

REPORT OF THE NORTHWEST TERRITORIES JUDICIAL REMUNERATION COMMISSION

2020

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Introduction:

[1] The *Territorial Court Act*¹ establishes the process through which territorial judges' salaries and benefits are set. The Judicial Remuneration Commission (Commission) conducts an inquiry and, based on submissions received at a hearing of the inquiry from territorial judges or their representative, the Minister of Justice (the Minister), and any other interested person or body, makes recommendations which are binding on the Minister to implement.²

[2] The Commission is mandated to conduct hearings and make recommendations on salaries and benefits every four years. The current Commission will establish territorial judges' salaries for the fiscal years 2020/21, 2021/22, 2022/23 and 2023/24. The Commission's recommendations take effect on April 1 of the year the Commission holds its hearing. This reflects the beginning of the government's fiscal year, with each fiscal year running April 1 to March 31.

[3] Section 12.9 of the *Territorial Court Act* sets out the factors the Commission must consider in making recommendations.³ The Minister and the territorial judges have provided considerable background information as to recommendations made by past Commissions, and regarding how the factors should be applied to the issues before the Commission.

[4] In the time since the Commission closed its proceedings and concluded its deliberations, but before completion of this report, the Northwest Territories and every province and territory in Canada have been forced to contend with a global pandemic. At the time of issuance of this report, the Northwest Territories is under a public health emergency caused by the imminent spread of the COVID-19 virus. Long-term economic effects of the pandemic on the Northwest Territories are unknown.

[5] This report reflects the Commission's conclusions based on an assessment of the evidence and submissions provided to the Commission and is based on economic conditions before the pandemic began. The Commission does not propose to re-open its proceedings. The Minister or the Chief Judge may utilize section 12.92 to request a further Commission inquiry, if as a result of the pandemic, there is need to revisit the recommendations outlined in this report.⁴

¹ *Territorial Court Act*, R.S.N.W.T. 1988, c. T-2

² *Territorial Court Act*, R.S.N.W.T. 1988, c. T-2, section 12.1 to 12.95

³ *Territorial Court Act*, R.S.N.W.T. 1988, c. T-2, section 12.9

⁴ *Territorial Court Act*, R.S.N.W.T. 1988, c. T-2, section 12.92

Issues:

[6] The following is a summary of the issues the Commission has been asked to consider in making recommendations for territorial judges' salary and benefits for the fiscal years 2020/21, 2021/22, 2022/23 and 2023/24:

Salary:

1. What should the Commission recommend territorial judges receive for salary over the next four years?

Long Term Disability (LTD):

2. Should the Commission recommend territorial judges be eligible for long term disability (LTD) benefits until the point where they are required to start receiving pension, at age 69?

Continuing Professional Development (CPD):

3. Should the Commission recommend the Minister provide territorial judges with a global fund, or individual allowances, for continuing professional development (CPD)?
4. Alternatively, should the Commission recommend the Minister set parameters for the number of courses, or specific courses, territorial judges are entitled to take as CPD?

Extended Health Benefits:

5. Should the Commission recommend approval of the Alberta Blue Cross Plan for current territorial judges, and plans administered by Green Shield Canada for retired judges and surviving spouses?

Background:

[7] The Commission conducted its inquiry through written submissions followed by a hearing held in Yellowknife, Northwest Territories, on January 13, 2020.

[8] The Commission presented interrogatories and received written responses from the parties before the hearing. In addition, the Commission received written submissions from retired judge Brian Bruser, on behalf of himself and his spouse. The Commission received additional responses and submissions, after the hearing, in response to questions arising at the in-person hearing.

[9] Neither party called witnesses at the hearing on January 13, 2020. The Commission received information directly from counsel, in the form of asserted or uncontested evidence combined with argument. Forecasts, predictions and interpretations of information were not tested through cross-examination.

[10] This section of the Commission's report outlines a summary of uncontested background information which is relevant to all four issues presented by the parties for the Commission's consideration. It provides the context for the evaluation of factors under each issue.

Nature and Extent of the Legal Jurisdiction of the Territorial Judges (Subsection 12.9(a) of the Territorial Court Act):

[11] Territorial judges deal with all aspects of the Territorial Court's jurisdiction, which include criminal, civil, and family jurisdiction. The following is more detailed outline of their responsibilities, taken primarily from the judges' submissions:

[12] A large percentage of adult criminal prosecutions in the Northwest Territories are tried in the Territorial Court. This includes trials of summary conviction offences, hybrid offences, and indictable offences. Judges also conduct preliminary inquiries, sentencing hearings, motions and case management conferences.

[13] Territorial judges hear almost all Youth Justice Court cases. Judges deal with matters relating to young offenders including applications relating to custody orders and community supervision orders. They also preside over sentencing conferences and bail conferences in complex cases.

[14] The Territorial Court has jurisdiction over civil matters of amounts up to and including \$35,000. The Territorial Court frequently deals with unrepresented litigants in these proceedings. Civil claims are subject to mandatory mediation and acting as mediator requires of judges a unique set of skills.

[15] The Territorial Court has jurisdiction over family law matters including issues of custody, child and spousal support, maintenance, child protection, legitimacy, paternity and adoption. Territorial judges also deal with temporary and permanent child apprehensions in the Northwest Territories.

[16] Territorial judges also consider *ex parte* applications for warrants, production orders, sealing orders, and applications to vary the conditions of court orders. Other out-of-court

work includes the development and delivery of training and education programs to lawyers, other judges, justices of the peace, and others.

[17] Territorial judges hear applications for psychiatric assessments, and applications to determine whether an accused person is unfit to stand trial or should be exempted from criminal responsibility. Territorial judges are involved in various ways with the following specialized courts:

- Domestic Violence Court
- Wellness Court
- Drug Treatment Court

[18] Matters involving minor offences may be diverted from the court system to Community Justice Committees. While on circuit, territorial judges may meet with local committees.

Adequacy of Salaries and Benefits having regard to Cost of Living and Changes in Real Per Capita Income (Subsection 12.9(b) of the Territorial Court Act):

[19] The parties submitted a Joint Book of Documents which included a report from the Conference Board of Canada⁵ and the Northwest Territories Budget Address for 2019-2020.⁶ The following is a footnote of relevant information and forecasts:

[20] The Consumer Price Index (“CPI”) statistics, published by Statistics Canada, tracks changes in the cost of a fixed basket of consumer goods on monthly basis. The percentage increases in CPI for the years 2015 to 2018 for Yellowknife, Northwest Territories, have been, respectively, 1.6% for 2015, 1.2% for 2016, 1.2% for 2017 and 1.6% for 2018.

[21] The Conference Board of Canada forecasts future CPI increases at 2.0% for 2019, 2.1% for 2020, 2.0% for 2021, 2.0% for 2022, and 2.0% for 2023.

[22] In 2017, the median total family income in the Northwest Territories was \$144,900, the highest in Canada. The Conference Board of Canada predicts that primary household income in the Northwest Territories will increase 7.2% in 2020, 3.2% in 2021, 3.9% in 2022 and 2.3% in 2023.

[23] Residents of the Northwest Territories also have the highest average weekly earnings of any jurisdiction in Canada, at \$1,420.19 in 2018. The Conference Board of Canada forecasts wages and salaries per employee to increase by 1.3% for 2019, 4.5% for 2020, 2.6% for 2021, 2.5% for 2022, and 1.9% for 2023.

⁵ Joint Book of Documents, Tab 14: Conference Board of Canada, “Territorial Outlook Economic Forecast Report: Summer 2019”

⁶ Joint Book of Documents, Tab 15: Budget Address, 2019-2020, Northwest Territories, February 6, 2019 including Budget Papers: Economic Review; and Fiscal Review.

Salaries and Benefits of Provincial and Territorial Judges in Other Jurisdictions in Canada (Subsection 12.9(c) of the Territorial Court Act):

[24] The parties have provided information to assist in the comparison of salaries with other provincial and territorial courts across Canada.⁷ The parties also provided information to allow for a comparison of LTD benefits.⁸

[25] Comparative information with respect to CPD and extended health benefits came to the Commission at the hearing and afterwards. The parties disagree as to the completeness of interpretative value of the information. As such, it remains contested and is considered along with the parties' arguments below.

