

**THE 2017 PROVINCIAL COURT COMMISSION
OF SASKATCHEWAN**

APPOINTED PURSUANT TO

THE PROVINCIAL COURT ACT, 1998

CHAIR: MR. LESLIE PROSSER, Q.C.
COMMISSIONERS: MR. PAUL S. JASPAR, FCPA FCA
MR. MERLIS BELSHER, FCPA FCA LLB

**SUBMISSION OF
THE GOVERNMENT OF SASKATCHEWAN**

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The Minister of Justice and Attorney General for the province of Saskatchewan is pleased to make this Submission to the Provincial Court Commission appointed pursuant to *The Provincial Court Act, 1998*.

This submission focuses on the issue of salaries. If other submissions filed with this Commission raise additional issues, the Minister will address those issues in reply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Minister of Justice and Attorney General

Per: 

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I. INTRODUCTION

1. The Government of Saskatchewan is deeply committed to the constitutional principle of judicial independence. That principle is the cornerstone of the Canadian court system. Judicial independence is essential to ensure fair and reasoned decisions from the courts, decided solely on the merits of each case. Judicial independence also ensures that the public has confidence in the court system and in court decisions, confident that the courts make their decisions without any external pressures or influences. Judicial independence is a crucial guarantee of the rule of law in a free and democratic society.

2. In Canada, judicial compensation commissions are one component of the constitutional guarantee of judicial independence. The commissions, such as this Commission, are placed between the elected branches of government and the judicial branch, to make independent recommendations about the adequacy of the compensation package for the judiciary. Compensation commissions have been in place across Canada since the seminal case by the Supreme Court on the issue, *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*.¹

3. The Government of Saskatchewan fully supports the judicial compensation commission process. Since its statutory inception in 1998, the Provincial Court Commission has provided valuable recommendations on the compensation package for

¹ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 (“*Provincial Court Judges Reference*”).

Judges of the Provincial Court of Saskatchewan. In every case, the Government in turn has implemented the recommendations of the Commission concerning salary and pension.

4. As well, the Government recognizes that the Provincial Court of Saskatchewan is composed of forty-eight accomplished, diligent and dedicated judges: the Chief Judge and forty-seven Judges.² This Province is fortunate to have such highly qualified, highly motivated, and highly esteemed individuals serving the public interest. The Government is committed to retaining those Judges on the Bench, and to ensuring that future appointees to the Provincial Court are of the same calibre. An attractive compensation package, composed of both salary and pension benefits, is essential to meeting those goals.

5. At the same time, the Government also recognizes that its financial resources must be allocated prudently and responsibly to cover a wide range of legitimate but competing public priorities — from education to health care, from public security to infrastructure. Adequate judicial remuneration is a constitutional imperative. The assessment of what qualifies as a constitutionally adequate level of judicial remuneration must take into account and be sensitive to local economic conditions and realities, in addition to widely divergent but meritorious demands upon the provincial treasury. In particular, the current financial and budgetary position of the Government is a significant factor which the

² “Courts of Saskatchewan: Provincial Court: Judges”; available on-line at: <https://sasklawcourts.ca/home/provincial-court/judges>.

Commission should take into account. In light of those current fiscal pressures, the Government has set a broad financial policy of reducing public sector compensation by 3.5% across the board, including the two elected branches of government, namely the legislative and executive branches.

6. The Government submits that the judicial salary, pension and retirement benefits, allowances, and other benefits provided to judges of the Provincial Court of Saskatchewan exceed the minimum degree of financial security — both individual and institutional — demanded by the constitutional principle of judicial independence. The salary for Saskatchewan Provincial Court Judges is well above the national average for provincial and territorial court judges: more than \$30,000 above the national average, and close to \$70,000 more than the lowest paid judges, from Newfoundland and Labrador. The pension and additional retirement benefits are very generous, exceeding what is available in the private and public sectors. The total amount of compensation currently paid to the judges meets the constitutional principle of judicial independence. It also meets or exceeds the goals of recruitment from the Bar and retention of judges on the Court.

7. While the current total package meets the constitutional requirements for judicial compensation, the Government acknowledges that judicial compensation is not static. The Supreme Court has indicated that while there is no guarantee of automatic salary increases, judicial salaries cannot be allowed to stagnate.

8. However, the Government submits that the two previous Commissions over-compensated for the effects of inflation in awarding salary increases based on the Saskatchewan Consumer Price Index plus an additional percentage increase each year. The Government respectfully submits that the methodology used to compensate for inflation was flawed, as the actual experience with inflation over the past six years demonstrates. Increases which were said to be necessary to keep pace with inflation in fact over-compensated, resulting in real salary increases, not simply increases to keep pace with inflation. The last Commission also took into account factors which the Government respectfully submits were not appropriate, such as a perceived need to keep the Saskatchewan Judges amongst the best-paid in the country, which led the Commission to recommend a real salary increase. The Government respectfully submits that concern is not mandated by the Constitution.

9. With the benefit of the actual inflationary trends over the past six years now available, and taking the Government's financial situation into account, the Government recommends that there be no increase to the salaries of Provincial Court Judges over the next three years. That approach, taking projected inflation into account, means that the over-compensation of the previous salary increases will more accurately reflect inflation over the past six years and the upcoming three years. Judges will continue to keep pace with the cost of living in Saskatchewan and maintain their current high levels of salary,

which will insure that the Provincial Court continues to attract and keep high quality candidates for the Bench.

II. OUTLINE OF THE GOVERNMENT'S SUBMISSION

10. In this Submission, the Government will begin by summarising the appointment and mandate of the 2017 Provincial Court Commission. The Submission will then turn to a review of the principles of judicial independence, as set out by the decisions of the Supreme Court of Canada, and the application of those principles to the function of this Commission in recommending appropriate levels of compensation for the Judges of the Provincial Court.

11. This Submission will then review the statutory framework for the Commission, as set out in *The Provincial Court Act, 1998*,³ and follow up with a summary of the decisions of the Commission over the past twenty years, including the most recent Commission, the Hodson Commission of 2014.⁴ This historical review will include a table of all salary increases over that twenty year period.

12. The Submission will then comment on the details of the compensation package currently enjoyed by the Judges of the Provincial Court, both the salary and the combined pension and retirement benefits, and relevant comparative factors. The Government respectfully submits that the total compensation package, not just the salary, must be considered in assessing the adequacy of judicial remuneration for the purposes of insuring

³ *The Provincial Court Act, 1998*, SS 1998, c. P-30.11 ("the Act").

⁴ "Report and Recommendations of the 2014 Provincial Court Commission of Saskatchewan, December 23, 2014" ("Hodson Commission 2014"). Online: <http://publications.gov.sk.ca/documents/9/100331-2014-PCC-Final-Report.pdf>

judicial independence. As well, both the salary and the combined pension and retirement benefits must be considered in relation to recruiting and retaining qualified individuals to the Court.

13. Having reviewed these factors, this Submission will address the issue of salary, which the Government anticipates will be one of the issues raised by the Provincial Court Judges' Association, and will outline in detail the reasons for the Government's proposal for no salary increase over the next three years.

14. As will be outlined in the section on the Commission's statutory mandate, there are other matters which the *Provincial Court Act* requires this Commission to review. The Government is not aware of any concerns with those other matters, such as the pension and retirement benefits, and will not address those other matters in this Submission. If the Association makes proposals with respect to any of the other matters in its Submission, the Government will respond to those proposals in its Reply.

III. THE 2017 PROVINCIAL COURT COMMISSION AND ITS MANDATE

15. The 2017 Provincial Court Commission was established in the early summer of 2017, in accordance with s. 36 of the *Provincial Court Act*. In June, 2017, the Association advised the Deputy Minister of Justice that it had appointed Mr. Paul Jaspar, FCPC, FCA, of Saskatoon, Saskatchewan as its appointee to the Commission.⁵ The Minister of Justice appointed Mr. Merlis Belsher, FCPA, FCA, LLB, of Saskatoon, Saskatchewan as his appointee to the Commission.⁶ Jointly, Mr. Jaspar and Mr. Belsher appointed Mr. Leslie Prosser, Q.C., of Saskatoon, Saskatchewan, to serve as Chairperson.⁷

16. Subsections 38 (1) and (2) of the *Provincial Court Act* set out the Commission's mandate:

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 judge 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) [i.e., administrative duties assigned by the chief judge];

⁵ E-mail from Judge Anand to Deputy Minister Gardner, June 27, 2017.

⁶ Minister's Order, June 28, 2017.

⁷ Letter from Merlis Belsher and Paul S. Jaspar to Deputy Minister Gardner.

- (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).

17. The benefits referred to in s. 38(2)(b) are set out in s. 65(d) of the Act:

65 The Lieutenant Governor in Council may make regulations:

...

- (d) providing for the benefits to which judges are entitled, including:
 - (i) leave of absence;
 - (ii) sick leave;
 - (ii.1) deferred salary leave;
 - (ii.2) leave for reasons of pressing necessity;
 - (ii.3) special leave;
 - (iii) travelling, sustenance and moving expenses;
 - (iv) life insurance; and
 - (v) disability, dental and health benefits;

18. The Commission thus makes two types of recommendations under the *Provincial Court Act*: required and advisory. The Commission is required to review the matters listed in s. 38(1), which relate to the remuneration package for Provincial Court Judges. The *Provincial Court Act* contemplates that the Government will adopt those recommendations

unless the Legislative Assembly passes a resolution pursuant to s. 45 of the *Provincial Court Act* rejecting one or more of them and directing the Commission to amend its proposed Regulation accordingly.

19. The type of recommendations which are advisory are listed in s. 38(2) of the *Provincial Court Act*. In contrast to the matters which the Commission is required to review under s. 38(1), the Commission possesses discretion whether to review the matters listed in s. 38(2) and to make any recommendations. The Government in turn has discretion whether to implement advisory recommendations.

20. In addition to the recommendations, the *Provincial Court Act* also gives the Commission the duty to prepare and enact regulations to implement its recommendations under s. 38(1). This is a departure from the normal rule that regulations are enacted by the Lieutenant Governor-in-Council. For the purposes of judicial compensation under s. 38(1), the Commission itself is the regulation-making authority, if the Minister accepts the Commission's recommendations.

21. The Commission does not have any power to make regulations to implement an advisory recommendation which it makes under s. 38(2). The Cabinet retains the power to make regulations for that purpose, under s. 65 of the *Provincial Court Act*.

22. Technically, the *Provincial Court Act* calls for the Commission to make two reports: one relating to the required matters, and one relating to the advisory matters.⁸ In practice, past Commissions have filed one comprehensive report, but clearly identified which recommendations are made under s. 38(1) and which are made under s. 38(2).

23. If the Commission plans to make a recommendation which requires a regulation, the Act requires that the Commission give an advance copy of its proposed Regulation to both the Minister and the Association, to give both parties “an opportunity to comment on technical and drafting issues with respect to the proposed regulations.” The Act does not set a deadline for the Commission to give an advance copy, only requiring that it be given “in sufficient time before submitting the report” to allow both parties time to consider and comment on the draft regulations.⁹

24. The statutory deadline for the Commission to submit its Report is on or before December 31, 2017.¹⁰ However, since that date will fall on a holiday (Sunday), the provisions of *The Interpretation Act, 1995* governing the calculation of time provide that the submission deadline is moved to the next day which is not a holiday, which is Tuesday, January 2, 2018.¹¹

⁸ *Provincial Court Act*, s. 41(1), (2).

⁹ *Provincial Court Act*, s. 42.

¹⁰ *Provincial Court Act*, *supra* note 3, s. 41(1).

¹¹ *Interpretation Act, 1995*, SS 1995, c. I-11.2, s. 24(1), 27(1) “holiday”.

25. As previously discussed in the Initial Comments to the Commission in August, 2017, in the past two cycles the Commission has given its Report on December 30th or 31st, even if the Commission has finalised the Report internally before that date. This approach ensures that the Minister has the full thirty days set out in the Act to consider the Report, without interruptions caused by the Christmas season. The Government respectfully submits that the same approach should be followed again. For instance, the Commission could provide any draft regulations for comment in the last week of December, 2017, but deliver its Report on the final day possible, namely January 2nd, 2018.

IV. JUDICIAL INDEPENDENCE

A. Overview and General Principles

26. The principle of judicial independence is a fundamental value of the Canadian system of governance. In *Beauregard v. Canada*, Chief Justice Dickson characterized judicial independence as “the lifeblood of constitutionalism in democratic societies”, and summarized its essence as follows:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure group, individual or even another judge — should interfere in fact or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.¹²

27. Constitutional recognition of the importance of judicial independence is now more than three centuries old, dating back to the English *Act of Settlement* of 1701, which established that the judges of the English royal courts held their office “during good behaviour”, and could only be removed by the Crown on joint resolutions from the House of Commons and the House of Lords.¹³ In *Beauregard*, Chief Justice Dickson commented that in Canada, “the principle [of judicial independence] itself is probably more integral and

¹² *Beauregard v. Canada*, [1986] 2 SCR 56, pp. 70, 69.

¹³ *Act of Settlement*, 12 & 13 Will. III, c. 2, s. 3, para. (7): “... judges commissions be made *quamdiu se bene gesserint* [“during good behaviour”], and their salaries ascertained and established; but upon the address of both houses of parliament it may be lawful to remove them.”

important in our constitutional system than it is in the United Kingdom”.¹⁴ He cited two reasons why this was so. First, since Canada is a federal country, unlike the United Kingdom, it is essential that there be “an impartial umpire to resolve disputes between two levels of government as well as between governments and private individuals who rely on the distribution of [federal and provincial legislative] powers”.¹⁵ An independent judiciary fulfills this important function in our federal system.

28. Second, with the proclamation of the *Canadian Charter of Rights and Freedoms* in 1982, Canada adopted a constitutional bill of rights which “... conferred on the courts another truly crucial role: the defence of basic individual liberties and human rights against intrusions by all levels and branches of government”. Dickson CJC concluded that only an independent judiciary can “play this deeply constitutional role”.¹⁶

29. The advent of the *Charter*, with its explicit recognition of the principle of judicial independence in section 11(d), inspired the judiciary to elaborate on its constitutional parameters. In the seminal case of *R. v. Valente*, the Supreme Court of Canada accepted that judicial independence has two dimensions — individual and institutional.¹⁷ The individual dimension relates to the independence of a particular judge. The institutional dimension relates to the independence of the court over which this judge presides, as

¹⁴ *Beauregard*, *supra* note 12, p. 71.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, p. 72.

¹⁷ *R. v. Valente*, [1985] 2 SCR 673, p. 687.

reflected in its institutional and administrative relationships to the executive and legislative branches of government. Institutional independence is sometimes also referred to as “collective” independence.

30. In *Valente*, the Supreme Court for the first time identified three essential conditions or components of judicial independence, namely: (1) security of tenure, (2) financial security, and (3) administrative independence.¹⁸

31. Since financial security, in both its individual and institutional dimensions, is central to this Commission’s mandate, it is helpful to recall how the Court defined financial security in its decision in *Valente* in 1985. Writing for a unanimous court, Justice Le Dain stated that financial security 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 pension and a pension that depends on the grace or favour of the Executive.¹⁹

32. Subsequently, in three significant rulings the Supreme Court elaborated upon and refined the *Charter’s* requirement for financial security for judges. These three rulings are

¹⁸ *Ibid.*, pp. 694, 704, and 708.

¹⁹ *Ibid.*, p. 704.

the *Provincial Court Judges Reference*,²⁰ *Ell v. Alberta*,²¹ and *Provincial Court Judges Association of New Brunswick v. New Brunswick (Minister of Justice)*.²² These three cases are the foundational cases for the constitutional requirement for commissions to make recommendations for judicial compensation. The Government will therefore review them in detail.

B. Provincial Court Judges Reference

33. In contrast to *Valente*, where the Court considered financial security as a function of the individual dimension of judicial independence, the *Provincial Court Judges Reference* addressed financial security from the institutional perspective. It was in this ruling that Chief Justice Lamer, writing for the majority (Justice La Forest dissenting), held that judicial compensation commissions are a constitutional imperative. Lamer CJC based this conclusion on s. 11(d) of the *Charter*, which guarantees independent and impartial tribunals in criminal trials,²³ and the Preamble to the *Constitution Act, 1867*.²⁴

²⁰ *Provincial Court Judges Reference*, *supra* note 1.

