

**2019 Yukon Judicial Compensation Commission**

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**WRITTEN SUBMISSIONS OF THE TERRITORIAL COURT JUDICIARY  
IN RELATION TO THE TERRITORIAL COURT JUDGES  
AND  
DEPUTY JUDGES**

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## WRITTEN SUBMISSIONS OF THE TERRITORIAL JUDGES AND DEPUTY JUDGES OF THE YUKON

### OVERVIEW

1. The mandate of this Judicial Compensation Commission (“JCC” or “Commission”) is to inquire into and make recommendations concerning judicial remuneration of judges for the three-year period from April 1, 2019 to March 31, 2022.<sup>1</sup> To assist the Commission with this task, the Territorial Court of Yukon Judges and Deputy Judges (“TCYJ”) provide the following submission.
2. Part I describes the role and purpose of the JCC and provides an overview of past JCC processes in the Yukon.
3. Part II of the submission addresses the factors to be considered by the JCC in assessing what is appropriate compensation for TCYJ. In considering the relevant factors, the TCYJ rely on the decisions of past JCCs as well as the reasoning of JCCs in other jurisdictions.
4. Part III details the TCYJ’s recommendations for a modest increase in the judicial salary of TCYJs structured as follows:
  - a) Effective on April 1, 2019, an increase in the lump sum of \$14,000;
  - b) Effective on April 1 of each of 2020 and 2021, an increase by the greater of 0% or a percentage equal to the Consumer Price Index (“CPI”) for Whitehorse for the preceding year ending December 31.
5. The TCYJ and the Yukon Government (“YG”) have already submitted a joint submission addressing travel insurance for Deputy Judges.
6. The TCYJ ask that this JCC be adjourned until after the Fall sitting of the Legislature to determine whether any pension issue needs to be addressed before this JCC.

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<sup>1</sup> *Territorial Court Act*, RSY 2002, c.217 [*TCA* or the *Act*], YG Book of Documents, Tab 2, s. 14

## **PART I. HISTORY AND OVERVIEW OF THE TRIBUNAL PROCESS IN THE YUKON – LEGAL AND LEGISLATIVE FRAMEWORK**

### **a. Judicial Compensation Commissions: An Overview**

7. Every federal, provincial and territorial jurisdiction across Canada has some form of JCC responsible for making recommendations to government about what is appropriate compensation for judges for the period of that tribunal's mandate. Each jurisdiction has designed its JCC process slightly differently with respect to such things as the timing of tribunals, the length of their respective mandates, the persons eligible for appointment to the tribunal and to what degree the JCC's recommendations are binding on government.

8. In the *PEI Reference*,<sup>2</sup> the Supreme Court of Canada determined that all issues relating to the compensation of judges must be decided by an independent, objective and effective compensation commission in each Canadian jurisdiction.<sup>3</sup> That landmark judgment goes much further than simply mandating compensation commissions. It also clarifies the meaning and central importance of judicial independence and the steps necessary to secure it in our Canadian democracy.

9. In the *PEI Reference*, Lamer CJC, as he then was, outlined three core characteristics of judicial independence: security of tenure, institutional independence and financial security.<sup>4</sup> Security of tenure ensures that a judge does not risk losing his or her job by making a decision that litigants or politicians do not happen to like. Institutional independence frees the court as a whole from improper pressures, so that the government cannot influence the court through manipulation of such things as judges' assignments, court lists or the allocation of resources.

10. Financial security has two aspects. First, judges must be free from the possibility that they can be financially manipulated by government: rewarding cooperative judges or courts on the one hand, or punishing economically the less compliant on the other. The *PEI*

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<sup>2</sup> *Reference re Remuneration of Judges of The Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Ekmecic; R. v. Wickman; Manitoba Provincial Judges' Association v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3 [**PEI Reference**], YG Book of Documents, Tab 1

<sup>3</sup> *PEI Reference*, YG Book of Documents, Tab 1, para 287

<sup>4</sup> *PEI Reference*, YG Book of Documents, Tab 1, para 8

*Reference* addressed this issue by requiring an independent commission process, such as this one, in order to ensure that the relations with the Court could not influence a government's decisions on the level of compensation provided to judges. The second aspect of financial security, the necessity for judicial compensation to be adequate, was also addressed by former Lamer CJC in forceful terms:

Financial security is a means to the end of judicial independence and is therefore for the benefit of the public. As Professor Friedland has put it, speaking as a concerned citizen, it is 'for our sake, not for theirs'.<sup>5</sup>

11. As the Supreme Court of Canada reiterated in a 2005 decision referred to as *Bodner*, financial security embodies three requirements: (1) judicial salaries can be maintained or changed only by recourse to an independent commission; (2) there can be no negotiations between the judiciary and the government over compensation; and (3), judicial salaries may not fall below a minimum level.<sup>6</sup>

12. In *PEI Reference*, as well as in *Bodner*, the Supreme Court of Canada outlined the flexible requirements for JCC processes, which must be independent, objective and effective. Regarding the rationale for the requirement of independence, Lamer CJC explained in *PEI Reference* that the constitutional function of the commissions is to serve as an “institutional sieve, to prevent the setting or freezing of judicial remuneration from being used as a means to exert political pressure through the economic manipulation of the judiciary.”<sup>7</sup>

13. On the requirement of objectivity, Lamer CJC explained that the JCCs must make their recommendations by reference to “objective criteria, not political expediencies” and present “an objective and fair set of recommendations dictated by the public interest”.<sup>8</sup>

14. As for the requirement of effectiveness, Lamer CJC wrote that it was to be guaranteed by the Government’s obligation not to freeze or change compensation until it had received a report of a salary commission, the requirement for regular reviews to avoid the possibility of erosion due to

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<sup>5</sup> *PEI Reference*, YG Book of Documents, Tab 1, para 193

<sup>6</sup> *Provincial Court Judges’ Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges’ Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Québec (Attorney General); Minc v. Québec (Attorney General)*, 2005 SCC 44 [*Bodner*], YG Book of Documents, Tab 23

<sup>7</sup> *PEI Reference*, YG Book of Documents, Tab 1, para 170

<sup>8</sup> *PEI Reference*, YG Book of Documents, Tab 1, para 173

increases in the cost of living, and that the JCC report must have a “meaningful effect” on the determination of judicial compensation. While the effectiveness requirement could mean that the commission’s report is binding on government, a variety of models would be consistent with judicial independence. Where the JCC recommendations were not binding, the government could refuse to implement the recommendations if it gave legitimate reasons and could justify its decision, if necessary in a court of law.<sup>9</sup>

15. Section 17(1) of the *TCA* gives the recommendations of this JCC binding effect.<sup>10</sup> As a result, the process in the Yukon has been considerably more efficient than in most other jurisdictions.

16. The Supreme Court of Canada reiterated in *Bodner* that the JCC process is necessary in order to ensure the financial security of the judiciary, and described the focus of a JCC as being “on identifying the appropriate level of remuneration for the judicial office in question.”<sup>11</sup>

17. The process for determining judicial compensation is unique. As the Supreme Court stated in *Bodner*, “the process is neither adjudicative interest arbitration nor judicial decision making”. Rather, the focus must be on what is appropriate remuneration for judges in light of relevant objective factors.<sup>12</sup>

#### **b. History of the JCC Process in the Yukon**

18. A review of previous JCCs in the Yukon provides context for this JCC in making its recommendations. According to the Supreme Court of Canada in *Bodner*, past JCC Reports are not binding on a subsequent JCC, but are nonetheless highly relevant:

All relevant issues may be addressed. The process is flexible and its purpose is not simply to “update” the previous commission’s report. However, in the absence of reasons to the contrary, the starting point should be the date of the previous commission’s report.<sup>13</sup>

19. The Court explained further:

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<sup>9</sup> *PEI Reference*, YG Book of Documents, Tab 1, paras 174-175, 180-183

<sup>10</sup> The binding nature of the recommendation is subject to an exception in s. 17(2) which is not engaged by the position advanced by the judges in this case: *TCA*, YG Book of Documents, Tab 2.

<sup>11</sup> *Bodner*, YG Book of Documents, Tab 23, para 14

<sup>12</sup> *Bodner*, YG Book of Documents, Tab 23, para 14

<sup>13</sup> *Bodner*, YG Book of Documents, Tab 23, para 14

Each commission must make its assessment in its own context. However, this rule does not mean that each new compensation commission operates in a void, disregarding the work and recommendations of its predecessors. The reports of previous commissions and their outcomes form part of the background and context that a new compensation committee should consider. A new commission may very well decide that, in the circumstances, its predecessors conducted a thorough review of judicial compensation and that, in the absence of demonstrated change, only minor adjustments are necessary. If on the other hand, it considers that previous reports failed to set compensation and benefits at the appropriate level due to particular circumstances, the new commission may legitimately go beyond the findings of the previous commission, and after a careful review, make its own recommendations on that basis.<sup>14</sup>

20. Accordingly, this Commission should consider the reasoning and recommendations of past JCCs in making recommendations for the period of its mandate. For that reason, we have focused on the analysis of past JCCs in respect of judicial salary only, which is the issue before this JCC.

