

**In The Matter of:
the *Provincial Court Act*, RSNB 1973, c.P-21
and Judicial Remuneration Commission**

Commission Report, January 15th, 2025

Commissioners:

Douglas C. Stanley, K.C., Chair
Kenneth B. McCulloch, K.C., Member
Jamie Eddy, K.C., Member

Counsel for the Province of New Brunswick:

Isabel Lavoie Daigle, K.C. and
Michael Hynes

Counsel for the Provincial Court Judges Association

Clarence Bennett, K.C. and
Mark Heighton

BACKGROUND

1. This Commission was established under section 22.02 of the *Provincial Court Act*, RSNB 1973, c.P-21 (the “*Act*”). The *Act* was enacted in response to a decision of the Supreme Court of Canada in *Re Provincial Court Judges* [1997] 3 S.C.R. (the “**PEI Reference**”). The direction the Supreme Court gave to provincial legislators, and the reasons for that direction, are best explained by the following comments from the Judgement of Lamar C.J., at p. 12:

Since these appeals were argued on the basis of s. 11(*d*) of the *Charter*, they should be resolved by reference to that provision. The independence protected by s. 11(*d*) is the independence of the judiciary from the other branches of government, and bodies which can exercise pressure on the judiciary through power conferred on them by the state. The three core characteristics of judicial independence are security of tenure, financial security, and administrative independence. Judicial independence has also two dimensions: the individual independence of a judge and the institutional or collective independence of the court of which that judge is a member. The institutional role demanded of the judiciary under our Constitution is a role which is now expected of provincial courts. Notwithstanding that they are statutory bodies, in light of their increased role in enforcing the provisions and in protecting the values of the Constitution, provincial courts must enjoy a certain level of institutional independence.

While s. 11(*d*) of the *Charter* does not, as a matter of principle, automatically provide the same level of protection to provincial courts as s. 100 and the other judicature provisions of the *Constitution Act, 1867* do to superior court judges, the constitutional parameters of the power to change or freeze superior court judges’ salaries under s. 100 are equally applicable to the guarantee of financial security provided by s. 11(*d*) to provincial court judges.

Financial security has both an individual and an institutional dimension. The institutional dimension of financial security has three components. First, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, to avoid the possibility of, or the appearance of, political interference through economic manipulation, a body, such as a commission, must be interposed between the judiciary and the other branches of government.

The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature. Provinces are thus under a constitutional obligation to establish bodies which are independent, effective and objective. Any changes to or freezes in judicial remuneration made without prior recourse to the body are unconstitutional. Although the recommendations of the body are non-binding they should not be set aside lightly. If the executive or legislature chooses to depart from them, it has to justify its decision according to a standard of simple rationality — if need be, in a court of law. Across-the-board measures which affect substantially every person who is paid from the public purse are *prima facie* rational, whereas a measure directed at judges alone may require a somewhat fuller explanation. Second, under no circumstances is it permissible for the judiciary — not only collectively through representative organizations, but also as individuals — to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence. That does not preclude chief justices or judges, or bodies representing judges, however, from expressing concerns or making representations to governments regarding judicial remuneration. Third, any reductions to judicial remuneration cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation. In order to guard against the possibility that government inaction could be used as a means of economic manipulation, by allowing judges' real salaries to fall because of inflation, and in order to protect against the possibility that judicial salaries will fall below the adequate minimum guaranteed by judicial independence, the body must convene if a fixed period of time has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors. The components of the institutional dimension of financial security need not be adhered to in cases of dire and exceptional financial emergency precipitated by unusual circumstances.

2. The amendments which followed this direction from the Supreme Court provide a mechanism for establishing fair remuneration and terms and conditions of employment for Provincial Court Judges. As the Supreme Court suggested in the PEI Reference, the Commission is "interposed between the judiciary and the other

branches of government". Its constitutional function is "to depoliticize the process of determining changes to or freezes in judicial remuneration".