²¹ *Ell v. Alberta*, [2003] 1 SCR 857, 2003 SCC 35.

²² *Provincial Court Judges Association of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] 2 SCR 286 (“*New Brunswick Provincial Court Judges Association*”).

²³ *Canadian Charter of Rights and Freedoms*, s. 11(d).

²⁴ The Preamble to the *Constitution Act, 1867* provides that Canada is to have “... a Constitution similar in Principle to that of the United Kingdom.” Lamer CJC held that this reference in the Preamble means that the principle of judicial independence, originally set forth in the *Act of Settlement* of 1701, is a constitutional value which applies to all Canadian courts, not just to courts which conduct criminal trials under s. 11(d) of the *Charter*: *Provincial Court Judges Reference*, *supra* note 1, paras. 105-106, 109.

34. Lamer CJC held that compensation commissions function as an “institutional sieve”, creating a tangible structural separation between the government and the judiciary.²⁵ Their existence is intended to “depoliticize” the process whereby appropriate levels of judicial remuneration are determined, to ensure that “courts are both free and appear to be free from political interference through economic manipulation by the other branches of Government”.²⁶

35. The *Provincial Court Judges Reference* established that the institutional dimension of financial security embodies three requirements. 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 minimum level.²⁷

36. In relation to judicial compensation commissions, Lamer CJC asserted the *Charter* demands that at the very least these commissions be independent, objective and effective.²⁸ In order to be “independent” for constitutional purposes, the composition of these commissions must be representative of the parties, and its members must serve for a fixed term. In Saskatchewan, these criteria are satisfied by s. 36 of the *Provincial Court Act*

²⁵ *Provincial Court Judges Reference*, *supra* note 1, paras. 170, 185 and 189.

²⁶ *Ibid.*, paras. 107, 131, 147 and 166.

²⁷ *Ibid.*, paras. 131-135.

²⁸ *Ibid.*, para. 169.

which authorizes each party to select one commissioner. Those commissioners jointly select the chair. The Act also sets a three year tenure for the commissioners.²⁹

37. To qualify as “objective” from a constitutional perspective, the recommendations of a judicial compensation commission must be based on objective criteria rather than political expediencies, and follow upon fair and open public hearings. The final report of such a commission must fully explain the basis, and justification for, the recommendations presented.³⁰ These requirements are also met by the *Provincial Court Act*, which requires that this Commission hold hearings and prepare a report containing its recommendations and draft regulations to implement those recommendations.³¹

38. Finally, three factors will ensure that judicial compensation commissions are “effective” for constitutional purposes. First, governments cannot alter judicial remuneration in any way without prior recourse to such a commission. Second, these tribunals must be convened regularly to receive representations and must make recommendations respecting judicial remuneration. Third, the recommendations made by these tribunals must have “a meaningful effect” on the process of determining the level

²⁹ *Provincial Court Act*, *supra* note 3, s. 36 (1), (2) and (5). The purpose of the three year tenure is to ensure that the Commission continues to exist if a new issue comes up after the Commission renders its Report: *Provincial Court Act*, s. 51.

³⁰ *Provincial Court Judges Reference*, *supra* note 1, para. 173.

³¹ *Provincial Court Act*, *supra* note 3, ss. 37, 41.

of remuneration ultimately paid by the government to the judiciary.³² These constitutional requirements are met in Saskatchewan by the statutory provisions that the Commission convene every three years, that the Commission must review certain issues, and that the Government must consider and respond to the Commission's recommendations.³³

39. On this point, Lamer CJC took pains to explain that meaningfully effective recommendations are not to be equated with compulsory directives. He stated:

My starting point is that s. 11(d) [of the *Charter*] does not require that the reports of the commission be binding, because decisions about the allocation of public resources are generally within the realm of the legislature, and through it, the executive. The expenditure of public funds, as I said above, is an inherently political matter.³⁴

[emphasis added]

40. However, if a government chooses not to accept the salary recommendations of a judicial compensation commission, it must explain publicly why it is departing from those recommendations and may even be called upon to defend its response to the commission's recommendations in a court of law. A reviewing court must scrutinize the government's reasons to determine if they satisfy a standard of "simple rationality".³⁵ This requirement

³² *Provincial Court Judges Reference*, *supra* note 1, paras. 174-175.

³³ *Provincial Court Act*, *supra* note 3, ss. 36(1)(c), 38(1), 43-47.

³⁴ *Provincial Court Judges Reference*, *supra* note 1, para. 176 (emphasis added).

³⁵ *Ibid.*, para. 182.

is met in Saskatchewan by the provisions outlining the Government's obligation to respond to the Commission report.³⁶

41. One final point about the *Reference* is that Lamer CJC made it clear that the judiciary is not immune from financial and budgetary pressures which the elected branches of government may face. He stated:

Finally, I want to emphasize that the guarantee of a minimum acceptable level of judicial remuneration is not a device to shield the courts from the effects of deficit reduction. Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times. Rather, as I said above, financial security is one of the means whereby the independence of an organ of the Constitution is ensured. Judges are officers of the Constitution, and hence their remuneration must have some constitutional status.³⁷

[emphasis added]

C. *Ell v. Alberta*

42. The second case is *Ell v. Alberta*, which considered whether the constitutional principle of judicial independence also applies to Justices of the Peace. The Supreme Court concluded that it did, and in its reasons made two significant points relating generally to judicial independence.

43. The first point was that the Court re-affirmed that the principle of judicial independence is not limited to courts conducting trials in criminal matters, which are

³⁶ *Provincial Court Act*, *supra* note 3, ss. 44-46, outlined earlier.

³⁷ *Provincial Court Judges Reference*, *supra* note 1, para. 196.

subject to the independence and impartiality guarantee of s. 11(d) of the *Charter*. Major J. for the unanimous Court repeated that the principle of judicial independence is a foundational principle, inspired by the *Act of Settlement* of 1701 and implemented in Canadian constitutional law through the Preamble to the *Constitution Act, 1867*.³⁸

44. Major J. also commented on the purpose of the constitutional guarantee of judicial independence, highlighting that it is not for the benefit of the judges, but rather for the litigants and the people:

The principal question in this case is whether the Legislature's removal of the respondents from office contravened their security of tenure. In assessing this issue, it must be considered that the conditions of independence are intended to protect the interests of the public. 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 *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": see *Mackin*, *supra*, at para. 116, per Binnie J., in his dissent.³⁹

[emphasis added]

³⁸ *Ell*, *supra* note 21, paras. 18-23.

³⁹ *Ibid.*, para. 29.

D. *New Brunswick Provincial Court Judges Association*

45. In *New Brunswick Provincial Court Judges Association*, the Supreme Court revisited the principles it had laid down earlier in the *Provincial Court Judges Reference*. The Court refined certain of its earlier pronouncements and clarified the philosophy animating its original ruling. The central issue to be decided in *New Brunswick Provincial Court Judges Association* was the standard of judicial review when a government does not accept the recommendations of a judicial compensation commission. What had Lamer CJC meant when he held that “simple rationality” was the standard of judicial review?

46. The Court in its unanimous opinion clarified that the applicable standard is rationality: “The adjective ‘simple’ merely confirms that the standard is rationality alone”.⁴⁰ Further, when applying this standard in a particular case, reviewing courts are admonished that “deference must be shown to the government’s response since the recommendations are not binding”.⁴¹ In the course of its analysis, the Court took time to review and elaborate on the constitutionally required attributes of judicial compensation commissions. Only those aspects of the Court’s opinion relating to the nature of the commission process and its recommendations will be summarized here.

⁴⁰ *New Brunswick Provincial Court Judges Association*, *supra* note 22, para. 29.

⁴¹ *Ibid.*, para. 40.

47. The Court characterized compensation commissions as “the forum of discussion, review and recommendations” about matters of judicial remuneration. Although recommendations made by a commission do not bind the government, in the *Provincial Court Judges Reference* the Court had hoped that they “would lead to an effective resolution of salary and other related issues”.⁴² While this hope may not have been realized in other provinces, in Saskatchewan all salary, pension, and related recommendations of previous Provincial Court Commissions since 1998 have been implemented by successive provincial administrations.

48. Turning to the issue of how compensation commissions should function in future, the Court set out three important operating guidelines. First, the Court emphasized the unique function of these commissions, namely they are “neither adjudicative interest arbitration nor judicial decision making”.⁴³ The Supreme Court did not intend for these commissions to be adversarial or to mediate disputes between the executive and judicial branches of government respecting specific matters of judicial compensation. Rather, their function is consultative: their mandate is to identify, and make non-binding recommendations pertaining to “... the appropriate level of remuneration for the judicial office in question”.⁴⁴

⁴² *Ibid.*, para. 11.

⁴³ *Ibid.*, para. 14.

⁴⁴ *Ibid.*, para. 14.

49. Second, when fulfilling their constitutional mandate, compensation commissions are encouraged to adopt a flexible process which will facilitate consideration of all issues relevant to judicial compensation. The mandate of a compensation commission is prospective in nature, namely to recommend appropriate levels of judicial remuneration for the next three to five years, and while its task is “not simply to ‘update’ the previous commission’s report”, absent reasons to the contrary “the starting point should be the date of the previous commission’s report”.⁴⁵

50. Third, a new compensation commission should take into account the report and recommendations of its predecessor or predecessors. While the commission must assess judicial remuneration “in its own context”, it should build upon the foundation set by previous commissions. Only in exceptional circumstances will it be necessary for a compensation commission to re-till ground already cultivated by its predecessors. The Court elaborated on this point as follows:

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 issue.⁴⁶

[emphasis added]

⁴⁵ *Ibid.*, para. 14.

⁴⁶ *Ibid.*, para. 15.

51. Fourth, salary increases are not automatic. The New Brunswick government had argued that the existing salary arrangements were adequate to protect judicial independence, but the New Brunswick Commission had rejected this argument, stating that approach would amount to a salary freeze. When the matter reached the Supreme Court, New Brunswick argued that in taking this approach, the New Brunswick Commission committed an error in law. While the Supreme Court did not specifically rule on this particular point of law, overall it held that the New Brunswick government's decision had a rational basis and upheld the decision not to increase the salaries.

E. Statutory Directions

52. In addition to these guidelines established by the Supreme Court of Canada, the *Provincial Court Act* also establishes criteria to which this Commission must be attentive. First, this Commission is statutorily forbidden to recommend a reduction in judicial remuneration below the amount paid to judges on the day this Commission reports, which in this cycle will be January 2, 2018 at the latest. This prohibition reads as follows:

38(3) The salary recommended by a commission cannot be less than the salary being received by the judges on the day on which the report containing the recommendation is submitted to the minister.⁴⁷

53. The effect of this provision is to establish a floor for the setting of judicial remuneration. For the purposes of this Commission, that floor as of December 31, 2017

⁴⁷ *Provincial Court Act*, *supra* note 3, s. 38(3).

will be the base salary currently paid to all Provincial Court Judges in Saskatchewan as of April 1, 2017, namely \$290,848, as set out in Table 1 of this Submission (below).

54. Second, there is a limitation that applies to the pension and additional retirement benefits. Subsection 38(4) of the *Provincial Court Act* provides that: “No 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.” In this cycle, the projected date for the coming into force of the Commission’s regulation, and thus the relevant date for the floor for pensions and additional retirement benefits, will be no later than February 1, 2018, and could be earlier, depending on the date of this Commission’s Report.

55. In addition to these statutory directions as to the merits of the Commission’s recommendations, the *Provincial Court Act* also provides that the Commission is the regulation-making authority for recommendations made under s. 38(1) of the Act. The process for the Commission to make regulations is set out in s. 41 to s. 44 of the Act:

- Section 41(1) provides that when the Commission issues its report to the Minister and the Association, it shall include its recommendations on the matters set out in s. 38(1), and also include proposed regulations to implement those recommendations.
- Section 42 provides that before issuing its report, the Commission must provide an advance copy of the proposed regulations to the Minister and to the Association, in “sufficient time” to allow the Minister and the Association to comment on “technical and drafting issues with respect to the proposed regulations”.

- Once the Minister and the Association have provided comments, the Commission issues its final report, which includes the proposed regulations. Section 41(1) of the Act, as modified this year by *The Interpretation Act, 1995*, provides that the deadline for the Commission's final report, recommendations and proposed regulations is no later than January 2, 2018.
- Section 43 provides that the Minister has 30 days from receipt of the Report to respond to the recommendations.
- Section 44(1) provides that where the Minister accepts all of the recommendations, the regulations proposed by the Commission will come into force on the day the Minister gave notice of acceptance.
- Section 47(1) provides that if the Minister does not give notice of acceptance or rejection of the recommendations within the 30 day period, the proposed regulations come into force on the day after the 30 day period expires.

56. While "sufficient time" to comment on the proposed regulations is not defined in s. 42 of the *Provincial Court Act*, the Government respectfully asks that the Commission bear this requirement in mind in preparing its Report.

57. The Government anticipates that it will file a draft Regulation with its Reply Submission, to assist the Commission in preparing the Regulation implementing its recommendations. Of course, that draft Regulation will not in any way bind the Commission, but will be provided simply for the assistance of the Commission. If the Association and the Government propose different terms, the draft Regulation will include both alternatives.

V. HISTORY OF PROVINCIAL COURT COMMISSIONS IN SASKATCHEWAN

A. Summary of Previous Commissions

58. This Commission is the ninth Provincial Court Commission in Saskatchewan's history, and the seventh to be established and report under the *Provincial Court Act*. The current commission process was enacted in 1998 to implement the 1997 ruling by the Supreme Court of Canada in the *Provincial Court Judges Reference*. The Government has implemented all recommendations relating to judicial remuneration made by the previous seven commissions which have reported under the *Provincial Court Act*.

59. In its Report, the 2011 Provincial Court Commission chaired by Mr. William F.J. Hood, Q.C., provided a useful historical overview of the recommendations of previous commissions, under the heading "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 Provincial 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 from 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 following two 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 the 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 [*sic*] 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. 2.⁴⁸

⁴⁸ “Report and Recommendations of the 2011 Saskatchewan Judicial Compensation Commission” (the “Hood Commission 2011”), paras. 10-21. Available on-line: <http://publications.gov.sk.ca/documents/9/100327-2011-PCC-Final-Report.pdf>. Note that para. 21 of the summary appears to be referring to p. 37 of the “Provincial Court Commission Report November 27, 2008” (the “Zakreski Commission 2008”), which refers to “18 years service plus 58 years of age”. The Zakreski Commission 2008 is available on-line: <http://publications.gov.sk.ca/documents/9/100326-2008-PCC-Final-Report.pdf>.

60. In 2014, the Hodson Commission repeated that summary and added a summary of the Hood Commission recommendations:

10. The Hood Report applied for the period April 1, 2012 to March 31, 2015. The Government announced in January of 2012 that it accepted all of the recommendations of this Commission. The Hood Commission recommended the base salary for Judges be increased by the Saskatchewan Consumer Price Index ("SCPI") plus an additional one percent for each of the three years resulting in a base salary as follows: 2012/13 - \$248,010; 2013/14 - \$254,458 and 2014/2015 \$260,819.

11. The Hood Commission accepted the joint agreement of the Government and the Association relating to the additional compensation above the base salary to be paid to the Chief Judge (7½%), the Associate Chief Judge (5%) and the Administrative Judges (2½%). The Hood Commission also recommended that the daily remuneration for Temporary Judges be set by a formula of 1/220 of the base salary of a full time Judge.

12. The Hood Commission rejected the requested change to pension entitlements including indexing. It also rejected the request for sabbatical for the office of the Chief Judge and did not recommend any changes to the medical, drug, dental and eye care benefits for the Judges. The Hood Commission agreed to increase the Professional Allowance from \$3,500 to \$3,650.