### **Pre-1998**

21. Prior to 1998, the salary of a TCYJs was \$112,135 *per annum*. The salary had been unilaterally reduced to that level, a reduction of 2%, in 1993 under the provisions of the *Public Sector Compensation Restraint Act*. Salaries remained frozen from 1993-1998. The salary of a TCYJ was the lowest of any Western Canadian jurisdiction.<sup>15</sup> The rate of pay for Deputy Judges had remained unchanged for 12 years prior to 1998.<sup>16</sup>

### **1998 JCC**

22. In December, the 1998 Yukon JCC was established in furtherance of a recommendation by Mr. E.M. Ted Hughes, Q.C. who had been appointed by YG to examine the outstanding issues and make recommendations, and by virtue of the *PEI Reference*. It was an independent compensation commission that carried out its mandate in accordance with Order-in-Council (“**OIC**”) 1998/168 dated September 18, 1998.<sup>17</sup>

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<sup>14</sup> *Bodner*, YG Book of Documents, Tab 23, para 15

<sup>15</sup> 1998 JCC Report, YG Book of Documents, Tab 8, pp. 6-7

<sup>16</sup> 1998 JCC Report, YG Book of Documents, Tab 8, p. 9

<sup>17</sup> 1988 JCC Report, YG Book of Documents, Tab 8, pp. 1, 3

23. The members of that JCC were Jean N. Besier, Donald Avison and Brenda Riis. The JCC reached unanimous conclusions and recommendations with respect to the compensation, pensions and other benefits applicable to TCYJ. By agreement between the parties, the JCC was given the mandate to make binding recommendations.<sup>18</sup> The Commission held hearings in Whitehorse on November 11 and 12, 1998.<sup>19</sup> The JCC's Report was issued in December 1998.

24. The JCC's unanimous recommendations were that salaries for TCYJs be set at \$135,000 *per annum* effective September 18, 1998 and that these salaries be adjusted annually, effective April 1, by the Whitehorse CPI of the preceding year. In addition to the TCYJs' base salaries, Chief Judges received an additional sum of \$6,850. The TCYJs did not seek a significant increase to the salary of the Chief Judge but the Commission increased it to \$7,000 per annum above the TCYJs' base rate. The rate of pay for Deputy Judges was increased from \$400-\$500 per day.<sup>20</sup>

## **2001 JCC**

25. The *TCA* was amended so that beginning in 2001, and in each third year thereafter, a Commission would be established to address judicial compensation.<sup>21</sup>

26. The members of the 2001 Yukon JCC were the Honourable Bryan Williams, Q.C., David Ordish and Judy Gingell. Mr. Ordish acted as Chair. The Commission began its work in the fall of 2001 and had a preliminary hearing on November 19, 2001. The Commission conducted its hearings on February 25, 2002.<sup>22</sup>

27. The JCC recommended an increase in salaries from \$141,702 *per annum* to \$166,000 *per annum* as of September 1, 2001, and that these salaries be increased April 1, 2002 to \$172,000 *per annum*, and April 1, 2003 to \$178,000 *per annum*.<sup>23</sup> The JCC did not recommend any increase to the \$7,000 stipend received by the Chief Judge but did recommend that this stipend be included in

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<sup>18</sup> 1998 JCC Report, YG Book of Documents, Tab 8, p. 1

<sup>19</sup> 1998 JCC Report, YG Book of Documents, Tab 8, p. 4

<sup>20</sup> 1998 JCC Report, YG Book of Documents, Tab 8, pp. 8-9

<sup>21</sup> 2001 JCC Report, YG Book of Documents, Tab 9, p. 2

<sup>22</sup> 2001 JCC Report, YG Book of Documents, Tab 9, p. 4

<sup>23</sup> 2001 JCC Report, YG Book of Documents, Tab 9, p. 9



his or her salary for pension purposes.<sup>24</sup> The JCC recommended that Deputy Judges be paid \$800 a day from April 1, 2002.<sup>25</sup>

## **2004 JCC**

28. The 2004 Yukon JCC was appointed by OIC 2004/115 dated June 4, 2004. The members were John Lawson, Roger Kerans, and Shirley Adamson.<sup>26</sup>

29. The JCC issued a directive establishing a mediation process, and mediation meetings began September 15, 2004 and continued into September 16, 2004. After the mediation, the TCYJs and YG filed a joint submission.<sup>27</sup>

30. The JCC adopted the joint submission and recommended an increase in salaries from \$178,000 *per annum* to \$189,900 *per annum* effective April 1, 2004. The JCC recommended that this salary be adjusted for inflation on a compound basis on April 1, 2005 and April 1, 2006 in an amount based on the percentage increase over the previous calendar year in the Whitehorse CPI, as reported by the Yukon Bureau of Statistics, based on the data compiled by Statistics Canada.<sup>28</sup> The JCC recommended an increase from \$7,000 to \$8,000 *per annum* to be paid to the Chief Judge.<sup>29</sup>

## **2007 JCC**

31. Representatives of the parties signed a Letter of Understanding following the conclusion of the 2004 JCC on its recommendation to set out a process for the parties to follow with respect to subsequent JCCs. The purpose of the Letter of Understanding was to establish an informal procedure that would apply to the establishment and conduct of future JCCs. If, with respect to the establishment and conduct of a particular JCC, the informal procedure proves to be unworkable,

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<sup>24</sup> 2001 JCC report, YG Book of Documents, Tab 9, p. 10

<sup>25</sup> 2001 JCC Report, YG Book of Documents, Tab 9, p. 16

<sup>26</sup> 2004 JCC Report, YG Book of Documents, Tab 10, p. 1

<sup>27</sup> 2004 JCC Report, YG Book of Documents, Tab 10, p. 3

<sup>28</sup> 2004 JCC Report, YG Book of Documents, Tab 10, p. 6

<sup>29</sup> 2004 JCC Report, YG Book of Documents, Tab 10, p. 7

then the formal procedure established by the *Act* applies. The 2007 JCC followed the process in the provisions of the Letter of Understanding.<sup>30</sup>

32. The 2007 JCC was established by OIC 2007/83 dated May 24, 2007. David A. Ordish, C.A. was the sole Commissioner.<sup>31</sup> Informal hearings were convened on October 22, 2007. During the informal hearing it was submitted that the parties involved intended to place a joint submission before the JCC. The hearing was then adjourned.<sup>32</sup>

33. On February 12, 2008 all of the TCYJs' issues were placed before the JCC as a joint submission from the TCYJs and YG.<sup>33</sup>

34. The parties agreed, and the JCC recommended, that the TCYJs have their salaries increased from \$199,901 *per annum* to:

- a) \$215,742 *per annum*, effective April 1, 2007;
- b) \$222,214 *per annum*, effective April 1, 2008;
- c) \$228,880 *per annum*, effective April 1, 2009.

35. The parties agreed and the JCC recommended that the stipend paid to the Chief Judge be increased from \$8,000 to \$10,000, effective April 1, 2007.<sup>34</sup>

36. As well, the JCC recommended that the sitting rate for Deputy Judges be increased annually by the same percentage increases applicable to the TCYJs.<sup>35</sup>

## **2010 JCC**

37. The 2010 JCC was appointed by OIC 210/33 dated February 25, 2010 and took 21 months to fulfill its mandate. Patrick L. Michael was the Commissioner. There was an interregnum in the

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<sup>30</sup> 2007 JCC Report, YG Book of Documents, Tab 11, p. 4; Letter of Understanding regarding Modified JCC Process for all parties, YG Book of Documents, Tab 3

<sup>31</sup> 2007 JCC Report, YG Book of Documents, Tab 11, p. 2

<sup>32</sup> 2007 JCC Report, YG Book of Documents, Tab 11, pp. 6-7

<sup>33</sup> 2007 JCC Report, YG Book of Documents, Tab 11, p. 7

<sup>34</sup> 2007 JCC Report, YG Book of Documents, Tab 11, p. 18

<sup>35</sup> 2007 JCC Report, YG Book of Documents, Tab 11, p. 18

Commission's activities resulting from a challenge to the legitimacy of the Commissions' appointment in the Supreme Court of Yukon brought by the Senior Presiding Justice of the Peace. The filing with the court of a petition on July 12, 2010 made it necessary for the JCC to cease proceedings and remain moribund until receipt of the decision of the presiding judge, Madam Justice V.A. Schuler, on April 19, 2011, dismissing that proceeding.<sup>36</sup>

38. Following the petition proceeding, the JCC process convened on June 20, 2011 to receive joint and individual submissions from, among others, YG and the TCYJs. The JCC recommended that the agreement set out in the joint submission of the TCYJs and YG respecting judicial remuneration be adopted as follows:

- a) An annual salary for TCYJs be increased by 3% *per annum* to:
  - i. \$235,746.40, effective April 1, 2010;
  - ii. \$242,818.92, effective April 1, 2011; and
  - iii. \$250,103.36, effective April 1, 2012.
- b) The *per diem* sitting rate for Deputy Judges of the Territorial Court of Yukon be increased by 3% *per annum* to:
  - i. \$943.45, effective April 1, 2010;
  - ii. \$971.75, effective April 1, 2011; and
  - iii. \$1,000.91, effective April 1, 2012;
- c) The other terms, benefits, allowances, stipends, etc. in effect for TCYJs remain unchanged.<sup>37</sup>