3. Commissions are established under the *Act* every four years. This Commission was appointed for the period April 1, 2024 to March 31, 2028.
4. To formulate its recommendation, the Commission is mandated to hold an inquiry and "receive and consider submissions" (s. 22.03(4) of the *Act*) from the Minister of Justice, the judges and "any other interested person or body" (s. 22.03(4) (c) of the *Act*). Public notice inviting submissions to the Commission from interested parties was given in accordance with the *Act*. No third party responded to the invitation to make representations to this Commission.
5. The Commission received joint written submissions and held a public hearing on November 28, 2024, in Fredericton. The judges were represented by the Provincial Court Judges Association (the "**Association**") and the Province of New Brunswick was represented by the Office of the Attorney General ("**PNB**").

JOINT SUBMISSION OF THE PARTIES

6. For the first time in the history of this process in New Brunswick, the Association and PNB filed a joint submission to the Commission (the Joint Submission). Additionally, oral submissions were made by Clarence Bennett, K.C., counsel for the Association and Michael Hynes, counsel for PNB.
7. Although legislative schemes across the country are intended to avoid the impropriety of judges negotiating the terms and conditions of their employment with the government, courts have recognized that judges and government could, in some circumstances, find it in their mutual interest to make a joint submission to a commission. In *Cameron v. Yukon*, 2011 YKSC 35, Schuler J. rejected a complaint by the Senior Presiding Justice of the Peace of the Territory that a joint submission by the parties violated the prohibition against negotiation that was articulated by the Supreme Court (see paragraph 1 above) and said as follows:

Exploring the possibility of a joint submission may or may not involve negotiating. If pressure, concessions or trade-offs take place in order to reach a joint submission, the requirements of the PEI Reference have not been observed. But if what takes place is simply a probing of the parties' respective positions and an effort to determine whether there is or can be common ground, that should not be characterized as the type of negotiations prohibited by the PEI Reference.

8. Surely, in holding that it is not permissible for the judiciary to engage in negotiations with representatives of the executive or legislative branches of government, the Supreme Court did not intend to foreclose the possibility that at some moment judges and provincial governments could have a meeting of the minds on what is in the best interest of the judges, the applicable province and the public interest in the administration of justice.
9. At the public hearing, counsel for the Association explained why the judges joined with PNB in the Joint Submission. Because this Report forms part of the history that future Commissions will look to, it is important to note the Parties' reasons. The recommendation in the Joint Submission on salary would not change the relative position of New Brunswick Provincial Court Judges to their counterparts in other provinces. As of the date of the hearing, New Brunswick Judges were at the bottom of that ranking. Given the timing of increases, they would be jockeying for this ranking with Newfoundland and Labrador. In essence, the judges are tempering their immediate pecuniary interests in the hope they may achieve some success in furthering their interest in addressing existing problems in the Provincial Court system. That interest coincides with the broader public interest in a properly functioning Provincial Court.
10. Counsel for the Association explained some of the pressing problems currently faced by the Provincial Court in New Brunswick:
 - at a time when demands are at an all-time high, resources are at an all-time low, largely because there are far fewer supernumerary judges than in the past,
 - the population has grown and drug abuse is increasingly prevalent,
 - the *Jordan* decision established stricter guidelines on unreasonable delays in criminal process,
 - RCMP have increased the number of investigations into child exploitation,
 - more and more complex warrants are being sought requiring judge's attendance at all hours of day and night,
 - greater public scrutiny of some trials through social media and intrusion on a judge's private life, and
 - difficulty in attracting applicants from private practice at current salary levels.
11. Counsel for the Association acknowledged that none of these are matters within the purview of this Commission. However, they are pertinent to the judges' decision to join in the Joint Submission.