Working Conditions under which the Territorial Judges carry out their Duties (Subsection 12.9(d) of the Territorial Court Act):

[26] The judges' submissions provide a snapshot of the working conditions of territorial judges, especially while travelling on circuit courts outside Yellowknife. The following is a summary of relevant conditions which are uncontested by the Minister:

- Territorial judges must travel to other communities, often by small aircraft, in cold and dark conditions. Delays can occur due to weather.
- On some of the circuits, suitable accommodation is not available, and the judge will commute to and from a community for each day of court sitting.
- In small communities, the Territorial Court sits without the amenities of a courthouse, in hockey arenas, community centres, gymnasiums, community halls, council chambers and hotels.
- There is often no private area for the judge in circuit courts, such that accused persons or members of the public may be able to approach the judge.
- Judges may sit beyond ordinary working hours to accommodate witnesses and accused who have travelled long distances. Judges may also need to travel on the weekend to accommodate circuit court schedules.
- The Territorial Court routinely deals with clients with difficult backgrounds and addiction issues or cognitive challenges. In smaller communities, it must do so without the same level of support available in larger centres like Yellowknife.
- Territorial judges regularly deal with accused persons or witnesses through an interpreter, which can lengthen proceedings and present additional challenges.
- Judges must carry out their duties within the unique cultural context of the Northwest Territories communities, and must isolate themselves, both socially and physically.

⁷Joint Book of Documents, Tab 11: Puisne Judges' Salaries Across Canada, as at November 2019; Initial Submission of the Minister of Justice of the Northwest Territories to the Judicial Remuneration Commission, submitted November 25, 2019: Table at p. 6

⁸ Submissions of the Judges of the Territorial Court of the Northwest Territories to the Northwest Territories Judicial Remuneration Commission, submitted November 25, 2019: Table at p. 72

Economic Fairness (Subsection 12.9(e) of the Territorial Court Act):

[27] In their submissions, the parties have approached economic fairness by advancing arguments based on fairness relative to pay and benefits received by other judges, senior public servants and professionals. As such, the parties' arguments on this factor are summarized below, and addressed in the Commission's analysis and reasons for decision.

Economic Conditions of the Northwest Territories (Subsection 12.9(f) of the Territorial Court Act):

[28] The primary resources presented to the Commission, regarding economic conditions in the Northwest Territories, are again the Conference Board of Canada report and the Government of the Northwest Territories (GNWT) budget document noted under the heading *Cost of Living and Real Per Capita Income*.

[29] The Conference Board of Canada report offers the following prognostication, largely based on an assessment of the mining industry, which is central to the Northwest Territories' economy:

- The Conference Board of Canada reports that diamond mining at the Northwest Territories' three mines (i.e., Gahcho Kué, Diavik, and Ekati) each topped 20 million carats in 2018, surpassing expectations.
- However, the Conference Board of Canada also notes that diamond production in the Northwest Territories has reached its peak.
- The Conference Board of Canada forecasts that the diamond mines in the Northwest Territories will commence wrapping up production beginning in 2025 and continuing into the 2030's.
- This could well have negative economic implications for the long-term in the Northwest Territories.
- Over the next four years, the Conference Board of Canada forecasts a decline in diamond mining in some areas, but also forecasts that these declines will be offset somewhat by other mining production developments, as well as increases in other areas of the economy.
- The Conference Board of Canada forecasts percentage Gross Domestic Product (GDP) changes of 2.1% in 2019, 2.5% in 2020, -3.0% in 2021, 1.3% in 2022 and 1.1% in 2023.

[30] The parties offer argument on the relevance and weight to be placed on this information, which the Commission therefore accepts only as projections that have been made, not as established fact. The parties' submissions are again addressed below.

Any other Factors that the Commission may consider Relevant to its Review (Subsection 12.9(g) of the Territorial Court Act):

[31] Both parties submit that judicial independence should be an important factor in the Commission's deliberations. The Minister also suggests consideration be given to the promotion of recruitment and retention for judges.⁹ The Commission accepts these are legitimate factors and has taken them into consideration.

⁹ Initial Submission of the Minister of Justice of the Northwest Territories to the Judicial Remuneration Commission, submitted November 25, 2019: p. 13

Salary:

[32] The parties have both advanced positions and rationales in support of increasing judges' salaries over the next four years.

[33] The judges' position is that judges should receive an increase of 3.38% for 2020/21, raising salaries to \$310,000, plus an increase equal to the percentage increase in CPI for Yellowknife over the preceding calendar year, for 2021/22, 2022/23 and 2023/24.

[34] The judges' further position is that the Chief Judge shall continue to receive an additional \$15,000 per year, which the Chief Judge currently receives as the Chief Judge's Differential.

[35] The Minister's position is that judges should receive an increase of 0.5% for 2020/21; and an increase of 0.5% for 2021/22; and an increase of 1.5% for 2022/23; and an increase of 1.5% for 2023/24.

Judges' Submissions:

[36] The following is a summary of the judge's submissions on salary, applying the factors outlined in section 12.9 of the Act:

Legal Jurisdiction and Working Conditions:

- Territorial judges exercise a jurisdiction that is as broad as, or broader, than their counterparts elsewhere.
- Working conditions are more difficult in that they perform more onerous circuit work.
- In most other jurisdictions, judges will exercise only criminal or civil jurisdiction, but not both.
- The number of regulatory offences has increased considerably in recent years.
- The increased monetary limit for small claims is among the highest in Canada. This has provided an avenue for litigation for individuals who would otherwise have had to bring claims in Supreme Court.
- Psychiatric Assessments and Mental Health applications can be complicated and stressful.
- Beyond their regular court and after-hours duties, territorial judges seek to enhance the administration of justice in the community, through delivering training and participating on specialized courts.
- The breadth of territorial judges' jurisdiction supports compensation that is among the highest paid to judges in other provinces and territories.

Cost of Living and Real Per Capita Income:

- The judges' proposal for \$310,000 effective April 1, 2020 would be a 3.38% increase, which likely amounts to just over 1% beyond what is required to protect the 2019 salary from erosion.
- Territorial judges live and work in a jurisdiction which has the highest average weekly earnings, primary household incomes, and median total family incomes in Canada.

- Further, it is predicted that primary household incomes will rise significantly in the Northwest Territories over the period at issue.
- According to the NWT Bureau of Statistics, Yellowknife's living cost differential for 2018 was 20 to 25% higher than that of Edmonton.
- The higher cost of living in the Northwest Territories must be considered in assessing how compensation paid to territorial judges should compare with that paid to counterparts in other jurisdictions.
- The various indicators showing the Northwest Territories as a leader in Canada in income measures supports the judges' proposal for increased compensation.

Other Jurisdictions:

- The uniqueness of the judicial role supports the approach of past Commissions, which have considered the comparison with compensation paid to judges in other jurisdictions to be of utmost importance.
- Past Commissions have consistently found that the Northwest Territories judges should be among the most highly paid of judges in the provincial and territorial jurisdictions across Canada.
- Since the 2001 Commission, comparisons have focussed on judges in Ontario, Alberta, Saskatchewan and Yukon.
- In Ontario, provincial court judges are entitled to salary increases each year based on the percentage increase in the Industrial Aggregate Index for Canada over the preceding twelve months (i.e., April 1 - March 31).
- Based on the recommendations of their last Commission, Ontario judges would be paid a salary equal to 95.27% of that amount, or \$326,993, in 2020/21.
- In Alberta, the government rejected the recommendation of the 2017 Commission and imposed a four-year salary freeze at the 2016 salary of \$293,991.
- The Alberta Provincial judges' Association plans to seek judicial review of the salary freeze.
- But for the salary freeze, and based on the recommendations of their last Commission, Alberta judges would be paid a salary equal to \$318,500, in 2020/21.
- The salaries for Yukon judges for the years commencing 2019/20 are currently unknown as the 2019 Yukon Commission's process has yet to occur but can reasonably be expected to increase.
- In Saskatchewan judges' salaries will increase in 2020 by an amount equal to the percentage increase in CPI plus 1%. If the CPI increase is 1.7%, the result would be a salary of \$312,284.