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<sup>36</sup> 2010 JCC Report, YG Book of Documents, Tab 12, pp. 1, 8-10

<sup>37</sup> 2010 JCC Report, YG Book of Documents, Tab 12, p. 26

## 2013 JCC

39. The 2013 Yukon JCC was appointed by OIC 213/24 dated February 27, 2013. Patrick L. Michael was the Commissioner.<sup>38</sup>

40. The 2013 JCC again received and accepted a joint submission on behalf of the TCYJ and YG. The JCC recommended that the agreement set out in the joint submission of the TCYJ and YG respecting remuneration of the TCYJ be adopted as follows:

- a) The annual salary for TCYJ be increased from \$250,103.36 on March 31, 2013 to:
  - i. \$257,606.46 as of April 1, 2013 (a 3% increase);
  - ii. \$262,758.59 as of April 1, 2014 (a 2% increase);
  - iii. \$268,013.76 as of April 1, 2015 (a 2% increase);
- b) The per diem sitting rate for Deputy Judges of the Territorial Court of Yukon be increased from \$1,000.91 on March 31, 2013 to:
  - i. \$1,030.94 as of April 1, 2013;
  - ii. \$1,051.56 as of April 1, 2014 (a 2% increase);
  - iii. \$1,072.59 as of April 1, 2015 (a 2% increase);
- c) ...
- d) The other terms, benefits, allowances, stipends, etc. in effect for TCYJs remain unchanged.<sup>39</sup>

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<sup>38</sup> 2013 JCC Report, YG Book of Documents, Tab 13, p. 2

<sup>39</sup> 2013 JCC Report, YG Book of Documents, Tab 13, p. 21

## 2016 JCC

41. The 2016 JCC was first established pursuant to OIC 2016/22; however, due to health issues of the Commissioner who had been appointed, it was necessary to abolish that Commission and re-establish a new Commission.<sup>40</sup>

42. The 2016 JCC was then established pursuant to OIC 2017/90 dated May 11, 2017. The Commissioner was Timothy S. Preston, Q.C.<sup>41</sup>

43. On November 9, 2018 an application was made by the parties to the Commission to approve a joint submission with respect to the TCYJ. The JCC approved the terms of the joint submission and made the following recommendations:

a) Salary for TCYJ be as follows, effective the following dates:

April 1, 2016:	\$273,374.04
April 1, 2017:	\$280,208.39
April 1, 2018:	\$287,213.60

b) The *per diem* sitting rates for Deputy Judges be as follows, effective the following dates:

April 1, 2016:	\$1,094.04
April 1, 2017:	\$1,121.39

c) Effective April 1, 2018, the formula for calculating a Deputy Judge's *per diem* sitting rate be changed such that their *per diem* sitting rate from and after April 1, 2018 will be based on the following formula: the salary of a TCYJ (at the time of sitting) divided by 235.

d) ...

e) All other terms, benefits, allowances, stipends and related remuneration in effect for members of the Yukon Territorial Court remain unchanged.<sup>42</sup>

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<sup>40</sup> 2016 JCC Report, YG Book of Documents, Tab 14, p. 1

<sup>41</sup> 2016 JCC Report, YG Book of Documents, Tab 14, p. 1

<sup>42</sup> 2016 JCC Report, YG Book of Documents, Tab 14, p. 24

44. As a result of recommendation (c), above, it is no longer necessary to address the *per diem* sitting rate of Deputy Judges independently of the recommendations in respect of the TCYJ.

**c. The Role and Jurisdiction of this 2019 Judicial Compensation Commission**

45. This 2019 JCC is tasked with making recommendations for the three-year period beginning April 1, 2019.<sup>43</sup>

46. The JCC must make fair and appropriate recommendations for compensation, after considering the various factors set out in section 19 of the *Act*, including any other matter the Commission considers relevant. In assessing the relevant factors, it should consider the reasoning of past JCCs in light of the particular circumstances before it. The Supreme Court of Yukon in *Cameron* held that “it is preferable that reasonably detailed reasons be given for a commission’s recommendation, even when it has accepted a joint submission, in part because the reasons may be of assistance to the work of the future commissions.”<sup>44</sup> These comments are consistent with sections 14 and 19 of the *Act*.<sup>45</sup> We therefore include discussion of the reasoning of JCCs even where recommendations were reached by joint submission. Each of the factors is discussed below.<sup>46</sup>

**PART II. FACTORS FOR CONSIDERATION**

47. No Commission could be expected to make recommendations about appropriate compensation in a vacuum. The whole concept of compensation being appropriate means it must be related to objective criteria or compared with compensation received by comparable groups. Accordingly, this section explores both the principles which should guide the recommendations and the specific comparisons which are submitted to be appropriate.

48. The *Act* provides:

19 In fulfilling its mandate, the commission shall, in addition to considering any matter it considers relevant, address in its report submissions presented to it regarding

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<sup>43</sup> Letter of Understanding Regarding Modified JCC Process for all parties, YG Book of Documents, Tab 3, Article 6.0

<sup>44</sup> *Cameron v. Yukon*, 2011 YKSC 35, YG Book of Documents, Tab 4, para 104

<sup>45</sup> 2016 JCC Report, YG Book of Documents, Tab 14, p. 13

<sup>46</sup> *TCA*, YG Book of Documents, Tab 2, s. 19

- (a) the current financial position of the government;
- (b) the need to provide reasonable compensation to judges;
- (c) the need to build a strong court by attracting qualified applicants;
- (d) the unique nature of the Yukon;
- (e) the compensation provided to judges in the Northwest Territories and British Columbia, Alberta, and Saskatchewan;
- (f) the laws of the Yukon;
- (g) the cost of living in the Yukon; including the growth or decline in real per capita income; and
- (h) any submissions by the public filed under section 26. S.Y. 2002, c.217, s.19

49. The Supreme Court of Canada directed in *Bodner* that each JCC must make its own assessment in its own context, and the purpose is not simply to update the previous JCC report.<sup>47</sup>

50. As noted above, the paramount, constitutionally-mandated consideration is financial security as an aspect of judicial independence.

51. The *PEI Reference* and *Bodner* decisions are clear that the protection and preservation of judicial independence is the *raison d'être* of a JCC. As such, it must be fundamental to the JCC's considerations. This underscores the need for recommendations that are based on objective criteria rather than primarily political considerations. The factors identified in the *Act* are considered below.<sup>48</sup>

**a. The current financial position of the government**

52. Yukon's economy is strong and robust. COVID-19 did not impact Yukon's economy in 2019. COVID-19 may have some economic impacts in 2020-21. However, these impacts are not likely to be significant in Yukon and, in any event, the structure of the TCYJ's submission is sufficiently flexible to accommodate any such impacts.

53. The two primary resources that will assist this Commission to understand the financial position of YG in the years 2019-2021 are the Territorial Outlook: Summer 2019, prepared by the

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<sup>47</sup> *Bodner*, YG Book of Documents, Tab 23, paras 14-15

<sup>48</sup> *PEI Reference*, YG Book of Documents, Tab 1, para 146; *Bodner*, YG Book of Documents, Tab 23, para 31

Conference Board of Canada in 2019<sup>49</sup> and the more recent Yukon Budget, for the fiscal year 2020-21 that was brought in during the 3<sup>rd</sup> session of the 34<sup>th</sup> Legislature, Yukon Legislative Assembly with the Budget Address of Premier Sandy Silver on March 5, 2020.<sup>50</sup> We address each in turn.

54. The Territorial Outlook: Summer 2019, prepared by the Conference Board of Canada makes forecasts for the percentage change in Yukon's GDP for the years 2019 and following. Yukon's economy is forecast to grow 10% in 2020 and then average 3.6% annual growth from 2021 to 2025. Below is a table showing the forecast growth in Yukon's GDP for the three years within this Commission's mandate.<sup>51</sup>

<b>Year</b>	<b>GDP Increase (Basic Prices)</b>
2019	2.2%
2020	10.0%
2021	5.3%

55. We discuss in greater detail below the Conference Board of Canada's forecast in respect of various indicators of income such as the change in primary household income and the change in wage/salary per employee (see paras. 122 and 123). Each of these indicators is forecast for growth in the coming years. Real gains in purchasing power are expected as these increases in income exceed the forecasted increases to the CPI for the same years. The Conference Board of Canada forecasts the increases in CPI for Whitehorse as follows.<sup>52</sup>

<b>Year</b>	<b>CPI % Increase</b>
2019	2.1%
2020	2.1%
2021	2.0%

56. We note, however, that the actual CPI for Whitehorse in 2019 was 2%.<sup>53</sup>

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<sup>49</sup> Conference Board of Canada, "Territorial Outlook Economic Forecast: Summer 2019" [**Territorial Outlook: Summer 2019**], TCYJ Book of Documents, Tab 1

<sup>50</sup> Government of Yukon, "2020-21 Budget Address" [**2020-21 Budget Address**], TCYJ Book of Documents, Tab 2 and Government of Yukon, "2020-21 Fiscal and Economic Outlook" [**2020-21 Fiscal and Economic Outlook**], TCYJ Book of Documents, Tab 3

<sup>51</sup> Territorial Outlook: Summer 2019, TCYJ Book of Documents, Tab 1, p. 59

<sup>52</sup> Territorial Outlook: Summer 2019, TCYJ Book of Documents, Tab 1, p. 59

<sup>53</sup> The actual CPI for Whitehorse was 2%: Yukon Bureau of Statistics, "Consumer Price Index 2019", YG Book of Documents, Tab 31.



