

**2010 Yukon Judicial Compensation Commission**

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**SUBMISSION OF THE GOVERNMENT OF YUKON  
IN RELATION TO THE TERRITORIAL COURT JUDGES  
AND HOURLY-RATED JUSTICES OF THE PEACE**

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## **SECTION I: INTRODUCTION**

### **The PEI Reference Case**

1. The decision of the Supreme Court of Canada in *Re Provincial Court Judges*, [1997] 3 S.C.R. 3 (the “PEI Reference Case”), recognized financial security as one of the three core characteristics of judicial independence, the other two being security of tenure and institutional independence. (See full text of the case at Tab 1 of Supporting Materials). Lamer C.J.C. for the majority of the court explained the concept of financial security this way at paragraph 133:

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

2. And at paragraph 147:

The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration.

3. In addition to the requirement that a commission be interposed between the judiciary and the executive of the Government to make recommendations on judicial remuneration, the Court also indicated that financial security requires that judicial remuneration be adequate and that it not fall below a basic minimum level. The reason for this, as noted by the Court at paragraph 135, is as follows:

Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries.

4. However, the Court also emphasized that the guarantee of a minimum acceptable level of judicial remuneration is not a means to shield the courts from the effects of deficit reduction. The Court observed:

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 (paragraph 196).

5. Moreover, the Court noted that salary increases can also be powerful economic levers and cautioned as follows:

...salary increases also have the potential to undermine judicial independence. (paragraph 159)

6. What is required, the Court held, is that an independent commission make recommendations on judicial remuneration that are grounded in objective criteria, not political expediencies, supported by reasons which relate to the public interest, broadly understood.

### **Part 3 of the Territorial Court Act – Mandate of the Commission**

7. As a result of the *PEI Reference* case, Part 3 (sections 13 to 29) of the *Territorial Court Act* (the “TCA”, set out at Tab 2 of Supporting Materials), which provides for the establishment every third year of a Judicial Compensation Commission (the “Commission”) was enacted. The Government and the judiciary both have input into the selection of the members in the manner set out in section 21. The Commission is mandated to make recommendations respecting all matters of “judicial remuneration” (section 14) which is defined as all forms of compensation including salaries, pensions, allowances and benefits.

8. In developing its recommendations, the Commission is directed by section 19 of the Act to consider any matter it considers relevant and in addition submissions made to it regarding the following:

- (a) the current financial position of the government;
- (b) the need to provide reasonable compensation to the judges;
- (c) the need to build a strong court by attracting qualified applicants;
- (d) the unique nature of the Yukon;
- (e) the compensation provided to judges in the Northwest Territories and British Columbia, Alberta and Saskatchewan;

- (f) the laws of the Yukon;
- (g) the cost of living in the Yukon, including the growth and decline in real per capita income; and
- (h) any submission by the public filed under section 26.

9. The recommendations made by the Commission are binding on Government to the extent that they do not exceed the highest total value of judicial remuneration provided to the provincial or territorial judges of British Columbia, Alberta, Saskatchewan or the Northwest Territories.

10. The Commission is thus established, as required by the *PEI Reference* case, as an independent body to make binding recommendations on judicial remuneration that are justified on an objective basis.

#### **MODIFIED PROCESS**

11. Following the conclusion of the 2004 Judicial Compensation Commission (“JCC”), and in part in response to the recommendations of that Commission, the parties met and negotiated a Letter of Understanding to simplify and economize the JCC process (see Tab 3 of Supporting Materials). This hearing is being conducted pursuant to that Letter of Understanding. The constitutionality of this modified process was recently upheld by Schuler J. of the Yukon Supreme Court in *Cameron v. Yukon* (2011).

12. In particular, Article 7.7 of the Letter of Understanding contemplates an informal meeting with the Commission to ascertain whether a Joint Submission can be made by the parties:

- 7.7 By August 31, the representatives will meet with a view to identifying common ground and exploring the possibility of joint submissions on agreed upon issues.