Working Conditions:

- Past Commissions have considered that working conditions of the judges are more onerous than those of their counterparts in the rest of Canada.
- While nearly all jurisdictions have circuit courts, territorial judges travel more often and to more remote communities, and often work longer hours.
- Territorial judges spend significantly more time on circuit than their counterparts in other jurisdictions, including judges in Yukon and Nunavut

- The greater severity of the crimes in the Northwest Territories results in a higher proportion of serious and complex criminal matters appearing in the Territorial Court, as compared with other jurisdictions.
- Bill C-75 is expected to have a significant impact on the work of provincial and territorial courts across Canada. Once it is fully implemented, the Bill will eliminate preliminary inquiries for all offences, except for those where there is a risk of life imprisonment.
- Bill C-75 will result in more trials in Territorial Court and will also likely result in more cases remaining in the Territorial Court.
- There are currently 39 active justices of the peace in the Northwest Territories. Justices of the peace assist territorial judges in several ways, but their authority and jurisdiction has been increasingly limited in recent years.
- Due to recent retirements, there is a junior and inexperienced roster of justices of the peace who require significant training. As a result, much of their work has been transferred to the Territorial Court, adding to judges' workloads.
- The Chief Judge, or another designated judge, spends considerable time overseeing training and meeting with justices of the peace.
- In addition to scheduled training sessions, the Chief Judge, or other designated judge, provides refresher courses to the clerks of the court and justices of the peace in their home communities.
- Judges' significant and difficult workload supports their requests for increased compensation.

Economic Fairness:

- The Commission should examine how judges' salaries compare with the salaries paid to judges in other jurisdictions considering the way in which the earnings of professionals and employees generally compare with the earnings of their counterparts in other jurisdictions.
- The high incomes and earnings of Northwest Territories residents, relative to residents of other jurisdictions, and the high average weekly earnings of Northwest Territories workers (relative to Alberta, Ontario and Yukon), support judges being paid a salary among the highest across Canada.
- In 2018, the incomes of professionals in the Northwest Territories were close to those of Ontario professionals, both of which were slightly behind the earnings of Alberta professionals but ahead of the Canadian average.
- Public administration earnings are higher in the Northwest Territories than in Ontario, Alberta, Saskatchewan and Yukon. They are also well in excess of the Canadian average.
- The various measures of compensation support the judges' request for compensation that is among the highest compensation paid to judges across the country.

Economic Conditions:

- This factor involves consideration of prevailing and predicted conditions in the territorial economy but does not consider the fiscal situation of the GNWT or its ability to pay.
- The Conference Board of Canada's predictions regarding the wrapping up of diamond mine production are not forecast to occur within the next four years, the period for which the Commission is making recommendations.

Minister's Submissions:

[37] The following is a summary of the judge's submissions on salary, applying the factors outlined in section 12.9 of the *Territorial Court Act*.

Nature and Extent of Jurisdiction:

- Judges hear most criminal and regulatory matters in the Northwest Territories, as well as certain family law matters, mainly child protection matters and some applications for child support.
- Judges may also hear small claims matters of a limited dollar amount, although this is rare in practice.
- The jurisdiction exercised by the judges is theoretically and practically very similar to the jurisdiction exercised by other territorial and provincial judges across Canada.
- While individual judges are not able to specialize, this is likely true of most territorial and provincial judges in Canada.

Adequacy of Salaries and Benefits:

- Salaries and benefits provided to judges are adequate to maintain judicial independence. In each of 2017, 2018 and 2019, there was an increase equal to CPI on December 31 of the previous year, plus 1.5%.
- The resulting salaries, including a 2019/20 salary of nearly \$300,000, as well as the generous benefits package provided to judges, are adequate to ensure judges remain independent and free from financial pressures.
- The percentage growth in judges' salaries since 2000/01 has been higher than the percentage growth in the salaries of others paid from the public purse.

Other jurisdictions:

- Comparing the salaries and benefits of territorial and provincial court judges across Canada continues to be an inexact science.
- Legislation in many provinces provides that Commission recommendations can be rejected, which can result in litigation and uncertainty.
- In 2019/20, territorial judges are approximately the third to fifth highest paid provincial/territorial judges in Canada, with a salary of \$299,869.
- Judges are also provided with a Northern Allowance of \$3,700 per year in addition to salary.

Working Conditions:

- Certain aspects of judges' working conditions are challenging, and each successive panel of the Commission has viewed the judges' working conditions as a significant factor suggesting the judges should be among the highest paid in Canada.
- As a result, working conditions are reflected in the judges' current salary.
- The working conditions of the judges are no worse than in the past and have probably improved somewhat in recent years. Improvements in technology can only continue to improve working conditions.

Economic Fairness:

- The current composition of the Territorial Court is evidence of the economic fairness of the compensation the judges receive.
- Two of the four current judges were very well-respected and experienced lawyers who were appointed from the private bar.
- Two of the four current judges were very well-respected and experienced lawyers working in the public sector prior to their appointments.
- The most recent appointee was previously the Information and Privacy Commissioner of Newfoundland and Labrador, indicating vacant positions attract excellent candidates from across Canada.

Economic Conditions:

- Since the 2016 recommendations of the Commission, the Northwest Territories' economy has performed poorly, and the economic outlook has deteriorated.
- In the last two years, diamond prices have collapsed, reducing mining revenues through lower sale values and reduced royalties for the GNWT.
- Between 2014 and 2018, the government sector grew at an average annual compound rate of 1.7%.
- The territorial public administration sector itself increased 1.2% annually over that time.
- Between 2014 and 2018, total employment in the Northwest Territories has fallen by an average annual rate of 0.8%.
- The GNWT's fiscal situation is linked to the economy through population growth. With population growing more slowly than the national average, this will remain a drag on the calculation for the federal Territorial Formula Financing grant over the next four years.
- The economic outlook remains uncertain because of the Northwest Territories economy's dependence on the non-renewable resource industry for high paying jobs and local business opportunities.

[38] Based on the above assertions regarding the Northwest Territories economy, the Minister submits that judges should not be paid such salaries as to create the perception judges are exempt from shouldering the burden of difficult economic times.¹⁰

¹⁰ Reply Submissions of the Minister of Justice of the Northwest Territories to the Judicial remuneration Commission, submitted December 20, 2019; citing Joint Book of Documents, Tab 12: *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. Ekmeçic; R. v. Wickman; Manitoba Provincial Judges' Association v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3 (PEI Reference), at para. 196

Reasons for Decision – Salary:

[39] In making its report and recommendations, the Commission is required to consider the factors outlined in section 12.9 of the *Territorial Court Act*. The Commission must make its own independent assessment of these factors, based on the evidence and argument presented.¹¹

[40] There is considerable common ground between the parties' submissions with respect to the factors in section 12.9. The Commission notes more similarities than differences in how the parties recommend the factors be evaluated. The overall picture is that judges' salaries should continue to be in the upper end compared to other jurisdictions and keep pace with cost of living increases.

Nature and Extent of Jurisdiction:

[41] The judges' jurisdiction encompasses a wide range of work, including criminal and quasi-criminal matters, youth matters, civil claims, family matters, child protection matters, *ex parte* applications and other duties, psychiatric assessments and mental health applications. Judges also participate in specialized courts, and work with justices of the peace.

[42] The skills required to work in all these areas goes beyond hearing cases in court. Judges must also be able to act as mediators of civil claims, serve as trainers for justices of the peace, and engage alternative approaches in Wellness Court and Drug Treatment Court. These are offered as just some examples of functions which go beyond the already challenging role of adjudicating cases in court. Judges must be highly skilled, and highly adaptable to fulfill the responsibilities required of them.

[43] There appears to be some question as to the volume of small claims matters judges hear, and how many of these are resolved through mediation as opposed to trial. There also appears to be some question as to the extent to which judges elsewhere can more readily specialize. The Commission cannot resolve these contested matters without more concrete evidence.

[44] It is not, however, necessary to resolve these disputed points with precision. The work is all judicial or related work. Regardless of how the workload is itemized, the evidence is that territorial judges exercise broad, varied and extensive jurisdiction. As a result, this factor supports continuing to pay judges in the upper range compared with other jurisdictions. The conclusion remains, notwithstanding variations that may exist from jurisdiction to jurisdiction.