57. The Conference Board publication is clear that the major driver of Yukon's economy is mining. There was a slump in mineral production in 2018 and 2019. However, the Conference Board forecasts that with the completion of the construction of the Eagle Gold site, Yukon's total mining output will surge by 81.1 % in 2020 and the mine will continue to ramp up production in 2021-22. The Conference Board notes that an operator intends to begin construction on a second gold mine, Coffee, in 2019 and plans to turn out gold ingots about two years later. A third mine, Casino, will dwarf these other two and will be built beginning in 2020.<sup>54</sup>

58. COVID-19 is a coronavirus that was first identified in December 2019. Since then, it has quickly spread and infected more than 11.19 million people globally. To date 11 people in Yukon have been infected, all of whom had recovered by May 1, 2020. Despite these relatively low numbers, COVID-19 has impacted people in the Yukon in that physical distancing measures and other restrictions were imposed beginning in March 2020. However, YG determined that mining operations, mineral exploration and development and related businesses and workers were essential services.<sup>55</sup> YG communicated that "essential services should and are encouraged to remain open while following the legal orders and the guidelines and recommendations of the Chief Medical Officer of Health".<sup>56</sup>

59. Further, it was in the face of the COVID-19 pandemic that YG brought in its most recent Budget for the fiscal year 2020-21. As noted above, the Yukon Budget was passed in March 2020. The Budget Documents are thus the most recent economic statements available and made at a time when COVID-19, including the shut-down of certain operations, was in contemplation by YG.<sup>57</sup>

60. According to the Budget Documents, the positive economic climate of recent years is expected to persist over the medium term in the Yukon.<sup>58</sup> Total government revenue increased in

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<sup>54</sup> Territorial Outlook: Summer 2019, TCYJ Book of Documents, Tab 1, p. 49-53

<sup>55</sup> Yukon Government, "Direction and Guidelines for the Delivery of Critical, Essential and other Services", TCYJ Book of Documents, Tab 4, p. 21

<sup>56</sup> Yukon Government, "Direction and Guidelines for the Delivery of Critical, Essential and other Services", TCYJ Book of Documents, Tab 4, p. 3

<sup>57</sup> 2020-21 Budget Address, TCYJ Book of Documents, Tab 2; 2020-21 Fiscal and Economic Outlook, TCYJ Book of Documents, Tab 3; CBC News, "Yukon MLAs pass territorial budget, shut down house until fall", March 20, 2020, TCYJ Book of Documents, Tab 5

<sup>58</sup> 2020-21 Fiscal and Economic Outlook, TCYJ Book of Documents, Tab 3, p. 17

2019 and is forecast in the Budget Documents to rise by 4.5% in 2020-21 and 2.9% in 2022-23.<sup>59</sup> Yukoners also continue to enjoy one of the most favorable tax regimes in Canada.<sup>60</sup> YG maintains that “Yukon’s economy is strong”<sup>61</sup> and “Yukon’s economy remains robust”.<sup>62</sup> Yukon’s labour market remains among the strongest in the country. It has the lowest unemployment rate in the country and has seen further gains in earnings.<sup>63</sup> These factors continue to push household incomes up and draw newcomers to the territory.<sup>64</sup> Higher incomes have also been fueling consumer spending. Household consumption expenditures are forecast to grow over the current outlook, with annual growth expected to average over 4% out to 2024.<sup>65</sup> YG’s GDP forecast was more modest than the Conference Board’s forecast. Yukon’s GDP was forecast in the Budget Documents for modest growth of 1% in 2019 but forecast to perform better in 2020, when it is projected to be 6.2% - the highest it has been since 2016.<sup>66</sup> Beyond 2020, the annual growth is forecast to average 3.3% out to 2024.<sup>67</sup> As mentioned, CPI for Whitehorse increased 2% in 2019 and is forecast to increase 2.5% in 2020 and 2% in 2021.<sup>68</sup>

61. The Budget Documents do not signal any concern about the economic impact of COVID-19 on Yukon’s economy, despite that because of COVID-19 the Legislative Assembly shut down until fall following the budget being passed. Again, the Budget Documents suggest that the major driver of Yukon’s economy is the mining sector and as noted, this was declared an essential service in March. The TCYJ submit that the mining sector is therefore not likely to be heavily impacted by COVID-19.

62. The available records support that Yukon’s economy is growing. The 2010 JCC noted that a growing economy might have a positive effect on the financial position of the government. However, it also noted it could well lead, through increasing demands in such areas as health care,

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<sup>59</sup> 2020-21 Fiscal and Economic Outlook, TCYJ Book of Documents, Tab 3, p. 2

<sup>60</sup> 2020-21 Fiscal and Economic Outlook, TCYJ Book of Documents, Tab 3, p. 3

<sup>61</sup> 2020-21 Budget Address, TCYJ Book of Documents, Tab 2, p. 5

<sup>62</sup> 2020-21 Fiscal and Economic Outlook, TCYJ Book of Documents, Tab 3, p. 6

<sup>63</sup> 2020-21 Fiscal and Economic Outlook, TCYJ Book of Documents, Tab 3, pp. 3, 6-8

<sup>64</sup> 2020-21 Fiscal and Economic Outlook, TCYJ Book of Documents, Tab 3, p. 6

<sup>65</sup> 2020-21 Fiscal and Economic Outlook, TCYJ Book of Documents, Tab 3, p. 9

<sup>66</sup> 2020-21 Fiscal and Economic Outlook, TCYJ Book of Documents, Tab 3, p. 7

<sup>67</sup> 2020-21 Fiscal and Economic Outlook, TCYJ Book of Documents, Tab 3, p. 7

<sup>68</sup> 2020-21 Fiscal and Economic Outlook, TCYJ Book of Documents, Tab 3, p. 19

social services, education and infrastructure, to a challenging financial picture for government and hard decisions about allocating its resources.<sup>69</sup>

63. What the 2020 Budget Documents make clear, however, is that Yukon is forecast to return to a surplus in 2020-21 of \$4.1 million, followed by further surpluses in the following years.<sup>70</sup> This balanced budget was achieved “a full year ahead of schedule.”<sup>71</sup> Yukon Government has been explicit that:

To help address pressures stemming from a growing economy and population, the Government of Yukon’s Five-Year Capital Plan includes increased spending to meet future demand in the areas of education, health and housing. Even with increased capital spending, Yukon’s finances are on track to return to a surplus in 2020–21, with further surpluses projected over the forecast period.<sup>72</sup>

64. Likewise, the Conference Board of Canada notes:

The strong economic growth expected in Yukon will benefit the government’s balance sheet over the forecast period. Although Yukon’s population is the oldest of the three territories, the opening of three new mines will attract new workers and lift the territorial economy. As such, steady gains in employment and wages will arrive at the same time as the steady rise in health care costs that come with a growing and aging population. On net, the fiscal health of the territory is positive.<sup>73</sup>

65. And while COVID-19 may be expected to impact the global economy, as noted above, the March 2020 Yukon Budget was debated and passed in the context of the COVID-19 pandemic.<sup>74</sup> While the judiciary is not immune to broadly based government actions that respond to specific pressures on the Yukon economy, those actions cannot be focused upon the level of remuneration provided to TCYJ.<sup>75</sup> The COVID-19 pandemic arose in 2020 and Yukon is already in the process of easing restrictions in relation to it.<sup>76</sup> COVID-19 is not a reason to deny TCYJ a reasonable increase in pay for 2019, nor is it a reason to deny an adjustment of 0 or a percentage equal to

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<sup>69</sup> 2010 JCC Report, YG Book of Documents, Tab 12, p. 29

<sup>70</sup> 2020-21 Fiscal and Economic Outlook, TCYJ Book of Documents, Tab 3, p. 5

<sup>71</sup> 2020-21 Budget Address, TCYJ Book of Documents, Tab 2, p. 1

<sup>72</sup> 2020-21 Fiscal and Economic Outlook, TCYJ Book of Documents, Tab 3, p. 17 (emphasis added)

<sup>73</sup> Territorial Outlook: Summer 2019, TCYJ Book of Documents, Tab 1, p. 57 (emphasis added)

<sup>74</sup> CBC News, “Yukon MLAs pass territorial budget, shut down house until fall”, March 20, 2020, TCYJ Book of Documents, Tab 5

<sup>75</sup> 2010 JCC Report, YG Book of Documents, Tab 12, p. 29

<sup>76</sup> Government of Yukon, “Current COVID-19 Situation”, July 6, 2020, TCYJ Book of Documents, Tab 19

Whitehorse CPI in subsequent years. The structure of this TCYJ proposal is self-adjusting in the sense that if Yukon's positive economic forecast is negatively impacted by COVID-19, this is likely to be reflected in the CPI.

