



**REPORT AND RECOMMENDATIONS**

**OF THE 2011 SASKATCHEWAN JUDICIAL COMPENSATION**

**COMMISSION**

**PRESENTED TO THE MINISTER OF JUSTICE AND ATTORNEY  
GENERAL AND THE SASKATCHEWAN PROVINCIAL JUDGES  
ASSOCIATION**

**DECEMBER 2011**

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# **SASKATCHEWAN PROVINCIAL COURT COMMISSION REPORT**

## **DECEMBER 2011**

### **I. INTRODUCTION**

#### **A. *Provincial Legislation***

1. The current Provincial Court Commission was appointed effective July 18, 2011 pursuant to section 36 of *The Provincial Court Act, 1998*, S.S.1998, c. P-30.11 (the “Act”). This is the fifth Commission appointed under this legislation.

2. The mandate of the Commission is set out in subsections 38(1) and (2) of the Act. These subsections read as follows:

38(1) A commission shall inquire into and make recommendations with respect to the following:

- (a) the salaries to be paid to:
  - (i) the chief judge;
  - (ii) an associate chief judge;
  - (iii) judges other than the chief judge, associate chief judges and temporary judges; and
  - (iv) temporary judges;
- (b) the remuneration to be paid to judges who perform administrative duties assigned to them pursuant to clause 8(f);
- (c) the allowances to be paid to judges who reside in the Northern Saskatchewan Administration District;
- (d) professional allowances;
- (e) vacation leave;
- (f) pension benefits and additional retirement benefits.
- (2) A commission may inquire into and make recommendations with respect to the following:
  - (a) the support staff, facilities, equipment and security of the court;
  - (b) the benefits to be provided to judges pursuant to regulations made pursuant to clause 65(d).

3. The Act authorizes the Commission to make two types of recommendations — compulsory and advisory. The compulsory recommendations are listed in subsection 38(1). They relate to various matters comprising the remuneration package for Provincial Court Judges. The

type of recommendations which are advisory only are listed in subsection 38(2) of the Act allowing the Commission discretion about whether to make any such recommendation.

4. The mandate of this Commission does not end with this Report. Section 51 of the Act leaves open to this Commission the consideration of other issues and reads as follows:

51(1) At the request of the minister or the association made at any time during the term of the members of a commission, the commission may inquire into and make recommendations with respect to any matter of significance to the court.

(2) Within six months after the day on which a matter is referred to a commission pursuant to subsection (1), the commission shall submit a report to the minister and the association containing any recommendations of the commission with respect to the matter.

5. The term of this Commission expires on June 30, 2014.

### ***B. Membership of the Commission***

6. The Commission is composed of three members. As required by section 36(2) of the Act:

- (a) one is appointed by the Minister of Justice
- (b) one is appointed by the Saskatchewan Provincial Court Judges' Association
- (c) these two members appoint a chairperson.

7. The Commission members are:

- (a) William F.J. Hood, Q.C., Chairperson
- (b) Catherine M. Knox, appointee of the Saskatchewan Provincial Court Judges' Association
- (c) George W. Patterson, appointee of the Minister of Justice.

### ***C. Process***

8. Advertisements calling for submissions to the Commission were placed in the Regina *LeaderPost* and the Saskatoon *StarPhoenix* on October 1, 2011. The advertisements indicated that the Commission would be receiving submissions from interested parties and that hearings were to be held in Regina and Saskatoon at the locations and dates indicated.

9. The Commission was assisted by written submissions received from:

- Saskatchewan Provincial Court Judges' Association ("Association")
- Deputy Minister of Justice, on behalf of the Government of Saskatchewan ("Government")
- Canadian Bar Association – Saskatchewan Branch ("CBA")
- Saskatoon Criminal Defence Lawyers Association ("SCDLA")

and replies from

- Association
- Government.

These documents and other material can be found at [www.provincialcourtcommission.sk.ca](http://www.provincialcourtcommission.sk.ca).

The Commission received oral submissions in Saskatoon on November 21, 2011 and in Regina on November 23, 2011 from:

- Association
- Government
- CBA
- SCDLA.

## **II. BACKGROUND AND CONTEXT**

### ***A. Previous Judicial Compensation Commissions***

10. There have been six previous Provincial Court Commissions in Saskatchewan:

- The Schmeiser Commission reported in 1991
- The Irwin Commission reported in 1993
- The Bundon Commission reported in 1998 and 1999
- The Vicq Commission reported in 2002
- The Barnard Commission reported in 2005
- The Zakreski Commission reported in 2008.

11. All of the above, with the exception of the Schmeiser and Irwin Commissions, reported under the current legislation.

12. The Government rejected the recommendations of the Schmeiser and Irwin Commissions. The initial salary recommendation of the Schmeiser Commission was for a salary of \$104,000 (October 1, 1990) and the initial salary recommendation of the Irwin Commission was \$108,000 (April 1, 1993).

13. The rejection of the Irwin Commission salary recommendations resulted in the commencement of a lawsuit against the Government by the Association. In June 1997, the Minister of Justice announced that a settlement had been reached in the lawsuit. Under the terms of the settlement, the amount of the salary for Provincial Court Judges was \$112,961 effective April 1, 1997.

14. The first Bundon Report addressed a joint submission from the Minister of Justice and the Association and the recommendation of the Commission followed the 1997 settlement.

15. The second Bundon Report addressed the period from April 1, 2000 to March 31, 2003. On January 13, 2000, the Government announced that it would accept all of the recommendations of this Commission. The salary recommended by the Commission was \$143,000 for the period ending March 31, 2003.

16. The Vicq Report addressed the period from April 1, 2003 to March 31, 2006. The Government announced in January of 2003 that it accepted all of the recommendations of this Commission. The recommendations resulted in a salary of \$165,190 for the period ending March 31, 2006 and indexing of pension benefits.

17. The Barnard Report applied for the period April 1, 2006 to March 31, 2009. The Government announced in January of 2006 that it accepted all of the recommendations of this Commission. The recommendations resulted in a base salary for Judges to be set at \$195,000 for the first year commencing April 1, 2006 and to be adjusted in each of the two following years by the increase in the Saskatchewan Consumer Price Index. The recommendations resulted in a salary of \$204,552 for the period ending March 31, 2009. The Barnard Commission also recommended additional amounts for the salaries of Chief Judge of \$10,000, \$5,000 for the Associate Chief Judge and \$3,000 for the Administrative Judges per year above the base salary. The Barnard Commission made additional recommendations relating to the daily rate for Temporary Judges, an increase in the professional allowance for Judges, and Judge Morin's entitlement to receive northern allowance.

18. The Zakreski Report applied for the period April 1, 2009 to March 31, 2012. The Government announced in January of 2009 that it accepted all of the recommendations of this Commission. The recommendations resulted in setting the base salary for Judges of the Provincial Court at \$220,916 for the period April 1, 2009 to March 31, 2010. This recommendation amounted to an eight percent increase in the base salary. The Zakreski Commission further recommended that the base salary be increased by a further four per cent in each of the two following years. This resulted in the base salary for Judges of \$238,943 for the current period April 1, 2011 to March 31, 2012.

19. The Zakreski Commission was not prepared to recommend any change in the current level of indexing of pension benefits. The Zakreski Commission accepted the joint agreement of the Government and the Association relating to the additional compensation to be paid to the Chief Judge, the Associate Chief Judge and the Administrative Judges. Accordingly, the Zakreski Commission recommended that the Chief Judge receive a salary of seven and one-half percent greater than the base salary; the Associate Chief Judge receive a salary of five percent greater than the base salary, and the Administrative Judges receive a salary of two and one-half percent greater than the base salary.

20. The Zakreski Commission recommended that the daily remuneration for Temporary Judges be set by a formula of  $1/220$  of the base salary of the full-time Judge.

21. The Zakreski Commission declined to recommend certain changes which the Association had requested with respect to an increase in the number of days of vacation leave from 30 days; declined to recommend "red circling" of the Chief Judge's salary at the conclusion of his or her term; and did not recommend that contributions no longer be made after 18 services by Judges who benefit from the special provision of section 13 of the Provincial Court Compensation Regulations R.R.S. c. P-30-11 Reg. 2.

## **B. The Provincial Court of Saskatchewan**

22. There are 48 Judges (not including 2 Judges currently on leave) of the Provincial Court of Saskatchewan resident in 13 judicial centres, holding Court in 73 additional circuit points across the Province for a total of 86 court points.

23. The current average age of all Judges of the Court is 58. The average age at appointment of Judges currently on the Court is 47. The average age at appointment over the last 10 years has been increasing and is now 50.6.

24. The Chief Judge, two Associate Chief Judges and six Administrative Judges are responsible for the administration of the Court.

25. The number of Judges has been fairly constant for the last 33 years. From 1979, immediately following the establishment of the Court in 1978, to the present, the total complement has ranged between 41 and 49 on the Court. The Zakreski Report, in 2008, noted:

The Provincial Court plays a vital role in the administration of justice in Saskatchewan. Charged with the immense responsibility ... it presides over the vast majority of criminal and civil claims in Saskatchewan. While its jurisdiction and workload in criminal and civil matters has consistently increased, it has responded to the needs of the communities that it serves, implementing creative and forward thinking changes to the way in which it delivers justice.

## **C. Jurisprudence**

### **1. Judicial Independence**

26. Justice mandates a fair hearing by an independent and impartial tribunal. In *R. v. Valente*, [1985] 2 S.C.R. 673, (*Valente*) the Supreme Court of Canada determined what was meant by an “independent tribunal” within the meaning of s. 11(d) of the *Canadian Charter of Rights and Freedoms* (the “Charter”). Subsection 11(d) provides:

- 11. Any person charged with an offence has the right ...
- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal ...

27. *Valente* recognized the judicial independence involves both individual and institutional relationships. Le Dain J. writing for the Court stated at para. 20-22:

20. It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government. ... The relationship between these

two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.

21. ... But a tribunal which lacks the objective status or relationship of independence cannot be held to be “independent” within the meaning of s. 11(d) ... regardless of how it may appear to have acted in the particular adjudication. It is the objective status or relationship of judicial independence that is to provide the assurance that the tribunal has the capacity to act in an independent manner and will in fact act in such a manner. ...

22. Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for purposes of s. 11(d) of the Charter should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is therefore important that a tribunal should be perceived as independent as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

28. In *Valente*, as well, the Supreme Court articulated three essential conditions or components of judicial independence for the purpose of s. 11(d) of the Charter: security of tenure, financial security and administrative independence.

29. With respect to financial security, Le Dain J. stated at para. 40:

The second essential condition of judicial independence for purposes of s. 11(d) of the Charter is, in my opinion, what may be referred to as financial security. That means security of salary or other remuneration and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to a pension and a pension that depends on the grace or favour of the executive.

30. With respect to administrative independence, Le Dain J. stated at para. 47:

The third essential condition of judicial independence for purposes of s. 11(d) is in my opinion the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function. The degree to which the judiciary should ideally have control over the administration of the courts is a major issue with respect to judicial independence today. ...

31. Judicial independence is for the benefit of the judged, not the Judge. In his dissenting judgment in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (the “P.E.I. Provincial Court Judges Reference”), La Forest J. explained at para. 329:

By its express terms, s. 11(d) grants the right to an independent tribunal to persons “charged with an offence”. The guarantee of judicial independence inhering in s. 11(d) redounds to the benefit of the judged, not the judges: see *Gratton v. Canadian Judicial Council*, [1994] 2 F.C. 769 (T.D.), at p. 782; Philip B. Kurland, “The Constitution and the Tenure of Federal Judges: Some Notes from History” (1968-69), 36 *U. Chi. L. Rev.* 665, at p. 698. Section 11(d), therefore, does not grant judges a level of independence to which they feel they are entitled. Rather, it guarantees only that degree of independence necessary to ensure that accused persons receive fair trials.

32. In the subsequent decision in *Ell v. Alberta*, [2003] 1 S.C.R. 857, the Supreme Court of Canada endorsed the point made by La Forest J. in the foregoing paragraph from *P.E.I. Provincial Court Judges Reference*. Writing for the Court, Major J. stated at para. 29:

Judicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice: see [*P.E.I. Provincial Court Judges Reference*], *supra*, at para. 9. The principle exists for the benefit of the judged, not the judges. If the conditions of independence are not “interpreted in light of the public interests they were intended to serve, there is a danger that their application will wind up hurting rather than enhancing public confidence in the courts”: [*Macklin v. New Brunswick (Minister of Finance)*], [2002] 1 S.C.R. 405], at para. 116 *per* Binnie J., in his dissent.

33. The ultimate test for judicial independence is through the eyes of a reasonable person and whether that reasonable person would perceive that there was a fair and unbiased hearing in the action.

34. In *Ell*, *supra*, Major J. summarized this test as follows at para. 32:

The ultimate question in each case is whether a reasonable and informed person, viewing the relevant statutory provisions in their full historical context, would conclude that the court or tribunal is independent: *Valente*, *supra*, at p. 689. The perception of independence will be upheld if the essence of each condition of independence is met.

## 2. Financial Security

35. In *Valente*, the court turned its mind to the financial security required for individual Judges to enjoy independence, finding that to be independent their salaries must be secured by law and not subject to arbitrary interference by the executive government. In *P.E.I. Provincial Court Judges Reference*, *supra*, addressed the institutional dimension of financial security; that is the independence of the court to which the Judge is a member.

36. The benefit to members of the Provincial Court is not the primary goal of judicial independence. Lamer C.J., writing for the majority of the Court in *P.E.I. Provincial Court Judges Reference* stated at paras. 9-10 as follows:

9. Although these cases implicate the constitutional protection afforded to the financial security of provincial court judges, the purpose of the constitutional guarantee of financial security – found in s. 11(d) of the *Charter*, and also in the preamble to and s. 100 of the *Constitution Act, 1987* – is not to benefit the members of the courts which come within the scope of those provisions. The benefit that the members of those courts derive is purely secondary. Financial security must be understood as merely an aspect of judicial independence, which in turn is not an end in itself. Judicial independence is valued because it serves important societal goals – it is a means to secure those goals.

10. One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court systems. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule. It is with these broader objectives in mind that these reasons, and the disposition of these appeals, must be understood.

37. The *P.E.I. Provincial Court Judges Reference* determined that the institutional dimension of financial security for the Court has three components. First, judicial salaries can be maintained or changed only by recourse to an independent compensation commission. Second, no negotiations on matters relating to judicial remuneration are permitted between the judiciary and the government. Third, judicial salaries may not fall below an acceptable level.

38. Lamer C.J. described the three components at paras. 133-135:

133. *First*, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective, for determining judicial remunerations, to avoid the possibility of, or the appearance of, political

interference through economic manipulation. What judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration. Those bodies are often referred to as commissions, and for the sake of convenience, we will refer to the independent body required by s. 11(d) as a commission as well. Governments are constitutionally bound to go through the commission process. The recommendations of the commission would not be binding on the executive or the legislature. Nevertheless, though those recommendations are non-binding, they should not be set aside lightly, and, if the executive or the legislature chooses to depart from them, it has to justify its decision – if need be, in a court of law. As I explain below, when governments propose to single out judges as a class for a pay reduction, the burden of justification will be heavy.

134. *Second*, under no circumstances is it permissible for the judiciary – not only collectively through representative organizations, but also as individuals – to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence. As I explain below, salary negotiations are indelibly political, because remuneration from the public purse is an inherently political issue. Moreover, negotiations would undermine the appearance of judicial independence, because the Crown is almost always a party to criminal prosecutions before provincial courts, and because salary negotiations engender a set of expectations about the behaviour of parties to those negotiations which are inimical to judicial independence. When I refer to negotiations, I utilize that term as it is traditionally understood in the labour relations context. Negotiations over remuneration and benefits, in colloquial terms, is a form of “horse-trading”. The prohibition on negotiations therefore does not preclude expressions of concern or representations by chief justices and chief judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration.

135. *Third*, and finally, any reductions to judicial remuneration, including *de facto* reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries.

39. The Supreme Court of Canada in *Provincial Court Judges Association of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] 2 S.C.R. 286, (“*Bodner*”) summarized the three requirements of financial security. Major J., writing for the Court stated at para. 8:

The *Reference*, at paras. 131-135, states that financial security embodies three requirements. First, judicial salaries can be maintained or changed only by recourse to an independent commission. Second, no negotiations are permitted between the judiciary and the government. Third, salaries may not fall below a minimum level.

### 3. Judicial Compensation Commissions

40. *P.E.I. Provincial Court Judges Reference, supra*, decreed judicial compensation commissions to be a constitutional imperative. *P.E.I. Provincial Court Judges Reference* described the function of the compensation commissions as that of an “institutional sieve which protects the courts from political interference through economic manipulation” at para 189. Their existence is intended to “depoliticize the process of determining changes to or freezes in judicial remuneration” (at para. 147).

41. Lamer C.J. in *P.E.I. Provincial Court Judges Reference* asserted that these commissions must be “independent, objective and effective” (para. 169).

42. “Independent” in that the composition of the commission should have members appointed by the judiciary on the one hand and the legislature on the other and that its members serve for a fixed term, which may vary in length.

43. To qualify as “objective”, the recommendations of the Commission on Judges’ remuneration must be based on objective not political criteria and achieved by the commission receiving and considering submissions from the judiciary and the government.

44. Lamer C.J. identified three factors to ensure the commissions are “effective”. First, government cannot alter the judicial remuneration in any way without recourse to such commission. Second, and in order to guard against the possibility that government inaction might lead to reductions in Judges’ real salary because of inflation and that such inaction could therefore be used as a means of economic manipulation, the commission must convene regularly and issue a recommendation in its Report. (See para. 174). Third, the recommendation made by the commission must have a “meaningful effect on the determination of judicial salaries” (para. 174).