B. The Hodson Commission 2014: Analysis and Recommendations

61. The recommendations of the Hodson Commission 2014 apply for the period April 1, 2015 to March 31, 2018. For each of the three years, the Hodson Commission recommended that the base salary of Judges of the Provincial Court be increased by the percentage increase in the Saskatchewan Consumer Price Index, and that amount be

further increased by 2% in each of the three years.⁴⁹ This recommendation resulted in the following base salaries:

**Table 1:
Base Salary of Saskatchewan Provincial Court Judges
2015/16 to 2017/18**

Fiscal Year	Salary
April 1, 2015 to March 31, 2016	\$272,295 ⁵⁰
April 1, 2016 to March 31, 2017	\$282,184; ⁵¹
April 1, 2017 to March 31, 2018	\$290,848. ⁵²

62. In their Submissions to the Commission in 2014, neither the Government nor the Association proposed any changes to the additional compensation to be paid to the Chief Judge, the Associate Chief Judge, Judges assigned administrative duties and Judges eligible for the northern allowance. The Hodson Commission accepted that there was no need to change those amounts.⁵³ The additional compensation therefore remained at the same levels recommended by the Zakreski Commission 2008: 7.5% for the Chief Judge, 5% for the Associate Chief Judge, 2.5% for Judges assigned administrative duties, and 5% for northern Judges.⁵⁴

⁴⁹ Hodson Commission 2014, *supra* note 4, para. 196(i), (ii) and (iii).

⁵⁰ Letter from Assistant Deputy Minister Jan Turner to Chief Judge Plemel and Judge B.J. Tomkins, March 4, 2015.

⁵¹ Letter from Assistant Deputy Minister Jan Turner to Chief Judge Plemel and Judge D. O’Hanlon, March 4, 2016.

⁵² Letter from Assistant Deputy Minister Jan Turner to Chief Judge Plemel and Judge D.J. Bird, March 1, 2017 (“2017 Salary Letter”).

⁵³ Hodson Commission 2014, *supra* note 4, para. 196(iv).

⁵⁴ Zakreski Commission 2008, *supra* note 48, pp. 41.

63. The Hodson Commission also continued the formula for the daily remuneration for Temporary Judges as 1/220th of the base salary of a full-time Judge.⁵⁵ This formula was also initiated by the Zakreski Commission 2008.⁵⁶

64. The Hodson Commission recommended that the professional allowance for Judges be increased from \$3,650 to \$4,000.⁵⁷

65. The Hodson Commission recommended that there be no sabbatical for the Chief Judge; no change to the extended health care benefits for Judges; and no change to the number of days of Judges' vacation leave.⁵⁸

C. Implementation of the Hodson Commission's Recommendations

66. Unlike the response to the previous Commission reports, where the Minister of the day notified the Commission and the Association that the Government accepted the recommendations, in 2015 the Minister did not respond to the recommendations. In accordance with section 47(1)(a) of the *Provincial Court Act*, the Regulations came into force automatically on the day after the 30 day period expired, namely January 31, 2015,

⁵⁵ Hodson Commission 2014, *supra* note 4, para. 196(v).

⁵⁶ Zakreski Commission 2008, *supra* note 48, p. 43.

⁵⁷ Hodson Commission 2014, *supra* note 4 para. 196(vi).

⁵⁸ *Ibid.*, para. 196(vii), (viii) and (ix).

and amended *The Provincial Court Compensation Regulations* to set out the current compensation package for the Provincial Court Judges.

D. Comments on the Magnitude of the Salary Increases

67. In reviewing these decisions of the previous commission, the Government respectfully submits that the salaries for Provincial Court Judges have increased markedly in the twenty-one years of the commission process. The following table illustrates the substantial salary growth. (The 1996 salary was the last salary not set by the commission process.)

Table 2
Annual Salary Increases
1997 – 2017

YEAR (April 1)	SALARY	INCREASE: DOLLAR	INCREASE: PERCENTAGE
1996	\$ 94,556	–	–
1997	\$ 112,961	\$ 18,405	19.5%
1998	\$ 112,961	0	0.0%
1999	\$ 112,961	0	0.0%
2000	\$ 143,000	\$ 30,039	26.6%
2001	\$ 143,000	0	0.0%
2002	\$ 143,000	0	0.0%
2003	\$ 158,000	\$ 15,000	10.5%
2004	\$ 161,634	\$ 3,634	2.3%
2005	\$ 165,190	\$ 3,556	2.2%
2006	\$ 195,000	\$ 29,810	18.0%
2007	\$ 198,900	\$ 3,900	2.0%
2008	\$ 204,552	\$ 5,652	2.8%
2009	\$ 220,916	\$ 16,364	7.9%

2010	\$ 229,753	\$ 8,837	4.0%
2011	\$ 238,943	\$ 9,190	3.9%
2012	\$ 248,010	\$ 9,067	3.8%
2013	\$ 254,458	\$ 6,448	2.6%
2014	\$ 260,819	\$ 6,361	2.5%
2015	\$ 272,295	\$ 11,476	4.4%
2016	\$ 282,184	\$ 9,889	3.6%
2017	\$ 290,848	\$ 8,664	3.1%

68. The first commission, the Bundon Commission 1997, accepted the settlement proposal agreed to by the Association and the Government. The Bundon Commission recommended that the base salary for Provincial Court Judges be \$112,961, effective April 1, 1997.⁵⁹ The Government accepted that recommendation.

69. On April 1, 2017, the salary for Provincial Court Judges is \$290,848.⁶⁰

70. The salary has thus more than doubled in twenty-one years, with an overall increase of \$177,887 over twenty years, or an average increase of \$8,894.35 per year.

71. In the past eight years alone, from April 1, 2009 to April 1, 2017, the salary has increased by \$69,932, or \$8,741.50 per year. That increase has been the result of the formulas used by the Zakreski, Hood and Hodson Commissions, which all relied on the

⁵⁹ "Report of the Provincial Court Commission Submitted to the Minister of Justice and Attorney General for Saskatchewan and the Saskatchewan Provincial Court Judges, December 16, 1998" ("Bundon Commission 1998"), Schedule, s. 3(3).

⁶⁰ 2017 Salary Letter, *supra* note 52.

percentages set by the commission, or a combination of Saskatchewan Consumer Price Index (“Sask CPI”) plus an additional percentage amount.

72. The Government submits two points stand out from this summary of the salary increases. First, the salary of the Judges has increased considerably over the past twenty years. On six occasions (1997, 2000, 2003, 2006, 2009, 2015), the Judges have benefited from a five-figure salary increase (over \$10,000) in one year. The highest increase in one year was \$30,039 in 2000, and the second highest was just short of that, \$29,810 in 2006. This Table demonstrates, as the Hood Commission commented, that the Judges have “caught up” from an alleged salary stagnation in the 1980s and 1990s.⁶¹ As well, the salary has steadily outpaced the rate of inflation measured by Saskatchewan Consumer Price Index. The Government will address this second point in more detail later in this Submission.

73. Second, the Government respectfully submits that there is a danger in relying on percentage increases, because the value of a percentage increase depends on the starting point of the salary being increased. An increase of 1% may appear to be a consistent increase, but in fact masks the reality that the value of a 1% increase has itself increased significantly over the past eight years.

⁶¹ Hood Commission 2011, *supra* note 48, para. 253.

74. For instance, when the Zakreski Commission 2008 set the 2009 salary at \$220,916, and then recommended a 4% increase in the next two years, the value of 1% was \$2,209.16 in 2010, and \$2,231.26 in 2011. By contrast, in the final year of the Hodson Commission recommendations, 2016-2017, the value of a 1% increase was \$2,821.84.

75. In closing on this point, the Government respectfully submits that the Commission should bear in mind the significant and steady increase in the salary over the past twenty years. As well, this steady increase in the effect of a percentage increase must be considered by this Commission. Relying on percentages, even the same percentages used by previous commissions, can mask the real amount of a proposed salary increase.

**VI. SUMMARY OF SALARY, PENSION AND RETIREMENT BENEFIT, AND OTHER
BENEFITS PAID TO PROVINCIAL COURT JUDGES**

A. Salary

76. Based on the recommendations of the Hodson Commission, the current salaries paid to Provincial Court Judges in Saskatchewan are as follows:

**TABLE 3
BASE SALARY AND ADDITIONAL AMOUNTS AS OF APRIL 1, 2017⁶²**

POSITION	SALARY
Judge – Annual Base Salary	\$ 290,848
Chief Judge – Annual Base Salary + 7.5%	\$ 312,662
Associate Chief Judge – Annual Base Salary + 5%	\$ 305,390
Judges performing Administrative Duties – Annual Base Salary + 2.5%	\$ 298,119
Judges receiving Northern Allowance – Annual Base Salary + 5%	\$ 305,390

77. As of the date of this Submission, there is one Associate Chief Judge, and four Judges performing administrative duties. There are five judges who are eligible for the full Northern allowance based on their residence (three in Meadow Lake and two in La Ronge), and six from Prince Albert who may be eligible for a pro rated Northern allowance depending on their sittings during the year.

⁶² 2017 Salary Letter, *supra* note 52; *Provincial Court Compensation Regulations*, RRS, c. p-30.11 Reg 2, s. 3(3), 4(1), 4(2), 4(3) and 5(2).

78. The Regulations also set the compensation for Temporary Judges, who are normally retired Judges who continue to serve on the Court. The Cabinet appoints them to a list of individuals eligible to serve as Temporary Judges.⁶³ They then serve at the discretion of the Chief Judge.⁶⁴ Temporary Judges serve the valuable function of filling in when a full-time Judge is not available, for example due to illness or vacation time, or when there is a vacant position on the Court.

79. Since Temporary Judges carry out judicial functions, their rate of remuneration is also within the mandate of this Commission.⁶⁵ Their current rate of remuneration is set as a daily rate, calculated as 1/220th of the base salary for Judges of the Court.⁶⁶ The fraction of 1/220th was first recommended by the Zakreski Commission in 2008, based on its calculation of the number of sitting days in a year.⁶⁷ The Hood Commission and the Hodson Commission agreed with that rate and carried it forward in 2011 and 2014.⁶⁸ As of April 1, 2017, that rate amounts to \$1,322 for a full day, and \$661 for a half day.⁶⁹

⁶³ *Provincial Court Act*, *supra* note 3, s. 18.

⁶⁴ *Ibid.*, s. 17.

⁶⁵ *Ibid.*, s. 38(1)(a)(iv).

⁶⁶ *Compensation Regulations*, *supra* note 62, s. 3(4).

⁶⁷ Zakreski Commission 2008, *supra* note 48, p. 43, para. (ii).

⁶⁸ Hood Commission 2011, *supra* note 48, para. 258(e); Hodson Commission 2014, *supra* note 4, para. 196(v).

⁶⁹ 2017 Salary Letter, *supra* note 52.

80. In addition to the compensation set out above, Judges and Temporary Judges are entitled to reimbursement for actual and reasonable travelling expenses.⁷⁰ These items come within the Commission's advisory recommendation power, which the Government can implement through regulations passed by the Cabinet.⁷¹

B. Pension Entitlement of Provincial Court Judges

(1) The Need to Consider the Pension Plan as a Component of the Total Judicial Compensation

81. The Government submits that in addition to the salary of the Judges, the Judges' pension plan is an important part of the total compensation package. The Government does not anticipate any requests from the Association for changes to the pension plan. Nonetheless, it is crucial that this Commission consider the Judges' pension plan in assessing the overall issue of whether the total compensation package, including salary, is sufficient to meet the test of judicial independence, as well as the goals of recruiting and retaining highly qualified applicants to the Bench. The pension plan is part of the total compensation package and is relevant to all three of these goals. In this section, the Government will therefore review the pension plan in some detail.

⁷⁰ *The Provincial Court General Regulations*, RRS, c. P-30.11 Reg 3 ("*General Regulations*"), ss. 11, 12.

⁷¹ *Provincial Court Act*, *supra* note 3, s. 38(2)(b), s. 65(d)(iii).

(2) General Comments from the Hodson, Hood and Zakreski

Commissions

82. The Hodson Commission in 2014, the Hood Commission in 2011 and the Zakreski Commission in 2008 all concluded that the salary for Provincial Court Judges cannot be considered in isolation. It is the total compensation package which must be considered by the Commission in assessing the overall position of the Judges. This is because the total compensation package, both the salary and the pension, are relevant to the issue of ensuring judicial independence, as well as the goals of recruitment and retention of highly qualified individuals for the Court.

83. The Hood Commission explained this point as follows:

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.⁷²

[emphasis added]

84. Similarly, the Zakreski Commission stated: “This commission defines compensation as including salary and benefits.”⁷³ The Hodson Commission agreed that the value of the pension “... must be considered by the Commission in determining the appropriate salary level.”⁷⁴

85. All three of the recent Commissions concluded that the current retirement package is very generous. The Hodson Commission stated that “... the Judges’ pension plan is a very generous plan”.⁷⁵ The Hood Commission commented that few lawyers in private practice have a pension plan at all, and added: “... even in the public sector, few, if any, would have a pension as generous as the plan for Provincial Court Judges.”⁷⁶ The Zakreski Commission noted that the combined pension and additional retirement benefits “...far exceeds this type of benefit in other private and public sectors.”⁷⁷

⁷² Hood Commission 2011, *supra* note 48, para. 211.

⁷³ Zakreski Commission 2008, *supra* note 48, p. 40, para. 18.

⁷⁴ Hodson Commission 2014, *supra* note 4, para. 148.

⁷⁵ *Ibid.*

⁷⁶ Hood Commission, 2011, *supra* note , paras. 214, 230.

⁷⁷ Zakreski Commission 2008, *supra* note 48, p. 40, para. 18.

(3) Outline of the Pension and Additional Retirement Benefits

86. A retired Provincial Court Judge is entitled to a defined benefits pension for life, based on years of service. It accrues at a benefit rate of 3% per year, up to a maximum of 23 $\frac{1}{3}$ years of service. The maximum benefit is thus 70%. This benefit percentage is then applied to the average of the Judge's best three years of salary, to determine the Judge's pension.⁷⁸

87. The pension plan also provides for a defined benefits pension to the surviving spouse of a deceased judge, including cases where the judge dies prior to retirement, or after retirement.⁷⁹

88. The pension plan also provides for benefits for surviving children of a deceased judge, if the judge does not leave a spouse or the spouse subsequently dies. This benefit is payable until each surviving child turns 18, and can be continued for up to five more years for each child, if the child is in full-time attendance at a secondary or post-secondary educational institution.⁸⁰

⁷⁸ *Provincial Court Act*, supra note 3, s. 22(1); *The Provincial Court Pension Plan Regulations*, RRS c. P-30.11 Reg 1 ("*Pension Plan Regulations*"), s. 4; *Compensation Regulations*, supra note 62, s. 10.

⁷⁹ *Provincial Court Act*, supra note 3, s. 23; *Pension Plan Regulations*, supra note 78, ss. 6, 7; *Compensation Regulations*, supra note 62, s. 14.

⁸⁰ *Provincial Court Act*, supra note 3, s. 24; *Compensation Regulations*, supra note 62, s. 15.

89. In addition to the right to a pension upon retirement at age 65, there are also provisions allowing Provincial Court Judges to take early retirement. There are two different types of early retirement.

90. The standard rule applies to a Judge who retires between the ages of 55 to 65 years, provided the Judge has served at least two years.⁸¹ A Judge who retires between age 55 and age 65 is entitled to a defined benefits pension for life, but calculated under a reduced formula.⁸²

91. However, if the Judge has at least 18 years of service at retirement, is aged 58 or older, and his or her combined age in years and years of service equal 80 or more, the Judge will receive a full pension of 70% of the average of the best three years of salary.⁸³ Depending on the Judge's circumstances, this pension can have an effective accrual rate of up to 3.89%.

(4) Statutory and Regulatory Framework for the Pension Plan

92. The pension plan as outlined above is actually composed of two different entitlements: the pension benefit, and the additional retirement benefit. This

⁸¹ *Provincial Court Act*, *supra* note 3, s. 22(2).

⁸² *Pension Plan Regulations*, *supra* note 78, s. 5.1; *Compensation Regulations*, *supra* note 62, s. 12.1.

⁸³ *Compensation Regulations*, *supra* note 62, s. 13.

combination of a pension plan and the additional retirement benefit is defined by a combination of statutory and regulatory provisions. Part III of the *Provincial Court Act* creates the right to a defined benefits pension for life and sets out the basic principles of the plan. Further details for the retirement plan are set out in two sets of regulations: *The Provincial Court Pension Plan Regulations* and *The Provincial Court Compensation Regulations*.