66. In any event, the salient finding is that the recommendations sought by the TCYJs can be accommodated within the current and forecasted financial position of the government.<sup>77</sup>

**b. The need to provide reasonable compensation to judges**

**Judicial Independence**

67. The TCYJs' proposal ensures an increase in salary for 2019 and preservation from erosion by inflation in subsequent years so that judicial salaries remain at the level required to maintain judicial independence, and to ensure public confidence in the independence of the judiciary.<sup>78</sup> The importance of protection against erosion is a topic we return to below in the context of the discussion in respect of the cost of living in the Yukon.

**Restraints on Ability to Earn Income**

68. As the 2016 JCC noted, judges face restraints on their ability to earn income from other sources or endeavors that are not faced by lawyers in private practice.<sup>79</sup> A judge has no opportunity to earn income from other sources. Section 12(1) of the *Act* provides that a judge: "shall not carry on directly or indirectly any occupation, profession, or business other than his or her judicial responsibilities."<sup>80</sup>

69. This restraint is in contrast to lawyers and civil servants who are quite free to engage in businesses outside their work. Even lawyers who choose not to engage in non-legal business have the option of increasing their professional incomes by taking on additional or more lucrative work. Lawyers who choose an academic career have the opportunity to do consulting work on the side.

70. As the 2016 JCC noted, an appointment to the bench is viewed as a long-term commitment, not a stepping-stone to another career so that judges cannot count on moving on to other

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<sup>77</sup> 2010 JCC Report, YG Book of Documents, Tab 12, p. 29

<sup>78</sup> 2016 JCC Report, YG Book of Documents, Tab 14, p. 18

<sup>79</sup> 2016 JCC Report, YG Book of Documents, Tab 14, p. 19

<sup>80</sup> *TCA*, YG Book of Documents, Tab 2, s. 12(1)

opportunities.<sup>81</sup> Following retirement, the options for engaging in remunerative work are limited, as a return to the practice of law is not generally an option -- especially in a small jurisdiction such as the Yukon.

**c. The need to build a strong court by attracting qualified applicants**

71. Candidates for appointment to the Court are members of the bar of at least ten years' standing.<sup>82</sup> The experience from across Canada suggests these candidates will in fact be outstanding practitioners who have at least 10 and, more likely, 15 years at the bar. Regard must be had to what lawyers with the requisite years of experience, and the appropriate degree of ability, are earning.

72. Often these candidates must be persuaded to accept significant reductions in their earnings in order to become judges. Nor can one simply look at the average earnings of lawyers who fall into the group likely to be appointed as judges. It must also be remembered that these lawyers are entering the most lucrative years of practice. This opportunity must be foregone, and that earning potential will be weighed just as heavily as present earnings when a lawyer is considering an appointment to the bench.

73. There is insufficient reliable data available concerning the incomes of private lawyers. For that reason, the TCYJ does not rely on such data in this process and instead focuses on the other options open to highly desirable candidates. Previous JCC's have recognized that the tradition in the Yukon has been to seek judges not just from candidates living and working in the Yukon but elsewhere, and judicial earnings elsewhere are therefore a factor to consider in this context as well. A fuller comparison of the judicial salaries in the jurisdictions of primary importance is offered below.<sup>83</sup> For the purpose of this section of the argument, the TCYJ submit that comparison with federally appointed judicial salaries is appropriate in considering the need to build a strong court not only because these courts recruit from the same pool of candidates, but because of overall similarity in the level of difficulty and complexity of the respective workloads, skills demanded by the work, and in the qualifications required for appointment as a judge.

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<sup>81</sup> 2016 JCC Report, YG Book of Documents, Tab 14, p. 19

<sup>82</sup> TCA, YG Book of Documents, Tab 2, s. 7

<sup>83</sup> 2004 JCC Report, YG Book of Documents, Tab 10, p. 5

74. In *Bodner*, the Supreme Court determined that a JCC would be misdirecting itself if it focused on comparison with s. 96 judges to the exclusion or virtual exclusion of other relevant factors.<sup>84</sup> To be clear, the TCYJ does not propose that the salary of TCYJ be determined based on the salary of federally appointed judges, but rather that the compensation paid to that group is relevant and important for the reasons explained above.

75. Consideration must also be given to the fact that the nature and function of judicial work shows great similarities among various levels of courts. While one level is purely appellate in nature, and another deals with jury trials as opposed to sitting and deciding as a judge alone, the same qualities of judicial temperament, legal knowledge, and an abiding sense of fairness are required of all judges. It is necessary that judges at all levels of court have the ability to make decisions that will greatly affect people's lives, including the potential loss of freedom, without bending to improper influence, the pressure of public demands and expectations, or a consideration of inadmissible material. The key factor is that judicial decision-making is common to all judges.

76. Cases that come before the Territorial Court of the Yukon are becoming increasingly complex and there are increasing numbers of multi-day trials. Amendments to the criminal law will likely lead to an even greater case load for the Territorial Court of the Yukon. That increase in workload is likely to be the very cases that would, before, have gone before the Yukon Supreme Court. Specifically, Bill C-75 limited an accused's right to a preliminary inquiry. In the past, defence counsel used preliminary inquiries to test the evidence of the Crown. Restricting the availability of preliminary inquiries means that more cases are likely to proceed to trial in the Territorial Court, rather than the Supreme Court. As well, there are increasing opportunities for pre-trial applications, for example, in sexual assault cases under sections 276 and 278 of the *Criminal Code*. These applications give rise to the need for more comprehensive reasons, very often in writing. Thus, the nature and function of judicial work shows great similarities among various levels of courts.

77. It is notable that some provincial jurisdictions have expressly restored linking provincial court judges' salary to that of supreme court judges. For example, Ontario judges' salaries were determined for the period April 1, 2014 to March 31, 2022 by the recommendations set out in the

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<sup>84</sup> *Bodner*, YG Book of Documents, Tab 23, para 72

Report of the 9<sup>th</sup> and 10<sup>th</sup> Provincial Judges Remuneration Commission. This Ontario JCC chose to set the salaries for Ontario judges in 2020 and 2021 as specific percentages of the salaries paid to federally appointed judges, inclusive of the indexing that is required each year by regulation. Specifically, effective April 1, 2020, Ontario Provincial Court judges will earn the Provincial judge April 1, 2019 salary rate + Industrial Aggregate Index (IAI) (Canada) + the difference required to bring Provincial judges' salaries to 94.67% of the Federally Appointed judge's current year's salary rate. Effective April 1, 2021, Ontario Provincial Court judges will earn the Provincial judge April 1, 2020 salary rate + Industrial Aggregate Index (IAI) (Canada) + the difference required to bring Provincial judges salaries to 95.27% of the Federally Appointed judge's current year's salary rate.<sup>85</sup> Also in New Brunswick, provincial court judges' salaries have been tied more recently to federal salaries so that they make 80% of the salary of a supreme court judge.

78. Federally appointed judges were paid a salary of \$329,900 as of April 1, 2019. According to section 25 of the *Judges Act*, the salaries of federally appointed judges are adjusted each year based on the percentage increase in the Industrial Aggregate Index ("IAI") for Canada (also known as Average Weekly Earnings), over the preceding twelve months.

79. The yearly salaries of federally appointed puisne judges in the Yukon, NWT and Nunavut are:

a) 2019: 2.6% increase to \$329,900 + \$12,000 northern allowance;

b) 2020: 2.7% increase to \$338,800 + \$12,000 northern allowance.<sup>86</sup>

80. A large gap in salary between the Territorial and Supreme Courts impacts on the Territorial Court's ability to attract the best-qualified applicants. Both Courts will draw applicants from the same pool of lawyers. If the Supreme Court offers overwhelmingly better salary and pension arrangements, lawyers will seek appointment to the Supreme Court, viewing the Territorial Court as a distinctly second-best choice.

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<sup>85</sup> In the Matter of the Courts of Justice Act and in the Matter of an Inquiry by the 9th and 10th Provincial Judges Remuneration Commissions (2014-2018, 2018-2022) between Her Majesty the Queen in Right of the Province of Ontario and the Ontario Conference of Judges, dated April 18, 2018, TCYJ Book of Documents, Tab 6, p. 6,

<sup>86</sup> *Judges Act*, RSC 1985, c J-1, TCYJ Book of Documents, Tab 7, ss. 22, 25, 27

81. Lawyers should be able to select judicial appointments that align with their abilities and experience. Gross differences between courts in remuneration levels will significantly influence lawyers to choose judicial appointments based on remuneration rather than on what best aligns with their experience and interest. The misalignment of work and experience serves neither the public nor the courts.

82. As many JCC's have already noted, judicial remuneration must be sufficient not only to attract the best-qualified candidates, but also to retain and motivate those candidates who are appointed.

**d. The unique nature of the Yukon**

83. The circumstances of Yukon have a significant impact on the work of the Territorial Court and the lives of its judges.

