment on the answers provided by the GNWT concerning the Conference Board's forecast and the efficacy of relying on GDP. Regarding the latter, they said that they did not disagree with the GNWT's contention that GDP is not necessarily the best measure of economic activity in the NWT and they agreed that it is important to look across a wide variety of indicators in order to properly assess the economic conditions and they say they did just that in the Judges' Submission. They also provide a number of graphs in their comments on the response of the GNWT to the said questions and these graphs appear to show that since 1999 employees in the NWT have consistently outpaced their counterparts in the rest of Canada in terms of compensation and that although there have been recent deviations from this overall trend in the past few years, the forecast is for the overall trend to continue in the next few years.

The Judges urge the JRC to take the broader perspective and that that should drive the recommendations, not the fluctuations in the economy, albeit significant, that occur from time to time for various reasons. They say that particularly when considered from that perspective, the overall gains in the economy over the last 15 years and the predictions

for solid economic growth in the NWT throughout the period of this JRC's mandate support their request for an increase in the Judges' salaries.

It is very difficult for the JRC to predict with any kind of certainty what the future holds for the NWT economy but it does believe that insofar as the current economic conditions of the NWT are concerned, those conditions are not much better, if at all, than they were in 2012. This JRC has considered all of the various charts and graphs presented by both parties regarding the future prospects of the NWT's economy and can only say that the future is largely uncertain with respect to those prospects but it does not believe that it is so bleak as to require the freezing of the Judges' salaries over the next four years. However, this factor has been taken into consideration by this JRC in determining that a 9.1% increase in the first year is not appropriate and that something less than that plus further modest increases, spread out over the four year mandate of this JRC is what is called for under the circumstances.

This JRC believes that s 12.9(f), (i.e. the economic conditions of the Territories) is but one of the seven factors required to be considered by it and that it is to be given no more and no less weight than any of the others. As previous JRC's have said, all of the factors are equal in importance.

As for the other factors set out in s 12.9, the GNWT says that there has been little or no change in all of them except for the salaries and benefits paid to other judges across the country and the economic conditions of the NWT and they say the negative changes in the latter should outweigh the positive changes in the former. The Judges argue that whether or not there has been much change in a particular factor, the JRC should still consider that factor and give it equal weight in making its recommendations in the context of this particular inquiry. This JRC agrees with this approach and has therefore given serious and equal consideration to each of the other factors set out in s.12.9.

S12.9c requires the JRC to compare the Judges' salaries to those of their counterparts across the country. If CPI changes over the next four years equal the amounts forecast by the Conference Board of Canada, the formula for calculating the salaries of the Judges over the next four years as set out above would produce the following estimated salaries over that period:

2016/17 - \$272,000

2017/18 - \$283,424

2018/19 - \$293,911

2019/20 - \$304,491

Should actual CPI, as measured by Statistics Canada, differ from the forecast, then the



amounts shown above for the years 2017-18 to 2019-20 will differ.

While the 2016-17 salary is lower by \$12,000 in the first year than what the Judges asked for, by 2019/20 it is much closer to the level they sought using the same Conference Board forecasts of CPI.

Based on the table of Puisne Judges Salaries Across Canada contained in the Judges' Submission, the \$272,000 which the Judges will receive in 2016/17 will put them in fourth position behind Ontario, Alberta and Saskatchewan. Yukon has yet to hold its inquiry into its judges' salaries but it would appear likely that those salaries will also be greater than the \$272,000 to be paid to the Judges. However, this is the same position as the Judges occupied after the 2012 inquiry and this JRC believes it to be satisfactory taking into consideration all of the factors. As a prior JRC stated, this is not a national ranking system. The fact that the JRC is specifically required by s 12.9(c) to consider the salaries and benefits of judges in other parts of Canada does not mean that it must conclude each time that its Judges must always maintain their previous rank amongst judges across the country. The position vis-a-vis other judges in the country will go up and down depending on the JRC's assessment in each inquiry of all of the factors set out in s 12.9.