93. The fact that two separate sets of regulations are needed to implement the retirement package is an illustration of the generous nature of the plan overall. The reason there are two sets of regulations is to comply with the limitations on a pension plan which can be registered under the federal *Income Tax Act*.⁸⁴ Registration of a pension plan allows the contributors, in this case the Judges, to deduct their contributions from their taxable income, and to defer tax not only on these contributions but on the value of the accrued pension for which the Government is liable.

94. One of the requirements for registration under the *Income Tax Act* is that the total contributions to the plan, from both the contributor and the other party, normally an employer but in this case the Government, cannot exceed maximum amounts determined by the defined benefit limit for the year and the eligible contribution limits for the plan.⁸⁵

⁸⁴ *Income Tax Act*, RSC 1985, c. 1 (5th Supp.), s. 147; *Income Tax Regulations*, CRC, c. 945, s. 8503.

⁸⁵ *Income Tax Regulations*, CRC, c. 945, s. 8503.

However, in order to fund the defined benefit plan for the Judges, and to provide the level of pension based on the formula, much more than the allowable contributions are required.

95. A second requirement is that a registered plan cannot provide for an accrual of pension benefits at a rate greater than 2% per year of service.⁸⁶ As mentioned above, the annual accrual rate for the Judges' combined pension and additional retirement benefit is at least 3% per year of service, and for some judges it can be as high as 3.89%.

96. In order to register the plan under the *Income Tax Act*, allowing the Judges to deduct their contributions and to defer tax on those contributions, the plan has been split into two Regulations. The *Pension Plan Regulations* authorise the maximum amount of contributions and accrued benefits under the *Income Tax Act*. The *Pension Plan Regulations* specifically state that the pensions paid under those Regulations are not to exceed the maximum amounts permitted for registered plans under the *Income Tax Act*.⁸⁷ Part III of the Act and the *Pension Plan Regulations* are registered as a pension plan with the Canada Revenue Agency.⁸⁸

97. The *Compensation Regulations* are the second set of regulations. They provide the additional retirement benefit. The *Compensation Regulations* make up the difference

⁸⁶ *Ibid.*, s. 8503(3)(g).

⁸⁷ *Pension Plan Regulations*, *supra* note 78, s. 10.2(1).

⁸⁸ *Ibid.*, s. 3(2)(b).

between the benefits allowed for registered plans under the *Income Tax Act*, and the amounts needed to provide the full defined benefit plan that is actually being provided to the Judges of the Provincial Court. The *Compensation Regulations* create an additional retirement benefit, calculated as the difference between the maximum benefit that the registered pension plan can provide, and the actual total benefit that the Judges' pension plan as a whole provides. That additional retirement benefit is paid by the Government alone. It is the combination of the pension plan, defined by Part III of the Act and the *Pension Plan Regulations*, and the additional retirement benefit, defined by the *Compensation Regulations*, which together provide the pension package for retired Judges.

(5) Contributions by the Judges and the Government

98. The Act requires each Judge to contribute 5% of their salary to the "Judges of the Provincial Court Superannuation Fund."⁸⁹ All interest on the money in the Fund is credited to the Fund,⁹⁰ which is administered by the Minister of Finance.⁹¹ The Fund is responsible to pay all "Pensions, annuities, supplementary allowances, death benefits, refunds and interest" owing under the pension plan.⁹²

⁸⁹ *Provincial Court Act*, *supra* note 3, s. 28(1).

⁹⁰ *Ibid.*, s. 32(3)(b).

⁹¹ *Ibid.*, s. 32(2).

⁹² *Ibid.*, s. 32(4).

99. The Government does not contribute periodic matching contributions directly to the Fund. Its obligation to pay its share of the pension and all of the additional retirement benefit is set out in the Act. Section 32(5) of the Act provides that “Any amount that is required to meet the obligations of the fund from time to time is a charge on and shall be paid out of the General Revenue Fund”.⁹³ Section 19(2) of the Act provides that “salary, remuneration, allowances, benefits and additional retirement benefits to which judges are entitled ... are a charge on the General Revenue Fund of the Province, and shall be paid out of the General Revenue Fund”.⁹⁴

100. That combination of a charge on the General Revenue Fund and a mandatory direction to pay is the strongest guarantee of payment possible under provincial law. The significance of the term “charge” is that it is a standing appropriation, without the need for Judges’ salaries to be included in the annual Appropriation Acts of the Government. There is a dual benefit to that approach: the salaries and pension are guaranteed by statute, and they do not need to be debated in the Assembly each year in the budget process. This second point meets the goal set out by the Supreme Court of “depolicising” the issue of judicial salaries.⁹⁵

⁹³ *Ibid.*, s. 32(5) [emphasis added].

⁹⁴ *Ibid.*, s. 19(2) [emphasis added].

⁹⁵ See s. 12(3) of *The Financial Administration Act, 1993*, SS 1993, c. F-13.4, s. 12(3)(b), and the definition of “Statutory Appropriation” in the Government’s Financial Administration Manual, Appendix E: “The authorization for spending funds without requiring an annual appropriation. The authorization is provided through Acts other than *The Appropriation Act*.” Online: <http://www.finance.gov.sk.ca/FAM/PDF/AppendixE.pdf>.

101. In the current fiscal year, it is forecast that the total benefits payable out of the plan will be \$7.4 million. The Government will contribute \$7.04 million into the Fund.⁹⁶

102. The Government's obligation towards the total pension and additional retirement earned by each Judge is considerable. As mentioned earlier, the Government does not contribute directly to the Fund with respect to future payments, but rather makes up the necessary difference as needed to meet the Fund's obligations to retired Judges. The cost of future benefits is shown on the Government's books as an accrued liability. The most recent actuarial valuation of the cost of the pension plan is 74.2% of a Judge's salary. When the Judges' 5% contribution is deleted, the Government's share of the plan is 69.2% of a Judge's salary, or 1,385% of the Judges' contributions.⁹⁷

⁹⁶ Aon Hewitt, "Report on the Actuarial Valuation for Accounting Purposes in Accordance with PS3250 and Section 4600 of the CPA Canada Handbook as at March 31, 2017: The Judges of the Provincial Court Superannuation Plan, April 24, 2017", p. 7.

⁹⁷ *Ibid.*, p. 4.

103. The following Table provides a summary of the pension and additional retirement benefit:

Table 4
Pension and Additional Retirement Benefit, as of April 1, 2017⁹⁸

Pension and Additional Retirement Benefit	<ul style="list-style-type: none"> ● Benefit rate of 3% per year of service, ● up to 23 1/3 years, ● multiplied by average salary over best 3 years. ● Maximum full pension based on 70%.
Survivor Pension	<ul style="list-style-type: none"> ● Surviving spouse entitled to defined benefits pension for life
Surviving Child Benefit	<ul style="list-style-type: none"> ● Benefit paid to surviving child of judge, if judge dies without spouse or if spouse later dies; payable up to age 18; can be extended up to 5 more years if child attending educational institutions.
Early Retirement Pensions	<ul style="list-style-type: none"> ● 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. ● Pension based on a reduced formula if a judge retires between age 55 and age 65, having served at least two years on the Court.
Indexing of Pension	<ul style="list-style-type: none"> ● Pensions indexed to 75% of CPI up to a CPI of 5% ● indexed at 50% of CPI for portion of CPI over 5%.
Judges' Contributions	<ul style="list-style-type: none"> ● Judges contribute 5% of salary.

⁹⁸ Source: Provincial Employment and Benefits Agency ("PEBA").

Government Contributions	<ul style="list-style-type: none"> ● Government contributes the amount necessary to make up the difference between the Judges’ contributions and the amounts necessary to pay the pension and additional retirement benefits. ● For Judges not yet receiving a pension, the cost of their future pension entitlements, for which the Government is liable , is currently 69.2% of the Judges’ salaries.
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C. Other Benefits

104. In addition to the salary, the pension benefit, and the additional retirement benefit, the Judges of the Provincial Court are eligible for other benefits, as set out in the following table:

**Table 5
Other Benefits**

Disability Benefits	100% of salary for temporary disability (up to 1 year); 70% for permanent disability. On recommendation of Judicial Council. No premiums. ⁹⁹
Annual Vacation	30 working days for each year of service. Up to 30 days can be accumulated, with prior approval from the Chief Judge. ¹⁰⁰
Annual Professional Allowance	\$ 4,000 per year. ¹⁰¹

⁹⁹ *Provincial Court Act, supra* note 3, s. 20.

¹⁰⁰ *Compensation Regulations, supra* note 62, s. 7.

¹⁰¹ *Ibid.*, s. 6(3). The Professional Allowance is paid to each Judge to allow them to pay for items that will assist them in carrying out their duties, such as texts, journals, computers, attendance at conferences, and

Annual Sick Leave	18 days per year, which may be accumulated from year to year. ¹⁰²
Group Life Insurance	Minimum 2 times salary with optional coverage up to \$500,000, the first \$25,000 of coverage being paid for by the Province. ¹⁰³
Dental Plan	Same dental plan as public service employees; premiums are paid by the Government. ¹⁰⁴
Extended Health Plan	The extended health plan provides comparable benefits to the plan provided to public service management. Premiums are paid by the Government. ¹⁰⁵

105. Note that the first item on this Table, Disability Benefits, is set out in the Act. The next two items in this Table, the Professional Allowance and the Annual Vacation, are items which this Commission is required to review.¹⁰⁶ The remaining items in this Table come within the Commission’s advisory recommendation power.¹⁰⁷

106. According to the most recent valuation for the cost of these benefits to the Government, the total cost to the Government for these other benefits is assessed at:

<u>Benefit</u>	<u>% of pay</u>
Pension/retirement benefits	69.20
Dental Plan	0.85

similar matters. As well, based on the proposal of the Government made to the Hood Commission, Judges can also use the Professional Allowance to pay for eligible expenses equivalent to those allowed to public service employees under the Flexible Benefit Plan to promote physical fitness and other goals, to the extent those apply to Judges: Hood Commission 2011, *supra* note ##, para. 273.

¹⁰² *General Regulations*, *supra* note 70, s. 5.

¹⁰³ *Ibid.*, s. 13.

¹⁰⁴ *Ibid.*, s. 14.

¹⁰⁵ *Ibid.*, s. 15.

¹⁰⁶ *Provincial Court Act*, *supra* note 3, s. 38(1)(d) and (e).

¹⁰⁷ *Ibid.*, s. 38(2)(b) and s. 65(d)(ii),(iv), and (v).

Sick Leave	5.70
Health Plan	<u>0.97</u>
Total	68.22 % ¹⁰⁸

D. Total Cost of Salary, Pension and Retirement Benefit, and Other Benefits

107. The total annual accrued cost to the Government for pension and additional retirement benefits is \$201,266. Although this cost is not paid immediately to the Judges, it is shown on the on the Government's books as an accrued liability. In addition to the pension and additional retirement benefits, the Government is also liable for the other benefits, to the amount of \$21,871. These costs are in addition to the base salary cost of \$290,848 per Judge.

108. The Government submits that all of these costs must be taken into account in assessing the total dollar cost of the compensation system. The Hood Commission accepted this point, stating:

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

¹⁰⁸ AON Hewitt, *supra* note 96, p. 4 (for Government cost of pension); other data provided by Public Employees Benefits Agency.

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.¹⁰⁹

[emphasis added]

109. As noted earlier in this Submission, the Hood Commission stated that both salary and pensions are a component of compensation.¹¹⁰ The Commission then noted “... the present pension is a very generous pension.” By way of comparison, the Government notes that the equivalent benefits portion for Crown counsel employed by the Government of Saskatchewan is 19.98% of their salary, as will be explained in more detail later in this Submission.

¹⁰⁹ Hood Commission 2011, *supra* note 4, para. 229.

¹¹⁰ *Ibid.*, para. 211.

VII. RELEVANT FACTORS TO TAKE INTO ACCOUNT

A. Introduction

110. The current compensation package was implemented following a Commission process that fully complied with the rigorous judicial independence requirements as explained in the Supreme Court decisions in *Provincial Court Judges Reference* and *Provincial Court Judges Association of New Brunswick*. Accordingly, the task of this Commission is to review that package and to determine what adjustments, if any, might be needed to maintain a fair and adequate compensation package, necessary to meet the test for judicial independence, and to ensure that the Provincial Court continues to attract, motivate and retain excellent judges.

B. Ascertaining Relevant Factors

111. Unlike many provinces, and the Parliament of Canada in relation to federally appointed judges, the Saskatchewan Legislature chose not to enumerate in the Act relevant factors to guide the Commission's deliberations, analysis and recommendations. The statutory enumeration of objective criteria for the guidance of a compensation commission is not a constitutional pre-requisite. In *Provincial Court Judges Reference*, Lamer CJC indicated that should a legislature choose to codify a list of relevant criteria, these "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".¹¹¹

112. A review of provincial and federal legislation equivalent to the Act reveals that there is a large measure of consensus about what factors a judicial compensation commission should take into account when crafting its consultative report and salary recommendations. Indeed, the Government submits that these are well reflected in the factors first identified and applied by the Vicq Commission in 2002,¹¹² and endorsed by the Barnard Commission in 2005.¹¹³ These factors 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.

113. The Government submits that this Commission should use the factors identified by the Vicq Commission and relied upon by subsequent Commissions. The current level of

¹¹¹ *Provincial Court Judges Reference*, *supra* note 1, para. 173.

¹¹² "Provincial Court Commission – Saskatchewan – Report, December 30, 2002" ("Vicq Commission 2002"), p. 4. Online: <http://publications.gov.sk.ca/documents/9/100324-2002-PCC-Final-Report.pdf>.

¹¹³ "Saskatchewan Provincial Court Commission Report, December 31, 2005" ("Barnard Commission 2005"), p. 9. Available on-line at: <http://publications.gov.sk.ca/documents/9/100325-2005PCC-Final-Report.pdf>.

judicial compensation is an additional factor, particularly since the Government submits that the current level of judicial remuneration greatly exceeds the constitutionally required minimum. The comparison to compensation packages for Provincial Court judges across the country is another relevant factor.

VIII. CURRENT SALARIES ARE MORE THAN SUFFICIENT TO PROTECT JUDICIAL INDEPENDENCE

114. One of the fundamental attributes of institutional financial security identified in the *Provincial Court Judges Reference* is that judicial salaries should not fall “below a basic minimum level of remuneration which is required for the office of a judge.”¹¹⁴ Lamer CJC set out the rationale for this requirement as follows:

I have no doubt that the Constitution protects judicial salaries from falling below an acceptable minimum level. The reason it does is for financial security to protect the judiciary from political interference through economic manipulation, and to thereby ensure public confidence in the administration of justice. If salaries are too low, there is always the danger, however speculative, that members of the judiciary could be tempted to adjudicate cases in a particular way in order to secure a higher salary from the executive or the legislature or to receive benefits from one of the litigants.¹¹⁵

115. As set out in Table 3 (above), a Judge of the Provincial Court currently receives an annual salary of \$290,848. With the additional amount of 7.5% (\$21,814), the Chief Judge receives an annual salary of \$312,662. The Associate Chief Judge receives an additional amount of 5% (\$14,542), for an annual salary of \$305,390, as does a Judge who receives the full Northern allowance. The four Judges who perform administrative duties receive an additional amount of 2.5% (\$7,271) for annual salary of \$298,119.

¹¹⁴ *Provincial Court Judges Reference*, *supra* note 1, para. 135.

¹¹⁵ *Ibid.*, para. 193.

116. The Government respectfully submits that these are substantial salaries. Although there is no objective test for the protection of judicial independence, the Government submits that these salaries, the result of twenty-one years experience with the commission process, meet the fundamental test: do the Judges receive a sufficient salary for the protection of judicial independence? The Government submits that they do.

117. Another method of illustrating the generous remuneration package paid to Provincial Court Judges is to look at the judicial salary together with the annual cost to the Government of the pension and retirement benefit. The Government acknowledges that its cost to provide the pension and retirement benefit is not a direct value to each Judge. The active Judges do not yet receive that pension and retirement benefit, and the amount that retired Judges actually receive will vary with their personal circumstances during their retirement.