Adequacy in Relation to Cost of Living:

[45] The Commission accepts that judges' salaries should adjusted along with cost of living increases, as a means of ensuring judges' incomes remain appropriate to maintaining judicial independence.

[46] The CPI provides a metric that allows salary increases to be aligned with statistically established cost of living increases. Both the judges and the Minister seem to agree in principle to some form of annual increase based on CPI. The judges have asked the Commission to

¹¹ Joint Book of Authorities, Tab 13: *Provincial Court Judges' Association 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. Quebec (Attorney General)*, [2005] 2 S.C.R. 286, at para. 15

recommend a fixed increase of 3.38% for 2020/21, higher than the forecast CPI increase for the year. The Minister has recommended fixed increases for each of next four years which are lower than CPI increases for the year. This is where the parties' positions diverge in applying the principle of cost of living increase.

[47] The Conference Board of Canada forecasts offer predictions on what cost of living will do over the next four years. For the purposes of maintaining salaries, the forecast figures are not as accurate as actual CPI information made available from Statistics Canada each year. All other factors being equal, the easiest way to maintain judges' salaries would be to adjust salaries each year based on actual CPI increases.

[48] The 2016 Commission applied this methodology to the second, third and fourth years of its mandate. It recommended that, commencing on April 1st of each year, from 2017 to 2019 inclusive, judges' salaries would be increased by an amount equal to the CPI for Yellowknife calculated by Statistics Canada for the preceding year ending December 31st (plus an additional 1.5 percentage points).¹²

[49] The parties agree that, if this Commission is to apply the same approach, the Commission should be specific in recommending that increases be based on the average CPI for the preceding year, to avoid any confusion that it is to be based on a specific date at the year's end. The Commission accepts this submission. If adjustments are tied to the CPI increases, the average increase over the preceding year offers a more appropriate metric than the CPI on a fixed date.¹³

[50] The Commission is not satisfied, on this factor, of the need to constrain judge's salaries to increases less than predicted CPI increases, as proposed by the Minister. Judges' salaries may have increased more than those of public servants since 2000, but this is not particularly determinative. Public servants' incomes are only one comparator to establish adequacy relative to others in the same community. Furthermore, the Commission's task is prospective. The Minister has not established any rationale for limiting future increases based on increases granted over the past 10 years.

[51] Percentage increases established through binding mediation, used to conclude collective bargaining between the GNWT with the Union of Northern Workers, are likewise not determinative. The Commission heard that Mediator Ready established increases of 0% for 2016, 0% for 2017, 1.6% for 2018, 2.3% for 2019 and 2.5% for 2020,¹⁴ In setting those percentages, the mediator was presumably looking at factors more directly tied to government finances, and unrelated to considerations of judicial independence. The Commission has no indication of how cost of living or changes in real per capita income factored into his deliberations.

[52] The Commission is likewise not satisfied, on this factor, of need to increase judges' salaries above predicted CPI increases in 2020/21, as proposed by the judges. The information offered, in terms of Yellowknife's cost of living differential for 2018, shows that costs are higher than in Edmonton. Median family incomes in the Northwest Territories are also high and

¹² Joint Book of Documents, Tab 9: 2016 Report of the Northwest Territories Judicial Remuneration Commission

¹³ Transcript of Hearing held January 13, 2020, at p. 22, ll. 5-24 and p. 41, ll. 5-14

¹⁴ Transcript of Hearing held January 13, 2020, at p. 95, ll. 22-27

predicted to increase in the next four years. These realities support judges being paid in the upper end, but they are not novel or determinative considerations for 2020/21.

[53] It has not been established that judges' relative earnings would be eroded unless they received a 3.38% increase in 2020/21. While relative earnings are one consideration, relative unemployment rates are another consideration and it has not been established the Northwest Territories compares as favourably on that score. In addition, the Commission does not have information as to the relative cost of living where other judges in the upper salary quartile reside, including larger cities like Calgary or Toronto. In summary, the Commission has not been provided with a rationale to conclude judges' relative earnings would be eroded unless they receive a 3.38% increase in 2020/21.

Other jurisdictions:

[54] The Commission has considered judges' salaries in other jurisdictions which continue to provide useful comparators for the upper end of salaries for provincial and territorial judges. The information available to the Commission does not extend for the next four years, and there is uncertainty especially with respect to Alberta.

[55] In Ontario, provincial court judges are receiving higher salaries in 2019/20 than territorial judges in the Northwest Territories. It is difficult to predict what will happen with salaries in Ontario, since they are based on a percentage of salaries for federally appointed judges.

[56] In Yukon, territorial judges are receiving lower salaries in 2019/20 than territorial judges in the Northwest Territories. Again, it is unknown what Yukon's Commission will recommend, and what the government will pay, over the next four years.

[57] In Alberta, provincial court judges could be receiving more or less than territorial judges in the Northwest Territories. It depends on whether the Alberta Government's freeze on judicial salaries remains in effect, or if it is successfully challenged on judicial review. As of the time of this report, the Commission had no further information as to whether a judicial review was proceeding.

[58] In Saskatchewan, provincial court judges will receive 3% increases in 2020/21 and 2021/22. This will result in salaries greater than those of territorial judges in the Northwest Territories, regardless of whether the Commission recommends the judges' full request or something less. The Minister's request would result in salaries far below judges' salaries in Saskatchewan.

[59] Based on these comparisons, straight CPI increases would maintain Northwest Territories' judges in the top quartile for salary, possibly quite comfortably in the top quartile depending on what happens in Alberta. Larger increases could push judges' salaries significantly higher in relative terms, given the unknowns in many of the higher paying jurisdictions.

Working Conditions:

[60] The Territorial Court conducts circuit courts across an expansive and remote territory, a feature which has characterized the Territorial Court throughout its history. The challenges of circuit work, including improvised facilities and cold temperatures, warrants higher than average salaries for territorial judges.

[61] There is some consensus that working conditions have improved to an extent, through the increased use of chartered flights, for example, as well as through increased accessibility to technology including telephone and video conferencing.¹⁵

[62] There is no indication judges' working conditions, which have always been difficult in the Northwest Territories, have gotten markedly worse. If they have improved to some degree, recent improvements still have not changed the most fundamental realities of delivering justice in the communities where events occurred. All the territorial judges participate in maintaining the circuit schedule, which means long hours and isolation on top of weather and ever-changing logistical challenges.

[63] The impact of changes to workload, on working conditions, is more challenging to assess. The Commission does not have much information, for example, to assess how much Bill C-75 will affect working conditions. If judges are required to hear more trials, the volume of work may increase, but the work is judicial in nature as with other work in the courtroom setting.

[64] Likewise, if judges are required to devote time to training and mentoring justices of the peace, which may take away from courtroom work, without necessarily subjecting judges to better or worse conditions.

[65] Working conditions has always been a factor supporting higher salaries for Northwest Territories. It continues to be so. Territorial judges have a wide and varied jurisdiction, which requires adaptability to physical changes, legislative changes, and occasional workload realignments. Much of what they do is conducted outside the capital of Yellowknife, with varying types and degrees of challenges.

Economic Fairness:

[66] The judges present economic fairness in terms of ensuring territorial judges have salaries competitive relative to those of judges and other professionals in other jurisdictions. As outlined above, territorial judges have salaries in the upper end of incomes of provincial and territorial judges.

[67] The above-average incomes of professionals in the Northwest Territories, close to those of Ontario professionals and slightly behind those of Alberta professionals, supports maintaining judges in the upper quartile of judicial earnings. Jurisdictions with professional incomes above the Canadian average remain relevant as comparator jurisdictions.

[68] The Commission accepts that judicial incomes should generally continue to exceed those of public service. In the Northwest Territories, public sector earnings may exceed those in Ontario, Alberta, Saskatchewan and Yukon, but this is again not a unique circumstance warranting an adjustment above CPI in 2020/21. There is no indication of public sector earnings on a trajectory that needs to be matched to ensure economic fairness to judges.

[69] The Minister points to the quality of judicial appointees, from both public and private sectors, as evidence of economic fairness in judicial remuneration to date. The ability to attract good candidates, as well as the relatively young retirement ages of territorial judges, indicates compensation to date has been fair and adequate. Adjustments based on CPI increases will ensure this continues for the next four years.