12. As Counsel for the Association explained at the hearing:

So, I say all this to you because the question on your mind, at least a question that I struggle with when we put together a joint submission, is why are judges content in those circumstances to be at the bottom? And they aren't, but in the context of the process that I just described to you, the idea of getting through a process without fighting, without being adversarial, having it done somewhere near the year that your pay increase is supposed to happen, has some appeal. And on the heels of the last JRC Commission where we spent days, four days, fighting, the idea that we would have some way forward that doesn't involve fighting has some appeal. Having the salary tied to the King's Bench also has some appeal in the sense that we haven't been particularly successful with this process, but maybe somebody else in a different process might, and we will go along with that.

...

So, we always look for a small win, and we believe the small win is there is a more collegial way forward. The reality is it's harder today to be a Provincial Court judge than it's ever been. The court - these are my words, not any of my clients - is in crisis. And all around you, the Province has recognized that the Crown needs more resources in terms of dollars and bodies but they haven't recognized what that does to the court and the ratios with respect to judges to Crown, et cetera.

13. It is important to acknowledge that the judges have put their minds to balancing their interests in the matters over which we have jurisdiction and the those that we do not. Presently, they see the latter as being of significant importance. To further their interests in addressing those issues they have chosen to be less adversarial and more collegial in this process.
14. Joint Submission addresses two issues - salary and representation costs - as follows:

Salary Recommendation

32. The parties agree that salaries should be set at 80% of salary paid to Justices of the Court of King's Bench. As noted above, linkage has been adopted by successive Commissions, including the 2020 Commission which concluded as follows:

242. Of all the factors considered and evidence presented the following were of substantial significance in formulating our recommendations regarding salary:

- *the relativity of salaries between the Provincial Court and the Court of King's Bench is an appropriate comparison.*
- *the percentage approach set at 80% (vis-à-vis federally appointed judges' salaries) properly addresses the necessary comparison to other judges' salaries.*
- *setting salaries to consistently achieve a seventh place ranking for New Brunswick's Provincial Court judges is next to impossible to do. Although this may have been a laudatory objective with past Commissions, in our view, it is no longer appropriate nor can a seventh place ranking be achieved or consistently maintained.*
- *this Commission has identified the need to attract qualified and quality individuals as candidates for appointment to the bench. We believe that the linkage of the salaries of Provincial Court judges to those of the federally appointed King's Bench judges is one way to do this.*
- *likewise we are of the view that linkage of the salaries creates certainty for all involved including the Province, the current Judges of the Provincial Court as well as lawyers who may be considering applying for an appointment to the Provincial Court.*
- *linkage assists in fostering respect for the Commission process. Linkage avoids litigation and subsequent allegations of unfairness and bad faith.*

33. Linkage has become the presumptively appropriate way to compensate the judges and has been adopted by the preceding three Commissions. Given the factors enumerated in section 22.021(6) of the Act, including the current economic conditions in the Province, salaries set at 80% of the federally appointed judges of the Court of King's Bench are adequate for the purpose of the four years under this Commission's mandate.

Representation Costs

34. The parties agree that 100% of the Association's legal expenses should be reimbursed. The question of whether this Commission has the discretion to make a provision for the costs incurred by the Association was settled in the affirmative by the 2016 Commission:

Neither party before this Commission raised the matter of our jurisdiction to consider representation costs. As a result, and taking into account the findings of the 2012 Commission, we find the matter of jurisdiction to consider representation costs to be settled in the affirmative and we proceed on that basis.

COMMISSION MANDATE

15. The mandate of the Commission is set out in the *Act*:

22.02(1.2) An inquiry shall deal with the following matters:

- (a) the salaries and amounts paid to the chief judge, the associate chief judge and judges;
- (b) the adequacy of pension, vacation and sick leave benefits provided to judges; and
- (c) any proposal that seeks to provide for or eliminate a measure that affects any aspect of the remuneration conditions of judges.