45. The Supreme Court of Canada in *Bodner* examined and elaborated on the role of commissions such as this Commission. In referring to *P.E.I. Provincial Court Judges Reference*, the court in *Bodner* stated at paras. 14-15:

14. The *Reference* laid the groundwork to ensure that provincial court judges are independent from governments by precluding salary negotiations between them and avoiding any arbitrary interference with judges’ remuneration. The commission process is an “institutional sieve” – a structural separation between the government and the judiciary. The process is neither adjudicative interest arbitration nor judicial decision making. Its focus is on identifying the appropriate level of remuneration for the judicial office in question. All relevant issues 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.

15. Each commission must make its assessment in its own context. However, this rule does not mean that each new compensation commission operates in a void, disregarding the work and recommendations of its

predecessors. The reports of previous commissions and their outcomes form part of the background and context that a new compensation committee should consider. A new commission may very well decide that, in the circumstances, its predecessors conducted a thorough review of judicial compensation and that, in the absence of demonstrated change, only minor adjustments are necessary. If on the other hand, it considers that previous reports failed to set compensation and benefits at the appropriate level due to particular circumstances, the new commission may legitimately go beyond the findings of the previous commission, and after a careful review, make its own recommendations on that basis.

46. In *Bodner* the Court expanded on the “objective requirements” of the commission requiring that the recommendations of the commission follow upon fair and open public hearings and that the final report fully explains the basis and justification for the recommendations presented. The Court stated at para. 17:

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

#### **4. Factors for Consideration**

47. Unlike many Provinces and the Parliament of Canada in relation to federally appointed Judges, the Saskatchewan legislature chose not to follow the recommendation by the court in *P.E.I. Provincial Court Judges Reference* and list in the Act the relevant factors to guide the commission’s deliberations. Although the court held that listing the factors in the legislation was not a constitutional requirement, it identified factors that could be included. Lamer C.J. at para. 173 stated:

Moreover I recommend (but do not require) that the objectivity of the commission be ensured by including in the enabling legislation or regulations a list of relevant factors to guide the commission’s deliberations. These factors need not be exhaustive. A list of relevant factors might include, for example, increases in the cost of living, the need to ensure that judges’ salaries remain adequate, as well as the need to attract excellent candidates to the judiciary.

48. In *Bodner*, the Court stated at para. 67:

The Commission’s aim is neither to determine the minimum remuneration nor to achieve maximal conditions. Its role is to recommend an appropriate level of remuneration.

49. The New Brunswick Court of Appeal in *Provincial Court Judges Association of New Brunswick v. New Brunswick (Minister of Justice)* (2003), 231 D.L.R. (4<sup>th</sup>) 38 (N.B. C.A.) disapproved using the salaries paid to federally appointed Judges as an appropriate comparative

for the purpose of setting the level of remuneration paid to Provincial Court Judges in New Brunswick. The New Brunswick Court of Appeal stated at para. 163:

In these circumstances, the Government of New Brunswick is justified in its contention that the Association's claim to salary parity with federally appointed puisne judges is misguided. The federal salary is fixed by reference to factors that have no application in the provincial context. Specifically, the fact that the federal salary is uniform so as not to reflect regional differences, and that it is set at a level that is capable of attracting qualified candidates in major metropolitan areas throughout Canada, where salary levels are much higher than in the small urban centres, are factors that need not concern provincial remuneration commissions. Thus, the Government has identified a "factor" that justifies the existence of a salary differential between provincially and federally appointed judges as contemplated by s. 22.03(6)(a.1).

50. The Supreme Court in *Bodner* approved, in part, what the New Brunswick Court of Appeal had said with respect to salaries of federally appointed judges. The Supreme Court highlighted the correctness of the New Brunswick Court of Appeal by referring to a statement made by the New Brunswick Court of Appeal in para. 71 as follows:

The Court of Appeal correctly highlighted the facts relied on by the Government and the weakness of the Commission's report in this regard (at para. 159):

Historically, federal judicial remuneration commissions have consistently accepted that the federal salary should be uniform and, with one exception, not reflect geographic differences. Additionally, federal commissions have consistently recognized that the uniform salary must be set at a level that is capable of attracting highly qualified candidates. This factor is problematic with respect to potential applicants practising law in Canada's larger metropolitan centres. Their incomes and salary expectations are understandably greater than those practising in smaller communities. Rather than recommending a salary differential based on the geographic location of a judge's residence, federal commissions have concluded that the salary level must be set at a level which does not have a chilling effect on recruitment in the largest metropolitan areas of the country. For this reason, the recommended federal salary is adjusted to reflect this geographic disparity.

51. However, the Supreme Court did not say that it was inappropriate to consider salaries of federally appointed Judges, but rather that this factor alone was not determinative. The Supreme Court stated at para.72:

The role of the reviewing court is not to second-guess the appropriateness of the increase recommended by the Commission. It can, however, consider the fact that the salaries of federally appointed judges are based on economic conditions and lawyers' earnings in major Canadian cities, which differ from those in New Brunswick. As a result, while the Commission can

consider the remuneration of federally appointed judges as a factor when making its recommendations, this factor alone cannot be determinative. In fact, s. 22.03(6)(a.1) of the *Provincial Court Act* requires the Commission to consider factors which may justify the existence of differences between the remuneration of Provincial Court judges and that of other members of the judiciary in Canada, yet the Commission chose not to address this. Moreover, it is inappropriate to determine the remuneration of Provincial Court judges in New Brunswick by applying the percentage ratio of average incomes in New Brunswick to those in Canada to the salary of federally appointed judges, because the salary of federally appointed judges is based on lawyers' earnings in major Canadian cities, not the average Canadian income.

and at para. 75:

In its response, the Government correctly points to several facts that legitimately support its position that the increase is excessive, namely, the fact that the recommendations are not based on economic conditions in New Brunswick but correspond to a percentage of the salary of federally appointed judges; the fact that such a raise would constitute preferential treatment in comparison with the raises received by senior civil servants in New Brunswick and most other provincial court judges in Canada; and finally, the fact that the increase would far exceed changes in economic indicators since the 1998 recommendations were implemented. Accordingly, the Government can legitimately refuse to implement the recommended salary increase on the ground that it is excessive.

## 5. Statutory Directions

52. We are mindful that the Act establishes criteria to which this Commission must be attentive. First, ss. 38(3) of the Act provides that this Commission is statutorily forbidden to recommend a reduction in judicial remuneration below the amount currently paid to the Judges on the day this Commission reports.

53. Second, there is a limitation that applies to retirement and pension benefits. Subsection 38(4) of the Act provides that “[n]o commission regulation respecting pension benefits or additional retirement benefits shall reduce a person’s benefits that accrued before the coming into force of the regulation.”

54. Third, although it does not directly restrict the considerations of the Provincial Court Commission, the Commission should be sensitive to this in its deliberations. Paragraph 35(b) of the Act defines what is meant by the term “national average”. It is defined as follows:

35 In this Part:

...

(b) “**national average**” means the average of the salaries paid to judges of the provincial courts or territorial courts of the other

provinces and territories of Canada, calculated as of the most recent occurrence of the date January 1;

This statutory definition is applicable only in circumstances where the Government declines to accept the Provincial Court Commission's recommendation on judicial remuneration.

55. If this Commission recommends a salary higher than the national average, and this is not accepted by the Government, ss. 45(1) of the Act requires that the Government not fix a salary less than the national average.

56. The Government submits that should this Commission calculate the national average, the relevant date is more appropriately January 1, 2012 and not April 1, 2012.

### III. THE ISSUES

57. The status of the issues before the Commission is categorized as follows:

1. Issues agreed to by the Association and the Government following the Report of the Zakreski Commission:

(i) Salary of Chief Judge, Associate Chief Judge, Administrative Judge

(a) The Chief Judge of the Provincial Court receive a salary seven and one-half (7.5) percent greater than the amount paid to Judges other than the Associate Chief Judges and Administrative Judges.

(b) The Association Chief Judges receive a salary five (5) percent greater than the amounts paid to Judges other than the Chief Judge and Administrative Judges.

(c) The Administrative Judges receive a salary two and one-half (2.5) percent greater than the amounts paid to Judges other than the Chief Judge and the Associate Chief Judges.

(ii) Salary of Temporary Judges

The Zakreski Commission recommended that the remuneration for Temporary Judges be based on a formula of 1/220 of the salary paid to a full-time Judge. This recommendation was implemented and continues by operation of law. Neither the Association nor the Government seeks any change to the statutory formula.

2. Issues that have been identified by the Association that either fall outside ss. 38(1) of the Act and for which no recommendation is made at this time, or are outside the mandate of this Commission entirely:

(i) Review Spousal/Survivor/Dependent Pension Benefits

The Association seeks this Commission's direction that the Judges and Government enter into a thorough review of spousal, survivor and dependent pension benefits;

(ii) Legislative Review

The Association submits that this Commission direct that the Judges and Government enter into a thorough legislative review of the Act which will specifically address:

- Increasing the Retirement Age from 65 to 70,
- Senior Judges Program,
- Indemnification,
- Addressing the comprehensive Senior Judges' Program, and

which includes a general review of the Act.

(iii) Costs

The Association requested an opportunity to file briefs and address this Commission at a future date regarding the costs of its participation in the Commission process and anticipates that the matter will be resolved outside the Commission process. However, out of an abundance of caution, they have asked that this Commission reserve this matter for further deliberation, if required.

3. Outstanding issues which require the recommendation of this Commission:

- (i) Judicial Salaries
- (ii) Indexing Pension to 100% of Saskatchewan CPI
- (iii) Medical, Dental and Eye Care Benefits
- (iv) Professional Allowance
- (v) Sabbatical for Office of Chief Judge

#### **IV. JUDICIAL SALARIES**

58. Gordon J. Kuski, Q.C. presented the submission on behalf of the Association.

## ***A. The Association***

### **1. Position**

59. The Association submits that the present base salary for a Judge of the Provincial Court of \$238,943 be increased as follows:

- i. For the period April 1, 2012 through March 31, 2013: the base salary of \$238,943.00 be adjusted by the increase in the All Items Saskatchewan Consumer Price Index (CPI), as measured by the average annual increase between January 1, 2011 and December 31, 2011, that this adjustment not be less than zero, and that the resulting figure be further adjusted upward by an additional 2%.
- ii. For the period April 1, 2013 – March 31, 2014: the base salary of the preceding period be adjusted by the increase in the All Items Saskatchewan Consumer Price Index (CPI) as measured by the average annual increase between January 1, 2012 and December 31, 2012, that this adjustment not be less than zero, and that the resulting figure be further adjusted upward by an additional 2%.
- iii. For the period April 1, 2014 – March 31, 2015: the base salary of the preceding period be adjusted by the increase in the All Items Saskatchewan Consumer Price Index (CPI) as measured by the average annual increase between January 1, 2013 and December 31, 2013, that this adjustment not be less than zero, and that the resulting figure be further adjusted upward by an additional 1%.

60. The Association submits that six factors have been identified and have been frequently relied upon by previous Commissions as part of the rationale and depoliticized process for arriving at salary recommendations. These factors are:

- (a) the Judges' role in judicial independence;
- (b) attracting the most qualified applicants;
- (c) economic and market factors in Saskatchewan;
- (d) salaries paid to other Trial Judges in Saskatchewan;
- (e) salaries paid to other Trial Judges in Canada; and
- (f) remuneration of senior members of the legal profession.

## 2. Work of Court

61. The Association submits that the Provincial Court is a hard-working Court and that Judges of this Court collectively possess a remarkable wealth of skills, experience and knowledge.

62. The Association endorses the findings of the Zakreski Commission noting the sacrifices that come with the role of a Judge. The Report of the Zakreski Commission states at p 11:

Judicial duty involves exceptional sacrifices of a personal and professional nature. Judges are no longer permitted to have other sources of earned income, apart from the judicial salary. A judge's freedom of speech is limited, and conduct in and out of the courtroom is strictly monitored and subject to complaint. Actions and behaviour in private and public can come under extraordinary scrutiny and comment.

63. The Association also referenced the Zakreski Commission's acknowledgment of the workload of the Provincial Court where at pp 11-13 the Zakreski Commission Report it states:

- Parliament has imposed many entirely new duties on the Justice System, including: numerous new offences, preventive peace bonds or recognizance, and a number of ancillary orders such as DNA warrants and sex offender registration.
- There has been a marked increase in the reclassification of offences which have been consistently transferred to the Provincial Court.
- There has been a substantial increase in the monetary limit for property offences which now start at under \$5,000, which has resulted in most property offences being tried in the Provincial Court.
- There has been a movement of offences from the indictable category to the hybrid classification. As a result of the amendments over the years, most offences in the *Criminal Code* have been brought within the absolute jurisdiction of the Provincial Court or are usually brought within the jurisdiction of the Provincial Court by a Crown election to proceed summarily or an accused person's election to the Provincial Court.
- The Provincial Court has had its jurisdiction expanded through federal statutes which create offences assigned to the Provincial Court. Since the last Commission, there has been a continuing trend of the Government of Canada to create new offences and at the same time expand the jurisdiction of the Provincial Court.
- The Provincial Government has issued significant law reform initiatives which has resulted in the Provincial Court having jurisdiction to try these offences.

- Two significant changes were introduced during the past three years which have impacted on the work of the Provincial Court. An amendment to the *Provincial Court Act*, creating a Civil Division of the Provincial Court of Saskatchewan, and a Regulation pursuant to *The Small Claims 1997 Act*, which increased the Provincial Court's jurisdiction from \$5,000 to \$20,000.
- It is becoming increasingly common in the Provincial Court for unrepresented or self-represented persons at all stages of proceedings, including bail, plea, sentence and trial. When this occurs it is crucial for the proper administration of justice, that the courts are, and are seen to be: fair, accessible, and accommodating to all self or unrepresented persons. Trial Judges necessarily drawn on their experience with people and knowledge of the law but most of all they need to be keenly perceptive as they endeavour to guide self and unrepresented person through the unfamiliar territory of court proceedings.
- Judges who preside in the north, or at single judge judicial centres, bear additional burdens associated with the remoteness of these points to which they must travel.
- It was reported to the Commission that the Provincial Court has been recognized as an innovative court citing such examples as: Sentencing Circles, Circle Court, Restorative Circle Initiative, Domestic Violence Treatment Option Court, Drug Treatment Court, Cree and Aboriginal Court.

64. The Association submits that the high demands and the immense and steadily increasing workload of the Court is deserving of recognition. The Association submits that the civil jurisdiction of the Court has grown, but acknowledges that the criminal law jurisdiction continues to be the major occupation of this Court.

65. Since 1994, the workload of the Court measured in criminal court appearances have increased by 131% from 338,000 to 781,000. Since the creation of the Court in 1978, as pointed out above, the number Judges has remained relatively constant, ranging between 40 and 49 Judges, with the current allotment being 48.

66. In 2007 the jurisdiction of the Small Claims Court increased to \$20,000. The number of civil claims issued during the period 2006 to 2010 has decreased slightly from 1,262 in 2006 to 1,044 in 2010. However, the number of Small Claims summons issued over \$5,000 has increased from 249 in 2006 to 447 in 2010.

67. The Association also submits that the Provincial Court in Saskatchewan has concurrent jurisdiction with the Court of Queen's Bench pursuant to *The Child and Family Services Act* and with respect to *The Family Maintenance, 1997* in the areas of child support and family maintenance. In addition, the Provincial Court is designated as the Youth Justice Court and it handles virtually all matters prosecuted under *The Youth Criminal Justice Act*. The Provincial

Court also has jurisdiction outside of Saskatoon and Regina for *Traffic Safety Act* matters and matters involving other Provincial statutes.

68. The Provincial Court is a very accessible Court travelling to the people that it serves. Judges situated in the judicial centres of Meadow Lake, LaRonge and Prince Albert, in addition to presiding in their base communities, fly to 15 different circuit court points, a total of 39 times per month.

69. There are 58 drive-in circuit points visited for a total of 126 times per month resulting in a total of 165 circuit point court days a month located outside of the 13 judicial centres.

70. The Zakreski Commission, on p 13 of its Report, stated:

[T]his Commission strongly concurs with the Government that the Provincial Court of Saskatchewan is composed of accomplished, diligent and dedicated judges. This Province is indeed fortunate to have such highly qualified, highly motivated and highly esteemed individuals serving the public's interest.

71. It should be pointed out at this juncture that the Government before this Commission recognized that the Provincial Court is a hardworking Court, with high responsibilities for the administration of justice. The Government also recognizes the high calibre of the members of the Court, their professionalism, their expertise and their commitment, both individually and collectively, to the fair administration of justice for all litigants who come before them.

72. This indeed is high praise for the Provincial Court and is fully endorsed by this Commission.

### **3. Attracting the Most Qualified Applicants**

73. There is a need to attract excellent and the most qualified candidates to the Provincial Court. The Association submits that financial security for Judges is a key component of judicial independence. They furthermore submit that Judges are best drawn from the most successful senior reaches of the legal profession and that to attract these lawyers to the Bench, the compensation and benefits must be sufficient such that a prospective Judge will not suffer a reduction in his or her standard of living upon taking appointment. They submit that consideration must be given to the salaries of successful senior counsel in the profession.

74. The Association submits that it has been very difficult for the Provincial Court to attract senior members of the private bar to the judiciary while contending that the Court of Queen's Bench has successfully attracted to its Court senior partners from major Saskatchewan law firms.

75. The Association refers to the 2002 Report of the Vicq Commission that the income of private bar lawyers was relevant to the salary level for Provincial Court Judges where it stated at p 13:

The Commission has concluded that this is an important segment of the pool of qualified candidates and the salary level for Provincial Court Judges should take this into account. Further, and although no reliable current data is available, the Commission is also prepared to assume that the income of high income earners in the private bar has significantly increased since 1997. On that basis, we conclude that there are a significant number of private practitioners in Saskatchewan earning in excess of \$200,000 per year.