Finally, with respect to salaries of other judges across Canada, during the hearing counsel for the GNWT pointed out that the tax rate in the NWT is relatively low, there is the northern resident deduction, no territorial sales tax and finally that the Judges receive a northern allowance. While all of this may be true, the GNWT did not provide this JRC with any details of the different tax rates across the country nor did it provide any comparison of the various northern allowances provided by the different jurisdictions (reference to the existence of other northern allowances was made by the Judges in their written submissions). There may be other provinces and/or Territories without sales taxes as well - no information on this was provided to this JRC. If the GNWT seriously wished this JRC to consider these factors in relation to s. 12.9(c) then it would have facilitated matters if it had provided the JRC with this kind of information.

The other factors under s 12.9 include the working conditions of the Judges. The Judges argue that clearly their working conditions are onerous and in fact more onerous than those of their counterparts across the country. They are of the view that this is one important reason why they should be paid a salary that is amongst the highest in the country insofar as judges are concerned. However, as the GNWT points out, there have been no changes to the working conditions since the date of the last inquiry and it could be that they have improved due to the addition of another Judge in 2009.

The Judges say that circuit work in the NWT is more difficult than circuits in other parts of Canada. The GNWT is of the view that there isn't that much difference. After reviewing the arguments of both parties on this factor, the JRC is of the view that while the working conditions may have improved somewhat in recent years, the circuit work

done by the Judges is more challenging than anywhere else in the country due to the relative frequency of it, the conditions prevailing on many of those circuits, the required travel by air to and from remote communities in less than ideal conditions and the facilities in which the Court operates in some of those communities.

This JRC agrees that the working conditions of the Judges are in fact more onerous than those of judges in the rest of the country and it agrees with the Judges' assertion that this, together with the current situation with certain of the other factors, should mean that the Judges' salaries and benefits continue to rank amongst the highest in the country.

The only other factors which this JRC has not touched on in these reasons are the nature and extent of the legal jurisdiction of the territorial judges and economic fairness.

Regarding the jurisdiction of the Judges, it has not changed since 2012. However, the Judges, in the Judges' Submission, argue that since it is broader than those of judges in other parts of the country and the fact that all of the Judges are required to exercise the full jurisdiction of the Court, as opposed to specializing in particular areas, the Judges should be amongst the highest paid in Canada. There is nothing in the GNWT's written submissions nor in anything its counsel said at the hearing that suggests that the jurisdiction exercised by the Judges is not in fact as broad, or broader, than judges elsewhere in Canada. The GNWT's position on this factor is simply that the jurisdiction hasn't changed since the last inquiry was held in 2012 and therefore not much additional consideration needs to be given to this factor. This JRC believes that the Judges do in fact have, if not the broadest jurisdiction of courts in Canada then certainly theirs is amongst the broadest and, as such, this does support their argument that they should continue to be amongst the highest paid. The chart provided in the Judges' Documents at Tab 2 thereof, setting out the various types of responsibilities of judges across the country, was reviewed by this JRC and it supports the Judges' contention concerning their relatively broad jurisdiction.

Finally, regarding economic fairness, the Judges argue as they have in the past, that the salaries of s 96 Judges should also be used as a comparator by the JRC in its inquiry into the Judges' salaries. As with previous JRCs, this JRC does not agree with this assertion. Nowhere in s 12.9 of the *Act* is there any mention of the salaries of s 96 judges and since s 12.9(c) specifically requires that the JRC compare the salaries of the Judges to those of judges of other provincial and territorial courts across the country, the JRC is of the view that if the legislature had wanted it to compare the Judges' salaries to those of s 96 judges it would have said so clearly in s12.9.

## Vacation

As mentioned above, this JRC has decided that no change is required respecting annual leave.

This JRC sees no compelling reason to change the annual entitlement from that which is enjoyed by the Judges currently. The fact is that they receive more vacation time than almost all of their counterparts across the country with the exceptions of Ontario and Nunavut whose judges receive 40 days annually. (Yukon judges get 35 days - so this is more than some of the Judges and less than others depending on the number of years on the Bench). The Judges argue that due to the fact that their working conditions are more onerous than those of their counterparts, they need more rest and recovery time. But, they already do receive more rest and recovery time than most of their counterparts and it must be remembered that there is the additional five paid days of leave over Christmas.

The Judges argue that these five days over Christmas are not in fact vacation days. They refer to the 1999 JRC. They say, at page 8 of their Reply, that these five days are not five days of mandatory leave for the Judges. This was determined by the 1999 JRC. They go on to say there that each jurisdiction has its own practice of court closures or reduced court service over the Christmas season. As such, the Judges take the position that these days should not be considered as part of the comparison.

