

**Government's Response
to the
Report of the 2016
New Brunswick
Judicial Remuneration Commission**

Department of Justice and Public Safety
March 15, 2018

Introduction

This Response of the Government of New Brunswick to the Report of the 2016 New Brunswick Judicial Remuneration Commission dated February 2, 2018 is a requirement of the Judicial Remuneration Commission process under the *Provincial Court Act*. This process stems from a decision of the Supreme Court of Canada (SCC) in September 1997 in the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* case. In its decision the SCC ruled that jurisdictions are constitutionally obligated to establish independent, effective and objective remuneration commissions to make recommendations regarding adjustments to judges' salaries. The Court also held that Provinces are constitutionally required to justify any departure from these recommendations, if need be, before a court of law.

In February 1998, the New Brunswick *Provincial Court Act* was amended to provide for a Judicial Remuneration Commission (JRC) with a mandate to conduct an inquiry; make a report and recommendations on salaries; examine the adequacy of pension, vacation, and sick leave benefits; and, examine other items concerning remuneration. Under the legislation, a JRC is appointed for a term of four years. The present JRC was constituted with the appointment of the Commissioners in November 2017. It consists of a nominee of the Government, a nominee of the Judges and a Chair chosen by the other two nominees.

Initial submissions were made to the JRC by the Province and the Provincial Court Judges' Association (PCJA) in December 2017. In the same month, the JRC invited interested parties and the general public to make submissions on the matters under its mandate. The JRC held hearings on December 19, 2017. After considering the information in the submissions, and from the hearings, the JRC submitted its Report to the Minister of Justice and Public Safety on February 2, 2018.

Framework for Decision-Making

Judicial independence is a long recognized principle of the Canadian democratic system of government. It helps preserve the integrity of our legal order by assuring the public that they will have access to fair and impartial arbitrators when disputes arise involving it and their fellow citizens or the other branches of government. The trust, confidence and respect that the public

holds for the administration of justice is invaluable in upholding the rule of law and the legitimacy of our public institutions. The Government of New Brunswick strongly believes in the importance of these principles and values and is committed to preserving them in their entirety.

Judicial independence protects against the arbitrary interference from the other branches of government in those aspects of the judicial function that are likely to have a meaningful impact on the impartiality of the judges. It is a means of ensuring the impartiality of the judiciary by protecting judges from removal without justification (security of tenure), ensuring them a fair and reasonable standard of living (financial security) and allowing them to manage their judicial duties with a limited amount of governmental involvement (administrative independence).

Financial security, the aspect of judicial independence that is the subject of this Response, guarantees a certain amount of stability in the remuneration and other monetary benefits of judges. In addition, it provides them with a level of salary that will uphold the status and dignity of the judiciary in the community and ensure that judgments are not given in exchange for financial benefits. Judicial independence also prohibits negotiations or discussions on financial issues between the judiciary and the other branches of government which are likely to give rise to a perception that the impartiality of judges would be exchanged for improved working conditions. For these reasons, remuneration and other financial benefits are not to be set until an independent and objective commission has had the opportunity to review the matter and to formulate recommendations on this matter.

As the Supreme Court confirmed in 2005, the Constitution does not compel a government to accept the recommendations of a judicial remuneration commission. However, if a government decides not to follow the recommendations it must bear the burden of showing rational reasons for rejecting them. It is accepted that a government must give weight to the recommendations and must explain why it did not accept them. The Government response must focus on the recommendations. Government must: articulate legitimate reasons for departing from the Commission's recommendations; demonstrate that the reasons rely on a reasonable factual foundation; and demonstrate that the Commission's process has been respected and its purposes (preserving judicial independence and depoliticizing the setting of judicial remuneration) have been achieved.

Based on these principles, the Government of New Brunswick's response to the JRC's recommendations is as follows:

Recommendation #1

A provincial court judge's base annual salary continue to be set at 80% of the Federal Justices, adjusted annually commencing 2016, with continuation of all benefits now in place.

Government Response

Government accepts the JRC's recommendation with respect to salary.

Recommendation #2

The Minister pay 100% of the Judges's Association's general representation costs incurred to participate in this Commission process.

Government Response

Government rejects the JRC's recommendation.

Like the guiding cases in the SCC, the *Provincial Court Act* has limited the jurisdiction of the JRC to issues of remuneration (i.e. salaries, pension, vacation, sick leave benefits, etc.). Representational costs incurred in the process of determining judicial remuneration are not a matter of remuneration. It therefore cannot be argued that there is any responsibility on Government to contribute to the costs of the PCJA or any other party wishing to appear or make representations to the JRC.

However, the Province has established a pattern of reimbursing some costs for the Judges' participation in the JRC process and is prepared to do so again. The Province is prepared to pay 50% of the PCJA general representation costs to a maximum of \$30,000. The 2008 JRC recommended the use of this formula. This formula was accepted for that JRC and was used in the 2012 JRC as well. The Province sees no reason to stray from the established formula.

The JRC has argued that the savings from the reduced expenses associated with the 2016 JRC should be redirected to pay the full amount of the Judges' costs for participating in the process. However, the reimbursement of costs is not meant to be based on the ability of the public purse

to pay these costs. Rather, it is based on a recognition that significant costs may have an impact on the limited number of judges responsible to cover them. The cap set out in the formula serves as a reasonable limit to the Provinces' contribution.

The general costs incurred by the PCJA were approximately \$30,000 so the cost to the Province will be approximately \$15,000.

Conclusion

As noted above, a government is not compelled to accept the recommendations of a judicial remuneration commission but must provide rational reasons for rejecting them if it decides to do so. The Province is of the opinion that the reasons set out in this response provide adequate rationale for rejecting the second recommendation of the 2016 Judicial Remuneration Commission.

In considering the recommendations of the JRC and in developing this response, the Province has kept in mind the need to preserve judicial independence and feels that the proposed response ensures the Judges a continued fair and reasonable standard of living, thereby providing financial security.