118. Nonetheless, the Government submits that the cost to the Government is a factor in assessing the remuneration package globally. This is an appropriate consideration for this Commission to take into account, as it relates to the factor of "Prevailing economic and fiscal conditions of Saskatchewan", which will be discussed at greater length later in the Submission. The Government also notes that the New Brunswick Court of Appeal observed in *Provincial Court Judges' Association of New Brunswick v. New Brunswick*:
" ... it is universally accepted that the value of the judicial pension is a significant factor to

be taken into account in comparing the income position of judges and lawyers in private practice.”¹¹⁶

119. As discussed above, the current salary is \$290,848. The annual accrued cost to the Government for the pension and retirement benefit is \$201,266 per Judge, which is entered as an accrued unfunded liability on the Government’s financial accounts. The Government respectfully submits that this is a substantial cost, which in turn will translate to a valuable defined benefit pension for life, when each Judge retires. Overall, when combined with the current salary, this is a very substantial and generous compensation package.

120. A third way to approach the issue is a comparative one: how do the Saskatchewan salaries compare to other Provincial and Territorial Courts across the country? The concept of surveying the salaries paid across the county, and using a national average of those salaries, comes in part from the *Provincial Court Act*, which provides that if the Legislative Assembly substitutes a different salary amount for that proposed by the Commission, the salary cannot be lower than the national average.¹¹⁷ While that provision does not apply to the Commission, the national survey and national average have traditionally been filed with the Commission as comparator data.

¹¹⁶ *Provincial Court Judges’ Association of New Brunswick v. New Brunswick* (2003), 231 D.L.R. (4th) 38 (C.A.) (“*Provincial Court Judges’ Association of New Brunswick (CA)*”), para. 168; appeal dismissed, *New Brunswick Provincial Court Judges Association* (SCC), *supra* note 22.

¹¹⁷ *Provincial Court Act*, *supra* note 3, s. 45(1)(b)(ii). Note that “national average” is not defined by the Act.

121. The following table compares the salary of all Provincial and Territorial Court Judges in Canada, other than Nunavut.¹¹⁸

TABLE 6
Salaries of Provincial and Territorial Judges¹¹⁹
As of April 1, 2017, Except Where Noted

Salaries for Provincial and Territorial Court Judges	
Alberta ¹²⁰	(2016) \$293,991
Ontario	\$292,829
Saskatchewan	\$290,848
Northwest Territories	\$278,828
Yukon ¹²¹	(2015) \$268,014
Prince Edward Island	\$258,734
Manitoba ¹²²	(2016) \$254,263
Quebec	\$251,500
New Brunswick ¹²³	(2015) \$246,880
British Columbia ¹²⁴	(2016) \$244,112
Nova Scotia ¹²⁵	\$249,021
Newfoundland & Labrador	\$215,732

¹¹⁸ Nunavut has a single trial court, whose judges are appointed and paid by the federal government: *Nunavut Act*, SC 1993, c. 28, s. 31; *Judges Act*, RSC 1985, c. J-1, s. 22(2.1). As it is a federally appointed court, it is not included in the table.

¹¹⁹ Source: Survey of other provincial and territorial governments.

¹²⁰ 2016 Salary. The Alberta Judicial Compensation Commission for April 1, 2017 to March 31, 2021 is yet to be appointed.

¹²¹ 2015 Salary. Salaries for 2016 to 2019 are currently under review.

¹²² 2016 Salary. Salaries for 2017/18 to 2019/20 are currently under review.

¹²³ 2015 Salary. The New Brunswick Judicial Remuneration Commission for April 1, 2016 to March 31, 2020, is yet to be appointed.

¹²⁴ 2016 Salary. The Judicial Compensation Commission report for the period 2017/18 to 2019/20 has been completed but not yet approved by the Legislative Assembly. The deadline for that decision is October 30, 2017.

¹²⁵ The last report of the Provincial Judges' Salaries and Benefits Tribunal was for the period April 1, 2014 to March 31, 2017. The Nova Scotia government did not accept the recommendations and continued the existing salary. Litigation is ongoing.

National Average (Including Saskatchewan)	\$261,335
National Average (Excluding Saskatchewan)	\$258,652

122. It will be argued later in this Submission that employing national comparators is not the only basis upon which to determine salaries for Provincial Court Judges in Saskatchewan. Even so, the information contained in this chart is revealing for it demonstrates that Provincial Court Judges in this province are very well remunerated, especially when compared to their counterparts in other jurisdictions:

- In terms of base salary alone, Saskatchewan ranks third, closely behind Alberta and Ontario.
- Saskatchewan is only \$3,143 behind the leading salary, Alberta.
- Saskatchewan is over the “National Average (Excluding Saskatchewan)” by \$32,195 and over the “National Average (Including Saskatchewan)” by \$29,513.
- There is a marked gap of over \$10,000 between the top three courts (Alberta, Ontario and Saskatchewan) and the fourth highest court (Northwest Territories). The gap becomes steadily greater between Saskatchewan and the remaining courts.

- Saskatchewan is more than \$30,000 ahead of the sixth ranked court in the middle of the list (Prince Edward Island), and approximately \$70,000 ahead of the last ranked court (Newfoundland and Labrador).

123. The Government submits that these salary figures show that Saskatchewan Provincial Court Judges are well-compensated when compared to their colleagues in other parts of the country. The Government also submits that this comparative table demonstrates that the level of financial benefits currently enjoyed by judges of the Provincial Court of Saskatchewan greatly exceeds the minimum level of remuneration required for judicial office. It must be assumed that the judges in other provinces and territories are receiving salaries which satisfy the requirements of judicial independence. Saskatchewan Judges rank well ahead of most of their colleagues in other provinces and territories, which strongly supports the conclusion that the salary level in Saskatchewan is considerably more than is needed to protect the judiciary from political interference through economic manipulation.

IX. RECRUITMENT AND RETENTION OF PROVINCIAL COURT JUDGES

A. Introduction

124. The Government submits that once it is determined that the compensation levels are sufficient to meet the requirements for judicial independence, the recruitment and retention of Provincial Court judges is the next most important factor to be weighed when determining the appropriate salary for judges of the Provincial Court of Saskatchewan.

Lamer CJC underscored the significance of this factor in the *Provincial Court Judges Reference* when he identified “the need to attract excellent candidates to the judiciary” as one of three factors a compensation commission should take into account.¹²⁶

125. The Government submits that by every objective criteria, the current salary, pension and benefit package paid to Provincial Court Judges in Saskatchewan is more than sufficient to attract competent and committed individuals to seek appointments to the Provincial Court, and to remain on the Court once appointed.

¹²⁶ *Reference re Provincial Court Judges*, supra note 1, para. 173.

B. Recruitment of Provincial Court Judges

126. It is difficult to ascertain with precision the various factors which motivate lawyers to seek judicial appointment. For example, the Vicq Commission 2002 identified four such factors namely, the “nature of the work”, the “prestige associated with being a judge”, the “security of the position”, and the “salary and benefits package”.¹²⁷ The Zakreski Commission 2008 accepted this list as well, and added a fifth factor, suggested by the Government: “a desire for public service.”¹²⁸ The Hodson Commission 2014 and the Hood Commission 2011 in turn adopted all five factors.¹²⁹ It cannot be denied that appointment to the judiciary affords a lawyer unique opportunities to contribute to the public life of Saskatchewan, and of Canada. It is the Government’s hope that public service is the single most important factor motivating individuals to seek judicial office.

127. The Hodson Commission and the Hood Commission both concluded that the current compensation package, salary and other remuneration, has been sufficient to recruit and retain the best and the brightest to the Court. The Hodson Commission commented on the exceptional individuals from diverse backgrounds which are currently on the Court, and concluded that there had been no difficulty in attracting sufficient high quality candidates to the Court. Significantly, the Hodson Commission commented that:

¹²⁷ Vicq Commission 2002, *supra* note 112, p. 12.

¹²⁸ Zakreski Commission 2008, *supra* note 48, p. 39, para. 8.

¹²⁹ Hodson Commission 2011, *supra* note 4, para. 169 ; Hood Commission 2011, *supra* note 48, para. 210.

It is less than clear to the Commission, the extent to which an increase in salary will influence an applicant to apply.¹³⁰

128. The Government submits that there are two factors which should be considered in any discussion of the recruitment of Judges for the Provincial Court. The first is that the bulk of the Provincial Court's workload is in the area of the criminal law. The target pool for the most qualified candidates for the appointment to the Provincial Court is therefore senior counsel with substantial experience in the criminal law, on either the Crown side, the defence side, or both. Crown counsel and Legal Aid counsel are thus an obvious component of the talent pool for possible appointments. So too are private counsel with substantial criminal practices, who may not necessarily be found in the largest firms in the Province.

129. The Government submits that a second important factor to consider in recruitment is diversity of experience, in terms of practice area, geographic area, and social factors.

This point was well made by the Federal Quadrennial Judicial Compensation and Benefits Commission 2008, chaired by Sheila Block:

The issue is not how to attract the highest earners; the issue is how to attract outstanding candidates. It is important that there be a mix of appointees from private and public practice, from large and small firms and from large and small centres.¹³¹

¹³⁰ Hood Commission 2011, *supra* note 48, para. 225; Hodson Commission 2014, *supra* note 44, paras. 170, 171.

¹³¹ "Federal Quadrennial Judicial Compensation and Benefits Commission, 2008," para. 116 ("Block Commission 2008"); available on-line: <http://www.quadcom.gc.ca/Media/Pdf/2007/RapportFinalEn.pdf>.

130. The Government has had, and continues to have, no difficulty in selecting highly qualified individuals to serve as provincial court judges. Individuals seeking appointment to the Provincial Court must first make a formal application. The applications are then reviewed by the Judicial Council of Saskatchewan, which decides whether to recommend them for appointment.¹³² The Government has been advised that there are currently twenty-three individuals who have been recommended for appointment by the Judicial Council, after review of their qualifications. That number is somewhat lower than three years ago, when the Government advised the Hodson Commission that there were thirty-five lawyers who had been approved by the Judicial Council.¹³³ Nonetheless, the current level of judicial remuneration encourages many lawyers to submit to the rigorous screening process and scrutiny by the Judicial Council in the hopes of becoming a Judge of the Provincial Court.

131. Since November 2014, the date of the Government's Submission to the Hodson Commission, the Government has made nine appointments to the Provincial Court of Saskatchewan. These appointments were:

- Michelle Marquette – December 19, 2014
- Vanessa Monar Enweani – July 24, 2015
- Steven Schiefner – November 13, 2015

¹³² *Provincial Court Act*, *supra* note 3, s. 54.

¹³³ Hodson Commission 2014, *supra* note 4, para. 88.

- Daryl Rayner, Q.C. – November 25, 2016
- Marilyn Penner – January 13, 2017
- Donna Taylor – March 10, 2017
- Michelle Baldwin – June 9, 2017
- Robert Mackenzie – June 23, 2017
- Lloyd Stang – September 1, 2017¹³⁴

132. Prior to their appointments, these Judges had varied and successful careers. Four of them were Crown Prosecutors with Saskatchewan Public Prosecutions at the time of their appointment, one of whom had also been with the Public Prosecution Service of Canada. One of the provincial Crown prosecutors had been the Assistant Deputy Attorney General, Public Prosecutions, for the entire Province, and one was a Regional Crown Prosecutor. One had also been a prosecutor with the International Criminal Court in The Hague, Netherlands, and is fully bilingual, an important qualification for the Court.

133. Four of the appointees went to the Bench from private firms. These appointees were from a cross-section of firms in Saskatchewan. One came from one of the largest firms in the Province, two from mid-range firms, and one was a sole practitioner. The Government submits that these appointments illustrate that an appointment to the Provincial Court is attractive to lawyers in private practice, including lawyers in large firms.

¹³⁴ Source: Media releases issued by the Government of Saskatchewan on the appointment of each Judge.

134. One appointee had been with the Legal Aid Commission prior to working with Public Prosecutions, while another appointee had a varied legal career having worked in municipal government and as Vice-Chair of the Saskatchewan Labour Relations Board.

135. In addition to coming from a variety of practices, the fourteen appointees were regionally diverse: three were in Regina at the time of their appointment; two came from Saskatoon; and one each came from Wadena, Yorkton, Meadow Lake and La Ronge.

136. All of the appointees had a record of extensive volunteer service to their local communities, as well as in organizations such as Red Cross, the Law Foundation of Saskatchewan, and the Saskatchewan Trial Lawyers Association.

137. The Government submits that these Judges represent a good cross-section of the legal profession in Saskatchewan. They show that the recent appointments to the Provincial Court come from a variety of experiences, both criminal law and general practice, from government and private practice, and from large firms and small, throughout the Province.

138. The Government notes that while the bulk of the Provincial Court's work is in the area of criminal or *quasi*-criminal law, with some family law and some small claims

jurisdiction, recent appointments have not been limited to those with criminal law backgrounds. Several of the recent appointments were in general practice. There has been no shortage of well-qualified individuals to serve as judges of the Provincial Court of Saskatchewan. Accordingly, there is no empirical data to suggest, even remotely, that the current judicial salary together with other financial benefits is inadequate to attract excellent and well-qualified individuals to seek judicial office.

C. Retention of Provincial Court Judges

139. Once appointed, retention of Provincial Court judges in Saskatchewan is not a problem. Indeed, since 1987 — a full decade before compensation commissions were found to be a constitutional pre-requisite to the setting of judicial remuneration — only fifteen Provincial Court judges have left the Court prior to the date they were eligible for retirement. Nine of these were appointed to the Queen's Bench; one resigned to take a position as an Associate Deputy Minister in the Government of Saskatchewan; two have taken leave of absence for other positions (one of whom has since returned to the Court); and three have resigned.

140. Useful information on the stability of the Provincial Court Bench across the country is provided by the Office of the Commissioner for Federal Judicial Affairs. Each year, the Office publishes the number of applicants for federal judicial appointments, including applications from Judges on the Provincial and Territorial Courts. In the most recent report, from a year ago, there were thirteen Provincial and Territorial Judges, from across the country, who had applied for a federal judicial appointment.¹³⁵

141. While this information is not broken down by province or territory, it does paint a picture of a high job satisfaction rate for Provincial and Territorial Court Judges across the country. Considering there are over 1,000 Provincial and Territorial Judges, that is an application rate of approximately 1.3% overall.

142. The Government submits that these numbers indicate a stable Bench. There is not a problem with retention of Judges once they are appointed.

¹³⁵ Office of the Commissioner for Federal Judicial Affairs: “Report of Activity of the Judicial Advisory Committees Across Canada”, November 1, 2015 to October 31, 2016. Available on-line: <http://www.fja.gc.ca/appointments-nominations/committees-comites/reports-rapports/report-rapport-2016-eng.html>.

X. COMPARISON WITH OTHER JUDGES

A. Introduction

143. 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, including compensation paid to senior lawyers in the public service, as well as lawyers in the Saskatchewan private bar, to the extent such information is available.

Reference can be made to the level of remuneration paid to Provincial Court Judges in other jurisdictions, but it is the conditions in Saskatchewan which should be most influential.

B. National Average of Provincial Court Judges' Compensation

144. The Government submits that a comparison of the level of compensation paid to Provincial Court Judges in Saskatchewan with that paid to Provincial Court Judges in other provinces can be of assistance to the Commission. However, such comparisons are simply one factor which the Commission should take into account. As the Zakreski Commission noted, a commission which restricted itself to one comparator only would be acting as “purely a rubber stamp.”¹³⁶

¹³⁶ Zakreski Commission 2008, *supra* note 48, p. 40, para. 19..

145. There is also the difficulty, noted by both the Hodson Commission¹³⁷ and the Hood Commission,¹³⁸ that it is difficult to have a completely up-to-date summary of the salaries of all of the Provincial and Territorial Courts across Canada. As Table 6 (above) demonstrates, the salaries from other jurisdictions are not always up to date, for a variety of reasons. In some jurisdictions, the commissions operate retroactively, instead of prospectively, as is the case in Saskatchewan. Changes to salaries may be delayed by the process by which the government is authorised to respond to the recommendations. And in some cases, there may be ongoing litigation which delays a final implementation of a salary for the current year.