13. The submissions which follow are the result of discussions held by the parties towards reaching a Joint Submission on agreed upon issues. The parties are pleased to advise that they have made significant progress in identifying and resolving their differences, and have reached a

Joint Submission to place before the Commission for its review. These Written Submissions will therefore set out that Joint Submission, and its rationale.

**SECTION II: OVERVIEW OF YUKON GOVERNMENT'S AND JUDGES' JOINT SUBMISSION**

**Salary**

14. The Territorial Court Judges currently earn a base salary of \$228,880/yr, which became effective April 1, 2009. The Government acknowledges the valuable contribution of the Territorial Court, and suggests an increase to the Judges' salaries effective April 1, 2010.

15. However, it is not appropriate that the salary of the Judges be increased to the salaries being sought by judges in the comparator jurisdiction of Alberta (\$250,000). The economic growth rate of Alberta far exceeds that of the Yukon. Nor is parity in salary with superior courts (\$271,400) appropriate, as different considerations apply in setting the level of remuneration for federally appointed justices and because of the historical differences in jurisdiction between the provincial/territorial courts and the superior courts.

16. It should also be noted that over the past several years, the compensation of the Territorial Court judiciary has seen a substantial increase. Over the last ten years, there has been more than a 68% increase in income for the Judges.<sup>1</sup> As inflation in Whitehorse over the same period has only been 19.4% in total, this amounts to a real increase in income of over 49% over ten years. Both the rate of increase and the absolute value of this salary are well above that enjoyed by most other sectors of Yukon's workforce.

17. Given the above, the parties jointly propose a salary increase for the Judges of 9% over three years (3% per year). This, together with their robust judicial pension and other benefits, ensures the level of compensation remains well above the level required to maintain judicial independence.

18. In particular, this proposal would bring the base salary of the Judges from \$228,880 to \$235,746.40 in the first year (effective April 1, 2010), \$242,818.92 in the second year (effective April 1, 2011), and \$250,103.36 in the third year (effective April 1, 2012).

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<sup>1</sup> From \$135,770 per annum in 1999 to \$228,880 per annum in 2009.

19. As the average income of lawyers in Canada<sup>2</sup> is \$142,345 per annum, it is submitted that this remuneration submission is such that qualified applicants will be attracted to and remain with the Court, especially given the significant pension benefits that accompany the salary. The low turnover experienced at the Court over the last 25 years appears to back that conclusion.

20. With respect to other aspects of remuneration for the judiciary, the parties jointly submit the following:

**Stipend for Chief Judge**

21. The stipend of the Chief Judge remain unchanged at \$10,000 per annum.

**Supervising Judge's Stipend**

22. The Supervising Judge's stipend remain unchanged at \$5,000 per annum.

**Pension**

23. No modifications are proposed to the pension arrangements for the Judges.

**Deputy Judges' Salaries**

24. The Government proposes that the *per diem* sitting rate for Deputy Judges (currently \$915) be increased annually by the same percentage increases applicable to Territorial Court Judges, so that the increases are as follows:

April 1, 2010: \$943.45 *per diem*

April 1, 2011: \$971.75 *per diem*

April 1, 2012: \$1,000.91 *per diem*

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<sup>2</sup> According to 2006 Census data: see *infra*

**Justices of the Peace (excluding the Senior Presiding Justice of the Peace)**

25. It is jointly submitted that hourly-rated Justices of the Peace (which excludes the SPJP, who is dealt with in separate submissions) be paid at time and one half for working on designated statutory holidays (those afforded to Government of Yukon employees), so that their hourly rate for such statutory holidays will be as follows:

JP 1: \$45.00 per hour

JP 2: \$52.50 per hour

JP 3 \$82.50 per hour

### **SECTION III: HISTORY OF YUKON COMMISSIONS**

#### **1998 Commission**

26. In December of 1998, following the *PEI Reference* case, the first Yukon Judicial Compensation Committee was established by Order in Council. The SPJP and the hourly rated Justices of the Peace were not included in the process at that time. The Commission's report is included at Tab 4 of the Supporting Materials.