76. Counsel for the Association in its oral submission proffered that senior lawyers in the large Saskatchewan law firms earn in excess of \$400,000 per year. In support of its submission, the Association presented the following data:

- Of the 48 active Judges currently on the Court, 25 were appointed from private practice, 13 from the Crown, 7 from Legal Aid, and 3 from the public sector. Over the course of three years, from 2008 to 2010, there were 78 applicants to the Judicial Council for appointment to the Provincial Court which originated as follows: 33% from the Crown, 13% from Legal Aid, 40% from the private bar and 14% from other areas of practice.
- Of the 25 Judges who were in private practice at the time of their appointment, only two came from a pool of larger firms which, in this scenario, is defined to mean 13 or more lawyers.
- On the other hand, the Association submits that a significantly greater number of Judges appointed to the Court of Queen's Bench and the Court of Appeal over the last three decades were practicing in "larger firms" at the time of the appointment and estimate that of the 12 Judges of the Court of Appeal (including supernumerary judges), four came from a larger firm, six were elevated from the Court of Queen's Bench and two were appointed from public service positions.
- Of the 40 Judges of the Court of Queen's Bench (including supernumerary judges), 24 accepted appointments from larger firms, two were elevated from the Provincial Court, two were appointed from the public service positions and the remaining twelve came from smaller firms.
- Again, the Association submits the following comparative figures:

**Private Practice**

- |  |       |
|--|-------|
| • Members of the Court from private practice     | 52%   |
| • Members of the Law Society in private practice | 65.5% |

**Public Practice**

- |   |     |
|---|-----|
| • Members of the Court from public practice     | 48% |
| • Members of the Law Society in public practice | 33% |

**Large Firms**

- |  |     |
|--|-----|
| • Members of Provincial Court from large firms       | 4%  |
| • Members of Court of Queen's Bench from large firms | 60% |

### **Applicants to the Provincial Court**

- Actual Applicants to the Provincial Court 2007-10 78
- Lawyers practicing in Saskatchewan aged 41 to 60 years 852

77. The Association submits that lawyers engaged in private practice may incorporate and gain the advantage of favourable tax implications that are not available to Judges. The Association presented a discussion paper regarding the tax planning opportunities available to lawyers in professional corporations that was prepared by the Virtus Group LLP, Chartered Accountants. The advantages include:

- Ability to receive compensation either in the form of wages or dividends, or any combination thereof.
- Ability to split income with spouse and/or children.
- Deferring personal income tax by not taking income from the professional corporation in excess of the amount required for living expenses.

78. Virtus Group LLP concluded that an incorporated individual, earning \$250,000 in Saskatchewan, can save \$6,983 in income tax by shifting the form of the remuneration from wages to dividends, but then go on to fairly point out that other factors such as Canada Pension Plan premiums should be taken into consideration. A Judge receiving a salary of \$250,000 will have \$2,217 in CPP premiums withheld, whereas the lawyer, as employee, and the incorporation as the employer, would pay both the employer and employee portion of the CPP or \$4,434 where the lawyer is paid wages in excess of \$46,300. They also point out that if only dividends are paid the lawyer should consider the resulting loss of the CPP and RRSP contribution room.

## **4. Economic and Market Factors**

79. The Association submits:

- The prevailing economic conditions in Saskatchewan and the financial condition of the Government of Saskatchewan are rational factors for consideration by this Commission in considering adjustments to salaries and benefits paid to Judges.
- This Commission should consider Saskatchewan's strong economy, bright economic future, and sound financial health in determining what constitutes fair and reasonable compensation for Provincial Court Judges.
- In May 2011 the Government of Saskatchewan announced an upgrade to its credit rating by Standard and Poor's to AAA:

The agency says: "The upgrade was warranted because of low and declining debt burden, rebounding economy, strong liquidity and moderate support from the federal government."

The news was welcomed by Deputy Premier and Finance Minister Ken Krawetz, who said the upgrade confirms the province's healthy fiscal position outlined in the recent "Saskatchewan Advantage" budget.

Standard & Poor's concluded: "The province's operating after capital results will continue to improve with the strengthening economy and operating revenue growth and that liquidity will remain strong.""

...

In its September 12, 2011, news release, The Royal Bank of Canada forecast that Saskatchewan would lead the nation in economic growth:

SASKATCHEWAN LEADS ECONOMIC GROWTH IN CANADA: RBC ECONOMICS TORONTO, September 12, 2011  
 – Saskatchewan is poised to be the provincial leader in economic growth through to 2012, according to the latest Provincial Economic Outlook report released today by RBC Economics. Thanks to gains in agricultural and potash production, Saskatchewan's GDP is forecast to grow 4.3 per cent in 2011 and 4.1 per cent in 2012."

80. The Association submits it is important, in principle and in practice, that the cost of living in Saskatchewan be considered by this Commission. Chief Justice Lamer, who wrote the majority decision of the Supreme Court of Canada in the *PEI Reference*, discussed the significance of the need for Commissions to be sensitive to the cost of living and thereby avoiding the erosion of salary due to inflation.

174 Finally, and most importantly, the commission must also be effective. The effectiveness of these bodies must be guaranteed in a number of ways. First, there is a constitutional obligation for governments not to change (either by reducing or increasing) or freeze judicial remuneration until they have received the report of the salary commission. Changes or freezes of this nature secured without going through the commission process are unconstitutional. The commission must convene to consider and report on the proposed change or freeze. Second, in order to guard against the possibility that government inaction might lead to a reduction in judges' real salaries because of inflation, and that inaction could therefore be used as a means of economic manipulation, the commission must convene if a fixed period of time has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors, and issue a recommendation in its report. Although the exact length of the period is for provincial governments to determine, I would suggest a period of three to five years.

## **5. Salaries Paid to Other Trial Judges in Saskatchewan**

81. The Association submits that there is no rational argument in support of a disparity in compensation as between Judges of the Court of Queen's Bench and the Provincial Court and

that it is important for the future of the Provincial Court that salary be removed as a disincentive to appointment to the Provincial Court.

82. The Association submits that there was not always this disparity in salary and that in 1978 there was a close proximity in the levels of remuneration for Judges in all Courts in Saskatchewan. The Association urges this Commission to implement salary that prevents a further widening of the salary differential between the two Courts.

83. The Association submits that the disparity is not justified based on a different role of Courts and that all Judges should be compensated based on the principle that “a Judge is a Judge”. The written submissions of the Association appear to argue parity, but the oral submissions made it clear that the Provincial Court Judges do not seek parity, but rather a levelling of the playing field so that the disparity in salary does not interfere with the ability to attract the best applicants.

## **6. Salaries Paid to Other Trial Judges in Canada**

84. The Association submits that salaries paid to Provincial and Territorial Judges elsewhere in Canada have been accepted as a relevant factor in reviewing salaries by some court commissions. The Association points out that there are significant difficulties in comparing salaries in that not all Provinces and Territories are on the same timetable and there are two standards in operation, first, the salary recommended by the Commissions and second, the salaries implemented by the Government.

85. There is a further complicating factor in obtaining an accurate view of Judge’s salaries elsewhere in Canada because of the adjustments which are made annually and these figures are not available, in this case, until the end of 2011. The Association submits that a 2.5% CPI increase be made to project the estimate for this compensation for April 1, 2012. The Association presents the following figures and commentary for consideration by this Commission, based on the following concepts:

Figures in the table below are based on the following concepts:

- a. Actual salary figures where Commission Reports were accepted and implemented.
- b. Commission recommendations where Reports have not been accepted or rejected.
- c. Implementation figures where Government unilaterally implemented salaries other than Commission recommendations.
- d. Any projections were made on a conservative annual COLA of 2.5%.
- e. Yukon joint submission increase of 3% per year.

Specific explanatory notes for each jurisdiction are provided below the table.

<b>JURISDICTION &amp; STATUS</b>	<b>APR 1/2009</b>	<b>APR 1/2010</b>	<b>APR 1/2011</b>	<b>APR 1/2012</b>	<b>APR 1/2013</b>
<b>British Columbia</b> Implemented to Mar 31/14 & Litigation*	\$ 225,500	\$ 231,138	\$ 231,138	\$231,138	\$ 248,473*
<b>Alberta</b> Recommended to Mar 31/13	\$ 250,000	\$ 255,000	\$ 257,500	\$ 263,988	\$ 270,588*
<b>Saskatchewan</b>	\$ 220,916	\$ 229,753	\$ 238,943	\$ 244,916*	\$ 251,038*
<b>Manitoba</b> Implemented to Mar 31/12 & Litigation	\$ 197,736	\$ 197,736	\$ 199,722	\$ 204,715*	\$ 209,832*
<b>Ontario</b> Implemented to Mar 31/13	\$ 248,057	\$ 252,274	\$ 262,113	\$ 268,665	\$ 275,381*
<b>Quebec</b> Implemented to June 30/13	\$ 221,270	\$ 225,737	\$ 227,488	\$ 230,723	\$ 236,491*
<b>Newfoundland &amp; Labrador</b> Implemented to Mar 31/14	\$ 197,243	\$ 203,348	\$ 209,448	\$ 215,732	\$ 221,125
<b>New Brunswick</b> Implemented to Mar 31/12	\$ 204,700	\$ 204,700	\$ 204,700	\$ 209,817*	\$ 215,062*
<b>Nova Scotia</b> Implemented to Mar 31/12 & Report pending	\$ 202,910	\$ 207,577	\$ 212,766*	\$ 218,085*	\$ 223,537*
<b>Prince Edward Island</b> Implemented to Mar 31/13	\$ 213,360	\$ 216,268	\$ 229,162*	\$ 234,891*	\$ 240,763*
<b>Yukon</b> Joint Submission to Mar 31/13 Report pending	\$ 228,889	\$ 235,746	\$ 242,818	\$ 250,103	\$ 256,355*

JURISDICTION & STATUS	APR 1/2009	APR 1/2010	APR 1/2011	APR 1/2012	APR 1/2013
<b>Northwest Territories</b> Implemented to Mar 31/13	\$ 221,255	\$ 227,255	\$ 233,255	\$ 239,086*	\$ 245,063*
<b>Nunavut/Federal</b> Implemented to Mar 31/12	\$ 267,200	\$271,400	\$281,100	\$ 288,127*	\$295,330*

**British Columbia** – *Moffit* Report, Sept 20/10, for the period Apr 1/11 – Mar 31/14. The Government rejected the proposed salary increase for 3<sup>rd</sup> of 4 years to implement BC Consumer Price Index over preceding 3 years, compounded annually, with the result of \$248,473\* in 2013. The British Columbia Judges Assoc commenced proceedings regarding the Government's failure to implement the Report.

**Alberta** – *Peacock* Report, Sept 6/11, for the period Apr 1/09 – Mar 31/13. The Government is considering the Report. COLA was awarded – Alberta CPI estimated at 2.5% for years 3 and 4. The Report also awarded: 100% pension indexation and Professional Allowance increase to \$3,750.00. \*Projection for 2013 based on 2.5% COLA increase.

**Saskatchewan** – Projections for 2012 and 2013 are based on 2.5% COLA increases, year over year.

**Manitoba** – *MacArthur* Report, June 9/09, for period Apr 1/08 – Mar 31/11. Government accepted the year 1 proposal only. The Manitoba Judges Assoc. has commenced proceedings regarding the Government's failure to implement the Report. \*Projections for 2012 & 2013 are based on 2.5% COLA, year over year.

**Ontario** – Next Commission is for the period Apr 1/12 – Mar 31/13. Commission recommendations are binding on salary. In the meantime Judges receive annual COLA based on IAA. \*Projection for 2013 is based on a 2.5% COLA increase.

**Quebec** – Last Report, Dec 23/10, for the period July 1/10 – June 30/13. The Government implemented only year 1 of the Report recommendations. \*The projection for 2013 at \$236,491 is based on 2.5% COLA. Note: While Quebec fiscal year begins 3 months later; for the purpose of comparisons, the fiscal year was treated as if it were to begin on April 1<sup>st</sup>.

**Newfoundland and Labrador** – The Government accepted the recommendations of the last Report through to Mar 31/14.

**New Brunswick** – Last Report, Feb 12/10, for the period Apr 1/-08 – Mar 31/12. The Report recommended: that New Brunswick be in 7<sup>th</sup> place in relation to provinces/territories. The Report was implemented by the Government. \*Projections for, 2012 & 2013 are based on 2.5% COLA increases, year over year.

**Nova Scotia** – Last Report, Dec 11/08, for period Apr 1/08 – Mar 31/11. The Government implemented the Report. Recent hearings are concluded. The parties await the Report. \*Projections for 2011, 2012 and 2013 are based on 2.5% COLA increases, year over year.

**Prince Edward Island** – Last Report, Feb 18/11, for period Apr 1/10 – Mar 31/13. The Government implemented the Report. As for the last two Commission Reports, it recommended a salary based on the national average of provincial/territorial courts. The April 1, 2011 salary figure is based upon the national average as defined by their statute. \*Projections for 2012 and 2013 based on 2.5% COLA increases, year over year.

**Yukon** – Awaiting Report for the period Apr 1/10 – Mar 31/13. There was a joint Submission for an increase of 3% in each of 3 years. The figures are based on the [joint] submission. The \*projection for 2013 is based on a 2.5% COLA increase.

**Northwest Territories** – Last Report, Feb 28/08, for period Apr 1/08 – Mar 31/11. The Report was implemented by the Government. New hearing is scheduled for the fall of 2011. The Report is binding. \*Projections for 2012 and 2013 are based on 2.5% COLA, year over year.

**Nunavut/Federal Salaries** – Last Report, May 30/08, s.26.2 *Judges Act* recommended effective April 1/08 – 264,300 for each of the next 3 years “an increase of statutory indexing plus an additional 2%. The Government did not accept the Report and implemented annual COLA pursuant to the *Judges Act*. Hearings are expected early in 2012. \*Projections for 2012 and 2013 are based on COLA of 2.5%.

86. The Association submits that salaries paid to the Provincial Court Judges in the three Provinces of Alberta, British Columbia and Ontario should be considered analogous on rational terms with that of Saskatchewan.

87. The Association also submits that the Commission should consider the salaries paid to Judges of the Court of Queen’s Bench in Saskatchewan in arriving at the appropriate remuneration and have included this information in their chart.

88. The Association submits the following information with respect to these Provinces:

**Average of 3 Comparable Provincial Court Salaries & Average Including Queen's Bench Salaries, Projected to April 1, 2012 and 2013**

Province	Salary April 1, 2011	Salary April 1, 2012	Salary April 1, 2013
<b>Alberta</b>	\$ 257,500.00	\$ 263,988.00	\$ 270,588.00
<b>British Columbia</b>	\$ 231,138.00	\$ 231,138.00	\$ 248,473.00
<b>Ontario</b>	\$ 262,113.00	\$ 268,665.00	\$ 275,381.00
<b>Average (Salary/3)</b>	<b>\$ 250,267.00</b>	<b>\$ 254,597.00</b>	<b>\$ 264,814.00</b>
<b>Queen's Bench</b>	\$ 281,100.00	\$ 288,127.00	\$ 295,330.00
<b>Average (Salary/4)</b>	<b>\$ 257,975.25</b>	<b>\$ 262,979.50</b>	<b>\$ 272,443.00</b>

89. The Association submits the basis for the above figures are:

- 1) Actual salary figures where commission reports have been accepted and implemented.
- 2) Commission recommendations where reports are out and no response yet received from Government.
- 3) Implementation figures where Government unilaterally implemented salaries different than Commission recommendations.
- 4) Any projections were made on a conservative annual COLA of 2.5%.

90. In the oral submission of the Association, the reference to salary paid to Judges in the Court of Queen's Bench in Saskatchewan was supplemented with that being the same salaries paid in the Territory of Nunavut where Judges are federally appointed.

***B. The Government***

91. Gerald Tegart, Q.C., Minister of Justice and the Attorney General, submitted the written submission and Tom Irvine and Darryl Brown presented the oral submission on behalf of the Government.

**1. Position**

92. The Government submits that the base salary for a Judge of the Provincial Court be increased as follows:

- (a) that there be no increase in the base amount of the salary for the year 2002/13;

- (b) that the base salary be increased for the years 2013/14 and 2014/15 to reflect increases in the cost of living based on the Saskatchewan Consumer Price Index as measured by the previous calendar year.

93. The Government submits that the task of this Commission is to review the present compensation and to determine what adjustments, if any, might be needed to maintain a fair and adequate compensation package to ensure that the Provincial Court continues to attract, motivate and retain excellent Judges.

94. The Government recognizes that currently the Provincial Court in Saskatchewan is composed of 48 accomplished, diligent and dedicated Judges. Saskatchewan is fortunate to have such highly qualified, highly motivated and highly esteemed individuals serving the public interest. The Government is committed to ensuring the future appointees to the Provincial Court are of the same calibre.

95. The Government submits that the judicial remuneration must take into account and be sensitive to local economic conditions and realities and must be a “made in Saskatchewan” compensation package.

96. The Government submits that the judicial salary, allowances, pension and other benefits provided to Judges of the Provincial Court of Saskatchewan exceed the minimal degree of financial security, both individual and institutional, demanded by the constitutionally recognized principles of judicial independence. The Government submits the current salary for Provincial Court Judges is above the national average and the pension and additional retirement benefits are very generous, exceeding what is available in the private and public sectors. They submit that the amount of compensation currently paid to Judges meets or exceeds the goals of recruitment from the Bar and retention of Judges on the Court.

97. The Government submits that the constitutional imperative of an independent judiciary does not necessarily mean that there shall be an increase in judicial salaries with each successive Provincial Court Commission. Rather, the goal for the Commission is to assess the adequacy of the compensation package as a whole, including salary, pension and additional retirement benefits, to determine if the compensation package will meet the constitutional requirement for an independent judiciary.