It should be noted that in 1999 the five days referred to were in fact unpaid days of leave. The relevant portion of the 1999 JRC Report provides as follows:

### Mandatory Days of Unpaid Leave:

The Government recommended that the requirement for Territorial Court Judges to take five days of unpaid leave be eliminated. The Territorial Court Judges recommended that this requirement remain untouched until the five days unpaid leave was eliminated for members of the Court's administration who are members of the Public Service.

As was noted by Mr. Voytilla in his presentation to the Commission:

"This is, of course, the requirement for judges to take five days of unpaid leave, formerly known as "Donny Days". This requirement should be removed and any such linkages to public service compensation avoided in the future." (Emphasis added)

The Commission agrees with the view expressed by Mr. Voytilla and finds that the requirement to take unpaid leave in the same fashion as members of the Public Service represents a close and unacceptable linkage between the Territorial Court Judges' remuneration arrangements and those of government employees.

The Commission therefore recommends that the five days of mandatory unpaid leave be eliminated.

Considering the recommendations for improving the Judges' compensation package included in this report and the benefits accruing to the Judges based on the proposed continued application of the 1997 formula for calculating Judges' salaries, the Commission does not recommend any additional compensation be provided for these days.

At the hearing (page 92 - Transcript) Chief Judge Gagnon informed this JRC that, "We were told that if Judges were planning to be away from the Northwest Territories during the time where there is mandatory leave, we have to take it as vacation, and so as part of the 31.5 days. We are entitled to paid leave if we stay here in the NWT. The rationale - - and what happens is that during that time, we have a schedule and a rotation and Judges are on-call to come in if there are situations that require us to work, and so it is not uncommon during those Donny Days."

It would appear therefore that if a Judge stays in Yellowknife over Christmas he or she is paid for those five days even though there may or may not be any work required during that period. That was certainly not the case which the 1999 JRC had to deal with. At that time it was mandatory unpaid leave. Counsel for the Judges referred the JRC at the hearing to the SCC's decision in *PEI Reference* in regard to the matter of mandatory unpaid Christmas leave and the Courts. Counsel relies on that decision for the principle that the Government cannot tell a court to close, a situation that is clearly interference with administrative independence. It is only the Court that closes the Court. This JRC agrees with that principle. Notwithstanding that, the fact is that those Judges who stay in Yellowknife over the Christmas period now receive these additional five days of paid leave even though they may not be called upon to do any work during that period. While it may not technically qualify as annual leave there can be no question but that it is some kind of paid time off and cannot be entirely ignored when addressing the matter of annual leave for the Judges.

This JRC notes the Judges' position that other jurisdictions also have their own particular approaches to court closures over Christmas and their argument that therefore these five days should not be considered when dealing with the Judges' entitlement to annual leave. However, we have been given no details of what those other jurisdictions actually do regarding Christmas closures. We have no information on just how long they might be, what is required of judges in those other jurisdictions at Christmas and whether or not they are paid during these closures.

The Judges also sought to have all of the Judges receive the same amount of annual leave regardless of the number of years on the Bench, saying they all do the same complex work under the same difficult conditions and that therefore they should all get the same forty days off annually. Again, this JRC sees no compelling reason to change

the system in this regard and is of the view that entitlement based on seniority, as previously requested by the Judges, has worked well in the past and there is no reason to think it won't continue to do so in the future.

## Judicial Indemnity Policy

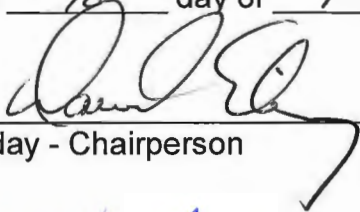
The Judges' Submission lays out all of the specifics of the proposed policy and the GNWT has informed the JRC that it supports the creation of such a policy saying in its letter of December 18, 2015, to the JRC, "that judicial independence is well-served by a policy that creates certainty that these protections will be available to Judges in all situations in which they are appropriate."


The parties have satisfied the JRC, in independent submissions requested by the JRC subsequent to the public hearing, that such a policy in fact qualifies under the *Act* as a benefit and that it is therefore within its jurisdiction to recommend that such a policy be binding upon the GNWT.