¹⁵ Transcript of Hearing held January 13, 2020, at p. 18, ll. 18-26

Economic Conditions:

[70] The Conference Board of Canada predicts the diamond mining industry will be wrapping up operations in the Northwest Territories starting, around 2025 and continuing into the 2030's. This is beyond the four-year period for which the Commission is tasked with making recommendations for judges' salaries to 2024. It is therefore too early to conclude judicial incomes should be reduced in relation to forecast changes in CPI.

[71] At this point, the influence of economic conditions has not been reflected in reductions to the public service, or cost-saving measures such as freezes on senior management salaries. It is therefore too early to conclude judges should have to share the burden of difficult economic times, as suggested by the Minister.

[72] The effect of anticipated economic events on the Northwest Territories' population, and the effect of population on government revenues, remain speculative at this point. The negative predictions outlined in the Conference Board of Canada report are subject to possible offset by increases in mining or other activity.

[73] The Commission's mandate is to recommend judges' salaries for the next four years, and to this end forecasts and predictions which extend beyond four years are less relevant than evidence regarding the more immediate economic timeframe. Conditions which prevailed at the time of the Commission's proceedings support judges receiving incomes consistent with those at the top of public and private sector incomes.

Any Other Factors:

[74] The Commission has considered the need to support judicial independence, in applying all other factors.

[75] Judges should be secure with respect to salary, and this includes security from unjustified erosion of salary. The Northwest Territories is not yet in economic circumstances where there is a burden of hard times which judges must share.

[76] The Territorial Court has attracted quality candidates in the past, and in order to continue doing so, salaries should be maintained at a high level with appropriate adjustments reflective of changes to CPI.

Conclusions:

[77] The Commission accepts that territorial judges' salaries should be in the top quartile nationally, but not necessarily at the top of the quartile. Based on the consideration of factors outlined above, this can be achieved through adjustments reflecting CPI increases for each of the next four years. In addition, it is reasonable to protect territorial judges' salaries from reduction in the event CPI decreases in coming years, since it cannot be assumed CPI changes will at all times be positive.

[78] There is no need for an additional increase in the first year, as the judges propose, since there is no increase required to raise salaries from a lower quartile to the top. There is likewise no supportable rationale for recommending increases less than CPI, as the Minister has proposed. This would have the effect of eroding judges' real earnings over the next four years.

[79] The Commission recommends that territorial judges receive an adjustment equal to the average percentage increase in CPI for Yellowknife over the preceding calendar year, ending December 31, for each of 2020/21, 2021/22, 2022/23, and 2023/24.

[80] The Commission recommends, as a means of protecting salaries from erosion, that territorial judges' average percentage adjustments be no less than zero, in the event of negative average percentage changes in CPI for Yellowknife over the preceding calendar year, ending December 31, for any of 2020/21, 2021/22, 2022/23 or 2023/24.

[81] The Chief Judge receives an additional differential of \$15,000 per year, and as there is no request for an increase and no suggestion the Minister plans to withdraw this component, a recommendation to continue the differential would be redundant.

Long Term Disability (LTD):

[82] The issue presented to the Commission on LTD is whether to recommend the extension of LTD benefits to the age at which judges are normally obliged to start receiving pension.

[83] The background information relevant to this issue is as follows:

- The GNWT insures for long-term disability benefits for each judge through Great-West Life (now Canada Life).
- Long-term disability benefits are also provided for under the judges' Supplemental Pension Plan Regulations.
- According to this regulation, disabled judges receive a monthly benefit equal to 70% of a judges' salary but must retire and commence receipt of pension at age 65. A disabled judge must retire at age 65.
- In 2005, section 11 of the *Territorial Court Act* was amended to provide that judges must cease holding office at age 75, up from age 65, unless they resign earlier voluntarily.
- Nonetheless, the judges' Supplemental Pension Plan Regulations provide that judges accrue pension only to age 69 and receipt of pension must commence in the month after the judge reaches age 69.
- There have not been any territorial judges who have gone on LTD.
- The Commission received information that seven judges have retired from the Territorial Court, with retirement ages ranging from 57 to 66, with one judge having retired over the age of 65.

[84] In summary, judges must no longer retire at age 65. If they continue to work until they are required to start receiving pension, a month after reaching age 69, there is currently no LTD coverage for the period between ages 65 and 69.

Judges' Submissions:

[85] The following is a summary of the judge's submissions in support of extending LTD to age 69:

- LTD benefits should be provided up to age 69, the age for mandatory receipt of pension under section 3(1) of the judges' Supplemental Pension Plan Regulations.
- This would give all judges on the bench the same opportunity to accrue judicial service up to age 69.
- The current provisions create a disadvantage for a judge who suffers an illness or significant injury as he or she approaches age 65.
- The judge may have had no intention of retiring and could recover from the disabling condition after reaching age 65 and be able to return to work up to age 75.
- But for being disabled at the time they reach age 65, the judge would have accrued further pensionable service up to age 69.
- Because the judge happens to be on disability at the time the judge reaches age 65, the judge is obliged to retire for pension purposes and commence receipt of pension.
- The extension of the availability of long-term disability benefits to age 69 would ensure equality of treatment for all judges regardless of disability.

- In Yukon, LTD benefits are available until age 65, retirement, resignation or death, with a mandatory retirement age of 75. This availability of LTD benefits is the same as in the Northwest Territories.
- In Saskatchewan, LTD benefits are available until 65, retirement, resignation or death. The mandatory retirement age is 65, with one-year extensions available to age 70.
- In British Columbia, Alberta and Ontario LTD benefits are available until the earlier of retirement, resignation or death. Retirement age varies from province to province.
- In Newfoundland and Labrador, the 2017-2021 Newfoundland and Labrador Salary and Benefits Tribunal recommended that long-term disability benefits should be available until retirement. The Government had not responded to the recommendation as of the date of submissions.

Minister's Submissions:

[86] The following is a summary of the Minister's submissions in support of maintaining the status quo:

- There is nothing inherently illogical or offensive about the current recommendation and regulations requiring a judge on LTD to retire at age 65.
- The change requested by the judges would increase the GNWT's risk exposure stemming from the limited insurance policies it can obtain for the judges.
- The LTD benefit for judges that is currently in place costs the GNWT money but, more importantly, exposes the GNWT to considerable risk.
- Because the judges are a very small group, the GNWT is not able to insure them for LTD as a group. Instead, the GNWT must try to obtain individual policies for each judge to defray its LTD risk.
- These policies have limitations, and any portion of the LTD benefit that is not covered by the insurance policy is self-insured by the GNWT. If a judge does not qualify for an individual policy, the GNWT is required to assume 100% of the LTD risk.
- The change requested by the judges could result in a judge being on LTD for a further four years, all the while accumulating pensionable service and being paid 70% of his or her salary.
- At the 2019/20 salary, this would result in an additional cost of \$840,000, which does not include the pension contributions and top-ups and other expenses that would result from four further years of LTD.
- The changes the judges have requested would also introduce considerable extra uncertainty to important planning decisions.
- In the event this situation arises, there will be important questions to be answered, for example:
 - Is the judge on LTD likely to return?
 - Should another judge be appointed to the bench?
 - What happens if the judge on LTD wants to return to active service if a new judge has been appointed?
- While these questions could arise under the present regime, the eligibility for an additional four years of LTD adds further risk and uncertainty.

Reasons for Decision – Long Term Disability (LTD):

[87] In determining this issue, the Commission is again required to consider the factors outlined in section 12.9 of the *Territorial Court Act*. The Commission must make its own independent assessment of these factors, based on the evidence and argument presented.

[88] The Commission accepts the fundamental premise that LTD benefits should be made available to judges for as long as they are eligible to work before receiving pension. The judges' proposal makes sense as a housekeeping measure to parallel benefits with the working tenure of judges, which was extended from 65 to 75 with amendments to section 11 of the *Territorial Court Act* in 2005.

[89] There may be a risk of increased costs associated with this proposal, but the Minister has not established those risks are cost prohibitive. The history of the territorial judges indicates that LTD has not been used, and that judges have typically retired earlier than 65. The risk of judges going on LTD for extended periods is not something that past circumstances suggests is highly probable.