98. As of April 1, 2011, the monetary value of the current remuneration package for Provincial Court Judges in Saskatchewan is set out in the following table:

<b>Judge – Annual Base Salary</b>	<b>\$234,943</b>
<b>Chief Judge – Annual Salary</b> (Base Salary + 7.5%)	<b>\$256,864</b>
<b>Associate Chief Judge – Annual Salary</b> (Base Salary + 5%)	<b>\$250,890</b>
<b>Pension and Additional Retirement Benefits</b>	Benefit rate of 3% per year of service, up to 23 1/3 years, times average salary over best 3 years. Full pension of 70% times average salary over best 3 years, when age and years of service equal 80, at age

	58 with minimum of 18 years' service. Contributory 5%. Pensions indexed to 75% of CPI up to 5% then 50% of CPI thereafter.
<b>Northern Allowance</b> (5% of base salary)	\$ 11,947
<b>Professional Allowance</b>	\$ 3,500
<b>Remuneration for Judges who Perform Administrative Duties</b> (2.5% of base salary)	\$ 5,974
<b>Annual Sick Leave</b>	18 days
<b>Annual Vacation</b>	30 days
<b>Group Life Insurance</b>	Minimum 2 times salary with optional coverage up to \$500,000, the first \$25,000 of coverage being paid for by the Province.
<b>Disability Benefits</b>	100% of salary for temporary disability (up to 1 year); 70% for permanent disability. On recommendation of Judicial Council. No premiums.
<b>Dental Plan</b>	No premiums.
<b>Extended Health Plan</b>	No premiums.
<b>Monetary Allowance for Travel and Meals</b>	Actual and reasonable travelling and sustenance expenses.

99. The Government submits the benefits portion of the current compensation package is significant. It comes to the equivalent of 53.26% of the current judicial salary or \$127,261. These benefits do not include the value of the disability benefits plan, professional allowance, northern allowance or other remuneration individual Judges may receive for performing additional duties assigned to them, or vacation leave entitlement of six weeks. The benefits, as a percentage of current salary, are as follows:

<b><u>Benefit</u></b>	<b><u>% of pay</u></b>
Pension/retirement benefits	44.90
Dental Plan	1.50
Sick Leave	5.70
Health Plan	<u>1.16</u>
Total	53.26%

100. The monetary equivalent of these benefits, combined with the current judicial salary provides Provincial Court Judges with a current annual remuneration package of \$366,204.

101. The Government wishes that this Commission be mindful of the finding of the Zakreski Commission on p 40 of its Report that "[t]he pension component of a Provincial Court Judge is very generous and far exceeds this type of benefit in other private and public sectors."

102. The Government submits that there is a large measure of consensus about what factors this Commission should take into account in providing its recommendations. The Government

submits that these factors were first identified and applied by the Vicq Commission in 2002 and endorsed by the Barnard Commission in 2005, and are:

- The history of judicial remuneration in Saskatchewan
- Changes in the cost of living
- Prevailing economic and fiscal conditions in Saskatchewan
- Public and private comparators both within and outside Saskatchewan
- Recruitment and retention
- The unique responsibilities and work environment of Provincial Court judges

103. The Government submits that this Commission should look at not just the salary, but the total remuneration package paid to a Provincial Court Judge which includes the monetary equivalent of their pension benefit. They submit that the salary and pension benefits of all Provincial Court Judges in Canada (salaries current to April 1, 2011 and current service cost of pensions current to December 31, 2009) is as follows:

**Survey of Provincial Judges Salaries and Current Pension Service Costs<sup>1</sup>**

<b>Jurisdiction</b>	<b>Judge's Salary</b>	<b>Pension – Current Service Cost</b>	<b>Total</b>
Alberta	\$ 220,000 <sup>2</sup>	\$ 64,790	\$ 284,790
British Columbia	\$ 231,138 <sup>3</sup>	\$ 61,367	\$ 292,505
Manitoba	\$ 199,722 <sup>4</sup>	\$ 70,762	\$ 270,484
New Brunswick	\$ 204,700	\$ 47,061	\$ 251,761
Newfoundland & Labrador	\$ 209,448	\$ 9,174	\$ 218,622
Nova Scotia	\$ 207,577	\$ 15,776	\$ 223,353
Ontario	\$ 262,113	\$ 97,768	\$ 359,881
Prince Edward Island	\$ 216,268 <sup>5</sup>	\$ 15,139	\$ 231,407
Quebec	\$ 227,488	\$ 51,412	\$ 278,900
Saskatchewan	\$ 238,943	\$ 107,285	\$ 346,228

<sup>1</sup> The Pension – Current Service Costs for the Northwest Territories and Yukon are not available, so they have not been included in this Table. The base salary for the Northwest Territories is \$233,255. The base salary for Yukon is \$242,819.

<sup>2</sup> The Alberta Provincial Court Commission has reported, recommending that the base salary for a Provincial Court Judge in Alberta increase to \$250,000 in 2009/2010; to \$255,000 in 2010/2011; and to \$257,550 in 2011/2012. The Alberta Government has not yet responded to the Report.

<sup>3</sup> The British Columbia government rejected the recommendations of the British Columbia commission and set this salary. There is currently litigation on this issue between the Government and the Judges.

<sup>4</sup> The Manitoba government rejected the recommendations of the Manitoba commission and set this salary. There is currently litigation on this issue between the Government and the Judges.

<sup>5</sup> Prince Edward Island uses a national average. Given the uncertainties about the current national average referred to in the three previous footnotes, this salary figure is under review.

104. The Government points out that only Ontario currently offers its Provincial Court Judges a more handsome remuneration package than Saskatchewan. In terms of base salary alone, Saskatchewan ranks third, behind Ontario and Yukon (base salary of \$242,819).

105. The Government acknowledges that the fiscal situation of the Province of Saskatchewan has improved since 2008. However, they caution that the current past is not necessarily indicative of the future, pointing to the turbulence and global economy, and in particular, that of the United States and of Europe. The Province of Saskatchewan's fiscal health is intertwined with its commodities in oil and potash.

106. The Government submits that this Commission should use the factors identified by the Vicq Commission relied upon by the Barnard Commission and that the Report of the Zakreski Commission should be the starting point for the Commission's deliberation.

## **2. Recruitment and Retention**

107. The Government submits that the recruitment and retention of Provincial Court Judges is the most important factor to be weighed when determining the appropriate salary for Judges of the Provincial Court of Saskatchewan.

108. Applicants for the position of Provincial Court Judges are motivated by five factors, namely:

- (a) the nature of the work;
- (b) the prestige associated with being a Judge;
- (c) security of position;
- (d) salary and benefits package; and
- (e) a desire for public service.

109. These factors were endorsed by the Zakreski Commission. The Government submits that the bulk of the Provincial Court's workload is in the area of criminal law and the most qualified candidates are therefore senior counsel with substantial experience in criminal law, either on the Crown side, the defence side, or both.

110. The Government submits that it has had and continues to have no difficulty in selecting highly qualified individuals to serve as Provincial Court Judges. We should point out at this juncture that the Association agrees that the Provincial Court Judge presently attracts those who are most qualified to serve in this position.

111. The Government points out that there are presently 41 individuals whose qualifications the Judicial Council has reviewed and recommended for appointment to the Court. At the time of the Government's submission to the Zakreski Commission, the number was very similar, namely 35 lawyers approved by the Judicial Council for appointment.

112. Since 2007, the Government has made 9 appointments to the Provincial Court of Saskatchewan.

113. The Government submits that because the bulk of the Provincial Court's work is in the area of criminal or quasi criminal law, corporate/commercial lawyers or real estate practitioners may not be predisposed to applying for appointment as the work is foreign to the preferred areas of practice and expertise.

114. Put simply, the Government has experienced no shortage of well-qualified individuals to serve as Judges of the Provincial Court. There is no empirical data to suggest even remotely that the current judicial remuneration package is inadequate to attract well-qualified individuals to seek judicial office.

115. With respect to retention, Saskatchewan has an unblemished record. The Government submits that since 1987 only two Provincial Court Judges have resigned from the Court prior to the date he or she was eligible for retirement and both of these individuals stepped down in the face of judicial disciplinary proceedings. The Association takes issue with this. Its records indicate that 11 Judges have left the Provincial Court for different reasons, in different ways, including:

- 6 elevations to the Court of Queen's Bench (Judges Archambault, Carter, Chicoine, Linn, McMurtry and Wedge).
- 3 resignations, including 1 taking up an ambassador's post (Judges Andreychuk, Smith and Bekolay).
- 2 leaves of absence (Judges Arnot and Turpel-Lafond).

### **3. Federally Appointed Judges**

116. The Government submits that while comparisons to compensation packages paid to federally appointed Judges may prove interesting, such comparisons can have no bearing on the appropriate level of the remuneration to be paid to Provincial Court Judges in Saskatchewan which is an argument for parity or partial parity to close the gap. They submit that in light of the Supreme Court's ruling in *Bodner*, that parity remuneration of provincially appointed Judges with federally appointed Judges is not a valid objective for provincial judicial compensation packages.

117. The Government submits that the arguments put forth by the Association when comparing the salary of Judges of the Provincial Court in Saskatchewan with Queen's Bench Judges in Saskatchewan is an argument for partial parity in closing the gap. They urge this Commission to resist the Association's request that closing the salary differential between federally appointed Judges and Provincial Court Judges is an objective of this process. The Government refers to the Barnard Commission in its final Report where it stated at p 13:

This Commission does not find the argument to compare with the Court of Queen's Bench to be compelling. The two courts are separately recognized in Canada's Constitution and the jurisdiction of each is vastly different. While the parity argument, or movement toward parity argument, has been a hallmark of the submissions on behalf of the Provincial Judges before

every Commission, our salary recommendation (set out below) proposes a principled and rational basis to determine the appropriate salary for Provincial Court Judges. The salary of Judges of the Court of Queen's Bench adds very little to our principled approach.

118. The Government also was of the view that the Zakreski Commission rejected the principle of parity when the Report at p 40, para. 19 stated:

This Commission does not subscribe to the suggestion that the salaries of Provincial Court Judges be determined by a single comparator factor (eg., Court of Queen's Bench). To adopt this practice would make Judicial Compensation Commissions purely a rubber stamp rather than have the ability to take a fresh approach and consider numerous current factors.

119. The Government submits that salaries for federally appointed Judges are the same across the country and that there is no rational basis for holding that Judges of the Provincial Court of Saskatchewan need to be remunerated at the same level as federally appointed Judges residing in major metropolitan centres such as Vancouver, Montreal and Toronto. The Government submits that the overriding concern is for this Commission to identify a level of judicial salaries sufficient to Saskatchewan to secure a litigant's right to receive a fair and unbiased hearing and disposition of his or her legal action.

#### **4. National Average of Provincial Court Judges' Compensation**

120. The Government submits that comparing compensation paid to Provincial Court Judges in Saskatchewan with what is paid to Provincial Court Judges in other Provinces is simply one factor that can be taken into account and that remuneration paid to Judges for the Provincial Court of Saskatchewan should be ascertained by reviewing and weighing local economic realities, including what they submit is compensation paid to senior lawyers in public service, as well as lawyers in the Saskatchewan Bar to the extent such information is available.

121. The Government is careful in pointing out that the national average is somewhat of an elusive standard and is exceedingly difficult to obtain an accurate picture of average judicial salaries across Canada because of the timing of provincial compensation commissions, the implementation or rejection by the Government of the recommendations and the ensuing litigation that often follows rejection.

122. The Government takes issue with the Association's restricted choice of comparators in other Provincial Courts when the Association picks Alberta, British Columbia and Ontario and ignores the other Provinces and then, instead of using current compensation, projects the compensation in these three Provinces. The Government points out that Provincial Court Judges in Saskatchewan are not recruited from these Provinces, and there is no evidence of the Court losing any of its members to such other Provinces.

123. The Government submits that there are serious problems with the Association's proposed numbers and that the national average of the Provincial Court salaries is based on actual salaries currently paid not on projected salaries or recommendations of Commissions that have been

rejected or not implemented by provincial governments. The Association's choice of projecting salary increases in other jurisdictions, based on a cost of living factor adjustment in the nature of 2.5% renders an already arbitrary approach to setting of judicial salaries, even more so.

124. The Government points out that the Zakreski Commission rejected the use of projected figures to calculate a national average at p 39 of the Report:

This Commission, although it was noted, does not subscribe to allowing future potential national adjustments in the calculation of a national average due to the speculative nature of this consideration. Projections can prove to be a slippery slope.

125. Interestingly, the Government suggests that any averaging calculation this Commission might select should include Saskatchewan in the calculation to determine the average.

126. The Government submits that the three Provinces chosen by the Association as comparatives coincidentally happen to have the three highest salaries for Provincial Court Judges and furthermore, that the Provinces of Ontario, British Columbia and Alberta have much larger populations and major metropolitan centres. The Government points out that the Province of Manitoba has a similar population to Saskatchewan and the current salary of the Manitoba Provincial Court Judges of \$199,722 is much lower than the salary in Saskatchewan.

127. In rejecting the proposal that it should limit itself to the three largest and wealthiest Provinces, the Barnard Commission stated at p 17 of its Report:

Another proposal made to us was that we consider the economic status of other jurisdictions, including only those that are "have" provinces, i.e., that contribute to the federal equalization program rather than draw from it. This proposal does not seem reasonable to us because it is too volatile and because it appears to us essentially to overweight ability to pay. While the ability to pay should be a consideration, it is certainly a lesser consideration than overall comparability with other groups.

128. The Zakreski Commission also rejected this approach, stating at p 39, para. 15 of its Report:

This Commission rejects any comparator reference to a "have province" vs. a "have not province". In arriving at a recommendation, this measurement serves no purpose, particularly when one examines what defines a "have" from a "have not" and the resulting volatility.

129. Furthermore, the Government submits that the reason higher judicial salaries are paid in British Columbia, Alberta and Ontario is because lawyers' incomes are much higher in certain areas of these provinces.

## **5. Prevailing Economic and Fiscal Conditions in Saskatchewan**

130. The Government acknowledges that the state of Saskatchewan's economy is a relevant consideration for the purpose of setting appropriate levels of judicial remuneration for the next three years. The Government submits that the level of remuneration for Judges of the Provincial Court of Saskatchewan should be ascertained by reviewing and weighing local economic realities. The Government acknowledges that the fiscal situation of the Province of Saskatchewan has improved since 2008. They caution, however, that it cannot be predicted with certainty how long commodity prices will remain high and how the turbulence in the global economy will impact on Saskatchewan's future. This cautious approach is not dissimilar to the representations made by the Government before the Zakreski Commission in 2008. The Report of the Zakreski Commission states at p 22:

The Government does not dispute that the Saskatchewan economy is enjoying an unprecedented period of growth, however, the Government also states that it is a matter of speculation as to how long it is sustainable at its current level.

## **6. Increases in the Cost of Living**

131. The Government agrees that the projected increase in the cost of living is a relevant consideration and submits that the Saskatchewan Bureau of Statistics, Minister of Finance, Consumer Price Indexes reflects a 1% increase in 2009, a 1.4% increase in 2010 and a 3.4% increase for the period September 2010 to September 2011. They submit that the salary increase paid to Provincial Court Judges in Saskatchewan resulting from the Zakreski Commission out-paced cost of living increases over the past three years and that this factor should be taken into consideration.

## **7. Other Salary Comparatives**

132. The Government submits that because the recruitment of well-qualified individuals to serve as Provincial Court Judges is a paramount consideration of this exercise and because resident Saskatchewan lawyers form the exclusive pool of which all provincial government Judges are selected, that three comparator groups appear to be relevant:

- (a) Senior legal counsel employed by the Saskatchewan Public Service, including the Deputy Minister of Justice;
- (b) Senior legal counsel employed by Saskatchewan Legal Aid Commission; and
- (c) Senior lawyers engaged in private practice of law in Saskatchewan.

133. As of April 1, senior Crown counsel employed by the Government in a non-supervisory capacity is paid \$142,200 together with a benefits package. The benefits portion of the compensation package, consisting of pension, dental plan, health plan and sick leave has a value of \$22,880 for a combined remuneration package of \$165,080. The Government compares this

compensation to the total value of the remuneration presently paid to Judges of the Provincial Court of Saskatchewan which is in the amount of \$366,204.

134. They also submit that another possible comparator is the position of the Deputy Minister of Justice and Deputy Attorney General who serve at pleasure rather than the Provincial Court Judges who have the security of tenure. The annual salary for the Deputy Minister is \$208,656.

135. The Government submits that the current maximum salary for senior counsel of the Saskatchewan Legal Aid Commission is \$130,771 per year, exclusive of any value for pension, dental plan, health plan and sick leave.

136. While acknowledging that compensation paid to senior lawyers in the Saskatchewan private legal sector is a comparable, the Government points out that it should not be forgotten that lawyers in private practice are responsible for underwriting the complete cost of their pension and other benefits. However, the Government submits the problem with this comparative is that there is no current reliable data.

137. Senior, well-paid lawyers in large firms do not necessarily possess qualities most desirable in Judges in the Provincial Court. The Government points out that a senior lawyer who practices as a corporate solicitor in a large firm may lack both the knowledge of the substantive law needed in the Provincial Court and the desire to work in such court. The Government points out again that the Provincial Court, although having a civil component, has by far the bulk of its workload in criminal law and the pool of candidates for such work is not found exclusively in large firms. Furthermore, the senior lawyers in large firms are typically located in the centres of Regina and Saskatoon.

138. The Government points out the further difficulty the Association has in that it has not provided any reliable information about the levels of remuneration for senior lawyers in the private Bar and that it is purely speculative to assert that the current total remuneration package for Provincial Court Judges is not high enough to attract senior lawyers from the private Bar.

## **8. Changes to and the Workload of the Provincial Court**

139. The Government submits changes to workload, or the particular level of workload, whether by a particular Judge or by the Court as a whole, should not be a factor for this Commission to take into account in relation to Judges' salaries.

140. If there is a problem with workload, the preferred solution is to consider ways in which to address that workload directly, rather than by increasing the salary paid to overworked Judges.

## **9. The Marshall Report**

141. The Government called as a witness to provide evidence to this Commission a Mr. James Marshall who is the senior policy fellow at the Johnson-Shoyama Graduate School of Public Policy, University of Regina. Mr. Marshall is an economist that was retained by the Government to provide a report to assist this Commission in examining a number of factors presented by the Government which the Commission may want to consider in its mandate.