146. The Saskatchewan Government, after receiving the advice of a judicial compensation commission, has the responsibility to pay the salaries and other financial benefits required by law to be paid to Provincial Court Judges. As this remuneration is paid entirely out of the provincial treasury, it must be tied to local economic conditions and bear a reasonable relationship to local market comparables, namely the compensation paid to senior lawyers in the provincial public service and the private legal sector in Saskatchewan. The Government submits that it would not be appropriate for this Commission to ascertain the level of compensation to be paid to Provincial Court Judges in Saskatchewan by referring

¹³⁷ Hodson Commission 2014, *supra* note 4, para. 177.

¹³⁸ Hood Commission 2011, *supra* note 48, para. 248.

only to the average salary paid to Provincial Court Judges across the country, without regard for local economic and labour market realities.

147. On this point, the Government respectfully disagrees with one of the comparative factors identified by the Hodson Commission 2014: “An increase above the cost of living is warranted to ensure that the salary of Saskatchewan Judges continues to be in the top tier of the provinces and territories.”¹³⁹

148. With all due respect to the previous Commission, the Government submits that there is nothing in the Constitution of Canada, the principles of judicial independence, nor the need to attract applicants from the Saskatchewan Bar, that warrants that factor. Saskatchewan Judges do not have a constitutional right to be amongst the best paid in the country. The Government will return to this point later in the Submission.

149. Indeed, were a “national average” standard to be employed, this Commission would effectively abrogate its constitutional and statutory responsibilities by deferring to recommendations made by compensation commissions in other provinces that utilized economic and other labour market data relevant to those particular jurisdictions but not to Saskatchewan. This would run contrary to the Supreme Court’s direction in *Provincial*

¹³⁹ Hodson Commission 2014, *supra* note 4, para. 183(d).

Court Judges Reference that an “effective” compensation commission is a constitutionally necessary pre-condition to the setting of judicial remuneration.¹⁴⁰

150. From a practical perspective, the “national average” is an elusive standard. It is exceedingly difficult to obtain an accurate picture of the average judicial salary across Canada because the convening of provincial compensation commissions varies across the country. Some compensation commissions, like this Commission, are mandated to make recommendations every three years, while others make recommendations every four years. Some make recommendations retrospectively, so that increases in salary may be in arrears from the moment of the recommendations. As well, in some provinces it is not uncommon for litigation to ensue should the government decline to follow the recommendations of the compensation commission, a reality lamented by the Supreme Court in *New Brunswick Provincial Court Judges*.¹⁴¹ As a consequence, it is possible only to obtain a snapshot of the level of judicial compensation across Canada at a specific time.

C. Comparison with Federally Appointed Judges Not Appropriate

151. In previous hearings before this Commission, comparisons have also been made between the compensation paid to Provincial Court Judges in Saskatchewan and that paid

¹⁴⁰ *Provincial Court Judges Reference*, *supra* note 1, para. 169.

¹⁴¹ *New Brunswick Provincial Court Judges*, *supra* note 22, para. 12.

to federally appointed judges. While comparisons to the compensation package paid to federally appointed judges may prove interesting, the Government submits it does not have much relevance to the appropriate level of remuneration that should be paid to Provincial Court Judges in Saskatchewan.

152. This issue arose in *New Brunswick Provincial Court Judges Association*. The New Brunswick Court of Appeal held that federally appointed judges were not an appropriate comparator for purposes of setting the level of remuneration to be paid to Provincial Court Judges in New Brunswick. The reason is that the salary for the federally appointed judges is uniform across the country, and therefore tends to be influenced by the need to be competitive in the larger metropolises, such as Toronto, Montreal and Vancouver:

162 The 1997 tax data supplied to the 2000 Federal Commission revealed that lawyers in Ontario who fell into the comparator population, and whose income fell within the 75th percentile, earned \$260,000. For lawyers in Toronto that figure climbed to \$343,000. By contrast, New Brunswick lawyers falling within the 75th percentile of the comparator population earned \$177,000. Given that the federal judicial salary is driven, in part, by the salary expectations of those practising in the larger metropolitan areas of Canada, it is clear that the salary expectations of those seeking a federal judicial appointment in New Brunswick are more easily satisfied than those seeking appointments in a province such as Ontario. This reality stems from the fact that the federal salary fails to take into account pronounced regional disparities in the income of those practitioners considered, at least by the judiciary, to form the group of lawyers most likely to generate outstanding candidates for judicial appointment.¹⁴²

[emphasis added]

¹⁴² *New Brunswick Provincial Court Judges' Association (CA)*, *supra*, note 116, para. 162.

153. The New Brunswick Court of Appeal concluded:

... 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.¹⁴³

[emphasis added]

154. The Supreme Court of Canada affirmed the ruling of the New Brunswick Court of Appeal on this point.¹⁴⁴ In light of the Supreme Court's ruling, the Government submits that parity of remuneration of provincially appointed judges with federally appointed judges is not a valid objective for provincial judicial compensation commissions.

155. The Bernard Commission 2005 reached the same conclusion, stating:

This Commission does not find the argument to compare with the 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 of the Provincial Court before every Commission, our salary recommendation (set out below) proposes a principled and rational basis to determine the appropriate salary for Provincial Court Judges.

¹⁴³ *Ibid.*, para. 163.

¹⁴⁴ *New Brunswick Provincial Court Judges Association (SCC)*, *supra* note 22, paras. 71-84.

The salary of judges of the Court of Queen's Bench adds very little to our principled approach.¹⁴⁵

[emphasis added]

156. A third factor is that, as noted by the Zakreski and the Hood Commissions, salary cannot be considered in isolation from pension. The salary and the pension together make up the total compensation plan. It would therefore be a mistake simply to compare the salaries of the Provincial Court Judges to the salaries of Queen's Bench judges, without taking into account the respective pension plans for both Courts. Absent any actuarial information comparing the Saskatchewan Provincial Court pension with the Queen's Bench pension, it is not appropriate simply to compare the salaries of the two sets of judges. At most, as commented by the Hodson Commission, the salary of federally appointed judges may simply be one factor to take into account.¹⁴⁶

¹⁴⁵ Barnard Commission 2005, *supra* note 113, para. 13.

¹⁴⁶ Hodson Commission 2011, *supra* note 4, para. 181.

XI. SALARY COMPARATORS – THE BAR

A. Introduction

157. It is not easy to identify comparators for purposes of setting the appropriate level of remuneration for judges of the Provincial Court of Saskatchewan. The Government submits that because the recruitment of well-qualified individuals to serve as Provincial Court judges is one of the major considerations in this exercise, and because resident Saskatchewan lawyers form the exclusive pool out of which all Provincial Court judges are selected, four comparator groups appear relevant. These are (1) senior Crown counsel employed in the Saskatchewan public service, including the Deputy Minister of Justice, (2) senior defence counsel employed by the Saskatchewan Legal Aid Commission, (3) senior Crown counsel employed by the federal Department of Justice and Public Prosecutions Service, and (4) senior lawyers engaged in the private practice of law in Saskatchewan, with a particular emphasis on criminal law. Each of these groups will be discussed in turn.

158. The reason for the choice of these comparator groups is based on the jurisdiction of the Provincial Court, and thus the skill set which a desirable candidate can bring to the Court. The bulk of the Provincial Court's jurisdiction and cases is criminal law and provincial offences. The Court has a civil jurisdiction, but that jurisdiction is small in relation to the great bulk of the Court's workload, which is the trial of criminal and

provincial penal offences. The pool of lawyers who therefore are most likely to bring the necessary experience and background in the criminal law are lawyers who practise in the area of criminal law: Crown prosecutors, both provincial and federal; Legal Aid defence counsel; and private counsel practising in criminal law.

B. Senior Legal Counsel in the Saskatchewan Public Service

159. In addition to the criminal law expertise of Crown prosecutors, there are two other factors which the Government submits support using senior Crown counsel as relevant comparators. First, provincial Crown counsel are drawn from the legal community in Saskatchewan, the same group which is the basis for appointment to the Provincial Court. To the extent that salaries and benefits offered by the Province attract qualified lawyers to the public practice of law, they help to demonstrate the level of financial remuneration expected by well-trained, senior lawyers in Saskatchewan. Second, once lawyers enter the public service, they are entrusted with significant responsibilities, particularly at the senior levels of the Ministry of Justice. In particular, the role of Crown prosecutor imposes significant duties of a public nature on lawyers who hold that office. While not necessarily comparable to the duties of a judge, those public duties are significant and help to establish Crown counsel as a relevant comparator.

(1) Senior Crown Counsel Employed by Saskatchewan Justice

160. As of April 1, 2017, the top-of-the-range salary for Senior Crown Counsel, including Crown Prosecutors, employed by the Government in a non-supervisory capacity is \$154,848. Since July 1, 2013, there have been two special circumstances supplements to this salary. Senior Crown Counsel whose year of call to the bar would place them at range maximum for five years or more may receive a 5% special circumstances supplement, subject to satisfactory performance, for a salary of \$162,588. Senior Crown Counsel whose year of call to the bar would place them at range maximum for ten years or more may receive a 10% special circumstances supplement, subject to satisfactory performance, for a salary of \$170,328.¹⁴⁷

161. The difference between the maximum salary of the most Senior Crown counsel in the Government of Saskatchewan, and the current salary for Judges of the Provincial Court, is thus \$120,520. The Government submits that this difference in salary is sufficient to make the position of Provincial Court Judge an attractive financial option for the most experienced Crown prosecutors to consider.

162. The benefits portion of the Crown compensation package is not insignificant. It comes to the equivalent of 19.98% of salary or approximately \$30,939 (calculated on the

¹⁴⁷ Source: Public Service Commission.

non-supplemented senior salary of \$149,880). This calculation includes such benefits as pension, dental plan, health plan and sick leave. It does not include the value of the long term disability benefits plan, scheduled days off (SDOs) or a vacation entitlement of six weeks available to employees after twenty-two years of service. The following chart illustrates how this amount is calculated:

<u>Benefit</u>	<u>% of Pay</u> ¹⁴⁸
Pension	7.60
Dental Plan	1.20
Sick Leave	5.70
Health Plan	<u>1.55</u>
Total	16.05%

In addition to these amounts, there are some additional fringe benefits which bring the total up to 19.98%.¹⁴⁹

163. When the current monetary equivalent of these benefits is combined with salary, the total value of a senior Crown Counsel's remuneration package in 2017 comes to \$185,787.¹⁵⁰ Direct comparison to the remuneration package of Provincial Court Judges is not easy to make, given that the Government acknowledges that pension cost to the Government is not an immediate financial value to individual Judges. However, the Government submits that for the purposes of this inquiry, it is clear that the pension and

¹⁴⁸ Source: Public Employees Benefits Agency.

¹⁴⁹ Government of Saskatchewan Financial Administration Manual, Fringe Benefit Factors, October 7, 2016.

¹⁵⁰ Using the non-supplemented senior Crown salary mentioned earlier.

benefits package for Judges is much greater than the equivalent package for Crowns at the top of the range.

(2) Senior Lawyers in Executive Management – The Deputy Minister

164. Another possible comparator is the position of Deputy Minister of Justice and Deputy Attorney General. There are of course significant differences between the function of Deputy Minister and that of a Provincial Court judge. The Deputy Minister's function is to administer a large Ministry. The Deputy Minister is the permanent head of the Department of Justice, responsible for the day-to-day administration of this large government central agency.¹⁵¹ The Deputy Minister is responsible for 870.3 FTE employees, and an expense budget for 2017-2018 of \$175,474,000. The Deputy Minister ensures that specific organizational commitments are achieved. Two major differences from the role of a judge is of course that the Deputy Minister is accountable to the Premier, and serves at pleasure, rather than with security of tenure.

165. Nonetheless, the Deputy Minister has a substantial legal role. The Deputy Minister provides legal advice to the Minister, either directly or by lawyers under the supervision of the Deputy Minister. The Deputy Minister also exercises functions of a quasi-judicial

¹⁵¹ *Justice and Attorney General Act*, SS 1983, c. J-4.3; *The Executive Government Administration Act*, SS 2014, c. E-13.1, s. 11.

nature as a delegate of the Attorney General, such as determining whether a prosecution for certain *Criminal Code* offences should be instituted (e.g. – offences involving hate speech)¹⁵² and deciding whether the Crown may proceed by direct indictment in a particular case.¹⁵³ These are serious legal responsibilities for the Deputy Minister, who is always a senior member of the Bar. The Government therefore submits that the salary paid to the Deputy Minister is a relevant factor for this Commission to take into account.

166. The current annual salary for the Deputy Minister is \$227,004/year (within a range of \$187,380 to \$243,600), with the same benefits package as for Senior Crown counsel. This is a substantial compensation for a member of the profession in Saskatchewan. However, it is \$63,844 less than the current salary of the Judges of the Provincial Court. The Government submits that this salary is also a relevant factor for the Commission to take into account.

(3) Conclusion with Respect to Counsel in the Saskatchewan Public Service

167. The Government submits that the salaries paid to senior Crown counsel and to the Deputy Minister are relevant factors for this Commission to take into account in assessing

¹⁵² *Criminal Code*, RSC 1985, c. C-46, s. 319.

¹⁵³ *Ibid.*, s. 577.

the adequacy of Judicial compensation. The substantially higher salary for Provincial Court Judges, compared to senior Crown counsel, such as Crown Prosecutors, is an attractive inducement for a senior lawyer to consider applying for an appointment to the Court.

C. Counsel with the Saskatchewan Legal Aid Commission

168. One of the recruitment goals for Provincial Court judges is lawyers who have experience with the criminal law, since that is the bulk of the work-load of the Court. In that perspective, senior counsel from the Saskatchewan Legal Aid Commission are an obvious target group. They have considerable expertise in the area of criminal law and if appointed, will bring that expertise to the role of a judge of the Provincial Court.

169. The Government submits that in terms of recruiting excellent counsel with criminal law expertise, the salary of senior counsel with the Saskatchewan Legal Aid Commission is a relevant comparator. The current maximum salary for Legal Aid counsel is \$139,706 per year.¹⁵⁴ That salary is over \$150,000 less than the salary of a Provincial Court Judge. The Government submits that the Provincial Court salary is an attractive inducement for a senior defence lawyer with the Legal Aid Commission.

¹⁵⁴ Source: Saskatchewan Legal Aid Commission Collective Bargaining Agreement, as of October 1, 2015.

D. Federal Crown Prosecutors

170. Another possible pool of applicants with experience in the criminal law are the federal Crown prosecutors employed by the Public Prosecutions Service of Canada. According to the Federal Treasury Board website, the top of the range for the LA-3A category, which is the appropriate category for most senior federal Crown prosecutors, is \$173,177 (outside of Toronto). This salary is over \$115,000 lower than the salary of Provincial Court Judges. As with the provincial Crown prosecutors, this difference strongly suggests that in terms of salary, the current salary level for the Judges would make the Court an attractive option for a senior federal Crown prosecutor.¹⁵⁵

E. Senior Lawyers in the Saskatchewan Private Legal Sector

171. It has always been exceedingly difficult to obtain current and accurate information respecting the earning capacity of senior lawyers in private practice across Canada, let alone information that is specific to Saskatchewan. Indeed, the Federal Block Commission, in its 2008 Final Report, commented on the paucity of current and reliable data on the income earned by lawyers in private practice.¹⁵⁶

¹⁵⁵ Treasury Board of Canada: “Agreement between the Treasury Board and Association of Justice Counsel”, Appendix A. Negotiations for a new Collective Bargaining Agreement are ongoing. On-line: <http://www.tbs-sct.gc.ca/agreements-conventions/view-visualiser-eng.aspx?id=13#toc258484882> .

¹⁵⁶ Block Commission 2008, *supra* note 131, paras. 112.

172. However, one factor that clearly needs to be taken into account when speaking of appointments from the private firms is that the Judges of the Provincial Court have a very attractive pension plan. It is a defined benefit plan, with contributions from the provincial government which go beyond the maximum set out in the federal *Income Tax Act*, as outlined earlier. It cannot be forgotten that lawyers in private practice are individually responsible for underwriting the complete cost of their retirement and other benefits. It is a matter of common knowledge that lawyers in private firms do not have pension plans, funding their retirement through personal savings, investments and RRSPs.