[90] The risks identified by the Minister are also not contingent on LTD benefits being extended to age 69. There is already a risk that the GNWT will be liable for high self-insured costs if any of the current judges were to go on disability. This is an inevitable function of the small size of bench, and the GNWT may have to bear that risk if it is unable to obtain group policies. The Minister has not established that increasing eligibility from 65 to 69 will greatly increase this risk.

[91] Finally, the Minister has depicted a worst-case scenario to provide an example of the risks associated with a judge going on LTD for an extended period. While a return to work may not always be feasible for a judge on LTD, there are many scenarios where there may be opportunities for resumption of duties, with or without modified work arrangements. The GNWT's risk is also mitigated by the small size of the bench, since the number of potential claims is limited.

[92] The Commission does not propose to speculate on the effect of a judge taking LTD on the need for judicial appointments. There are many variables which will go into determining how many judges the Territorial Court needs, and need will vary from time to time depending on caseloads and other factors. The Territorial Court already manages workload through use of regular and deputy judges. Scenarios involving a judge going on LTD can be managed as circumstances present themselves.

Conclusion:

[93] The Commission supports making LTD benefits available to judges up to the age at which they start receiving pension, as opposed to ceasing at age 65. This will achieve consistency in pay and benefits for all judges of working age who have not yet attained the age of receiving mandatory pension.

[94] The Commission recommends that, effective April 1, 2020, long-term disability benefits should be made available to judges until the earlier of resignation, death, or attaining the age for mandatory receipt of pension, at age 69.

Continuing Professional Development (CPD):

[95] The Minister introduced the issue of addressing CPD, by requesting the Commission recommend either a professional development allowance for each judge, or a global fund for the Territorial Court as a whole.

[96] At the public hearing on January 13, 2020, the Minister clarified that its proposal is intended to encompass French language training which judges have been regularly receiving over the years. The Commission requested information as to actual amounts spent on judges' CPD, including French language training. The parties were given an opportunity to address this information through further written submissions.

[97] The judges maintain there should be no monetary limit on CPD, but they are not opposed to establishing parameters around the number of training opportunities that should be funded. With respect to French language training, the judges have proposed the GNWT fund specific programs plus private tutoring sessions for judges.

[98] In response to the Commission's request during the hearing, the Minister provided a table indicating judges' CPD actual expenses since 2010/11. The table indicates that expenses for French language training and travel have exceeded expenses for all other forms of conferences and training since 2013/14.¹⁶

[99] With respect to specific French language programming, the Commission has received the following information, which does not appear to be in dispute:

- There is a French Language Program available to judges, operated by the Commissioner for Federal Judicial Affairs Canada, with two sessions a year held in Quebec.
- There is also a French Language Training Program for provincial and territorial judges, with two sessions a year held in New Brunswick.
- Some jurisdictions have accessed federal funding for judges to attend these programs.
- The Minister has applied for federal funding, but at this point, has not received a response.

Minister's Submissions:

[100] The following is a summary of the Minister's submissions in support of introducing limits to judges' CPD expenses:

- The Minister supports the judiciary's ongoing education, so that judges may stay abreast of developments in the law, as well as shifts in social and cultural contexts.
- Judges' conference and training costs have increased significantly over the years.
- In difficult economic times and given that less than one thousand dollars is spent annually on conferences and training for the average GNWT employee, there is pressure on the Department of Justice to manage judge's CPD expenses more effectively and efficiently.
- Saskatchewan has an annual professional allowance of \$4,000 per judge.
- Manitoba has a global fund of \$40,000 per year.

¹⁶ Territorial Court Judges – Conference / Training Expense Summary, submitted January 16, 2020

- Ontario allocates \$3,750. per judge as an annual professional allowance.
- Alberta has an annual professional allowance of \$4,000 per judge.
- Recognizing that travel costs from the north are higher, and that local professional development opportunities are less frequently available, the Minister proposes a CPD allowance of \$5,000 to \$7,500. Alternatively, the Minister proposes a global fund of \$20,000 to \$30,000.

[101] At the hearing, the Minister submitted that judges cannot realistically expect to become proficient enough to conduct a trial in a second language. Language training should be included in the CPD allowance or global fund to ensure overall expenses are reasonably maintained.

[102] In response the judges' submissions on French language training, the Minister expressed agreement to providing funding for judges to attend two of the four annual sessions identified by the judges, on the following conditions:

- Costs will be paid from federal funding, if available.
- Additional costs will be paid from the CPD fund.
- All costs will be paid from the CPD fund, if federal funding is not available.
- Training from private tutors that is approved by the Chief Judge will be paid from the CPD fund.

Judges' Submissions:

[103] The following is a summary of the judges' submissions regarding funding for CPD:

- The Territorial Court is a small bench of only four judges. Judges deal with complex issues in relative isolation and this is particularly so when they are on circuit.
- It is in the public interest to ensure that CPD relevant to the work of the Territorial Court is encouraged through appropriate funding, in order to ensure the ability to provide a high quality of justice.
- The Canadian Association of Provincial Court Judges ("CAPCJ") adopted a resolution in 2013 that aspires to all judges receiving at least 10 days per year of judicial education.
- In most jurisdictions, this is achieved through the delivery of in-house programs for as many as six days per year, and attendance at judicial or legal conferences for the balance.
- Given the small Bench in the NWT, in-house programs are not a feasible alternative, and the result is that most NWT judges likely receive less than 10 days per year of judicial education.
- In addition to pursuing purely educational opportunities, the Chief Judge is a member of the Canadian Council of Chief Judges ("CCCJ"), which meets twice annually.
- Another territorial judge serves as a director of the CAPCJ. The CAPCJ directors meet in person twice annually, including at one meeting held in conjunction with CAPCJ's annual educational conference.
- Participation in the work of CCCJ and CAPCJ is invaluable to the Territorial Court as a whole, and the public served by the judiciary. From the judges' perspective, their involvement in the work of the CCCJ and CAPCJ is particularly important for judges from a remote jurisdiction like the NWT, as it gives them access to expertise and experience from across Canada.

- The Territorial Court is unable to benefit from the economies of scale created by the provision of in-house judicial education in the larger jurisdictions, so most provinces are not useful comparators for the NWT.
- In Manitoba, the \$40,000 annual education budget is provided to the Manitoba Provincial Court to offer in-house education for its 41 member judges. This approach is not a feasible option for a court the size of the Territorial Court of the Northwest Territories.
- Manitoba judges are also each provided with a further education allowance budget equal to \$3,000 per judge, for a total of \$123,000 based on 41 judges.
- Manitoba judges also receive a professional allowance in the amount of \$2,000 per year.
- In Alberta, there are two three-day Bench meetings each year funded by the Government of Alberta, the main portions of which involve high-quality judicial education. In addition to the Alberta Provincial Court's education budget, each judge receives a professional allowance of \$4,500 per annum.
- Similar arrangements are in place in British Columbia and Ontario.
- Yukon and Prince Edward Island each have three full-time judges and, as such, their courts are closest in size to the Territorial Court of the Northwest Territories.
- Also, like their colleagues from the Northwest Territories, Prince Edward Island and Yukon judges incur significant expense in travelling to pursue judicial education.
- The Government of Yukon funds judicial education approved by the Chief Judge in accordance with established court policy. In addition, judges receive a professional allowance of \$5,000.
- Members of the Provincial Court of Prince Edward Island participate in the annual Atlantic judges' Education Conference. This is arranged in coordination with judges from the provincial courts of Newfoundland and Labrador, Nova Scotia and New Brunswick, to create efficiencies in the delivery of judicial education.
- In addition, the Government of Prince Edward Island pays for judges' attendance and participation in judicial education approved by the Chief Judge.
- The determination of what judicial education is appropriate and necessary for members of the Territorial Court is an essential component of the administrative independence of the judiciary.
- Accordingly, the power to approve attendance at professional development events must remain within the control of the Chief Judge, in accordance with court policy.