142. Mr. Marshall presented many statistics, some of which are referred to here. One statistic was the rate of growth in Judges' salary compared to per capita personal income in Saskatchewan for the period 2005 to 2010. Table 9, which follows, indicates the statistics:

**Table 9: Rate of Growth in Judges Salaries per Capita Personal Income for Saskatchewan, 2005 to 2010.**

	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>Cumulative</b>
<b>Increase in Judges Basic Salary</b>	18.0%	2.0%	2.8%	8.0%	4.0%	<b>39.1%</b>
<b>Personal Income Per Capita Growth</b>	5.8%	8.9%	13.5%	-1.3%	3.6%	<b>33.7%</b>

143. During this time frame, the rate of pay for Judges of the Provincial Court in Saskatchewan has improved slightly more than incomes earned by Saskatchewan people from all sources.

144. During this same period, Mr. Marshall compared the growth in Judges' salaries to the Consumer Price Index for Saskatchewan, as well as the Gross Domestic Product Price Index for Saskatchewan. The following table indicates this information:

**Table 10: Rate of Growth in Judges Salaries, the Consumer Price Index and the Gross Domestic product Price Index for Saskatchewan, 2006 to 2010.**

	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>Cumulative</b>
<b>Increase in Judges Basic Salary</b>	18.0%	2.0%	2.8%	8.0%	4.0%	<b>39.1%</b>
<b>Consumer Price Index for Saskatchewan</b>	2.1%	2.8%	3.3%	1.0%	1.4%	<b>11.0%</b>
<b>GDP Price Index for Saskatchewan</b>	5.4%	7.7%	23.4%	-8.2%	5.4%	<b>35.4%</b>

145. The Marshall Report also compared the relationship of Judges' salaries to the Consumer Price Index for Saskatchewan during the period 1999 to 2010. During this period, the salary for Provincial Court Judges increased by 103.4% while the consumer price index increased only 29%.

146. The Report also compared the base salaries for Judges in Saskatchewan to other Canadian Provinces and Territories as of April 1, 2011, and concluded that Saskatchewan Provincial Court Judges' basic salary exceeds the national average of competing Provincial Court Judges' salaries in Canada by either 6.4% or 7.1%, depending on whether Saskatchewan is included in the averaging exercise. It was noted that only Ontario's Provincial Court Judges currently receive a salary greater than Saskatchewan. This information is produced in the following table:

**Table 16: Basic Salaries for Judges in Saskatchewan in Comparison to Other Canadian Provinces and Territories, 2011**

	Actual as of April 1/11	Saskatchewan as a Percentage of each Jurisdiction
<b>British Columbia</b>	\$231,138 <sup>1</sup>	103.4%
<b>Alberta</b>	\$220,000 <sup>2</sup>	108.6%
<b>Saskatchewan</b>	<b>\$238,943</b>	<b>100.0%</b>
<b>Manitoba</b>	\$199,722 <sup>3</sup>	119.6%
<b>Ontario</b>	\$262,113	91.2%
<b>Quebec</b>	\$227,488	105.0%
<b>New Brunswick</b>	\$204,700	116.7%
<b>Nova Scotia</b>	\$207,577	115.1%
<b>Prince Edward Island</b>	\$216,268 <sup>4</sup>	110.5%
<b>Newfoundland &amp; Labrador</b>	\$209,448	114.1%
<b>Northwest Territories</b>	\$233,255	102.4%
<b>Yukon</b>	\$242,819	98.4%
<b>Simple Average Salary</b>	<b>\$224,456</b>	<b>106.4%</b>
<b>Simple Average Excluding Saskatchewan</b>	<b>\$223,139</b>	<b>107.1%</b>

147. The Marshall Report notes that the average annual wage of all Saskatchewan employees as of June 2011 is \$44,296.20 compared to the basic salary of a Saskatchewan Provincial Court Judge which is currently roughly 5.4 times this average.

148. The Marshall Report also provided a forecast on the Saskatchewan CPI increase and real gross domestic product growth in 2011. Six forecasts indicated an expectation of growth in Saskatchewan economy between 2.8% and 4.3% in real terms in the 2011 year. The average of real growth rate forecast for 2011 is 3.4%, higher than the 1.4% average of annual growth in real GDP in Saskatchewan experienced over the past five years.

149. Five of the six agencies have forecasted CPI in Saskatchewan to rise between the rate of 2.5% and 2.9% in 2011. This average is an expected 2.68% increase in Saskatchewan CPI compared to the actual average increase of 2.1% in the past five years.

<sup>1</sup> The British Columbia government rejected the recommendations of the British Columbia commission and set this salary. However, the salary for 2011/12 is the same whether as recommended by the commission or proposed by the government in any event. There is currently litigation on this issue between the Government and the judges.

<sup>2</sup> The Alberta Provincial Court Commission has reported, recommending that the base salary for a Provincial Court Judge in Alberta increase to \$250,000 in 2009/2010; to \$255,000 in 2010/2011; and to \$257,550 in 2011/2012. The Alberta Government has not yet responded to the Report.

<sup>3</sup> The Manitoba government rejected the recommendations of the Manitoba commission for a salary of \$211,862 for 2010/2011 and set this salary. There is currently litigation on this issue between the Government and the judges.

<sup>4</sup> Prince Edward Island uses a national average. Given the uncertainties about the current national average referred to in the three previous footnotes, this salary figure is under review.

150. In conclusion, the Marshall Report notes, in part, that the salaries of Provincial Court Judges in Saskatchewan have kept pace, more or less, with the rate of economic growth and have exceeded increases in the cost of living in Saskatchewan.

### ***C. Saskatoon Criminal Defence Lawyers' Association***

151. William Roe, Q.C., President and Andrew Mason, Coordinator, presented the written submission, and Andrew Mason and Mark Brayford, Q.C. presented an oral submission, the points of which are summarized below. The SCDLA is made up primarily of criminal defence practitioners in the Saskatoon area, complimented by others throughout Saskatchewan. Members of the SCDLA represent a majority of the accused in Saskatoon and surrounding districts at all levels of the Courts.

152. Since 1985, salaries for a Queen's Bench versus a Provincial Court Judge in Saskatchewan have risen as follows:

Year	Saskatchewan Bench	Queen's	Saskatchewan Court	Provincial	Difference
1985	\$ 105,000		\$ 71,000		\$ 34,000
1986	\$ 115,000		\$ 73,130		\$ 41,870
1987	\$ 121,300		\$ 80,052		\$ 41,248
1988	\$ 127,700		\$ 90,000		\$ 37,700
1989	\$ 133,800		\$ 90,000		\$ 43,800
1990	\$ 140,400		\$ 90,000		\$ 50,400
1991	\$ 147,800		\$ 90,000		\$ 57,800
1992	\$ 155,800		\$ 90,000		\$ 65,800
1993	\$ 155,800		\$ 92,250		\$ 63,500
1994	\$ 155,800		\$ 94,556		\$ 61,244
1995	\$ 155,800		\$ 94,556		\$ 61,244
1996	\$ 155,800		\$ 94,556		\$ 61,244
1997	\$ 165,600		\$ 112,961		\$ 52,639
1998	\$ 175,800		\$ 112,961		\$ 62,839
1999	\$ 178,100		\$ 112,961		\$ 65,139
2000	\$ 198,000		\$ 143,000		\$ 55,000
2001	\$ 204,400		\$ 143,000		\$ 61,400
2002	\$ 210,941		\$ 143,000		\$ 67,941
2003	\$ 216,000		\$ 158,000		\$ 58,000
2004	\$ 240,000		\$ 161,634		\$ 78,366
2005	\$ 244,200		\$ 165,190		\$ 79,010
2006	\$ 244,700		\$ 195,000		\$ 49,700
2007	\$ 252,000		\$ 198,900		\$ 53,100
2008	\$ 260,000		\$ 204,552		\$ 55,448

2009	\$ 267,200	\$ 220,916	\$ 46,284
2010	\$ 271,400	\$ 229,753	\$ 41,647
2011	\$ 281,100	\$ 238,943	\$ 42,157

153. The SCDLA submits there cannot be two tiers of justice in Saskatchewan and that litigants have the right to have their cases heard by Judges possessed with the same general level of skills, legal knowledge and expertise, irrespective of which court it is. They acknowledge that the only basis on which material difference in overall compensation can be justified between the two different courts is because of the differences in fiscal capacity or the difference in the cost of living between Saskatchewan and other parts of Canada. There should be no disparity based on qualifications or workload nor the importance/value of the work done. In summary, they submit that the current relative economic factors, including the fiscal capacity of the Province of Saskatchewan and its cost of living here do not justify a lower compensation scale for Saskatchewan Provincial Court Judges. A lower level of compensation for Provincial Court Judges works against attracting the most qualified members of the Bar to become Judges of the Provincial Court. Put simply, they argue that the judicial qualifications or workload do not justify the significant disparity in the levels of compensation between the two courts.

#### ***D. Canadian Bar Association, Saskatchewan Branch (the “CBA”)***

154. Perry Erhardt, Q.C., past President and David Thera, President, presented both the written and oral submissions on behalf of the Saskatchewan branch of CBA. The CBA represents 38,000 lawyers, judges, notaries, law teachers and students across Canada, and the Saskatchewan branch consists of approximately 1,100 members.

155. The CBA submits that the Province’s current and projective financial situation allows for fair and reasonable compensation and benefits for Judges. The salaries and benefits should reflect the significant role of Provincial Court Judges play in shaping the system of justice in Saskatchewan and the importance of having quality lawyers on the Provincial Court. The salaries and benefits must reflect the personal and professional sacrifices which are undertaken by accepting an appointment to the Bench. Salary is an important factor in insuring the best persons are sitting as Judges. The salaries should be consistent with prevailing and predicted market conditions and the Commission should continue to use comparables of lawyers who are senior private practitioners and senior public servants.

156. Appropriate compensation levels should be such that Judges do not experience significant economic disparity between pre-appointment and post-appointment and that the best and most capable applicants for judicial appointments are not deterred.

#### ***E. Association’s Reply***

157. In reply to the position taken by the Government, the Association made several points, including the following:

- (a) The Association submits that the factors for consideration that the Government and they have set out are similar.
- (b) Attracting the most qualified applicants will always be more important than the secondary aspect of retention.
- (c) They urge the Commission to give little weight to the information provided by the Government regarding the salary and benefits of non-supervisory lawyers employed with the Government as this will do little to attract the best senior lawyers of the private Bar who, because of their experience and expertise, enjoy a significantly higher salary than lawyers with the Government.
- (d) They take issue with the Government if the Government's position is that the role of this Commission is to determine what adjustments, if any, are needed to maintain a fair and adequate compensation package to that determined by the Zakreski Commission. The Government submits that positions or recommendations of past commissions are more than a starting point, not binding on subsequent commissions, and that this Commission should evaluate all relevant factors by way of a fresh analysis. This will determine not only whether the previous commission may have overlooked something. It will also determine whether evidence of significant change warrants significant adjustment of compensation.

158. The Association takes issue with the argument by the Government that because the salaries of private practitioners are difficult to ascertain, the appropriate comparison should be that with lawyers in the public service only. The Association points out that this argument has the effect of reducing the significance of the earnings of the senior lawyers in private practice.

159. The Association submits that the service costs of Judges' pension plan is inappropriate to discussion of benefits or compensation.

160. The Association takes issue with the salary of the Deputy Minister of Justice as a comparator.

161. In passing, and as a point of interest, the Government pointed out that the Provincial Court Judges in Saskatchewan are better paid than the Justices of the Supreme Court of the United States. As of 2009, the Chief Justice of the United States is paid US \$223,500, while Associate Justices are paid US \$213,900.

162. The Association took issue with this comparison on the following basis:

- (a) Judges of the United States are not limited in their ability to earn income from outside sources unlike Judges of the Provincial Court of Saskatchewan.
- (b) The ability to attract and retain Judges in the United States is said by some to be at a crisis point. The Association referred the Commission to an article in

Washington Post of February 8, 2011 entitled, Federal Judicial Vacancies Reaching a Crisis Point, where it was pointed out that federal Judges were retiring at a rate of one per week in 2011, driving up vacancies that have nearly doubled since President Barack Obama took office. The departures are increasing the workloads dramatically and delaying trials in some of the nation's federal courts. The Association also referred the Commission to an article in the New York Times of July 4, 2011 entitled, Pay Frozen Where New York Judges Leave Bench. This article pointed out that for the first time in memory Judges are leaving the Bench in relatively large numbers, not to retire but to return to being private lawyers. The turnover in New York has increased in the law few years. Nearly one in ten Judges are now leaving annually. Reference is made to a Judge recently resigned when his salary was \$144,000. He stepped down to become a partner in a law firm where the average partner pay is \$1,400,000. The article goes on to point out the Chief Justice of the United States, John G. Roberts Jr. has noted that federal judicial salaries have slipped below the pay of top law school deans and other law professors and has said the pay gap could undermine the strength of the federal courts. The salaries of state trial Judges nationally rose 34% to a medium of \$116,100 in the decade ending 2005, but during the same period the medium partner share of profits at large firms jumped 141% to \$957,500.

163. The Association submits that there are many difficulties with the Government's total compensation argument. They say it is misleading and unreliable because the pension plans in each jurisdiction have different histories and different features, including different mandatory retirement ages. They submit that there has been no attempt to provide total compensation comparisons with other comparators such as the Judges of the Court of Queen's Bench and the Court of Appeal in Saskatchewan. They also submit that the current pension costs identified by the Government are just that. The cost to the Province is not the same as a benefit or compensation to the Judge. They also submit that the Government does not make contributions to fund the Judges' pension plan and again point out that the pension service costs in 2011, at 44.9% of the salary, which is a service cost and not the value of the benefits.

164. While acknowledging that both the Association and the Government agree that the most important factor in determining remuneration is the ability to track and retain Judges, they point out that the Association's arguments differ from the Government's in five key respects:

- (a) The salary and benefits must be sufficient to attract rather than deter successful senior private practitioners;
- (b) The "pool" or group of applicants drawn upon should be representative of practicing Saskatchewan lawyers;
- (c) It is not sufficient to attract competent applicants, but rather the emphasis must be on the best qualified;

- (d) The Commission must examine anew whether the current salary and benefits package is appropriate to attract the most qualified; and
- (e) There is no “recruitment” of applicants. In Saskatchewan that has been a relatively passive process.

165. While the Government has pointed out that there was no empirical data to suggest the Provincial Court struggles in attracting applicants of a high calibre, the Association in their Reply relied upon some existing information.

166. The Association relies in part upon the information found in the Federal Quadrennial Judicial Compensation and Benefits Commission chaired by Ms. Sheila Block (“Block Commission”) in its Final Report dated May 30, 2008 and suggests that because of the general knowledge of our growing economy, common sense strongly suggests that the income for Saskatchewan’s lawyers has improved considerably since 2006 and indeed, since the Saskatchewan Provincial Court Commission last deliberated in 2008. The Block Commission referred to a survey of Canadian private sector lawyers’ income prepared by Navigant Consulting Inc. at the request of the Canadian Superior Court Judges Association and the Canadian Judicial Council. This survey relied upon unreported income by lawyers in the private sector in 2006. Of interest is the statement in paragraph 114 of the Block Commission’s Final Report that Saskatchewan lawyers in the 75<sup>th</sup> percentile of income earned \$192,857 in 2006.

167. The Association relies in part upon information from a Report prepared for the Alberta Provincial Judges’ Association dated March 31, 2011 to support the premise that Saskatchewan’s robust economy has translated into a substantial improved standard of living in Saskatchewan. This Report stated that during the past decade personal income in Saskatchewan converged toward and essentially reached the average income in Canada in 2008. This Report also noted that during the period 1990 to present, personal incomes, while essentially equal between Alberta and Ontario in 1990 through 2000, by 2008 Alberta’s personal per capita income was 29.5% greater than Ontario’s. It would also appear from this Report that in 2008 per capita income in Saskatchewan was equal to that of Ontario and Canada.

168. Although the Association still acknowledges the difficulty in obtaining comprehensive and current data regarding income of private and in-house practitioners, they refer to a 2011 Canadian Lawyer Compensation Survey reported in the July 2011 edition of *The Canadian Lawyer* magazine which appears to deal with associate compensation, senior in-house counsel compensation, as well as in-house counsel compensation. The Association asks that we give consideration to this which appears to be done on the basis of a national average. Their points are as follows:

At the senior in-house counsel compensation level the article reported the following salary ranges, from a sample size of 12:

<b>General Counsel</b>	<b>Median</b>	<b>Lowest</b>	<b>Highest</b>
Director level	\$155,000	\$70,000	\$300,000
Executive Level	\$207,000	\$85,000	\$654,000

From a sample size of 87, the article reported on the average compensation of in-house counsel based on the year of call. Of those lawyers called in the year 2001 and before:

<b>Year of Call</b>	<b>Median</b>	<b>Lowest</b>	<b>Highest</b>
2001 and before	\$150,000	\$85,000	\$385,000

169. The Association also makes the following statement:

The Law Firm Partner Income National Survey, with a sample size of 42, reported the following distribution of income:

<b>Salary Ranges</b>	<b>Percentage Earnings in that Range</b>
• Up to \$50,000	5%
• \$51,000 - \$100,000	10%
• \$101,000 - \$150,000	20%
• \$151,000 - \$200,000	13%
• \$201,000 - \$250,000	14%
• \$251,000 - \$300,000	10%
• \$301,000 - \$350,000	8%
• \$351,000 - \$400,000	3%
• \$401,000 - \$450,000	7%
• Over \$450,000	10%

170. In closing, the Association again submitted that the spread between the income of lawyers in private practice and the income of Judges should not be allowed to increase further. The spread between the income of Judges of the Court of Queen's Bench and the Provincial Court not become so disproportionate such that this Court will be unable to draw from the same pool of excellent candidates for judicial appointment.