84. The Territorial Court is governed by the *TCA*.

85. There are currently three resident full-time judges, including the Chief Judge. There are also approximately 27 Deputy Judges who are called upon to assist as required. These Deputy Judges are sitting or supernumerary judges from other jurisdictions. In addition, a justice of the Court of Appeal or a judge of the Supreme Court may sit as a judge of the Territorial Court and, when that justice or judge does so, they are a judge of the Territorial Court.<sup>87</sup> In comparison, NWT has four full-time resident judges, including the Chief Judge and also makes use of additional Deputy Judges. The population of NWT is very similar to that in Yukon.

86. While the Court sits permanently in Whitehorse, it also provides services to 13 other communities on a regular basis. In these communities, it operates in the context of a "circuit court" environment throughout the year. This environment necessitates an extensive travel schedule, making the job more physically demanding and exhausting than it otherwise would be. The conditions under which the TCYJ preside and the facilities for overnight accommodation and meals are usually less than ideal. Circuit court travelling time and nights away from home have a substantial impact on a judge's family life.<sup>88</sup>

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<sup>87</sup> *TCA*, YG Book of Documents, Tab 2, s. 5

<sup>88</sup> See e.g. 1998 JCC Report, YG Book of Documents, Tab 8, p. 2



87. Whether in Whitehorse or on circuit, TCYJs are faced on a daily basis with the strain of dealing with difficult and seemingly intractable social problems. The toll is greater because TCYJs must consciously strive to avoid becoming jaded, callous and cynical. They must remain sensitive and responsive to the circumstances of the parties before them, while building up sufficient “mental armour” to avoid being overwhelmed by facts and issues that can be profoundly disturbing.

88. Governmental policy of community and restorative justice initiatives can place additional demands on the judiciary.<sup>89</sup> The substantial First Nations population in the Territory requires the TCYJ to be familiar with and sensitive to Aboriginal and/or Indigenous culture, practices, mores and conventions. This awareness must also extend to the differences in such matters as between different communities.<sup>90</sup>

89. The efforts of the Court in fostering community justice result in the TCYJ participating in many meetings and training sessions in addition to the regular court sittings.

90. The small size of the judiciary and the large area served means that TCYJ will receive calls at all hours from police officers in Whitehorse, or in any of a dozen rural detachments, seeking search warrants, telewarrants or Feeney arrest warrants.

91. Social isolation of TCYJ is a factor that was considered by the 2016 JCC.<sup>91</sup> Given the small population, a greater proportion of cases are reported by the media and court matters, particularly criminal cases, are frequent topics of media, public and political comments. In a small community, the TCYJ routinely encounter persons they have dealt with in court. For this reason, a judge can also become socially quite isolated, as it is necessary for the judge to forego many activities and relationships he or she might otherwise wish to pursue. Just as freedom of association is curtailed, TCYJ face considerable restriction on their freedom of expression. This restriction extends far beyond the obvious necessity to remain silent on political or public policy issues. The rights other citizens take for granted, for example, to write a letter to the newspaper or to sign a community

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<sup>89</sup> 2016 JCC Report, YG Book of Documents, Tab 14, p. 20

<sup>90</sup> See e.g. 2001 JCC Report, YG Book of Documents, Tab 9, p. 7

<sup>91</sup> 2016 JCC Report, YG Book of Documents, Tab 14, p. 19

petition, are similarly out of the question. These pressures and constraints add considerably to the stress of what is already a difficulty job.

**e. The compensation provided to judges in the Northwest Territories and British Columbia, Alberta, and Saskatchewan**

92. Consideration of the salaries and benefits of provincial and territorial court judges in other jurisdictions in Canada is useful because the judiciary is unique both in constitutional status and job function and is therefore not a “job” that can easily be compared with others in the Yukon.

93. The key comparators established in the *Act* are BC, Alberta, Saskatchewan and Northwest Territories. The table below addresses the salary in the statutorily defined comparator jurisdictions from 2007 until the most recent date available. The narrative that follows considers this data in more depth:

	<b>AB</b>	<b>BC</b>	<b>Sask</b>	<b>NWT</b>	<b>Yukon</b>
April 1, 2007	\$220,000	\$202,356	\$198,900	\$209,255	\$215,742
April 1, 2008	\$220,000	\$220,000	\$204,552	\$215,255	\$222,214
April 1, 2009	\$250,000	\$225,500	\$220,916	\$221,255	\$228,880
April 1, 2010	\$255,000	\$231,138	\$229,753	\$227,254	\$235,746
April 1, 2011	\$257,550	\$231,138	\$238,943	\$233,254	\$242,819
April 1, 2012	\$263,731	\$231,138	\$248,010	\$249,582	\$250,103
April 1, 2013	\$273,000	\$242,464	\$254,458	\$252,414	\$257,606
April 1, 2014	\$279,825	\$244,889	\$260,819	\$256,055	\$262,758
April 1, 2015	\$286,821	\$248,562	\$272,295	\$260,302	\$268,013
April 1, 2016	\$293,991	\$262,000	\$282,184	\$272,000	\$273,374

	<b>AB</b>	<b>BC</b>	<b>Sask</b>	<b>NWT</b>	<b>Yukon</b>
April 1, 2017	?	?	\$290,848	\$278,828	\$280,208
Imposed by Gov <i>(Recommended)</i>	\$293,991 (\$296,382)	\$262,000 (\$273,000)			
April 1, 2018	?	?	\$295,792	\$289,733	\$287,213
Imposed by Gov <i>(Recommended)</i>	\$293,991 (\$302,304)	\$266,000 (\$277,095)			
April 1, 2019	?	?	\$304,075	\$299,869	
Imposed by Gov <i>(Recommended)</i>	\$293,991 (\$309,500)	\$270,000 (\$281,251)			
April 1, 2020	?	?	\$312,286	2019+CPI (1.6%)	
Imposed by Gov <i>(Recommended)</i>	\$293,991 (\$318,500)	(\$287,000)			
April 1, 2021 <i>(Recommended)</i>		? (\$297,000)		2020+ 0 or CPI	
April 1, 2022 <i>(Recommended)</i>		? (\$307,000)		2021+ 0 or CPI	
April 1, 2023 <i>(Recommended)</i>				2022+ 0 or CPI	

### **British Columbia and Alberta<sup>92</sup>**

94. In May 2019, the 2017 Alberta JCC issued its Report, and recommended increases in judicial salaries in each of the fiscal years 2017-18 through 2020-21. In September 2019, the Government of Alberta rejected these recommendations and imposed a four-year salary freeze at the 2016 salary. The Alberta Provincial Court Judges' Association has brought an application for judicial review, which means that the outcome for the Alberta judicial salaries will remain unknown until after this JCC issues its Report.

95. The recent history of judicial salaries in BC is complex, given the Government's rejection of the salary recommendations of three successive JCCs and the ensuing litigation. Litigation remains outstanding in respect of a judicial review of the government's rejection of the JCC's salary recommendations for 2017-2019. Nevertheless, the more recent 2020 JCC completed its recommendations regardless of the outcome of that outstanding judicial review.

### **NWT and Saskatchewan<sup>93</sup>**

96. The NWT has split into two jurisdictions since the *Act* was passed. The TCYJ submit that both as a matter of statutory interpretation and policy Nunavut must be considered a comparator jurisdiction. In Nunavut, the Territorial and Supreme Courts have been merged into one court. This court provides a practical demonstration of the similarity of the workload and experience required on both courts, as is further explained above. Indeed, a Territorial Court Judge, Justice Kilpatrick,

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<sup>92</sup> Alberta and BC salary figures are drawn from the following documents. **Alberta:** 2007-2017 from 2013 Alberta JCC Report, TCYJ Book of Documents, Tab 10, pp. 15-16, 54; 2013-2020 from 2017 Alberta JCC Report, YK Book of Documents, Tab 26, pp. 6, 54-55. **British Columbia:** 2007 from 2007 BC JCC Report, TCYJ Book of Documents, Tab 11, p. 7; 2008-2010 from 2010 BC JCC Report, TCYJ Book of Documents, Tab 12, p. 8; 2011-2013 from *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2015 BCCA 136, TCYJ Book of Documents, Tab 13, paras 11(40), 88; 2014-2016 from British Columbia, Legislative Assembly, *Official Reports of Debates (Hansard)*, 41<sup>st</sup> Parliament, 2nd Session, Issue No. 43 (24 October 2017) at 1386-1389, TCYJ Book of Documents, Tab 15; 2017-2019 from 2019 JCC Report, YG Book of Documents, Tab 24, p. 7 and <https://www2.gov.bc.ca/gov/content/careers-myhr/all-employees/pay-benefits/salaries/salarylookuptool/legal-judiciary/judge-provincial-court-of-bc>, TCYJ Book of Documents, Tab 14; 2019-2022 from 2019 BC JCC Report, YG Book of Documents, Tab 25, p. 7

<sup>93</sup> Northwest Territories and Saskatchewan salary figures are drawn from the following documents. **NWT:** 2007-2011 from 2008 NWT JCC Report, TCYJ Book of Documents, Tab 16, p. 9; 2011-2015 from 2012 NWT JCC Report, TCYJ Book of Documents, Tab 17, pp. 6-7; 2016-2018 from 2016 NWT JCC Report, YG Book of Documents, Tab 28, p. 22; 2019-2024 from 2019 NWT JCC Report, TCYJ Book of Documents, Tab 18, p. 10, 31. **Saskatchewan:** 2007-2017 from 2017 Saskatchewan JCC Report, YG Book of Documents, Tab 27, p. 4-5, 56

became the Senior Judge of the Nunavut Court when Nunavut was established, although he has now retired.