173. The value of the judicial pension in attracting excellent candidates to the Provincial Court was recognised by both the New Brunswick Court of Appeal¹⁵⁷ and the Hood Commission.¹⁵⁸ The Provincial Court pension plan is a very attractive component for recruitment from the private bar.

174. The Government submits that the current salary paid to Provincial Court judges, not to mention the over-all remuneration package, is more than adequate to attract well-qualified individuals from the private Bar to seek and to accept appointments to the Provincial Court of Saskatchewan. This is borne out by the fact that four of the nine

¹⁵⁷ *New Brunswick Provincial Court Judges' Association (CA)*, *supra*, note 116, para. 168.

¹⁵⁸ Hood Commission 2011, *supra* note 4, paras. 225, 230.

Judges appointed since the Government's Submission to the Hodson Commission have come from the private sector, including from one of the largest firms in the province.

XII. PREVAILING ECONOMIC AND FISCAL CONDITIONS IN SASKATCHEWAN

A. Introduction

175. Previous Commissions have considered the prevailing economic and fiscal conditions in Saskatchewan. The Government submits that the current financial situation of the Government of Saskatchewan is a significant factor which must be considered in setting the appropriate levels of judicial remuneration for the next three years, namely, April 1, 2018 to March 31, 2021.

176. The Budget materials for the current fiscal year, 2017-18, show that the Government is facing a budget deficit of \$685 million dollars. That factor is affecting all of the Government's spending priorities.

177. The Government respectfully submits that the judiciary, as one of the three branches of government, is not immune from the effects of that revenue shortfall.

B. Summary of Budget Situation

178. As is well known, Saskatchewan's economy remains heavily resource-based, which in turn means that government revenues depend heavily on the resource sector. As the

budget documents show, oil and potash prices began dropping three years ago and have stayed stubbornly low. The Government's revenues from those key resources has declined significantly. That decline in revenue has meant a shortfall of more than a billion dollars, as well as hundreds of millions less from tax revenue from the slowdown of those sectors.¹⁵⁹

179. The Government has responded to that financial situation by taking measures to increase revenues and reduce expenditures. Nonetheless, there is still a projected budget deficit of \$685 million for 2017-18, in both the main *Budget 2017* and in the *First Quarter Report*.¹⁶⁰

180. A smaller shortfall of \$304 million is forecast for 2018-19 with a return to balance in three years – a modest surplus of \$15 million in 2019-20 and an increased surplus of \$183 million in 2020-21.¹⁶¹

181. Revenue is forecast at \$14.17 billion in the 2017-18 Budget, up about \$141 million from last year's budget and \$471 million higher than the 2016-17 third quarter forecast. The increase in revenue in the 2017-18 Budget is largely due to the impact of modernizing and expanding the tax system, including an increase to the Provincial Sales Tax (PST) rate, as

¹⁵⁹ *Saskatchewan Provincial Budget 17-18: Meeting the Challenge ("Budget 2017")*, p. 6.

¹⁶⁰ *Ibid.*, p. 7; *Saskatchewan Budget Update 17-18: Meeting the Challenge – First Quarter Financial Report ("First Quarter Report 2017")*, p. 4.

¹⁶¹ *Budget 2017*, *supra* note 159, p. 7.

well as higher projected net income from government business enterprises and a modest increase in non-renewable resource revenue. This is offset by significant reductions in one-time federal transfers and own source revenue.¹⁶²

182. Of particular significance to the issues facing this Commission, the *Budget 2017* includes a reduction of \$250 million from total public sector compensation costs, plus a \$300 million contingency to protect against unexpected in-year revenue declines and unforeseen expense pressures due to higher-than projected utilization and natural disasters, such as forest fires and flooding.¹⁶³ In the *First Quarter Report 2017*, the planned public sector compensation reduction has been reduced to \$125 million as negotiations continue in the public sector. The budget contingency has been reduced to \$135.1 million to reflect realised expense pressures.¹⁶⁴

C. Economic Indicators

183. In 2016, the Saskatchewan economy continued to be affected by low commodity prices and subdued global growth. Following a decline of 1.3 per cent in 2015, Saskatchewan real GDP is expected to have declined by 0.2 per cent in 2016.¹⁶⁵

¹⁶² *Ibid.*, p. 8.

¹⁶³ *Ibid.*

¹⁶⁴ *First Quarter Report 2017*, *supra* note 160, p. 4.

¹⁶⁵ *Budget 2017*, *supra* note 159, p. 27.

184. Following a weak performance in 2015, many indicators were down again in 2016. Building permits, international goods exports, investment in new housing construction, wholesale trade as well as the number of housing starts and new motor vehicles sales were all down in 2016. Other areas of the Saskatchewan economy, however, held up reasonably well. Saskatchewan's unemployment rate remained one of the lowest in the country. Average weekly earnings in Saskatchewan in 2016 was \$987.85.¹⁶⁶

185. Saskatchewan real GDP is currently forecast to increase by 0.8 per cent and nominal GDP is anticipated to rise by 4.9 per cent in 2017. Though growth is expected to resume in 2017, oil and gas investment as well as potash investment are still expected to remain below the levels realized a few years ago when prices were much higher and the potash industry was in the midst of significant expansion.¹⁶⁷

186. Saskatchewan's economy, like other oil-producing provinces, has been affected by low oil prices and weak global economic growth over the past two years. Strong economic fundamentals and diversity in Saskatchewan's economy have helped weather economic challenges. Some economic indicators such as population, average weekly earnings,

¹⁶⁶ *Ibid.*, pp. 29, 31.

¹⁶⁷ *Ibid.*, p. 32.

investment in non-residential building construction not only outperformed the national average, but some reached historically high levels in 2016.¹⁶⁸

187. With the background of strong U.S. economic growth together with gradually improving oil prices, Saskatchewan's economy is forecast to grow by 0.8 per cent in 2017 to an average of 1.9 per cent for the remaining forecast period.¹⁶⁹

188. Nonetheless, it is the current situation which the Government is facing which affects its position on spending and taxes. As well, it must be remembered that resource royalties are one of the major sources of provincial revenue.¹⁷⁰ Even if other sectors of the economy are showing signs of recovery, the current resource prices can have a significant effect on government revenues.

D. Government Response to Budget Deficit

189. Faced with this financial situation, the Government has responded in three ways:

(1) raising taxes;

(2) cutting back on services to the public; and

¹⁶⁸ *Ibid.*, p. 35.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*, p. 72.

(3) implementing a policy of across-the-board cuts to public sector compensation averaging 3.5%, including both the legislative and executive branches of government.

(1) Revenue Initiatives

190. As part of its response, the Government in the 2017/18 Budget announced changes to provincial revenue measures. Personal and corporate income tax rates were reduced, but the Provincial Sales Tax was increased, both in the tax base and in the tax rate.¹⁷¹ One of the major changes was to increase the rate for the Provincial Sales Tax, from 5% to 6%.¹⁷² That change will be felt by every resident of Saskatchewan whenever they make a retail purchase which is subject to PST.

191. The Government also expanded the tax base that is subject to the PST. For instance, children's clothing and restaurant meals are now subject to the PST. The changes also included extending the PST to the payment of insurance premiums, as well as expanded application of the PST to construction projects, including home renovations.

¹⁷¹ *Ibid.*, p. 50

¹⁷² *Ibid.*, p. 53.

There have also been increases to tobacco taxes and fuel taxes. Overall, these changes will affect all residents of Saskatchewan to some extent.¹⁷³

(2) Reductions in Services

192. *Budget 2017* also shows that the Government found it necessary to reduce a number of programs, or reduce funding to well-established programs, to help address the fiscal challenge facing the Province:¹⁷⁴

- the hearing aid plan, podiatry services and chiropractic services were phased out;
- long-term care fees were increased, effective July 1, 2017;
- total education expense was budgeted at \$3.6 billion, down \$45.1 million or 1.2 per cent from 2016-17;
- Saskatchewan's twenty-eight school divisions will receive \$1.9 billion in school operating funding, down \$22 million from 2016-17, a 1.2 per cent reduction year-over-year;
- base operating grants to universities, technical institutes and regional colleges were reduced by 5%.

¹⁷³ *Ibid.*, p. 52.

¹⁷⁴ *Ibid.*, p. 13.

193. The Government also wound up the Saskatchewan Transportation Company (STC), noting the steady rise in the subsidy that the Government had been paying for each passenger.¹⁷⁵

(3) Reduction in Public Sector Compensation

194. The proposal to reduce public sector compensation is a significant part of the Government's response to the fiscal pressures.

195. The cost of compensation across the public sector is approximately \$7.0 billion annually, representing the largest single component of Government's expense. Given the fiscal challenge, the *Budget 2017* proposed a reduction in total public sector compensation funding of \$250 million, a savings of approximately 3.5 per cent. Employees across the public sector – in ministries, Crowns, agencies, health regions, school divisions, and the post-secondary sector – are being asked to help meet the challenge.¹⁷⁶

¹⁷⁵ *Ibid.*, p. 11.

¹⁷⁶ *Ibid.* But note that the proposed public sector compensation reduction has been reduced in the *First Quarter 2017*, *supra* note 160, p. 4.

196. Premier Wall announced that effective April 1, 2017, Ministers and MLAs will take a 3.5 per cent wage rollback and staff in the Premier's office, caucus offices and Ministers' offices will take nine unpaid days off – equivalent to a reduction of about 3.5 per cent.¹⁷⁷

197. The Executive Council has already implemented those wage rollbacks. The Premier, the Deputy Premier and the Cabinet ministers have all voluntarily taken a 3.5% salary reduction for fiscal 2017/18, renewable in future years. Staff in the Office of Executive Council, ministerial assistants, Deputy Ministers, and heads of Crown corporations have all taken a salary reduction.¹⁷⁸

198. The legislative branch is also subject to the compensation roll-backs. By an amendment to the Legislative Assembly Act passed in the spring, the annual compensation for all Members of the Legislative Assembly have been reduced by 3.5%.¹⁷⁹

(4) Impact on Judicial Salaries

199. The Government respectfully submits that the judiciary is not immune from the financial challenges which the Government is facing. As the third branch of the provincial

¹⁷⁷ *Ibid.*

¹⁷⁸ "Summary of Compensation Reductions for Members of Executive Council, Deputy Ministers, and Crown Corporation Chief Executive Officers"; *The Ministerial Assistant Employment Regulations*, RRS c. P-42 Reg 2, s. 6.2; Order-in-Council 147/2017.

¹⁷⁹ *An Act to Reduce Salaries of Members of the Legislative Assembly, 2017*, SS 2017, c. 3, s. 2.

government, the judiciary is also affected by the financial situation. The Supreme Court in the *Provincial Court Judges Reference* made it clear that the judiciary is also subject to financial constraints facing government, provided spending reductions are broadly-based across government. When the elected members of both the other branches of the government have reduced their compensation, and the public service generally is facing compensation reductions, it is not inconsistent with the constitutional guarantee of judicial independence that the judiciary also be asked to contribute in some way.

200. The Government submits that this principle applies with even greater force when the Government has taken measures to increase revenue and decrease services in ways that every resident of Saskatchewan will feel in some way. When the people of Saskatchewan are feeling the effects of the financial restraint measures, it would be difficult to argue that the judiciary is nonetheless unaffected.

201. In *New Brunswick Provincial Court Judges Association*, the Supreme Court confirmed that there is no automatic entitlement to a salary increase every year.¹⁸⁰ The Government respectfully submits that its proposal for no salary increases over the next three years is not an independence issue, in the current climate of fiscal restraint.

¹⁸⁰ *New Brunswick Provincial Court Judges Association*, supra note 22.

202. The Government submits that in times of fiscal restraint, it is appropriate to require the judiciary, as one of the branches of government, to share in the fiscal restraint measures faced by the other branches of government and all residents of Saskatchewan. This approach does not affect the independence of the judiciary. Judicial independence does not make judges uniquely impervious to provincial fiscal realities and restraint measures.

203. Lamer CJC made this point in the *Provincial Court Judges Reference*, in two passages quoted earlier in this Submission but which bear repeating at this point. First, Lamer CJC emphasised that decisions about the provincial budget, revenues and expenditures, are an inherently political matter, within the authority of the legislative and executive branches of the government:

My starting point is that s. 11(d) [of the *Charter*] does not require that the reports of the commission be binding, because decisions about the allocation of public resources are generally within the realm of the legislature, and through it, the executive. The expenditure of public funds, as I said above, is an inherently political matter.¹⁸¹

[emphasis added]

204. Lamer CJC then went on to point out that the judiciary is not subject to the needs of budget restraint. Judicial independence is not a shield for the economic interests of the judiciary:

¹⁸¹ *Provincial Court Judges Reference*, *supra* note 1, para. 176.

Finally, I want to emphasize that the guarantee of a minimum acceptable level of judicial remuneration is not a device to shield the courts from the effects of deficit reduction. Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times. Rather, as I said above, financial security is one of the means whereby the independence of an organ of the Constitution is ensured. Judges are officers of the Constitution, and hence their remuneration must have some constitutional status.¹⁸²

[emphasis added]

205. Similarly, in *Ell*, Major J. for the Court emphasised that judicial independence exists for the benefit of the judged, not the judges. Conditions of judicial independence must be interpreted in light of the public interest.¹⁸³ The Government submits that the budget situation of the provincial government is a significant public interest factor.

206. The Government respectfully submits that its proposal for no salary increase for the next three years is consistent with these statements from the Supreme Court. When both of the other branches of government and the people of the Province are feeling the impact of the financial situation, it is not unreasonable to expect that the judiciary will also be affected. In fact, as Lamer CJC suggested, it would be damaging to the reputation of the judiciary if they did not participate in the measures necessary to deal with a difficult financial situation.

¹⁸² *Provincial Court Judges Reference*, *supra* note 1, para. 196.

¹⁸³ *Ell*, *supra* note 21, para. 29.

207. The Government respectfully submits that the proposal for no salary increase at this time, in this particular climate of fiscal restraint, does not raise an independence issue. Judicial independence does not mean a salary increase every year of a judge's work life. As Table 2 (above) shows, over the past twenty years the Judges of the Provincial Court have benefitted from salary increases far in excess of cost of living, including six annual increases exceeding \$10,000. In light of that pattern, it is appropriate for the Government to propose that there be no salary increase for the next three years, during a period of general public sector compensation restraint, and taxation and service decisions which affect all residents of Saskatchewan.

208. In these circumstances, a three year period of no salary increases does not affect judicial independence. It is part of an overall need to rein in provincial spending. Judicial independence does not make judges uniquely impervious to fiscal realities and restraint measures.

209. The Government's proposal for no salary increases for the judiciary nonetheless recognises the special position of the judiciary in our constitutional structure. The Government is not proposing that they face the same salary reduction as the elected members of government, and individuals who work in the public sector. The Government's position is that in these circumstances, it is both reasonable and appropriate for the judiciary to forego any salary increases over the next three years.

XIII. INCREASES IN THE COST OF LIVING

210. In the *Provincial Court Judges Reference*, Lamer CJC identified “increases in the cost of living” as one of the three factors a compensation commission might take into account.¹⁸⁴ In their Final Reports, the Vicq Commission 2002, the Barnard Commission 2005, the Hood Commission 2011, and the Hodson Commission 2014 all included in their salary recommendations an automatic cost of living increase based on the Saskatchewan Consumer Price Index.

211. The Government agrees that projected increases in the cost of living can be a relevant consideration for this Commission to take into account. However, the Government also notes that the increases recommended by the Zakreski Commission, the Hood Commission and the Hodson Commission all exceeded the increases in the CPI for the three years covered by those three Reports.

212. The Government submits that the fact that salary increases have out-paced cost of living increases over the past nine years is a significant factor which this Commission should take into account in approaching the question of salaries.

¹⁸⁴ *Provincial Court Judges Reference*, *supra* note 1, para. 173.