## **V. INDEXING PENSIONS TO 100% OF SASKATCHEWAN CPI**

### **A. The Association**

171. The Association submits that the Saskatchewan Provincial Court pension be fully indexed to 100% of the Saskatchewan CPI.

172. By way of background, the 2002 Vicq Commission recommended pensions be indexed in accordance with the Saskatchewan CPI beginning April of each year with the first adjustment to be made to pensions on April 1, 2004. The Vicq Commission agreed that its jurisdiction did not extend to Retired Judges or to those that would retire prior to April 1, 2003. The Regulations under the Act provide that annually, from 2004 onwards, a Retired Judge's pension will be increased to reflect a 75% increase in the cost of living according to the Saskatchewan CPI provided that the increase in CPI does not exceed 5%. Any increase in the Saskatchewan CPI over 5% is to be indexed at 50% of the CPI increase. The indexing provisions are found in s. 14.1(2) of the *Provincial Court Compensation Regulations* made pursuant to the Act.

173. The Association's rationale for why pensions in Saskatchewan should be indexed at 100% as opposed to the recommendation of the Vicq Commission is because the majority of the judicial plans in the other Provinces provide for 100% indexing. The Association provides the following information:

<b>Jurisdiction</b>	<b>Rate of Indexation</b>
Federal jurisdiction (s. 96 judges)	100% of Canada CPI
Yukon	100% of Canada CPI
Northwest Territories	100% of Canada CPI
British Columbia	Discretionary by Trustees but 100% indexing
Alberta	60% of AB CPI (100% recommended by Commission)
Saskatchewan	75% of Saskatchewan CPI up to 5%, and 50%
Manitoba	66.7% of Canada CPI
Ontario	100% of Canada CPI
Quebec	100% of CPI for the Province of Quebec
Nova Scotia	100% of Canada CPI up to 6%
New Brunswick	100% of Canada CPI up to 5%
Prince Edward Island	100% of Canada CPI up to 6%
Newfoundland & Labrador	60% of CPI to max. indexing of 1.2%

174. The Association submits that pensions payable to Judges who have retired should be indexed to 100% of the cost of living. This encompasses not only active Judges upon retirement, but those Judges who have retired.

### ***B. The Government***

175. The Government submits that insofar as the request of 100% indexing involves Provincial Court Judges who are now retired, that these Judges no longer hold judicial office and the Commission lacks statutory authority to make any recommendations in relation to them or their surviving partners.

176. The Government refers to the finding of the Zakreski Commission at p 40 of its Report where it stated in para. 18:

This Commission defines compensation as including salary and benefits. The pension component of a Provincial Court Judge is very generous and far exceeds this type of benefit in other private and public sectors.

and also in its recommendations at p 14 as follows:

This Commission is not prepared to recommend any change to the current indexation of pension provisions established at [75%] increase in cost of living. In this Commission's view, the current pension is very lucrative and when considered with the benefit level available with no restriction on maximum payment, it far exceeds provisions of other private and public sector organizations within the province.

177. The Government points out that the Association has not identified any changes in circumstances of Judges or other providers or recipients of pension benefits in Saskatchewan or elsewhere that would suggest it is necessary for the Commission to revisit the level of indexation of pensions determined or recommended by the Vicq Commission.

178. The report on the actuarial valuation for accounting purposes of the Judges of the Provincial Court Superannuation Plan prepared by Aon Consulting as at March 31, 2011 opined that the estimated current benefit cost of this plan amounts to approximately 49.8% of a Judge's pensionable earnings.

179. This is an amount one would have to set aside to pay for the future benefits of this pension if he or she were not a member of the plan. Presently, the members' contributions of these pensionable earnings that is the amount that is paid by the Judge, is 4.9% and the Government funds the remaining 44.9%. As of March 31, 2011, the actual liabilities of the plan on the assumptions used were \$117,003,000. The deficit in the plan, based on this liability, was \$95,395,000. This deficit is backstopped by the Province.

180. If 100% indexing was provided on a go-forward basis, this would result in an increase in the current service cost of \$380,000 or 3.6% of the covered payroll from 49.8% to 53.4% of the Judges' present salary. If 100% pension indexing on a go-forward basis (not retroactive) was provided to all Judges, retired and present, the actual liability of the plan, that is the anticipated cost to the Government, would increase by \$7,520,000.

181. It was pointed out by the Government in the oral submission that it is not that easy to compare indexing of a pension plan of a Provincial Court Judge in one Province to another, and in particular, in Saskatchewan. It was suggested that in some Provinces Judges, as members, contributed as much as 10% of their income towards their pension. In other words, the terms of the plan change from Province to Province and in some Provinces the amount contributed by Judges is substantially in excess of what it is in Saskatchewan.

182. The Government also submitted that the Public Employees Pension Plan of which the vast majority of public servants, many employees of Crown corporations and even members of the legislative assembly are members, is a defined contribution plan and provides no indexing benefit whatsoever. Furthermore, for those employees in the public sector generally who were fortunate enough at this time to be members of a defined benefit plan, none enjoy 100% indexing. Reference was made to the Public Service Superannuation Plan which was closed to new members in 1977 which offers indexing of 70% of CPI and required contributions ranging from 7% to 9% depending on age at the commencement of service. Reference was also made to the Municipal Employees Pension Plan and Teachers Superannuation Plan. None of the 18 pension plans for public sector employees registered under *The Pension Benefits Act* in Saskatchewan offers what the Association is asking for.

## **VI. MEDICAL, DRUG, DENTAL AND EYE CARE BENEFITS**

### ***A. The Association***

183. The Association submits that clarification is needed for certain health benefits.

184. The Association seeks formal endorsement of the principle that the Judges of the Provincial Court receive the same medical, drug, dental, and eye care benefits as and when they are made available to the executive branch of the Provincial Government Civil Service.

185. The Judges of the Provincial Court also request that they be granted a flexible health care allowance in the sum of \$780 per year consistent with that enjoyed by the executive level of the civil service of the Province of Saskatchewan.

186. The Association submits that health care benefits, including medical, drug, dental and eye care should be extended to Retired Judges.

187. The Association points out that Queen's Benches in Saskatchewan who have gone supernumerary continue to receive the health care benefits until the mandatory final retirement age of 75 years. In Alberta, British Columbia, New Brunswick and Ontario, upon retirement, when the Provincial Court Judge continues to sit on a part-time or senior Judge program basis, the medical benefits are continued on the same basis as for full-time sitting Judges.

188. Presently in Saskatchewan when a Judge retires and is appointed as a temporary Judge also known as a Relief Judge or a senior Judge, they are paid on a per diem basis but do not received any medical benefits. Most Judges, upon retirement, chose to work as Relief Judges which they may do until the age of 75.

189. The Association submits that Relief Judges are vital to the Court's ability to meet the ongoing commitments of the Court to facilitate vacation and education leave for full-time Judges. Several of the current Relief Judges sit in excess of 70 days a year.

190. The specific proposal presented by the Association is that the existing level of extended medical, drug, dental and eye care benefits currently provided by Great West Life to full-time Judges should be continued to the age of 75 for all Judges who are working full-time at the date of retirement. More specifically, it was submitted that upon retirement Judges be allowed to maintain their current medical, drug, dental and eye care coverage with Great West Life or an insurer of the Government's choice with a shared 50/50 cost.

### ***B. The Government***

191. The Government does not agree with the issue or concern that the Association has in their complaint that Judges of the Provincial Court are not receiving the same health care benefits as and when they are made available to the executive branch of the Provincial Government Civil Service. In their view, this is an administrative issue to be looked after by the Government and

results from the timing of the contracts with the different benefit providers for coverage for the different groups.

192. The Government advised that the goal of the flexible benefit allowance received by out-of-scope public employees is to:

- (a) promote physical fitness;
- (b) encourage long-term financial planning through advice and/or enhanced retirement savings; and
- (c) payoff student loans for young employees.

193. The Government is opposed to creating an additional benefit over and above the Judges' Professional Allowance of \$3,500. Rather than create a new benefit, the Government suggests that expenses which are eligible for the flexible benefit allowance to out-of-scope public employees can be included as eligible expenses under the Judges' Professional Allowance of \$3,500.

194. The Government disagrees that Retired Judges working as Relief Judges should receive health benefits which are afforded to full-time Judges. The Government has consistently taken the position that Judges who are retired are no longer Provincial Court Judges as defined in the Act and that this Commission lacks statutory authority to make any recommendations in relation to them. The Government refers to the final Report of the Barnard Commission at p 18 where it states "[t]he Commission does not believe it is in our jurisdiction to address matters concerning retirees."

195. The Government furthermore submits that it is Retired Judges who choose whether or not to work as Relief Judges and those who choose to work are already collecting a pension from the public plus the Government pays a Relief Judge almost \$1,100 per day to sit over and above the pension payments.

## **VII. PROFESSIONAL ALLOWANCE**

### ***A. The Association***

196. The Judges' Professional Allowance presently is \$3,500 per year. The Association proposes this sum increased to \$4,000 a year on the basis that the Judges of the Court will allocate \$350 of that increase to a specific judicial robe replacement account which will be administered to the Office of the Chief Judge and the remaining \$150 will go directly to the professional allowance for each Judge.

### ***B. The Government***

197. The Government, while recognizing the need for robes, opposes any increase to the professional allowance. In 2005 the Association requested a robe allowance of \$500 and the

Barnard Commission agreed to the request and increased the professional allowance from \$3,000 to \$3,500.

198. Instead, the Government proposes allocating funds within the Court Services operational budget to accommodate the replacement of robes and therefore the professional allowance need not to be increased.

## **VIII. SABBATICAL FOR OFFICE OF CHIEF JUDGE**

### ***A. The Association***

199. The Association proposes that the Office of the Chief Judge be granted a sabbatical for a period of three months to be taken after the completion of his or her term as Chief Judge conditional upon he or she returning to the position of a Puisne Judge. The Association points out the primary role of a Chief Judge is administrative and upon completion of the term, the sabbatical is necessary for study, renewal, adjustment and catch up on changes to the law to return to the position of Puisne Judge. It is not uncommon in other jurisdictions for Provincial Court Judges to be given a sabbatical. In the Yukon, Northwest Territories and Prince Edward Island all Judges may be granted sabbaticals on certain terms and conditions, and in Ontario and Quebec, Administrative Judges are to be given sabbaticals.

### ***B. The Government***

200. The Government opposes a sabbatical with pay for an outgoing Chief Judge and points out that Judges of the Provincial Court are entitled to participate in deferred salary leaves which, in the case of the Chief Judge, could be used in lieu of a sabbatical with pay. The Government also submits that this proposal comes within s. 38(2) of the Act and any recommendation made by the Commission would be an advisory recommendation, not a mandatory recommendation.

## **IX. ANALYSIS**

### ***A. Fresh Analysis or Starting Point***

201. We are of the view that the approach of this Commission is not to start fresh and disregard the work and recommendations of previous commissions; but rather the opposite. This Commission recognizes the work, rationale and recommendations of its predecessors. It is upon this foundation that this Commission's starting point for its analysis is the Report of the Zakreski Commission. The process is fluid, evolutionary and, unless the circumstances dictate otherwise or have substantially changed since the last Commission, is not revolutionary.

202. However, this does not mean this Commission merely "rubber stamps" the recommendations of the Zakreski Commission or, for that matter, the rationale and recommendations of prior commissions. In our view, this would abdicate our responsibility under the Act and wrongfully ignore the jurisprudence. The mandate of this Commission is to "inquire into and make recommendations" regarding the matters set out in the Act. This means that this Commission cannot rest on the laurels of its predecessors. Rather, this Commission must

complete a full analysis of the issues before it. To this extent, there is a “fresh analysis”, but it is made against the backdrop of building upon the work, rationale and recommendations of previous commissions.

203. The role of this Commission is not to be a crusader for change in the absence of demonstrated need for change. The role of this Commission is not to substitute its notions of “financial security” for the realities recognized in the jurisprudence and followed by its predecessors in counterpart commissions in other Provinces.

204. This Commission must consider what relevant circumstances have changed since the report of the previous Commission, whether the previous Commission failed to take something into consideration that it should have, either because it was overlooked or was not squarely before it, or whether there is new and relevant information that was not previously available for consideration.

205. This Commission is mindful of the Supreme Court’s statement in *Bodner* that if this Commission is satisfied that its predecessors conducted a thorough review of judicial compensation or a factor thereof, that in the absence of demonstrated change this Commission may well decide that only minor adjustments are necessary.

## ***B. Salaries***

206. The focus of this Commission is to identify and make recommendations on the appropriate level of remuneration for Judges of the Provincial Court. Appropriate remuneration is the remuneration necessary to achieve judicial independence and in turn maintain public confidence in the judicial system. Appropriate remuneration is for the benefit of those that are judged, not the Judges. Therefore, this process is not intended to directly benefit the Judges and the benefit they receive is secondary to the primary purpose. Accordingly, this process is not akin to an interest arbitration where the Association is pitted against the Government. The Commission’s aim is not to determine the maximum or the minimum compensation for the benefit of either the Association or the Government as this was solely the interests that were at stake.

207. All participants in the submissions before this Commission agreed that the most important factor in determining appropriate remuneration is the remuneration necessary to attract the most qualified applicants to become Judges to the Provincial Court. We agree and would add that attracting and retaining go hand-in-hand. To this end, we disagree with the submission by the Association that attracting the most qualified applicants will always be more important than what it described as the secondary aspect of retention. They are of equal importance in ascertaining the appropriate remuneration.

208. In the view of this Commission, if the remuneration package was only sufficient to attract the most qualified applicants to the position, but was insufficient to retain that person in the position, it would not be appropriate remuneration. Public confidence in the judicial system is at best served not only by attracting the most qualified to the Bench, but by retaining the most

qualified on the Bench honing his or her skills and gaining wisdom from experience, until retirement.

209. We refer to the issue facing the justice system in the State of New York that was brought to our attention by the Association. The point is that in the State of New York salaries have become so inappropriate that Judges are leaving the Bench in relatively large numbers, one in ten annually, not to retire, but to return to practice. We are of the view that if this was the state of affairs in the Provincial Court in Saskatchewan, which it is not, but rather the antithesis, the perception and reality of judicial independence would be severely fractured if not lost completely.

210. This Commission not only recognizes but fully endorses the factors that attract candidates to seek appointment to the Provincial Court as enumerated in the Vicq Report and expanded upon in the Zakreski Report. There may well be other factors, but the five factors identified are a nature of work, prestige associated with being a Judge, security of position, desire for public service and the compensation and benefits package. This Report is focused on the compensation and benefits package.

211. Salary is a component of compensation. Pension is also a component of compensation. The inquiry into the appropriate salary to attract and retain the most qualified candidates often referred to as “the brightest and the best” for the position of Provincial Court Judge must make this determination against the backdrop that salary cannot be looked at independent of pension and other benefits and, for that matter, in isolation of the other factors that cause one to seek judicial appointment. The point is that the appropriate salary does not have to “one up” or equal the maximum salary currently earned by the top percentile of the legal profession in Saskatchewan to attract the most qualified for the position to the position of Judge on the Provincial Court. This Commission agrees that compensation and the benefit package is a very significant factor in attracting qualified applicants, and even if the Government were able to attract the most qualified for this position to this position for less compensation, the institutional dimension of financial security as a condition of judicial independence demands that the salary not fall below a basic minimum level of that which is required for an office of a Judge. As pointed out by Lamer C.J. in *P.E.I. Provincial Court Judges Reference* public confidence in the independence of the judiciary would be undermined if salaries fell to such levels that it could be perceived that Judges were susceptible to political pressure through economic manipulation. Put simply, this is not about the bargain that would be struck between government and Judges if they were free to negotiate; this is not the interest that is in issue.

212. There are a few other general observations this Commission makes before addressing the specific factors that influence the appropriate salary.

213. Both the Government and the Association agree that the Provincial Court is an excellent court and is currently made up of the most qualified persons for the position of Judge on the Provincial Court.

214. The Government and the Association agree that the present pension is a very generous pension.

## 1. **Workload of the Court**

215. The jurisdiction and the workload of the Provincial Court is a logical factor for consideration.

216. As has previous Commissions, this Commission fully appreciates and acknowledges that judicial duty involves exceptional sacrifices of the personal and professional nature. Unlike others, Judges are not permitted to engage in other work so income is limited to judicial salary, a Judge's freedom of speech is limited, and conduct in and out of the courtroom is strictly monitored and subject to complaint. Actions and behavior in practice and in the public arena have always come under scrutiny and comment, and we would be remiss if we did not observe that in our current age of technology and instant information sharing the concept of scrutiny and accountability has taken on whole new dimensions. As has been stated by others, Judges occupy "a place apart" in our society and they pay a social, emotional and economic price for the privilege of their position.

217. We also endorse the findings of previous Commissions in Saskatchewan and throughout Canada, that the Provincial Court plays a vital role in our society. Traditionally, this Court is the point of entry into the criminal justice system and the data provided to us shows their role is ever-increasing. They preside over the vast majority of criminal matters and they have wide reaching powers that require them to balance the rights of persons charged with offenses against the need to ensure our communities are protected and well served. Two of their most onerous duties are, as defined by the Association, to determine guilt and impose sentences, where necessary, that balance the protection of the public and the needs of the offender. In these and all of their duties, it is a delicate balance as it requires they must be independent and unbiased, and be perceived as such at all times.

218. The role and duty of the Judge is not confined to the courtroom and it is not limited to the normal work hours that many citizens enjoy. Judges can be called upon at any time, day or night, to deal with emergency situations, to authorize search warrants and urgent mental health warrants. Judges in the North and those who attend the many circuit points throughout the Province often have work days that are long in duration and work environments that require special skills to maintain public confidence in the administration of justice.