97. The yearly salaries of the judges of the Nunavut Court of Justice are as follows:

- a) 2019: 2.6% increase to \$329,900 + \$12,000 northern allowance;
- b) 2020: 2.7% increase to \$338,800 + \$12,000 northern allowance.<sup>94</sup>

98. In respect of Saskatchewan, in addition to the base salary noted in the table above, pursuant to section 5 of the *Provincial Court Compensation Regulations*, some Saskatchewan Provincial Court judges receive an additional 5% of their annual salary as a northern allowance.<sup>95</sup>

### **Yukon Analysis**

99. The TCYJ submit that in the face of the uncertainty surrounding the judicial remuneration that will eventually be in place in British Columbia and Alberta, Saskatchewan and the Northwest Territories are the most relevant and reliable comparators.

100. Past JCC's have endorsed the need for Yukon judicial salaries to "catch up" to their compatriots in comparator jurisdictions. As noted above, when the JCC process was established in the Yukon, TCYJ salaries had been reduced by 2% in 1993 and frozen at that level until 1998. The 1998 JCC found the levels of compensation at that time "fall well short of what can reasonably be considered appropriate."<sup>96</sup> TCYJ were the lowest amongst the relevant comparators.<sup>97</sup> There was therefore a necessary period of "catch up" and the 2001 JCC recognized that "catch up" was a feature that legitimately went into the establishment of a proper compensation package.<sup>98</sup>

101. The 2010 JCC noted that TCYJ salaries had increased substantially between 1999-2009 and that these increases were necessary to bring the pay of the TCYJ into the same range as that

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<sup>94</sup> *Judges Act*, RSC 1985, c J-1, TCYJ Book of Documents, Tab 7, ss. 22, 25, 27

<sup>95</sup> See e.g. 2010 JCC Report, YG Book of Documents, Tab 12, p. 33; 2013 JCC Report, YG Book of Documents, Tab 13, p. 28

<sup>96</sup> 1998 JCC Report, YG Book of Documents, Tab 8, p. 3

<sup>97</sup> 1998 JCC Report, YG Book of Documents, Tab 8, p. 6

<sup>98</sup> 2001 JCC Report, YG Book of Documents, Tab 9, p. 7

received by their compatriots in the comparator jurisdictions. The 2010 JCC noted that at that time, the “catch up” phase had passed.<sup>99</sup>

102. The TCYJ submit that review of the table above demonstrates that since 2018, TCYJ salaries have begun to fall behind their compatriots in the comparator jurisdictions and most importantly, behind NWT judicial salaries. The pay of judges in the NWT has received careful attention from past Yukon JCCs.<sup>100</sup> The 2001 JCC stated that “achieving parity with the [NWT] is a fair and proper objective.”<sup>101</sup> The need to “catch up” is a live issue again for this 2019 JCC.

103. The TCYJ’s proposal is that they receive:

- a) Effective on April 1, 2019, an increase in the lump sum of \$14,000;
- b) Effective on April 1 of each of 2020 and 2021, an increase by the greater of 0% or a percentage equal to the CPI for Whitehorse for the preceding year ending December 31.

104. This proposal would put the salaries of TCYJ between NWT judges and Saskatchewan judges. An increase by the greater of 0% or a percentage equal to the CPI for Whitehorse would hold TCYJs in that position vis a vis NWT judges until the next JCC. That is the fair, reasonable and appropriate relative position TCYJ salaries have held since 2015 until 2018.<sup>102</sup> Prior to 2015, the TCYJ salaries were ahead of both Saskatchewan and NWT.

**f. The laws of the Yukon**

105. As successive JCCs have recognized, the laws of Yukon give TCYJs jurisdiction that is more extensive than that of many provincial court judges. Moreover, because of the small size of the Court, all members are called upon to deal with all of the wide-ranging matters dealt with by the Court. This is in contrast to the situation in many of the provinces, where judges may be assigned to specific court divisions (criminal, civil, family or youth).

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<sup>99</sup> 2010 JCC Report, YG Book of Documents, Tab 12, p. 30

<sup>100</sup> 2013 JCC Report, YG Book of Documents, Tab 13, p. 28

<sup>101</sup> 2001 JCC Report, YG Book of Documents, Tab 9, p. 9

<sup>102</sup> 2016 JCC Report, YG Book of Documents, Tab 14, p. 17

106. The laws of the Territory also place additional and, somewhat unique, responsibilities on the TCYJ. Such duties include:

- a) Emergency intervention orders;
- b) reviewing Victim Assistance Orders and other orders issued by justices under the Family Violence Prevention Act;
- c) acting as review officers for vehicle impoundments and licence suspensions under the Motor Vehicles Act;
- d) exclusive jurisdiction for child protection matters pursuant to the *Child and Family Service's Act*;
- e) peace bond applications;
- f) Coroner's Inquests; and
- g) hearing prosecutions under the *Environment Act*, the *Waters Act*, the *Forest Resources Act*, the *Wildlife Act*, the *Occupational Health and Safety Act* and a large number of other regulatory statutes.

107. Government policy supports community and restorative justice initiatives. This places additional demands on TCYJs, including attending community meetings and developing alternative court procedures to accommodate the interests of the community. This also includes participation in the Domestic Violence Treatment Option Court and the Community Wellness Court, both of which include responsibilities that extend beyond simply adjudicating in these courts.

108. As set out above, recent amendments to criminal law are likely to lead to additional work for TCYJs.

**g. The cost of living in the Yukon including the growth or decline in real per capita income**

**Cost of Living**

109. In interpreting this factor, some previous JCCs have inquired into things such as the rate of inflation and changes in CPI.<sup>103</sup>

110. The impact of inflation is an important consideration which was specifically identified by Lamer CJC in *PEI Reference*. Lamer determined that one key to the effectiveness of the JCC process is that the process should be held regularly, such as every three to five years, in order to guard against the erosion of judicial salaries because of inflation.<sup>104</sup>

111. Changes in the cost of living are most often discussed in reference to CPI statistics published by Statistics Canada. The CPI tracks changes in the cost of a fixed basket of consumer goods on a monthly basis. Statistics Canada calculates the change in the CPI for, among other things, each province as well as Canada as a whole. In the Yukon, Statistics Canada calculates the CPI only for Whitehorse.

112. The following chart shows the percentage increases in CPI for the years 2015 to 2019 for Whitehorse and Canada, the most recent year for which data is annual data is available.

	<b>Whitehorse</b>	<b>Canada</b>
<b>2019</b>	2.0%	1.9%
<b>2018</b>	2.4%	2.3%
<b>2017</b>	1.7%	1.6%
<b>2016</b>	1.0%	1.4%
<b>2015</b>	0.2%	1.1%

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<sup>103</sup> 2010 JCC Report, YG Book of Documents, Tab 12, p 39

<sup>104</sup> *PEI Reference*, YG Book of Documents, Tab 1, para 174



113. Whitehorse's CPI has, since 2017, been higher than Canada's. In 2019, it was also higher than Saskatchewan (1.7%), NWT (1.6%) and Alberta (1.8%) but lower than BC (2.3%).<sup>105</sup> That means that relative to their compatriots in Saskatchewan, NWT and Alberta, to the extent that such salaries have not been tied to CPI, TCYJ salaries have eroded more than their compatriots since 2017. It also means that any increase in salary of less than 2% for 2019 for TCYJ would be a lower salary than they currently earn.

114. In the Budget Documents, Yukon Government forecasts the following CPI increases: 2020 (2.5%), 2021 (2.0).<sup>106</sup>

115. In its "Territorial Outlook: Summer 2019", the Conference Board of Canada forecasts the following CPI increases for 2020 and 2021:<sup>107</sup>

<b>Year</b>	<b>CPI % Increase</b>
2020	2.1%
2021	2.0%

116. Some prior JCC's have set recommendations expressly tied to CPI in the second and third year of the JCC's mandate.<sup>108</sup> CPI-based increases can be structured to ensure judicial salaries keep pace with inflation throughout the final years of a JCC's mandate.

117. While it is important to guard against erosion due to inflation, successive Commissions have recommended salary and other increases that exceed the percentage increases in the CPI, particularly in the first year of the Commission's mandate. The TCYJ's proposal for an increase in the lump sum of \$14,000 effective April 1, 2019 would be a 4.9% increase. Taking into account that CPI increased by 2% in 2019, this is an increase of only 2.9% beyond what is required to protect the 2019 salary from erosion due to increases in the cost of living. Section 15 of the *Act* requires that no recommendation of the JCC shall result in less remuneration than the remuneration provided to judges to whom the *Act* applies on the day on which the JCC is established.