213. As mentioned earlier, the Supreme Court commented in *Provincial Court Judges Association* that normally a Commission need not go back and re-consider the analysis of previous commissions. However, the Court also said that it is open to a Commission to do so, in appropriate circumstances:

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 issue.¹⁸⁵

[emphasis added]

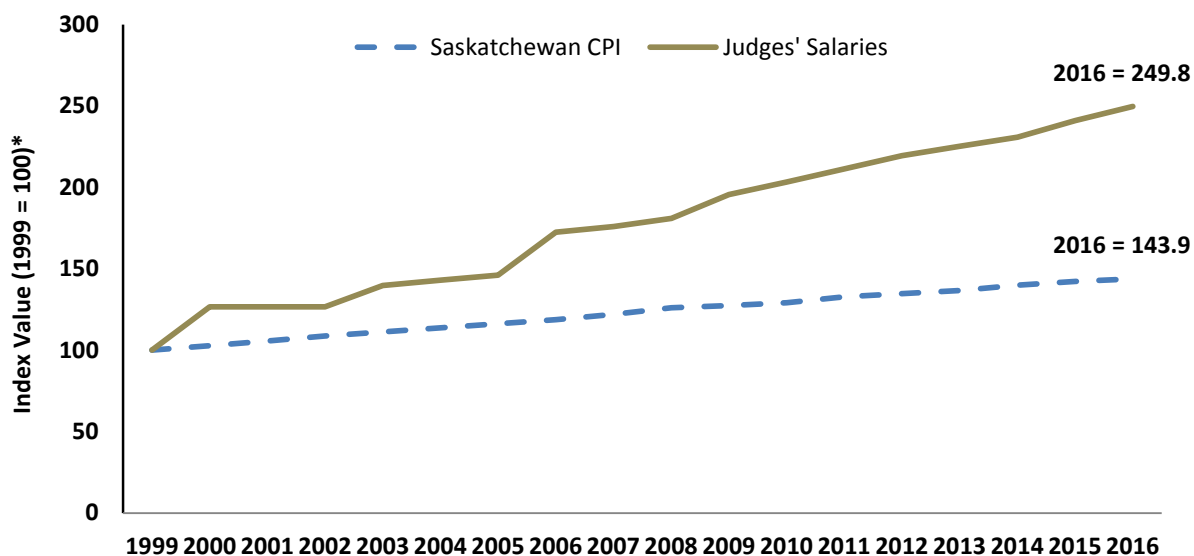
214. The Government submits that it is appropriate to re-consider the methodology used to consider cost-of-living increases. The task of a commission on this issue is speculative, by definition. Commissions try to predict what may happen in the future, and take that into account in setting a cost-of-living component for a salary increase.

215. However, it is also appropriate to look backwards from time to time, to see if the methodology used to calculate a cost-of-living component was accurate. The Government respectfully submits that doing so now indicates that the salary increases awarded to the judiciary over the past three commission cycles have over-compensated for inflation.

¹⁸⁵ *New Brunswick Provincial Court Judges Association*, supra note 22, para. 15.

216. On this issue, the Government includes three summaries of the rates of Saskatchewan CPI, two of which compare the Saskatchewan CPI to the increases in the salaries of Provincial Court Judges over the past two decades. The first summary, “Growth in Judges’ Salaries Compared to Consumer Prices, 1999 to 2016”¹⁸⁶ is an update of one of the charts contained in the Hodson Commission 2014 report, which had been filed by the Government. It shows that the judges’ salaries have consistently out-paced Sask CPI, and that the rate of divergence is steadily growing:

Figure 1
Growth in Judges' Salaries Compared to Consumer Prices,
1999 to 2016



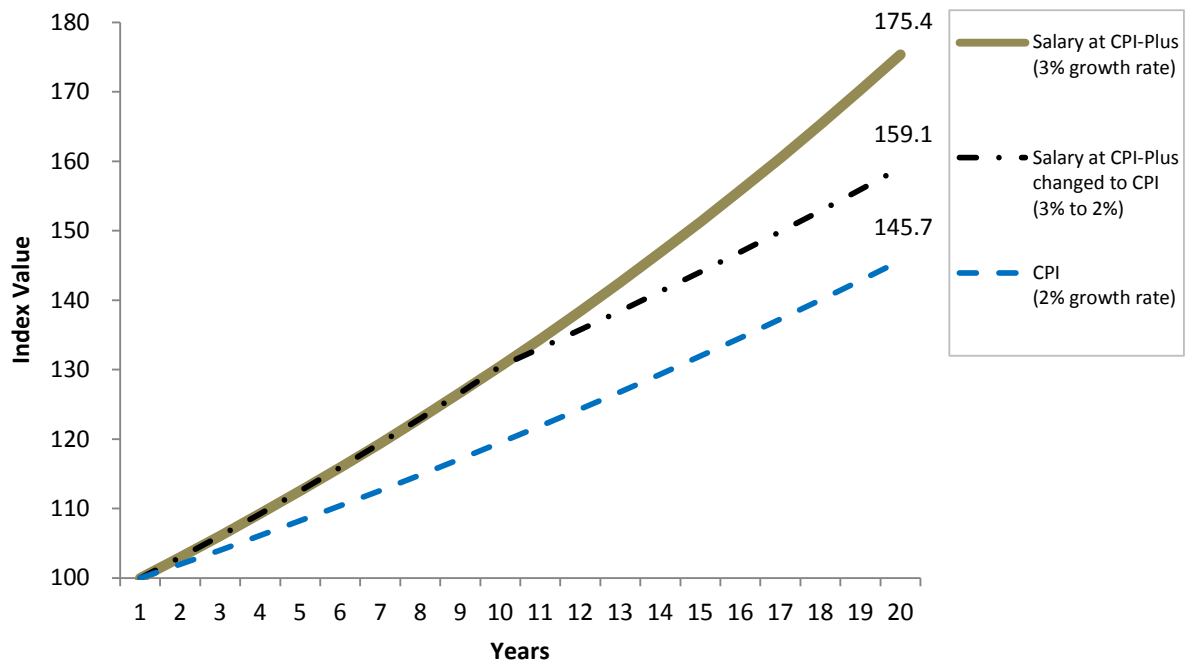
Sources: CANSIM 326-0020, accessed on September 22, 2017; Saskatchewan Ministry of Justice.

*CPI rebased from 2002 to 1999 by the Saskatchewan Bureau of Statistics.

¹⁸⁶ Saskatchewan Finance, Bureau of Statistics, “Growth in Judges’ Salaries Compared to Consumer Prices, 1999 to 2016”, September 29, 2017.

217. The second summary, “A Comparison of the CPI and ‘CPI-Plus’ Salary Increases”¹⁸⁷ compares the long-term effect of consistently giving a salary increase of CPI and an additional percentage. Not surprisingly, there would be an ever-increasing gap:

Figure 2
Comparison of the CPI and Salaries at CPI-Plus

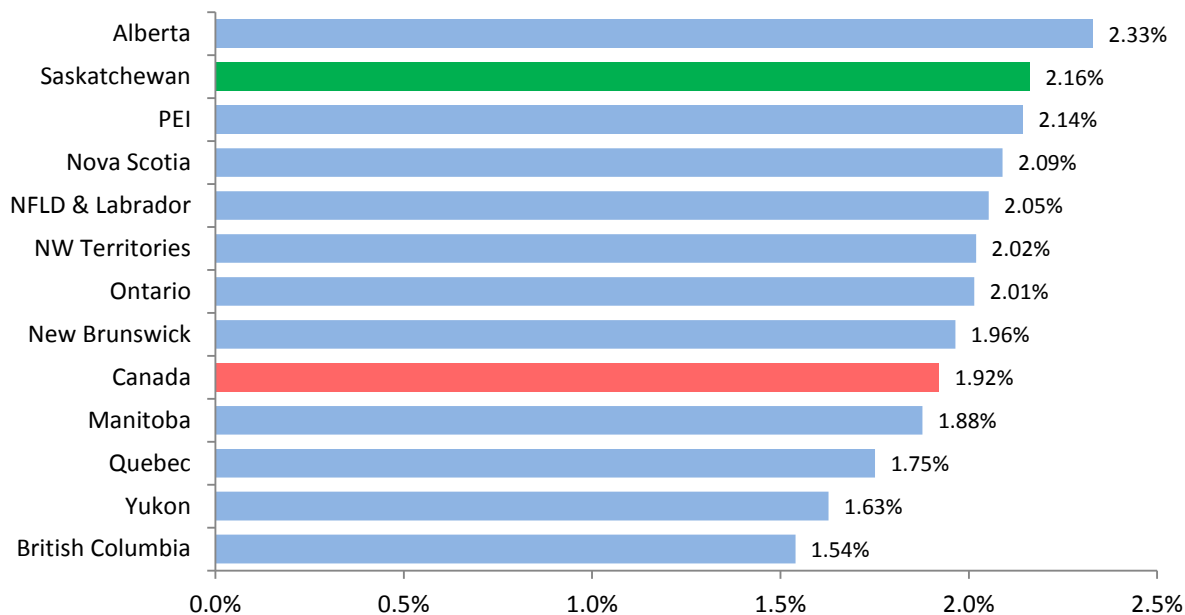


218. The third summary, “Canadian Consumer Price Index Growth Rate Comparison, 1999 to 2016”,¹⁸⁸ shows that the Saskatchewan CPI is ahead of the national CPI and the CPI in all other provinces and territories except Alberta:

¹⁸⁷ Saskatchewan Finance, Bureau of Statistics, “A Comparison of the CPI and ‘CPI-Plus’ Salary Increases”, September 29, 2017.

¹⁸⁸ Saskatchewan Finance, Bureau of Statistics, “Canadian Consumer Price Index Growth Rate Comparison, 1999 to 2016”, September 29, 2017.

Figure 3
Canadian Consumer Price Index Growth Rate* Comparison, 1999 to 2016



Source: CANSIM 326-0020, accessed on September 22, 2017.

*Compound average annual growth rates.

219. With respect to Figure 3, the Government acknowledges that the cost of living for Saskatchewan is marginally greater for Saskatchewan than the national average and the other provinces. However, there is an off-setting factor, which is identified in the *Budget 2017* data, in relation to taxes and utilities in Saskatchewan:

Calculating the combined cost of provincial taxes and utilities is a reliable way to compare the attractiveness of living in different parts of Canada.

...

In 2017, Saskatchewan individuals and families will pay total provincial taxes that are very competitive with those paid in other Canadian cities, with a ranking of second or third lowest in Canada for all six representative family situations.

...

Regina also ranks favourably with other cities in Canada when comparing provincial taxes and utilities. For the representative family situations, Regina ranks as having

the lowest or second lowest overall combined taxes and utilities of the 10 cities surveyed.¹⁸⁹

220. The Government submits that the first two Figures raise a more significant concern. They show that the salaries of the Provincial Court Judges have been steadily out-pacing inflation over the past decade, and will continue to do so if the same salary increases are granted. Inflation is not the sole factor, of course. Commissions have recommended salary increases over and above the rate of inflation. However, in a time of fiscal restraint, the Government submits that a steadily widening gap between the rate of inflation and the real salary increases awarded to the judiciary is a matter of concern. That pattern is an additional factor supporting the Government's proposal for no salary increases over the next three years. To the extent that past Commissions have over-compensated for inflation, a three year period of restraint will reduce the wide gap between inflation and real salary increases.

221. The Government submits that this concern about a pattern of regularly exceeding inflation is a matter of particular concern in the current financial climate. The Government is pursuing salary restraints on a broad basis in the public sector, including the other two branches of government, legislative and executive. A trend line of a salary which increasingly exceeds inflationary trends is difficult to justify in the current climate, when other individuals who are paid from public funds are looking at salary cut-backs.

¹⁸⁹ *Budget 2017, supra* note 159, p. 59.

222. There are two other comments which the Government wishes to make with respect to the factors identified by the Hodson Commission 2014, which relate to the issue of a real salary increase, not just one based on inflation.

223. First, as mentioned earlier, the Hodson Commission 2014 suggested that one factor that justified a real salary increase, over and above inflation, was the need to keep the salary of Saskatchewan Judges “...in the top tier compared to other provinces and territories”.¹⁹⁰ The Government re-iterates its concern that this factor is unwarranted. Neither the Constitution of Canada nor the principle of judicial independence contain a “Saskatchewan” clause entitling the Saskatchewan judiciary to a pre-eminent rank in the salaries across the country. The Government urges this Commission not to repeat that factor as a justification for a salary increase.

224. The second factor cited by the Hodson Commission 2014 was that the judiciary should receive some benefit from the improved Saskatchewan economy.¹⁹¹ Unfortunately, this approach almost made it appear that the judges were akin to shareholders in the provincial revenues, and were entitled to an increased share. The Government respectfully submits that this approach was flawed, for two reasons. First,

¹⁹⁰ Hodson Commission 2014, *supra* note 4, para. 183(d).

¹⁹¹ *Ibid.*, para. 183(b).

the issue for this Commission is the appropriate salary for the judiciary. It is not a question of the judiciary receiving a benefit from an improved economy. Second, as the Budget documents show, the hope for an improved economy was illusory in both 2015 and 2016. Saskatchewan real GDP declined by 1.3% in 2015 and is expected to have declined by 0.2% in 2016.¹⁹² Many economic indicators were down in both 2015 and 2016.¹⁹³

225. One final point is that previous commissions have identified a desire for public service as one of the factors which motivates individuals to become Judges. The Government respectfully submits that this factor carries with it the need to be sensitive to the economic position of the people whom one serves. Recent economic trends have suggested that the top earners in the Canadian economy have been the ones who have seen the greatest increase in their salaries, while individuals lower down in the economic sphere have not seen such significant increases in their incomes.¹⁹⁴

226. The Government respectfully submits that while the judiciary are highly trained and come from a remunerative profession, the public service can entail some sacrifices. The public's respect for the judiciary, like other public institutions, can be affected by

¹⁹² *Budget 2017*, *supra* note 159, p. 27.

¹⁹³ *Ibid.*, p. 29.

¹⁹⁴ Younglai and Yukselir, "Who are Canada's 1 per cent and highest paid workers?", *Globe and Mail*, October 8, 2017. Online: https://beta.theglobeandmail.com/news/canada-1-per-cent-highest-paid-workers-compare/article36383159/?click=sf_globefb.

perceptions of large salary increases from the public purse, when other people in the public service are asked to take reductions and salaries are not increasing in the private sector.

227. Overall, the Government submits that these factors all count against a salary increase for the judiciary at this particular time.

XIV. RECOMMENDATION ON SALARY

228. The Government submits the judicial salary, allowances, pension and other benefits currently provided to judges of the Provincial Court of Saskatchewan exceed the minimum degree of financial security — both individual and institutional — demanded by the constitutionally recognized principle of judicial independence. The Hood Commission recognised and endorsed this conclusion in its recommendations:

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.¹⁹⁵

229. As well, the current salary for Provincial Court Judges is well above the national average. Provincial Court Judges in Saskatchewan are the third highest paid in the country.

230. The pension entitlement is very generous, exceeding what is available in the private and public sectors. The pension entitlement includes additional retirement benefits, which exceed the maximum pension amounts which are permitted for pension plans registered under the *Income Tax Act*.

¹⁹⁵ Hood Commission 2011, *supra* note 4, para. 253.

231. The total amount of compensation currently paid to the judges meets or exceeds the goals of recruitment from the Bar and retention of judges on the Court. The Court continues to attract leaders in the Bar, and once appointed, the Judges tend to stay on the Court. Excellent recruitment and high retention rates are a strong indicator that the current compensation package is valuable and helps to attract the best candidates.

232. The Government is facing a serious financial situation which has triggered tax increases and service reductions which affect all residents of Saskatchewan. The Government has instituted a policy of general reduction in public sector compensation, including both of the other two branches of government, legislative and executive.

233. Past increases to judicial salary have been very generous and have well exceeded the rate of inflation in Saskatchewan.

234. In these circumstances, the Government respectfully submits that it is appropriate that there be no salary increase for the judiciary for the next three years.

235. The Government submits that this proposal will keep the salary for Judges of the Provincial Court well above the levels necessary to fulfill the constitutional requirements for judicial independence. It will also keep the position of Judge of the Provincial Court a very attractive career aspiration for lawyers practising in both the public and private bars,

including lawyers with substantial experience in criminal law. When this salary level is combined with the pension and additional retirement benefits, it will insure that the Court will retain its current highly qualified complement of Judges.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, October 18, 2017.