219. This Commission acknowledges the workload of the court is substantial and continues to rise. We also acknowledge the judges of the Court have responded to this increasing demand with ingenuity, flexibility and a dedicated commitment to their duty to the public. The Zakreski Commission in its Report listed many of the reasons why the workload is increasing. Those reasons remain current but we want to add that we recognize there have been a number of legislative changes since 2009, including the introduction of new crimes and sentencing requirements that continue to increase the working mandate and responsibility of the Court; and that citizen usage of the Provincial Court for criminal and civil matters is increasing over time.

220. The Commission would be remiss if we fail to acknowledge that there is a national recognition of significant issues with respect to access to justice that are reflective of an increased burden on our Judges at all levels of Court. More often than ever, citizens are appearing in Court without legal representation, in both civil and criminal matters, and this

places an increasing burden on the presiding Judge to ensure the procedure is fair and accountable and that rights are protected. The number of persons with mental health issues, cognitive disabilities, learning disorders, literacy problems and other complex issues is also ever-increasing at a time when resources are becoming more and more strained. The burden to address the special needs of these individuals falls on the shoulders of the Judge.

221. The consensus is that the Provincial Court is a hardworking Court. Where the parties differ is that the Association's submission is that the ever-increasing workload is a major factor that should be considered in assessing whether the present salary level is appropriate, whereas the Government does not agree that workload is a factor.

222. The Government submits that the focus on workload issues is of limited relevance to the Commission's mandate. The Government submits it is not the function of the Commission to act as salary arbiter.

223. Increasing salary does not change being overworked. This Commission notes the situation presently in British Columbia. An article in the November 28, 2011 edition of the Vancouver Sun headlined the "Chronic Judge Shortage" of Provincial Court Judges in British Columbia is leading to a backlog of court cases and a breakdown. This is resulting in a breakdown in the timely hearing of cases and causing prejudice to the rights of the accused. In our view, the solution, or at least one of the solutions, to this problem would be more Judges, not necessarily higher paid Judges.

224. Significant strides have been made by previous Commissions and the Government to address the inequities in the compensation of Provincial Court Judges. It is important that these accomplishments not be lost by this Commission. We see it as our duty to ensure the compensation process not stagnate or backslide and be reflective of present and prospective realities.

## **2. Most Qualified Applicants**

225. As pointed out above, we agree that the most important factor and the one accorded at this juncture the most weight is the compensation package appropriate to attract the most qualified applicants to the position of Judge on the Provincial Court. The evidence is that the present salary, together with the pension and benefit package is currently appropriate to do this. To coin an expression, "the proof is in the pudding".

226. Again, as pointed out above, the Association acknowledges that the Provincial Court is an excellent court consisting of Judges who are the most qualified for this position. In our view, it is therefore difficult to conclude that there is anything inappropriate about the current salary or remuneration package, or that an enhanced salary would attract the best if the remuneration package is already attracting the most qualified for this position.

227. The fact that there are presently 41 individuals whose applications for appointment to the Provincial Court have been reviewed and recommended by the Judicial Council is of significance in the consideration of the appropriateness of the salary. This number is 6 more than were in line at the time of the Zakreski Commission. This represents a significant pool to draw

from for the Provincial Court considering there were only 9 appointments to the Provincial Court since the last commission.

228. We draw from this that there is currently no difficulty in attracting the most qualified for the position to the position with the existing compensation package. Furthermore, the fact is that the Provincial Court Judges are not vacating their positions for greener pastures before retirement. There are no retention issues that result from the present compensation package.

229. We should point out at this juncture that we agree with previous commissions that what is an appropriate salary is not a determination made in isolation of the other benefits, especially in this case considering the value of the Judges' pension. The Association acknowledged that the pension for Provincial Court Judges is very generous. The present salary that was recommended by the Zakreski Commission and accepted by the Government is currently \$238,943. The current service cost of the pension is \$107,285. We do not accept the Association's position that the service cost is not the value of the pension to the Provincial Court Judges. The service cost is the actuarial valuation, a notional valuation based on reasoned assumptions of what one would have to pay, in this case, the Judge, to buy the pension provided by the Government to the Judges. The final value of the remuneration package, after including dental, sick leave and health plan, is \$366,204 per year. This does not include the value of all benefits.

230. While many lawyers in private practice may receive dental, sick leave and health coverage in addition to their salary, few, if any, in private practice, have a pension. In private practice, the lawyers' pension is typically solely funded from salary and earnings. For that matter, even in the public sector in Saskatchewan, few, if any, would have a pension as generous as the plan for Provincial Court Judges.

### **3. Senior Members of the Legal Profession in Private Practice**

231. The Association submits that the income of senior lawyers in larger offices in Saskatchewan is a factor in determining appropriate salary for the Provincial Court Judges. We do not disagree. It is a factor worthy and deserving of consideration. However, the problem we see is twofold. There is a lack of empirical, reliable and current information as to the income of senior lawyers in larger law firms in Saskatchewan. Also, we are not satisfied that the nature of the work of senior lawyers in larger offices necessarily makes them the most qualified for this position.

232. The evidence that was presented by the Association with respect to incomes of senior lawyers in larger firms in Saskatchewan was sketchy at best. Counsel for the Association has put forth his personal knowledge and that which he has been told by others of the income of senior lawyers in larger firms. He has invited members of the Commission to take into consideration their own personal knowledge. We have a problem with this approach. Unlike other information presented, personal knowledge is not public knowledge and therefore has not been subjected to the rigorous testing that reliable information should be subjected to.

233. We cannot personally conclude that the current compensation package, all components considered, is not appropriate to attract senior lawyers in larger firms that aspire or can be attracted to become a Provincial Court Judge.

234. The Government submits that the Provincial Court is primarily a criminal court with a significantly smaller civil law component and the best fit for Provincial Court Judges does not come from senior lawyers in larger offices, but rather from the talent pool found in smaller offices, criminal defence lawyers, Crown prosecutors and rural practitioners. There is substance in this submission. This does not mean that senior lawyers in larger firms are to be excluded from the pool of candidates. Compensation is only one factor that attracts candidates to the Provincial Court, and it may well be that senior lawyers in larger firms are not attracted to the position for reasons that having nothing at all to do with a compensation package. The work of a Provincial Court Judge may not necessarily line up with the work and expertise of a senior lawyer in larger firms.

235. In our view, there is another problem with the Association's submission that the current salary does not somehow favourably compare with compensation earned by senior lawyers in larger law firms. This submission predisposes that this is the target pool of the most qualified for the position of Provincial Court Judge. There is no evidence to support this. Quite frankly, absent compelling evidence to the contrary, while acknowledging that this a factor that should be taken into consideration, it would be improper, without further evidence, to accept that this is necessarily the best pool to draw from to become Provincial Court Judges. We suspect that public perception is not so much where the Judge came from, but rather the ability to do the job and do the job well.

236. There is another issue that surfaces when consideration is given to the compensation earned by lawyers in larger law firms. If one accepts, as we do, that this is a factor that should be taken into consideration in determining whether the salary is appropriate to attract the most qualified applicants, we should then consider the compensation earned by senior lawyers in larger law firms in other Provinces when we take into consideration the salaries earned by counterpart provincial Judges in other Provinces. If the salaries of Saskatchewan Judges are to be compared to the salaries of Judges, for example, the "have" Provinces of Alberta, Ontario and British Columbia, it would be of interest to know how the compensation earned by senior lawyers in larger law firms in Saskatchewan compared with the compensation earned by their counterparts in these other have Provinces. If, as we suspect, and alluded to in the submissions that senior lawyers in larger law firms in the Provinces of Ontario, Alberta and British Columbia earn more than their counterparts in Saskatchewan, then it would be logical that an adjustment should be made to the comparative earnings of Provincial Court Judges in the "have" Provinces when compared to those in Saskatchewan.

#### **4. Federally Appointed Judges**

237. We agree that the remuneration of federally appointed Judges is a factor that should be taken into consideration. However, we do not agree the rationale is based on parity or an analysis that is somehow premised on a percentage ratio between the two. Rather, the rationale for the consideration is that in Saskatchewan, as in other Provinces, federally appointed Judges compete with the same talent pool as Provincial Court Judges. The rationale comes back to attracting the most qualified person for the position to the position. If the disparity in the salary between the Provincial Court Judges and those Judges in the Court of Queen's Bench and Court of Appeal in Saskatchewan is such that the Provincial Court was losing out on attracting the most qualified for the position to the position, then it may follow that the salary of the Provincial Court Judge was not appropriate.

238. However, because the Court of Queen's Bench is more successful in attracting senior lawyers from larger firms in Saskatchewan, it does not, in and of itself, mean that the salary of the Provincial Court Judges is not appropriate. For the reasons set out above, the remuneration package is not the only factor that attracts candidates to seek judicial appointment. The nature of the work of the Provincial Court is different than that of the Court of Queen's Bench and accordingly each court attracts different candidates, all of whom may well be the most qualified for the position sought.

239. Again, as pointed out above, both the Association and the Government acknowledge that the Provincial Court is an excellent court filled with the most qualified in the position of Judge and as the Government has pointed out, there is a significant pool of approved candidates waiting to fill vacancies in the Provincial Court. Therefore, there is little, if any, foundation to any submission at this time that the remuneration of the Provincial Court Judge is inappropriate.

240. It is of note that although parity with federal Judges, in and of itself, is not a factor, the present process of striving to meet the constitutional tests of judicial independence and, in particular, the financial security of the Provincial Court, that the disparity between the two salaries has narrowed. The data provided by the SCDLA indicates that in 1985 the salary of the Provincial Court Judge was 67.6% of that of the Judge of the Court of Queen's Bench. In 2011 the salary of the Provincial Court Judge is 85% of the salary of the Judge of the Court of Queen's Bench.

#### **5. Senior Lawyers in Saskatchewan Public Practice**

241. We agree that the remuneration of senior lawyers in Saskatchewan in public practice, including Crown prosecutors and lawyers at the Saskatchewan Legal Aid Commission is also a factor for consideration. It is readily apparent that the remuneration of a Provincial Court Judge is greater than that of senior Crown prosecutors and senior lawyers at the Saskatchewan Legal Aid Commission. The talent pool in Crown prosecutors and at the Saskatchewan Legal Aid Commission is closely associated with the work of the Provincial Court. It would therefore follow that the most qualified from this pool, if inclined, would most likely be attracted to the salary presently paid to Provincial Court Judges.

242. However, we are inclined to place little, if any, weight as a comparable on the salary of the Deputy Minister of Justice and the Deputy Attorney General. The Government has pointed out that the role of the Deputy Minister is quite different than the role of a Judge. The Deputy Minister is accountable to the Premier and serves at pleasure rather than with the security of tenure. The position of Deputy Minister is, or certainly can appear to be, a political position. The Commission's objective is to depoliticize the process of determining remuneration.

## **6. Provincial Judges in Other Provinces**

243. We agree that the remuneration paid to Provincial Court Judges in other Provinces is a very relevant factor in determining the appropriate salary in Saskatchewan. However, this is not because the talent pool of senior lawyers in Saskatchewan are logical candidates for the position of Provincial Court Judges in other Provinces, but more because one of the conditions of financial security is that salaries do not fall below an acceptable level for the office of Judge. We are also sensitive of the definition of "national average" in the Act in that it serves as a threshold below which the Government cannot go below if it chooses not to follow the Commission's recommendation on salary.

244. We are interested but not persuaded by the Association that the salaries paid to the Provincial Court Judges in the so-called "have" Provinces of Alberta, British Columbia and Ontario are more analogous on rational terms with that of Saskatchewan and therefore should be given more weight to the exclusion of the other Provinces. In our view, this is too narrow. Manitoba is similar in size and, like Alberta, is proximate to Saskatchewan. We are reluctant to ignore the salaries in the other Provinces.

245. Also, as pointed out earlier, if reliance was to be placed on the three "have" Provinces as the best comparables because Saskatchewan can be considered now a "have" Province as well, then the salaries paid in these three Provinces should be adjusted for comparable purposes to reflect the difference of salaries of lawyers within those Provinces with the salaries paid to lawyers in Saskatchewan. It was acknowledged in the submissions that the salaries of lawyers in these three Provinces have historically been greater than in Saskatchewan. If this is true, this may well explain why salaries of Judges in these three "have" Provinces have been at the upper end of the range. It is all relative to the economic realities that surround the talent pool that is being attracted. The economic realities vary from Province to Province and are forever changing. Put simply, if, for example, the most qualified for the position of Provincial Court Judge in Regina, Saskatchewan earns on average of \$250,000 and their counterpart in Vancouver earns on average \$300,000 then it would come as no surprise that British Columbia, in order to attract the most qualified for the position to the position would require a greater salary than in Saskatchewan.

246. What is missing in the submissions is empirical, reliable, current information as to the earnings of senior lawyers, not only in Saskatchewan but in the other Provinces, which the Association submits are the better comparables.

247. At this point in time, we are of the view that the Provincial Court Judges are paid more than the "national average" calculated on a static basis.

248. The mandate of this Commission is to make recommendations that are prospective. The problem with a static national average is that it is not prospective. The national average, although capable of calculation on a static basis, is in reality a moving target. There are recommendations of commissions in other Provinces that have not been approved and are in litigation. There are those where the recommendations are in limbo. There is a timing difference that distorts matters and leads the Association to invite us to look at projected salaries, for good reason, rather than static salaries today.

## **7. Pension**

249. We agree that in determining the appropriate salary one cannot ignore the very generous pension of the Provincial Court Judges in Saskatchewan. The remuneration package of salary and pension in Saskatchewan, in 2011 (\$346,228), ranks well ahead of all other Provinces (it would appear that none were more than \$300,000 excepting only Ontario - \$359,881). More will be said of the pension and pension indexing later.

## **8. Saskatchewan**

250. We agree that the prevailing economic and fiscal conditions in Saskatchewan are a relevant factor. We agree with the submissions by the Government and the Association that these are indeed good economic times for Saskatchewan. No one of us can predict the future, but when required to make future decisions, they should be based on the best and most current available information. The Saskatoon StarPhoenix saw fit to report in its December 13, 2011 paper, the article entitled "Province Poised for More Growth". The article referred to a report from RBC that projects Saskatchewan's real GDP will grow 4.2% in 2012 and 4.7% in 2013. The article states that nationally, Canada's GDP is expected to grow 2.5% in 2012. The present economic future for Saskatchewan looks good.

## **9. Cost of Living Adjustments**

251. The appropriate salary should take into consideration increases in the cost of living. This is one of the factors referred to in *P.E.I. Provincial Court Judges Reference*.

## **10. Other Factors**

252. The above list of factors is not exhaustive. There were other factors referred to in the submissions, for example, the advantage of lawyers in private practice to incorporate, which while not fully addressed by this Commission in this Report, does not mean they were not considered. Rather, they were not of sufficient weight to influence our recommendations or in our view, at this time, of importance to earn further comment.

## **11. What Adjustments in Salary, if any, are Required over the Next Three Years**

253. We are of the view that the present salary of the Provincial Court Judges is appropriate for all of the reasons stated above. We do not feel it is necessary to recommend any "catch up" in salary. In our view, the present salary, together with the pension and other financial benefits satisfies the condition of financial security in judicial independence.

254. However, this is today, and our mandate is to make recommendations for the next three years. Even the Government's submissions recognize that it would inappropriate for salaries to remain stagnant for this period.

255. If the salary is appropriate today, then the salary that is recommended should not go backward, but be a salary that is appropriate over the next three years.

256. The Marshall Report identified that the personal income growth in Saskatchewan in the five year period from 2006 to 2010 was 33.7%; CPI increased 11% and the GDP growth in Saskatchewan was 35.4% and the Provincial Court Judges' salaries increased 39.1%. We draw from this that if the salaries of the Provincial Court Judges during this period had only been increased at the same rate as CPI, the salaries would have fallen behind the rest of income growth in Saskatchewan and compared to the salaries of Provincial Court Judges in other Provinces would be at the low end of the range and perhaps less than the static national average.

257. Therefore, in the circumstances, the increase should reflect more than a cost of living increase.

## **12. Recommendations on Salaries**

258. This Commission makes the following recommendations:

- (a) For the period April 1, 2012 through March 31, 2013 the base salary of \$238,943 be adjusted by the increase in the All Items Saskatchewan Consumer Price Index ("SCPI") as measured by the average annual increase between January 1, 2011 and December 31, 2011, that this adjustment not be less than zero and the resulting figure be further adjusted upward by an additional 1%.
- (b) For the period April 1, 2013 through March 31, 2014 the base salary of the preceding period be adjusted by the increase in the SCPI as measured by the average annual increase between January 1, 2012 and December 31, 2012, that this adjustment not be less than zero and the resulting figure be further adjusted upward by an additional 1%.
- (c) For the period April 1, 2014 through March 31, 2015 the base salary of the preceding period be adjusted by the increase in the CPI as measured by the average annual increase between January 1, 2013 and December 31, 2013, that this adjustment not be less than zero and the resulting figure be further adjusted upward by an additional 1%.
- (d) The administrative allowances for the Chief Judge, the Associate Chief Judge and the Judges with administrative duties remain the same as currently set out in the Provincial Court Compensation Regulations, namely Chief Judge 7.5%; Associate Chief Judge 5% and Administrative Judge 2.5%.

- (e) The remuneration for Temporary Judges remain at a daily rate of 1/220ths of the base salary of a Judge.

### ***C. Indexing of Pension***

259. There is not sufficient information before this Commission to demonstrate why there should be an increase in the indexing of the pension, let alone to the extent requested by the Association.

260. The fact that other Provinces provide greater or 100% indexing is not, in and of itself, sufficient to conclude that there needs to be an adjustment to the indexing provided to the pension of Saskatchewan.

261. The Government suggests that the pensions in other Provinces have different contribution limits. It was suggested, on the Government's side during the hearing, that the contribution limit may be as high as 10% of the Judges' salary in one Province. This information was anecdotal.

262. There may well be other nuances that, if demonstrated, would require adjustments to a comparable in another Province to permit a proper comparison with the pension in Saskatchewan.

263. Information that would be useful for comparative purposes among Provinces would include:

- (a) contribution limits;
- (b) provincial practices on indexing of pensions; and
- (c) the starting point before indexing.