#### **2001 Commission**

27. In the autumn of 2001, the second Commission was established pursuant to the provisions of Part 3 of the *Territorial Court Act*. Highlights of the binding recommendations made by the Commission are set out in Appendix A. The complete report is found at Tab 5 of the Supporting Materials.

#### **2004 Commission**

28. In the spring of 2004, the third Commission was established pursuant to the Act, and its recommendations again included the SPJP and hourly rated Justices of the Peace. The Commission's final report was issued in February of 2005, and can be found at Tab 6 of the Supporting Materials. Highlights of the recommendation of this Commission are also included in Appendix A herein.

#### **2007 Commission**

29. In 2007, the fourth Commission was established pursuant to the Act, and its recommendations again included the SPJP and hourly rated Justices of the Peace. The Commission's final report was issued in March 2008, and can be found at Tab 7 of the Supporting Materials. Highlights of the recommendation of this Commission are also included in Appendix A herein.

**SECTION IV: APPLYING THE FACTORS SET OUT IN THE ACT**

30. The Government will review each of the factors which the Commission is required to address in its report pursuant to s. 19.

***1) The Current Financial Position of the Government***

**Projected Surplus**

31. The Yukon Government's Main Estimates projects a surplus of \$38.4 million for 2011/2012.

**Net Financial Resources**

32. The Government's net financial resources from the same estimates are \$43.1 million for 2011/2012.

**Territorial Formula Financing Agreement**

33. The Government is highly dependant on transfer payments from Canada. The grant that comes through the TFFA alone makes up a significant proportion of the Government revenues. Other major federal transfer payments (e.g. Canada Health Transfer), when combined with the TFFA grant, make up the vast majority of the Government's total revenues. The remaining source of revenues are made up of "own source revenues", including taxes and fees.

34. Even if "own source revenues" were to increase in volume because of improved economic activity, the TFFA mechanism results in an offset or claw back against the grant received such that the net financial position of the Government would not be improved and in fact could worsen. Increasing tax rates is an option available to the Government to increase revenue flows and to improve the Government's fiscal position; however, the *Taxpayer Protection Act* dictates that the Government first seek the public's consensus through a plebiscite for a tax increase other than a tobacco tax increase. This is a complex endeavour that could take some time to accomplish and is not a politically appealing undertaking.

35. Even if rates were to be increased on some taxes, owing to the limited tax bases in the Yukon, minimal additional revenues can be raised.

36. This dependency on federal transfer payments, accompanied by the volatility and unpredictability of the complex TFFA grant elements, makes the accurate predictions of the Government's fiscal position challenging. For example, a decline in the provincial/local expenditure escalator used in the TFFA to calculate the grant could result in a several million dollar loss in the transfer payment. Similarly, if our population growth lags behind the national average growth, this results in losses in the TFFA grant.

37. Given this volatility, maintaining sufficient reserves to deal with potential grant downswings is prudent fiscal management.

### **Cost of Implementing Commission Recommendations**

38. In making recommendations on judicial remuneration, the cost of the recommendations to the public purse needs to be considered. In calculating actual costs, it must be remembered that salary increases have an impact on pension, group insurance and leave benefit costs. This "domino effect" means that a straight salary increase to the Judiciary will actually cost the Government a multiple of that figure in pension and other benefit costs.

#### ***2) The Need to Provide Reasonable Compensation to the Judges***

39. Financial security as a component of judicial independence requires that judicial salaries be above an adequate minimal level required for the office of a judge. At the same time, large salary increases that cannot be justified on an objective basis are also to be avoided. Thus, there is a range of compensation, the top and bottom margins of which identify the points that "public confidence in the independence of the judiciary would be undermined" (*PEI Reference* case, paragraph 135).