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<sup>105</sup> Yukon Bureau of Statistics, "Consumer Price Index 2019", YG Book of Documents, Tab 31

<sup>106</sup> 2020-21 Fiscal and Economic Outlook, TCYJ Book of Documents, Tab 3, p. 19

<sup>107</sup> Territorial Outlook: Summer 2019, TCYJ Book of Documents, Tab 1, p. 59

<sup>108</sup> 1998 JCC Report, YG Book of Documents, Tab 8; 2004 JCC Report, YG Book of Documents, Tab 10

118. In the subsequent years, the proposal is that TCYJ’s salaries should be increased based on the greater of 0 or the percentage change in the CPI for Whitehorse, over the preceding calendar year. The structure of this proposal mitigates any risk that might arise as a result of an unexpected economic downturn.

### **Changes in Real *Per Capita* Income**

119. Although it continues to be referenced in s. 19 of the *Act*, Statistics Canada has not tracked “real *per capita* income” since 2010. It is likely for this reason that none of the parties have addressed this topic in subsequent JCCs.<sup>109</sup> While that statistical measure is no longer available, other measures are available to track the growth or decline in earnings and incomes generally.

120. One available income measure is median total family income. A comparison of median total income of families across Canada reveals that incomes of families in the Yukon are consistently higher than in any other jurisdiction in Canada, with the exception of the NWT. In 2017, the median total family income in Yukon, was second highest in Canada at \$120,630, and the overall Canadian median total family income was \$92,990.<sup>110</sup>

121. Another measure is Average Income Assessed. In 2017, Yukon had the third highest Average Income Assessed compared to other Canadian jurisdictions, with the exception of NWT and Alberta.<sup>111</sup>

122. Another measure is primary household income *per capita*. This is a broad measure of the market income of households which includes income from labour, businesses, and property prior to Government transfers and taxes. The Conference Board of Canada predicts that primary household income in the Yukon will increase significantly in the years 2020 and following:<sup>112</sup>

<b>Year</b>	<b>Change in Primary Household Income</b>
2019	3.8%
2020	8.7%
2021	5.6%

<sup>109</sup> 2013 JCC Report, YG Book of Documents, Tab 13, p. 32

<sup>110</sup> Statistics Canada, Median Total Income - All Census Families, Table: 11-10-0012-01 (formerly CANSIM 111-0012), TCYJ Book of Documents, Tab 8

<sup>111</sup> Yukon Bureau of Statistics, “Yukon Income Statistics 2017 Taxation Year”, TCYJ Book of Documents, Tab 9, p. 6

<sup>112</sup> Territorial Outlook: Summer 2019, TCYJ Book of Documents, Tab 1, p. 59

123. Another consideration is the increases in the Wages and Salaries Per Employee. The forecasted increases are as follows:<sup>113</sup>

<b>Year</b>	<b>Change in Wages and salary per Employee</b>
2019	2.6%
2020	4.3%
2021	3.5%

124. As noted above, real gains in purchasing power are expected as the above increases in primary household income exceed the forecasted increases to the CPI for the same years.<sup>114</sup>

<b>Year</b>	<b>CPI % Increase</b>
2019	2.1% [actual CPI 2%]
2020	2.1%
2021	2.0%

125. These various indicators show that Yukon is a leader in Canada in these various income measures. Further the incomes in Yukon have increased relative to incomes of other Canadians in recent years. The Conference Board of Canada predicts continued growth. These considerations support the TCYJ's proposals for increased compensation.

**h. Any submissions by the public filed under section 26**

126. The public filed no submissions with the JCC.

**i. Other Relevant Considerations**

127. The preamble to section 19 makes clear this Commission may consider any matter it considers relevant.

**COVID-19**

128. The COVID-19 pandemic has been a significant challenge for the Territorial Court of Yukon. It has substantially added to the administrative workload of the Court and resulted in working conditions that are more stressful and dangerous. It has required significant creativity and adaptability by the TCYJ. It is likely that as physical distancing measures ease, there will be a surge of cases before the Court, many more urgent than they would have been but for the pandemic. The workload of the Court is therefore likely to be heavier in the medium term.

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<sup>113</sup> Territorial Outlook: Summer 2019, TCYJ Book of Documents, Tab 1, p. 59

<sup>114</sup> Territorial Outlook: Summer 2019, TCYJ Book of Documents, Tab 1, p. 59

129. Beginning on March 17, 2020 the Court issued a notice outlining measures to deal with the pandemic in the court setting. Subsequent notices have been issued as the pandemic evolved. Of course, it is essential that courts remain open, even in times of emergency. The court has strived to ensure that bail hearings and other important matters continue to be heard. Although the court adjourned most trials and preliminary hearings at the beginning of the pandemic, it continued to hear matters, mainly, although not exclusively by telephone and/or video, including bail hearings, urgent applications, sentencings (both in custody and out of custody), pre-trial conferences, circuit court appearances, and docket courts.

130. Unfortunately, the Court has experienced numerous difficulties with respect to both conference call and video technology. This has led to complaints by participants and additional obstacles for the Court to overcome. Although court services continues to work on the underlying issues, it appears that the problems are not easily resolved and stem from either the one local telecommunications provider and/or from the Yukon Government IT network. TCYJ are supportive of an in-depth examination of YGs IT network routing to determine whether it is properly functioning. Although court services has provided the courts with high quality video equipment, it is essential that IT infrastructure be reliable. The TCYJ do not ask this JCC to solve these issues but raise them as an example of the difficult work environment in which the TCYJ find themselves.

131. During this pandemic, YG has recognized the essential services that courts provide by deeming the court process to be a critical service, as outlined by way of Ministerial Order pursuant to the *Civil Emergency Measures Act*. This resulted in Deputy Judges of both the Territorial and Supreme Court being authorized to attend Yukon, while not being bound by the strict self-isolation requirements which are in place, in order to ensure that the rule of law is upheld and justice is not delayed.

132. In light of COVID-19, the Territorial Court has recently set out requirements for resuming in-person court hearings in Whitehorse in early July. The court is also consulting with the communities outside of Whitehorse to work collaboratively with them, with a view that in-person circuit courts resume in the near future.

133. The court is also being creative in dealing with the backlog of trials resulting from the pandemic. The court has scheduled assize sittings for this fall and winter during which a high volume of trials will be on the docket. A triage judge will oversee and manage the files, while also having the support of at least two other courtrooms to deal with the matters in an efficient and timely manner. Although this type of trial scheduling has never been employed previously in the Yukon, the court is confident that it will result in an efficient use of court resources.

134. The court has also instituted updated judicial authorization application procedures to minimize in-person contact with police officers. The court modified the application process for search warrants, general warrants and other various warrants by stipulating that they only be received by telecommunication. For other applications which are not authorized by the *Criminal Code* to be made by telecommunication, face-to-face applications are still occurring.

135. It should be noted that the number of judicial authorization applications has increased dramatically over the last 10 years. The court dealt with 60 such applications in 2010 and approximately the same number in 2015. However, in 2018 there were 122 applications; in 2019, the police made 132 applications, and between January 1 and June 30, 2020, there have already been 79 applications.

### **PART III. RECOMMENDATIONS AND CONCLUSIONS**

136. The TCYJ seek the following recommendations:

- a) Effective on April 1, 2019, an increase in the lump sum of \$14,000;
- b) Effective on April 1 of each of 2020 and 2021, an increase by the greater of 0% or a percentage equal to the CPI for Whitehorse for the preceding year ending December 31;
- c) The TCYJ and YG have already submitted a joint submission addressing travel insurance for Deputy Judges;
- d) The TCYJ have asked that this JCC be adjourned following the August hearing until some time after the fall sitting of the Legislature so that it may be determined whether additional submissions in respect of judicial pensions are required. Section 18 of the

*Act* provides that subject to section 29, on the filing of recommendations under section 14 or section 16, the Commission's term of office ends. The judges therefore ask that any recommendations on the issue of salary not be filed until the parties have advised, or the Commission has determined, that the pension issue is resolved or need not be addressed;

- e) The TCYJ ask that all other terms, benefits, allowances stipends and related remuneration in effect for TCYJ remain unchanged.

137. The TCYJ set out above how each of the factors set out in the *Act* supports their proposal for the 2019 salary and the proposal for the greater of 0 or a CPI-based adjustments in each of the following two years.

138. The salary proposed by the TCYJ will ensure the protection of judicial independence, as it is based on the objective factors set out in s. 19 of the *Act*. The uniqueness of the judicial role supports the approach of past JCCs, which have considered the comparison with the compensation paid to judges in other jurisdictions to be of the utmost importance.

139. According to the Supreme Court of Canada in *Bodner*, the purposes of the JCC process are to protect judicial independence and to depoliticize the setting of judicial compensation. The TCYJ provide this submission to assist the JCC in fulfilling its important role in that process, which is to make recommendations about appropriate compensation for judges during the period of April 1, 2019 to March 31, 2022.

140. The TCYJ submission has reviewed all of the relevant factors identified in section 19 of the *Act* in light of the reasoning of past JCCs. For the reasons set out above, the judges submit that each of their proposals is appropriate based on all of the relevant factors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: 07 Jul 2020



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Signature of lawyer for Territorial Court Judges  
and Deputy Judges  
**ALISON M. LATIMER**