We agree that the Judges should be indemnified by the GNWT in the circumstances outlined in the Judicial Indemnity Policy and that, as the GNWT says, judicial independence is well served by such a policy.

Finally, as both parties have informed the JRC that the other items mentioned in s 12.5(1)(b) of the *Act* (i.e. pension, sick leave and various other benefits) do not require this JRC's attention, this JRC has not extended this inquiry into those areas.

Dated the 10<sup>th</sup> day of March, 2016;

  
David Gilday - Chairperson

  
Gerald Avery

  
Margaret Melhorn

SCHEDULE  
**Government of the  
Northwest Territories  
Judicial Indemnity Policy**

**1. Application**

This indemnity policy ("Policy") applies to all current and former territorial judges of the Territorial Court of the Northwest Territories ("judges").

**2. Purpose**

- a) It is in the public interest that the Government of the Northwest Territories (the "Government") and the Minister of Justice and Attorney General (the "Minister"), in particular, defend the judicial independence, jurisdiction, and reputation of the Territorial Court and judges.
- b) It is also in the public interest that judges who are the subject of a complaint to the Judicial Council under the *Territorial Court Act* or subject to a review by the Chief Judge under s.29.1(1) of the *Territorial Court Act* that does not result in a referral of the matter to the Judicial Council (herein referred to generally as a "Judicial Complaint") or who are subject to any other action, proceeding, complaint, charge or inquiry (a "Proceeding"), arising out of their conduct as a judge, including Proceedings affecting their ability to act as a judge, have a complete opportunity to provide full answer and defence.

**3. Details and Extent of Coverage**

- a) Subject to subparagraph 3(c), the Government shall indemnify a judge for legal fees and other costs, charges and expenses, including amounts paid to settle actions or satisfy judgments, reasonably incurred because of Proceedings initiated against them which arise out of their conduct as a judge, including:
  - Judicial Complaints
  - civil actions
  - criminal or territorial offences
  - proceedings under the Northwest Territories *Human Rights Act* or other administrative proceedings
  - inquiries where the *Public Inquiries Act* applies
  - any other Proceeding which could affect their tenure, independence, or ability to perform the duties of a judge.
- b) Subject to subparagraph 3(c), the Government shall also indemnify a judge for legal fees and other costs, charges and expenses reasonably incurred in seeking standing, testifying or participating in any public inquiry which may involve their conduct as a judge or

affect their ability to act as a judge. In circumstances arising out of the judicial function, the Government shall also indemnify a judge for legal fees and other costs, charges and expenses reasonably incurred in responding to a subpoena issued to a judge, or in relation to the judge's attendance as a witness in any court, administrative or other public process.

- c) The Minister may seek to recover from a judge any sums paid under this Policy and cease any further indemnification if a Court or administrative tribunal having jurisdiction over the Proceeding finds that the judge has acted in bad faith in one or more of the following ways:

- the judge is deserving of sanction in respect of a Judicial Complaint
- the judge acted maliciously and without reasonable and probable cause in a civil action and that the protections provided by subsection 17(3) of the *Territorial Court Act* do not apply
- the judge is guilty of a criminal or regulatory offence
- there is a basis for a complaint against the judge in an administrative proceeding

or

- where a Proceeding terminates before the applicable tribunal or decision-maker renders a decision and in the Minister's opinion the judge's conduct fell below the acceptable standard
- where the Minister considers that the judge acted unreasonably in settling an action or in commencing an appeal of a judgment.

- d) If the Minister seeks to recover any sums or cease any further indemnification under subparagraph 3(c), and the judge does not agree, the parties shall resolve the dispute in accordance with paragraph 5.

#### **4. Commencement of Coverage**

- a) Upon becoming aware of any potential or actual Proceeding arising out of his or her conduct as a judge or affecting his or her ability to act as a judge, and where the judge reasonably considers that legal counsel is required, a judge must notify the Minister as soon as reasonably practicable of the potential or actual Proceeding in general terms and shall request indemnity coverage under this Policy. The judge must also notify the Chief Judge of the potential or actual Proceeding and the request for coverage under this Policy.
- b) Within a reasonable period of time up to thirty days after receiving the request, the Minister shall advise the judge and the Chief Judge that the indemnity does or does not apply.
- c) If the judge does not agree with the Minister's decisions in subparagraph 4(b) or if the Minister has not made a decision within thirty days, the matter may be referred to a dispute resolution officer in accordance with the procedure set out below.