264. This list is not exhaustive. We suspect an actuary could identify the salient factors to set the proper framework for consideration.

265. We do note that while indexing is important, the starting point of the pension may be of more importance. For example, in comparing two pensions, all other factors being equal, if the one plan provides 100% indexing but on a lower amount, the other plan that provides for a higher amount need not require 100% indexing to make it the superior plan. We have to be careful to compare apples with apples rather than with oranges.

266. Also, the increase from year to year in the salary may go some way to compensate for less than 100% indexing.

267. For the foregoing reasons, we recommend that, at the present time, there be no changes to the pension entitlements for the Provincial Court Judges at this time.

## ***D. Other Matters***

### **1. Professional Allowance**

268. The Commission has considered the Association's request for an increase in the current Professional Allowance from \$3,500 to an annual sum of \$4,000, on the basis that the Judges of the Court would allocate \$350 of the increase to a specific judicial robe replacement account and the remaining \$150 would go directly to the Professional Allowance of each Judge. We have considered the history of this benefit and the fact that it has not been increased since April 2006. We have also considered that Government has undertaken to make the cost of robes an operational expense under the Court Operations budget.

269. We recommend an increase in the Professional Allowance to \$3,650. This increase is intended to reflect our finding that although the cost of robes and robe replacement will be paid by Government henceforth, some increase is still appropriate to reflect that there have been other increased costs for permitted benefits in the years since 2006.

### **2. Sabbatical for Office of Chief Judge**

270. This Commission does not recommend a sabbatical for the Office of the Chief Judge. The Commission has given careful consideration to the request from the Association that the Office of the Chief Judge be given a three month paid sabbatical at the end of his or her service. Given the submission presented, this Commission is of the view that the identified issues that may be necessary for the Chief Judge to address on return to active Court duty can be addressed within the current system.

### **3. Enhanced Medical, Drug, Dental and Eye Care Benefits**

271. The Association and the Government are in agreement that the Judges of the Provincial Court receive the same medical, drug, dental and eye care benefits as and when they are made available to the Executive Branch of the provincial government civil service. The Association seeks a formal endorsement of the principle from this Commission to address the fact that there is sometimes a significant time lag before the increase is accessible by the Judges. While Government's response is that any delay results from the timing of the renewal of the benefits contract for Judges, we encourage them to enter into discussions with the Association to find an administrative mechanism to address any such future time lag anomaly.

### **4. Medical, Drug, Dental and Eye Care Benefits for Retired Judges**

272. This Commission adopts the finding of previous Commissions that we do not have jurisdiction to inquire into or make recommendations with respect to Retired Judges and thus we decline to make the recommendations proposed by the Association with respect to the extension of these health benefits to them.

## **5. Flexible Health Care Benefit**

273. The Commission has considered the Association's request but declines to recommend that Judges receive a Flexible Benefit, equivalent to the Flexible Benefit received by out-of-scope public employees in the Executive Branch. We endorse the Government's proposal that the current guidelines for eligible expenses that can be funded in the Judges' Professional Allowance be expanded to include eligible expenses equivalent to those allowed to public service employees under the Flexible Benefit Plan expenditures to promote physical fitness and the other goals, if applicable to Judges, referred to earlier in paragraph 192.

## **6. Review of Spousal, Survivor and Dependent Pension Benefits**

274. With respect to the Association's request for a direction from this Commission that Judges and Government enter into a thorough review of spousal, survivor and dependent pension benefits at this time, we are of the view that it is not necessary to make such direction. The Government indicates that it is willing to discuss the details of these benefits and we encourage the parties to engage in discussion to address the concerns identified by the Association.

## **7. Costs**

275. The Government has submitted that the issue of the costs of the Commission process is beyond the jurisdiction of our mandate. Commissions in the past, including the Vicq Commission and the Barnard Commission, have rejected this submission and expressed the view that they had such jurisdiction. They have, however, directed that the representatives of the Government and the Association attempt to reach a satisfactory agreement on the appropriate costs, and retained the right to hear submission as to costs if agreement cannot be reached.

276. The Government acknowledges that the issue of costs of the Commission process has previously been resolved between representatives of the Government and the Association without any need for intervention by the Commission. The Government does not expect that it will be any different for the costs of this Commission process.

277. The Association also anticipates the issue of costs will be resolved outside the Commission process, but have asked that this Commission reserve this issue for further deliberation, if required.

278. This Commission makes no order as to costs at this time and remains seized of the matter. If satisfactory agreement cannot be reached, the Commission will hear submissions as to costs.

## **8. Legislative Review**

279. We are of the view that we lack the jurisdiction to recommend the legislative review of the Act as requested by the Association. We note the Government's position that they are willing to consult with the Judges and the Association if changes to the Act are to be contemplated.

280. Accordingly, the recommendations on the other matters that fall within our mandate can be summarized and are as follows:

- (a) We do recommend an increase of \$150 in the Professional Allowance.
- (b) We do not recommend there be a sabbatical for the Office of the Chief Judge.
- (c) We do not recommend there be any changes to the medical, drug, dental and eye care benefits for the Judges.

### ***E. Recent Developments***

281. In the midst of concluding the recommendations set out in this Report, the Commission was informed that Reports were rendered by our counterpart Commissions in the Yukon and Nova Scotia and the Alberta Government accepted most of the recommendations by the Alberta Commission. The nature of this process is a work-in-progress. Such concepts as the “national average” and comparables in other Courts and jurisdictions are forever changing. However, this is the nature of the environment that these recommendations must be made.

#### **1. Alberta**

282. In Alberta, most of the recommendations made by the Alberta Commission have been accepted by the Alberta Government.

283. The base salary of Provincial Court Judges in Alberta will eclipse the salary increases recommended by this Commission in respect of Provincial Court Judges in Saskatchewan. The salaries of Provincial Court Judges in Alberta are:

April 1, 2009 to March 31, 2010	\$250,000
April 1, 2010 to March 31, 2011	\$255,000
April 1, 2011 to March 31, 2013	increased by the percentage amount of the year-over-year increase, if any, in the Alberta (All Items) CPI for the preceding calendar year.

284. The recommendations by the Alberta Commission for such increases were made against the following backdrop. Judicial salaries had remained frozen in Alberta from 2006 to 2009 at \$220,000. It was noted by the Alberta Commission that the proposal by the Alberta Judges Association for an increase of 13.6% to \$250,000 effective April 1, 2009 was only 1.2% more than the cumulative changes in the cost of living over the same period, and that this was much less than the range of substantial salary increases granted to the public sector groups in Alberta during this period.

285. The Alberta Commission detected a strong linkage between the pay levels of Alberta and Ontario Provincial Judges reflected by the pattern of recommendations from Judicial Compensation Committees in Alberta over the last decade. The Alberta Commission was of the view that it was reasonable to maintain this trend. The Alberta Commission further reasoned that

its recommendations would result in an increase effective April 1, 2011 to \$257,550 in Alberta compared to \$262,113 in Ontario.

286. Unlike our Alberta counterparts, we do not detect any such linkage in Saskatchewan between pay levels of Saskatchewan and Ontario Provincial Court Judges, or any other Provincial or Federal Court Judges.

287. The Alberta Government also accepted the recommendation of 100% indexing of Provincial Court Judges' pensions in Alberta.

288. The Alberta Judges Association commissioned an actuary to review the Alberta pension arrangements and compare to parallel plans in place federally and other Provinces. In Alberta the actuary followed the basic methodology used in the 2010 Report prepared by Mercer for the Government of Quebec and which was filed in the Quebec Judicial Compensation Commission proceedings. The Alberta Commission states in its Report at pp 42-43 as follows:

The Mercer Report took 5 characteristics of judges, representative of those enrolled in the plan, and calculated the various aspects of the provincial plans in place to determine what it called the value of the plan for each of the profiles, expressed as a percentage of a judge's base salary. It then subtracted from this total value, the judge's contribution to the cost of the pension (7% in Alberta's case), to arrive at a net or "residual value" for each provincial plan. It charted these residual values for judges in each profile, by Province, so that provincial plans could be compared, on a value basis, using common assumptions, the one to the other. It then averaged these five profiles, yielding the following provincial plan value rankings:

Federal	45.9%
Saskatchewan	40.1%
Quebec	39.5%
Ontario	39.5%
PEI	35.1%
Nova Scotia	34.6%
British Columbia	32.3%
Manitoba	31.8%
Alberta	30.2%
New Brunswick	29.9%
Newfoundland	27.5%

Alberta thus ranked 9<sup>th</sup> out of 11, with a benefit significantly below the average net value of 34.7% and only about 2/3 of the value of the plan in place for federal judges.

289. This actuary adjusted some of the assumptions made in the Mercer Report to assess the relative value of the plans. The Alberta Commission states in its Report at pp. 43-44 as follows:

The profiles were altered to better reflect Alberta's demographics and its judicial population. The conclusions, also provided to us in chart form, read as follows:

On the basis of the five identified profiles and the above retirement age assumption, the value of the judicial pension in Alberta ranks 9<sup>th</sup> out of 11. Its value is 26.7% of salary compared to 30.6% of salary on average for judges in other jurisdictions for a negative spread of 3.9% of salary (26.7% versus the 30.6% average) representing a 12.7% shortfall (1-26.7%/30.6%).

With costs of living increases set at 100% of CPI, the value of the judicial pension in Alberta would rank 5<sup>th</sup> out of 11. Its value would still be slightly lower than the average of the other pension arrangements (negative spread of approximately 1% of salary) representing a 3% shortfall.

Compared with the pension arrangements of Ontario, BC, Saskatchewan and the federal government, the value of the judicial pension in Alberta ranks 5<sup>th</sup> out of 5. Its value is 8.2% of salary lower than the average of the other pension arrangements (26.7% versus the 34.9% average) which represents a 23.5% lower value (1-26.7%/34.9%).

With 100% indexing, it would still rank 4<sup>th</sup> out of 5 and its value would still be 5.2% of pay lower than the average of the other pension arrangements (29.7% versus the 34.9% average) which represents a 15% lower value (1-29.7%/34.9%).

Relative to other provincial pension arrangements then, even with the 100% proposal the Association advances, Alberta remains significantly below comparable provinces and significantly below the federal arrangements in terms of the net value of its overall pension scheme. ...

In summary, we find that virtually all the significant comparable plans in Canada provide this 100% index provision. Introducing this benefit for Alberta judges will still leave the overall benefit of the pension arrangements somewhat behind those in place elsewhere.

290. The Minister of Justice and Attorney General for Alberta retained Aon Hewitt, an actuarial pension expert to provide expert evidence for the purpose of the Commission and to further provide an analysis in respect of certain of the recommendations in the Alberta Commission Report. The Aon Hewitt's Analysis Report (the "Aon Report") was attached to the Order in Council 520/2011 in the Province of Alberta concerning the recommendations of the Alberta Commission.

291. Appendix D to the Aon Report is a summary of the pension plan provisions by jurisdiction. This Appendix sets out the contribution rate of Provincial Court Judges by Province. The contribution rate is the percentage of the salary contributed by the Judge towards funding his or her pension benefits. The contribution rates and periods during which contributions are paid vary from Province to Province. The Aon Report indicates that the lowest contribution rate is 5% and that is in Saskatchewan. The contribution rate in Alberta is 7%. The highest rate is 9% (which is reduced to 0% at 20 years of service) in Newfoundland and Labrador.

292. Contribution rates, periods during which the Judges make contributions, retirement age, pension amount, and the pension calculation formula are just some of the factors to be considered, together with the methodology and assumptions that must be taken into consideration to assess the relative value of pension plans. This value is an opinion typically provided by an actuary with the requisite experience and qualifications to provide such an opinion. As pointed out earlier, no such opinion was provided by either the Association or the Government in the process before this Commission. As such, this Commission does not have the required information to make an informed and reasonable recommendation to adjust pension indexing in Saskatchewan.

293. This Commission takes notice that Saskatchewan's pension was ranked highest of all the Provinces in Mercer Report based on the methodology and assumptions used. This, for the moment, solidifies the Commission's confidence that its recommendations with respect to pension meet the tests of judicial independence.

## **2. Nova Scotia**

294. On December 5, 2011 the Nova Scotia Provincial Judges' Salaries and Benefits Tribunal provided its report and recommendations for the period of April 1, 2011 to March 31, 2014.

295. The salary for Nova Scotia Provincial Judges for the fiscal year ending March 31, 2011 was \$207,577. The recommendation was to increase this salary for the 2011-2012 year to \$214,000 and for the years 2012 through 2014, the salaries were to be increased annually by the percentage increase, if any, in the Nova Scotia Industrial Average Index for the preceding calendar year.

296. The Tribunal acknowledged that this is well below the national average, but believes that the base amount reflects the circumstances which, in its view, Nova Scotia finds itself at the moment.

297. The Tribunal recommended that the indexing of the Provincial Judges' pension benefits in Nova Scotia from January 1, 2011 to March 31, 2014 correspond to 75% of the Canadian CPI to a maximum of 5%. By way of background, the Nova Scotia Tribunal determined the pension issue in light of statutory reform to the Public Service Superannuation Plan (the "PSSP" or the "Plan"), of which Nova Scotia Provincial Judges are members. The changes to the PSSP were designed to address underfunding of the Plan and included reducing indexing to 75%. The Tribunal, in determining whether the statutory changes could constitutionally apply to Judges, held that Nova Scotia Provincial Judges would remain PSSP members, but that the Tribunal would determine the indexing rate. The Tribunal set the indexing rate at 75%, consistent with other members of the Plan.

298. This Commission observes the changes in pension indexing in Nova Scotia and acknowledges the context in which the Tribunal arrived at its decision to index pensions at 75%. This situation is different from Saskatchewan. As such, the Nova Scotia Tribunal's decision to index at 75% does not affect this Commission's decision with respect to pension indexing.

### **3. Yukon**

299. The 2010 Yukon Judicial Compensation Commission Report was submitted December 5, 2011.

300. The parties were in agreement and submitted joint submissions to the effect that the Yukon Commission should recommend the following salaries for Territorial Court Judges effective the following dates:

April 1, 2010	\$235,746.40 (3% increase)
April 1, 2011	\$242,818.92 (3% increase)
April 1, 2012	\$250,103.33 (3% increase)

301. Pension and other benefits were not before the Yukon Commission. Accordingly, there are no recommendations with respect to pension benefits in the Yukon Report.

302. This Commission notes that the Yukon Commission endorsed the joint recommendation of the Judges and the Government with respect to Territorial Court Judges salaries. The Yukon Commission undertook an analysis to ensure that judicial independence was maintained, as was done by this Commission. However, this Commission notes that the Yukon Commission is mandated to consider factors that we are not, including the unique nature of the Yukon and the financial position of the Government. Furthermore, the Yukon Commission was limited to comparing salaries to British Columbia, Northwest Territories, Alberta and Saskatchewan. This Commission was not bound by such constraints and felt it more appropriate to consider salaries across the nation.

### **4. Concluding Remarks**

303. Of recent note is the update on the All-Items Saskatchewan Consumer Price Index which has increased 2.9% between November 2010 and November 2011. If the increase holds true for the year ending December 31, 2011, the recommendations of this Commission result in a base salary effective April 1, 2012 of \$248,331.

304. In our view, the compensation, salary, pension and other benefits recommended for the Provincial Court Judges in this Report compares favourably with other known and recognized comparables and meets the constitutional tests of judicial independence.

305. We are indeed blessed in Saskatchewan with the good fortune of the day, much of which can be attributed to the hard work and perseverance of our ancestors. Today Saskatchewan reaps the benefits of what has always been in this Province, and our recommendations as set out in this Report reflect what we perceive to be remuneration sufficient to maintain judicial independence of Provincial Court Judges in Saskatchewan.

## **X. SUMMARY OF RECOMMENDATIONS**

306. In summary, we recommend as follows:

- (a) For the period April 1, 2012 through March 31, 2013 the base salary of \$238,943 be adjusted by the increase in the All Items Saskatchewan Consumer Price Index ("SCPI") as measured by the average annual increase between January 1, 2011 and December 31, 2011, that this adjustment not be less than zero and the resulting figure be further adjusted upward by an additional 1%.
- (b) For the period April 1, 2013 through March 31, 2014 the base salary of the preceding period be adjusted by the increase in the SCPI as measured by the average annual increase between January 1, 2012 and December 31, 2012, that this adjustment not be less than zero and the resulting figure be further adjusted upward by an additional 1%.
- (c) For the period April 1, 2014 through March 31, 2015 the base salary of the preceding period be adjusted by the increase in the CPI as measured by the average annual increase between January 1, 2013 and December 31, 2013, that this adjustment not be less than zero and the resulting figure be further adjusted upward by an additional 1%.
- (d) The administrative allowances for the Chief Judge, the Associate Chief Judge and the Judges with administrative duties remain the same as currently set out in the Provincial Court Compensation Regulations, namely Chief Judge 7.5%; Associate Chief Judge 5% and Administrative Judge 2.5%.
- (e) The remuneration for Temporary Judges remain at a daily rate of 1/220ths of the base salary of a Judge.
- (f) There be no changes to the pension entitlements, including indexing, for the Provincial Court Judges at this time.
- (g) The Professional Allowance be increased from \$3,500 to \$3,650.
- (h) There be no sabbatical for the Office of the Chief Judge.
- (i) There be no changes to the medical, drug, dental and eye care benefits for the Judges.

## **XI. CLOSING**

307. In closing, this Commission wishes to express a sincere thank you to those parties who have made submissions in this process. The calibre was exemplary; befitting of the Provincial Court, those who represent the accused and the litigants before it, and the Government's

commitment to the independence of the judiciary “not as an end in and of itself but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice.”

Dated at Saskatoon, Saskatchewan, this 30<sup>th</sup> day of December, 2011.

“William F.J. Hood”

William F.J. Hood, Q.C., Chairperson

“Catherine M. Knox”

Catherine M. Knox

“George W. Patterson”

George W. Patterson