[104] The judges submit they are not opposed to establishing parameters around the funding available for judicial education on the following basis:

- (a) funding should be provided for judges to attend up to two judicial education conferences per year; and, in addition,
- (b) a judge serving as a director and/or committee member of CAPCJ should be permitted to attend additional meetings of that organization, as necessary to fulfill their mandate; and
- (c) the Chief Judge's participation in meetings of the CCCJ should also be funded.

[105] With respect to French language training, the judges submit it should be considered separate and apart from judicial education generally, on the basis the public interest demands that members of the Territorial Court are equipped to conduct court proceedings in French.

[106] The following is a summary of the judges' further submissions on French language training, delivered after the hearing and in response to the Minister's submissions at the hearing:

- The *Criminal Code* provides that an accused can have a trial in either of the two official languages.
- This means that there will be francophones in Territorial Court who will go through the process from first appearance to trial.
- Although judicial steps prior to trial can be dealt with through an interpreter, the court does not always know that a person will be speaking French and an interpreter is not always immediately available.
- There is an advantage to the judicial system if the judge can deal with these preliminary steps in French, in a small jurisdiction with only four judges.
- The territorial judge should not have to make a choice between French language training and professional development in other substantive or procedural areas of the law.
- This is recognized by the CAPCJ, which has adopted as a guideline, the need for each provincial or territorial judge to have 10 days of training in substantive or procedural law. This minimum requirement is in addition to any language training which should be made available to the judge.
- Both Yukon and Prince Edward Island provide certain separate funding for French language training, beyond that provided for substantive judicial education.
- The Provincial Court in Prince Edward Island receives funding from the federal Government for up to \$25,000 toward French language training for judges.
- In addition, up to \$3,200 in funding is provided for judges' travel to access language training. Any additional costs are paid by Prince Edward Island.
- Similarly, Yukon territorial judges receive funding from the federal government which covers the expenses of two Yukon judges attending training in New Brunswick twice per year.
- Supreme Court judges in the Northwest Territories are entitled to have a private tutor and to attend the Quebec sessions. This is outside of other entitlements to professional allowance.

[107] The judges' proposal on language training is that the GNWT fund all amounts not covered by the federal government, for the following French language training for anglophone judges:

- (a) Private tutor, for 90-minute sessions twice per week; and
- (b) Attendance by the judges, each year, at any two of:
 - i) the French Language Program offered in Quebec; or
 - ii) the French Language Training Program offered in New Brunswick.

[108] The judges also propose that the GNWT should fund francophone judges for any expenses not covered by the federal government to attend training for French-speaking judges working in an English environment, offered in Quebec City.

Reasons for Decision – Continuing Professional Development (CPD):

[109] Section 5.1 of the *Territorial Court Act* provides that the Chief Judge may, in consultation with other territorial judges, establish and implement a plan for continuing education of territorial judges. The existence of this provision, in legislation, implies that the Chief Judge will be provided with an operational budget to put such a plan into effect.

[110] Section 12.4 of the *Territorial Court Act* mandates the Commission to conduct an inquiry with respect to salaries, pension, sick leave and other benefits provided to territorial judges. The provision does not specifically mention allowances for CPD, but this could be considered among the “other benefits” provided to territorial judges.

[111] The Commission is reluctant to make recommendations with respect to specific elements of a CPD plan, since this is within the purview of the Chief Judge. The budget for establishing and implementing the plan should be left to discussions between the Chief Judge and the Department of Justice, comparable to other budget items essential to maintaining the court, such as equipment and supply costs.

[112] There may still be some scope, however, for the Commission to consider recommendations to provide CPD allowances as “other benefits” provided to territorial judges. This approach recognizes the hybrid nature of CPD, in that it can be pursued as required under a plan pursuant to legislation, or as a professional pursuit made available as a benefit.

[113] The issue has been presented in a way that does not reflect this distinction. The Minister proposed amounts, either for individual allowances or a global fund, are far below the actual expenses incurred by the GNWT since 2010. If French language training expenses (including travel and contract expenses) are removed, the Minister’s proposed numbers are closer to actuals. However, the Minister is proposing to have the Commission recommend numbers which incorporate both language training and other forms of CPD.

[114] If French language training had nothing more than marginal benefit, there could be some rationalization for including it within the numbers presented. The Commission, however, accepts the reasons judges have offered in support of French language training. While it may be highly unlikely that a unilingual anglophone judge will become sufficiently proficient to conduct a trial in French, that is not standard.

[115] Individuals coming before the Territorial Court have a right to a trial in French. It is reasonable to expect territorial judges seek out training to at least have the proficiency to communicate information to any individual appearing before them. Minimal or functional proficiency may fall short of fluency, but it is preferable to zero competency in the second language. There is value to the administration of justice in training judges to some level of proficiency in French.

[116] The Commission is nonetheless reluctant to address French language training as proposed by either of the parties. The judges’ proposal is to recommend the GNWT fund private tutors as well as the specific programs designed specifically for judges. The Minister accepts this proposal, provided funds beyond those paid from federal funding come out of the proposed CPD fund. Both proposals presume the Commission is prepared to accept a role in accepting the programs as the basis for a funding recommendation.

[117] If the Commission were to recommend funding for specific programs, it could be straying into areas more properly belonging within the purview of the Chief Judge. This applies to specific French language courses. It also applies to the judges' suggestion that the Commission specifically fund participation in CAPCJ and the CCCJ. The Commission does not see its role as recommending specific opportunities or meetings, or the number of courses a judge can take, as a means of rationalizing the undetermined cost of those items.

[118] The Commission would be more inclined to consider recommending amounts for CPD, in the form of individual allowance or a global fund as proposed by the Minister. However, this recommendation would have to be based on complete information and made with due consideration of section 5.1. In this case, the Commission is presented with neither. There is no indication as to whether specified training items are currently budgeted or implemented under section 5.1, as opposed to qualifying as "other benefits" for the Commission to consider under section 12.4. Without this information, it is impossible to fix amounts for a CPD fund or allowances.

[119] There is also no indication as to why the GNWT is not receiving federal funding for French language training for judges. This appears to be a funding source which other small jurisdictions have been able access. If any pending application for federal money is successful, the Minister's concerns regarding CPD costs may be addressed. Again, without knowing whether federal money is available, the Commission cannot reasonably fix amounts for a CPD fund or allowances.

[120] The information from other jurisdictions is not entirely clear, but it seems to suggest there are two types of funding for judicial CPD. There is funding for core training, which sometimes includes in-house or regional conferences. Then there are additional allowances for individual judges. If this is how funding is delineated elsewhere, the relevance of the distinction should be outlined in submissions to any future Commission dealing with this issue.

[121] Based on the information presented, the Commission recognizes judges have CPD requirements which exceed those of the average GNWT employee, as indicated by hours recommended by the CAPCJ. Judges also pursue French language training specific to their function. Total expenses for CPD have remained consistent within a range since 2014-15. There is no suggestion the status quo will not continue if the Commission does not make a recommendation.

Conclusion:

[122] The Commission is not persuaded that CPD is appropriately deemed a benefit to be provided directly to individual judges, and indeed CPD has not been addressed as a benefit by previous Commissions to date. Either party may revisit this issue with future Commissions, to the extent Commissions have the authority to address CPD as "other benefits" under section 12.4 of the *Territorial Court Act*.

Extended Health Benefits:

[123] The Minister introduced the issue of extended health benefits for current and retired judges in this inquiry. In the case of current judges, extended health benefits are provided through Alberta Blue Cross. In the case of retired judges and their spouses, extended health benefits are provided through a plan administered by Green Shield Canada.

[124] The Minister asks the Commission to recommend direction on what benefits to provide to current and retired judges respectively. Specifically, the Minister asks the Commission to approve the Alberta Blue Cross plan for current judges, and the Green Shield Canada plan for retired judges and their surviving spouses.

[125] The territorial judges and retired Judge Brian Bruser both asked the Commission to table the issue of extended health benefits for future consideration.

[126] Retired Judge Bruser did not attend the hearing on January 13, 2020. He did, however, present written submissions to the Commission as an interested person on behalf of himself and his spouse, Deborah Bruser.