- d) If the Minister or the dispute resolution officer decides that indemnity does apply, then the Minister shall immediately authorize the judge to retain and instruct private legal counsel, or appoint a lawyer retained by the Department of Justice to represent the judge. If the Minister and the judge disagree over choice of counsel, either may refer the matter to the dispute resolution officer in accordance with paragraph 5.
- e) If the Minister or the dispute resolution officer authorizes the judge to retain private legal counsel and if the judge has complied with his or her responsibility to notify the Minister as soon as reasonably practicable of the actual or potential Proceeding, he or she will be indemnified for legal fees and disbursements incurred from the date of the retainer, even if this date precedes the date the retainer was authorized. An affected judge will be indemnified for all reasonable legal and other costs incurred, including travel expenses, subject to review by a dispute resolution officer as described in section 5. To the extent that the Department of Justice adopts a policy governing the legal fees and disbursements payable to its external counsel, the rates outlined therein shall be considered by the dispute resolution officer in assessing whether the legal fees and other costs incurred by the judge are reasonable.
- f) If the judge retains private legal counsel, counsel shall on a quarterly basis provide a report to the Minister setting out the status of the Proceeding in general terms, hours and disbursements billed, and the rate charged. In the event the Minister is the complainant, the foregoing information shall be provided to the Chief Judge.

## **5. Dispute Resolution**

- a) A retired judge of the Supreme Court or Court of Appeal of the Northwest Territories, or any other qualified person as mutually agreed upon by the Minister and the judge (the "dispute resolution officer"), shall be appointed on an *ad hoc* basis to resolve any disputes under this indemnity, including:
  - Whether this indemnity should apply in the particular circumstances
  - Whether the judge should be authorized to retain private legal counsel or can be properly and effectively represented by a lawyer retained by the Department of Justice
  - The choice of lawyer retained by the judge
  - The reasonableness of the hours, fees, disbursements or other expenses charged by a lawyer retained by the judge
  - If and to what extent a judge should be required to repay any sums paid in respect of the judge pursuant to this indemnity and/or the extent to which indemnification ought to continue
  - If and to what extent a judge is responsible for any costs or other amounts ordered against the judge personally in matters for which indemnity was provided
  - If and to what extent a judge is responsible to pay the cost of the dispute resolution process; and

- If and to what extent a judge must pay to the Government any costs awarded in favour of the judge. This determination may only be sought if the judge has not been fully indemnified in accordance with this indemnity.
- b) If either the Minister or the judge wishes to have a dispute under this Policy resolved by a dispute resolution officer, the Minister or the judge, as the case may be, shall notify the other party in writing that a dispute resolution officer is required.
- c) The Minister and the judge shall choose the dispute resolution officer by mutual agreement, and shall make all reasonable efforts to engage the dispute resolution officer within fourteen days of the Minister receiving written notice that a dispute resolution officer is required.
- d) Subject to subparagraph 5(a), the Minister shall compensate the dispute resolution officer according to the terms set out in a contract between the Minister and the dispute resolution officer.
- e) The dispute resolution officer shall review the matter on a *de novo* basis and shall adopt whatever procedure he or she determines will be effective to resolve the matter.
- f) A decision of the dispute resolution officer is final and binding on the parties and not subject to appeal or judicial review.

## **6. Miscellaneous**

- a) If a judge benefitting from an indemnity as described herein is eligible for funding from any other sources, such as an insurance policy, the judge must (i) exhaust that source of funding before receiving any sums under the indemnity described herein, and (ii) reimburse the Government for any sums already paid to or on behalf of the judge.
- b) Subject to a determination otherwise by the dispute resolution officer, if the judge is fully indemnified in accordance with this Policy, any costs recovered by the judge who receives indemnity coverage as described herein shall be paid to the Government. If the judge is not fully indemnified through this Policy, then the Government is entitled to any costs recovered by the judge over and above an amount which, together with the indemnity provided, will fully reimburse the judge for his or her legal expenses for the matter.
- c) It is understood and agreed that judges, including the Chief Judge, and the Minister must act pursuant to this indemnity in the utmost good faith.
- d) The Minister in consultation with the judges of the Territorial Court of the Northwest Territories or their representative, shall review this Policy every four years from the date it is first implemented.