16. The *Act* sets out criteria the Commission is to use in assessing those matters:

22.021(6) In making its report and recommendations, the Commission shall consider the following factors:

- (a) the adequacy of judges' remuneration, having regard to the cost of living or changes in real per capita income;
- (b) the remuneration of other members of the judiciary in Canada as well as the factors which may justify the existence of differences between the remuneration of judges and that of other members of the judiciary in Canada;
- (c) economic fairness, including the remuneration of other persons paid out of the Consolidated Fund;
- (d) the economic conditions of the Province; and
- (e) any other factors the Commission considers relevant to its review.

REPORT AND RECOMMENDATIONS:

A. Salaries and Amounts Paid to the Chief Judge, the Associate Chief Judge and Judges

17. The parties have submitted that maintaining the current formula that links judges' salaries to 80% of those of Justices of the Court of King's Bench ought to be maintained for the four years of this Commission's mandate. Three previous Commissions have accepted that this formula provides remuneration that is adequate. This formula has been adopted in several other jurisdictions. The Joint Submission describes the formula as: "the presumptively appropriate way to compensate the judges".
18. Economic data presented to the Commission in the Joint Submission confirms that salaries based on the formula have and are likely to continue to protect judges from inflation and to roughly maintain their relative position in relation to other wages paid in the Province.
19. Continuing to apply the formula also generally maintains judges' salaries relative to other members of the judiciary in Canada. It would not create any unfairness when compared to the remuneration paid to other persons out of the Consolidated Fund.
20. There is no evidence that the economic conditions of the Province are such that continuing the formula for judicial remuneration would be problematic to the Province of New Brunswick or would create a sense that judges were in a privileged position.
21. The Commission has considered and determined that the premiums currently paid to the Chief Judge and Associate Chief Judge, adequately reflect the nature and additional responsibilities of those positions and does not recommend any changes.
22. **The Commission recommends that the current formula of paying New Brunswick Judges 80% of the salary paid to Justices of the Court of King's Bench continue for the period of the Commission's mandate and that the Chief Judge continue to receive an additional 8% premium and the Associate Chief Judge continue to receive an additional 4% premium.**

B. Adequacy of Pension, Vacation and Sick-leave Benefits

23. The Joint Submission sought no change to the current pension, vacation and sick-leave benefits package for judges and the Commission considers that the existing benefit package is adequate and apparently fair and reasonable.

24. **The Commission recommends that the existing pension, vacation and sick-leave benefits be maintained for the duration of the Commission's mandate.**

C. Any Proposal that Seeks to Provide For or Eliminate a Measure that Affects Any Aspect of the Remuneration Conditions of Judges

25. The Joint Submission addresses the issue of representation costs. The significant cost of participating in the legislatively imposed process indirectly affects judges' remuneration. The Association is funded entirely through contributions of its members, the judges. The Joint Submission describes how the 2016 and 2020 Commissions dealt with representation costs:

34. The 2016 Commission noted several factors in support of a recommendation for costs:

The Judges submit a number of factors for the Commission's consideration of representation costs. These include:

- The judiciary does not participate in this process by choice, rather it is mandated to do by the governing legislation;*
- If the judges were required to fund their participation, absent contribution from the province individual remuneration would be negatively impacted;*
- New Brunswick has a relatively small membership on the Provincial Court, yet the procedural and substantive nature of the Commission process here is of similar complexity to other larger and more populous provinces with correspondingly greater Provincial Court membership; and*
- Unlike the Province, the judges do not have access to resources such as "in-house" counsel, civil service expertise available to assist in formulation and presentation of submissions to the Commission.*

36. The 2020 Commission endorsed and agreed with the factors outlined above by the 2016 Commission:

365. We accept that all of the above apply equally to the 2020-2024 Commission and substantiate a recommendation that the Provincial Court Judges are entitled to representation costs.

- All of which is respectfully submitted, this 15th day of January, 2025

Douglas C. Stanley, K.C., Chair

Kenneth B. McCulloch, K.C., Member

Jamie Baby K.C., Member