[127] Retired Judge Bruser claims entitlement to disclosure of efforts by the GNWT to obtain benefits equivalent to those of Deputy Ministers under the Public Service Health Care Plan (PHSCP), as recommended by the 2004 Commission.¹⁷ He asks the Commission to appoint its own actuary to assess the extended health benefits issue. If the current plans are approved, he asks that retired judges be grandfathered to maintain entitlement to benefits as recommended in the past. Retired Judge Bruser takes the position that the GNWT has not fulfilled its commitments on this issue.

[128] At the hearing, territorial judges' counsel indicated other retired judges may have an interest and should have a chance to weigh in on this issue. Counsel for the Minister agreed and proposed a meeting with current and retired judges to provide an overview and explanation of benefits.

[129] On February 6, 2020, the Commission notified the parties the issue was tabled with reasons to follow. The Commission's reasons, as outlined below, do not require a review of the particulars of the Alberta Blue Cross and Green Shield Canada plans, or consideration of submissions advanced after the hearing on January 13, 2020.

¹⁷ Joint Book of Documents, Tab 6: 2004 Report of the Northwest Territories Judicial Remuneration Commission, at p. 17.

Reasons for Decision – Extended Health Benefits:

[130] The Commission is not prepared to address judges' extended health benefits in its current report. The hearing ended with counsel for the judges and counsel for the Minister agreeing to discuss the matter further, with the participation of retired judges. The Commission encouraged this discussion.

[131] The Commission relies on counsel to frame the issues that it needs to decide. The Commission's proceedings take place within statutory timeframes, such that parties can anticipate hearings on a regular four-year cycle. There should be time for counsel to clearly identify issues for the Commission to decide, and present evidence the Commission can use to base its recommendations.

[132] In this case, it is not entirely clear what the parties are seeking in terms of the Commission's scope of inquiry when it comes to extended health benefits.

[133] The Minister is obviously seeking certainty when it asks the Commission to recommend approval of Alberta Blue Cross for current judges and Green Shield Canada for retired judges. Setting specific policies would resolve ongoing differences as to whether current policies achieve the equivalency with benefits provided to Deputy Ministers under the PHSCP, as recommended by the 2004 Commission.

[134] Retired Judge Bruser appears to be seeking a broader inquiry, to address the perceived failure of the GNWT to fulfill this recommendation. He submits the Minister must disclose efforts to obtain equivalent plans since 2004, which might be appropriate if the Commission were adjudicating appropriateness the Minister's efforts to implement past recommendations. He suggests the Commission retain an independent actuary, for an open-ended inquiry into appropriate benefits.

[135] The current judges' position on the substantive issues is undefined. This is understandable if current judges, who are in a different plan than retired judges, have not identified the same questions or concerns as retired Judge Bruser. It does, however, make it difficult for the Commission to contemplate the issue in a way that is conducive to issuing a forward-looking recommendation applicable to all territorial judges.

[136] The Commission cannot proceed without better definition of the issues. The Commission typically hears evidence and argument from the Minister, territorial judges or their representative, and any other interested person or body. The Commission then issues prospective, forward-looking, recommendations to establish salary and benefits for all territorial judges. It does not adjudicate or engage in dispute resolution over the implementation of past Commission recommendations or initiate its own inquiry into appropriate benefits.

[137] The Commission also requires greater clarity as to standing and representation. Normally, the Commission receives an initial submission from the Minister and another from the territorial judges. The *Territorial Court Act* defines "territorial judges" to generally include deputy territorial judges. The Commission understands most retired judges serve as deputy territorial judges. In these proceedings, judges' counsel appeared for current judges and retired Judge Bruser made separate submissions as an interested person.

[138] If the Commission is to address extended health benefits, judges' counsel should be able to clearly indicate whether they represent all territorial judges, including retired or deputy territorial judges. All parties should be prepared to indicate whether retired judges have standing to advance individual positions on salaries and benefits, as interested persons under subsection 12.7(c) of the *Territorial Court Act*.

[139] The Commission, finally, may not be able to address extended health benefits without a clearer distinction between evidence from argument. In this inquiry, the Minister's initial submission generated responses from territorial judges, as well as from retired Judge Bruser. The Commission was provided information about the contents of the Alberta Blue Cross and Green Shield Canada plans, inextricably mixed with position statements and argument as to whether the extended health benefits achieve equivalency with benefits provided to Deputy Ministers under the PSHCP.

[140] Within the timeframes mandated for the hearing of this inquiry, the Commission could not meaningfully consider everything advanced by the Minister, the territorial judges and retired Judge Bruser. The exchange between the parties, as it unfolded before and after the hearing, did not sufficiently frame the case. It did not clearly establish the issues to be decided or enable the Commission to assess what information is relevant and reliable for its deliberations. The Commission's strict statutory timelines require parties to anticipate issues, provide notice to interested persons, and prepare their evidence well in advance of the hearing of an inquiry.

Conclusions:

[141] The Commission concludes it is premature to consider a recommendation to approve existing plans, or to direct what benefits the Minister should provide, or to retain its own actuary. Discussions between the Minister and the territorial judges clearly need to happen, not to negotiate extended health benefits, as this would be fundamentally at odds with judicial independence,¹⁸ but at least to ensure the effective sharing of information about the plans.

[142] The Commission accepts the notion that all retired territorial judges should have notice that extended health benefits have been raised as an issue in these proceedings. The Commission itself has no vested interest in the issue, and so leaves it to the Minister and the Chief Judge to ensure retired territorial judges have notice of any opportunities to meet with government officials to discuss questions about their extended health benefits.

[143] In the circumstances, there was no reasonable prospect of the Commission addressing extended health benefits in the current report, given the manner and timing in which the issue was presented. The Commission's regular mandate ends upon completion of this report, so the issue is tabled indefinitely. The Minister or the Chief Judge may request a separate inquiry at any time between the submission of this report and the next Commission.¹⁹ Otherwise, the next opportunity to frame the issue will be with next Commission.

¹⁸ Joint Book of Documents, Tab 12: PEI Reference, at para. 8

¹⁹ *Territorial Court Act*, R.S.N.W.T. 1988, c. T-2, section 12.92

Summary of Conclusions:

[144] Territorial judges' salaries should remain in the top quartile nationally. This can be achieved through adjustments equal to CPI increases for each of the next four years. In addition, territorial judges' salaries are to be protected from erosion in the event of any CPI decreases.

[145] Territorial judges should also be eligible for LTD benefits until the earlier of resignation, death or retirement. This includes all judges of working age who have not yet attained the age of receiving mandatory pension.

[146] The Commission therefore has recommendations with respect to salary and LTD, as outlined in the Summary of Recommendations below.

[147] With respect to CPD, the Commission does not have grounds to change the existing approach. Either party may revisit this issue in future, to the extent Commissions have the authority to address CPD under section 12.5 of the *Territorial Court Act*.

[148] It is premature to consider a recommendation on extended health benefits. The Commission has encouraged discussion, with participation of retired judges, and continues to encourage that discussion.

[149] Section 12.92 of the *Territorial Court Act* provides a mechanism which allows the Minister or the Chief Judge to request inquiry to address extended health benefits at any time between the submission of this report and the next Commission.²⁰

[150] This mechanism is also available to the Minister or the Chief Judge to request an inquiry into any of the issues outlined in this report, due to any unforeseen implications of the COVID-19 pandemic on the factors that go into determining territorial judges' salaries and benefits.

²⁰ *Territorial Court Act*, R.S.N.W.T. 1988, c. T-2, section 12.92

Summary of Recommendations:

[151] The following is a summary of the Commission's recommendations:

1. The Minister will adjust territorial judges' salaries by an amount equal to the average percentage increase in CPI for Yellowknife over the preceding calendar year, ending December 31, for each of 2020/21, 2021/22, 2022/23 and 2023/24.
2. The Minister will not reduce territorial judges' salaries in the event of negative average percentage increases in CPI for Yellowknife over the preceding calendar year, ending December 31, for any of 2020/21, 2021/22, 2022/23 or 2023/24.
3. The Minister will make long-term disability benefits available to judges until the earlier resignation, death, or attaining the age for mandatory receipt of pension, at age 69, effective April 1, 2020.

Dated this 30th day of March 2020 at the City of Yellowknife Northwest Territories.

"David Gilday"

"Gerald Avery"

"Peter Vician"

David Gilday

Gerald Avery

Peter Vician