### **Relative Financial Position of the Judiciary**

40. To determine what is reasonable compensation, appropriate to the judicial office and sufficient to ensure financial security, it is helpful to survey the income in various sectors in the Yukon to gain an understanding of the relative financial position of the Judges to others in the community they serve. Judges currently earn \$228,880. The *per capita* personal income in the Yukon<sup>3</sup> over the last few years has been as follows:

2003: \$30,613

2004: \$32,194

2005: \$34,548

2006: \$36,120

2007: \$46,854

2008: \$47,922

2009: \$48,407

41. The income levels for other sectors are as follows:

- a deputy minister with the Yukon Government earns between \$155,003 and \$207,362<sup>4</sup>
- a senior lawyer with the Yukon Government earns between \$100,578 and \$134,537<sup>5</sup>
- teachers with 10 or more years of experience earns between \$90,037 and \$97,845<sup>6</sup>
- the Premier of Yukon earns \$136,387<sup>7</sup>

42. As noted above, over the ten year period from the first increase effective April 1, 1999 to the last salary increase on April 1, 2009 as a result of the recommendations of the 2007 Commission, there has been a 68% increase in the salaries of the Judges.

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<sup>3</sup> per Yukon Bureau of Statistics, Information sheet no. 69.14 – January 2011

<sup>4</sup> Information provided by the Employee Compensation Branch of the Yukon Government's Public Service Commission.

<sup>5</sup> Ibid.

<sup>6</sup> Teacher Pay Grid.

<sup>7</sup> As set out in the *Legislative Assembly Act*.

43. In contrast, over the period from 2001 to 2010, for example, Yukon Government employees received the following increases, before inflation:

- 2001: 2.25%
- 2002: 3.00%
- 2003: 2.00%
- 2004: 2.50%
- 2005: 2.50%
- 2006: 3.00%
- 2007: 3.00%
- 2008: 3.00%
- 2009: 3.00%
- 2010: 2.00%

44. Manager and legal officers employed by the Government received the following wage increases:

- 2007: 3.00%
- 2008: 5.00%
- 2009: 3.00% (MG), 4% (LE), 7% (DM)
- 2010: 2.00%

45. It is apparent, then, that the salaries of the Judges are currently considerably higher than the salaries of many other sectors of the workforce in the Yukon. This salary has over the last number of years grown at a significant rate. It should also be noted that the Judges receive a Yukon Bonus travel benefit of \$2,242 per year. Moreover, the judicial pension plan is a robust one that is considered more beneficial than the plan applicable to territorial and federal employees, for example,<sup>8</sup> and is an important aspect of compensation which also contributes to the financial security of the judiciary.

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<sup>8</sup> For example, the accrual rate for the judicial pension plan is 3%, while under the public service superannuation plan it is 2%; the pension benefit for the judiciary is based on best average earnings over 2 years while under the PSSP the benefit is based on best average earnings over 5 years.

### **Parity With Superior Court Judges' Salaries Not Appropriate**

46. It is sometimes suggested at JCCs involving Provincial or Territorial Court Judges that there ought to be parity, or near parity, with salaries of the Superior Court Judges, for after all, “a Judge is a Judge”.

47. This proposition has recently been laid to rest by the Supreme Court of Canada, after it had been rejected by several Canadian JCCs.

48. In the 2001 New Brunswick JCC, the Commission set the Provincial Court Judges salaries at 85% of a Superior Court Judge’s salary. The New Brunswick government refused to accept the Commission’s recommendations for several reasons. One of the reasons it rejected the Commission’s recommendations was because it felt it inappropriate to compare Provincial Court Judges salaries to Superior Court Judges salaries, given the different considerations that go into setting the latter.

49. The Judges challenged the Government’s decision in Court. At the New Brunswick Court of Appeal,<sup>9</sup> the Court held that it is important to consider salary and benefits of appropriate comparator groups such as Provincial or Territorial Court Judges, and to avoid using inappropriate comparator groups such as Justices of the Superior Court. Robertson JA held as follows:

...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. [at para 163]

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<sup>9</sup> *Provincial Court Judges’ Association of New Brunswick v. New Brunswick (Minister of Justice)*, [2003] NBJ No. 321 [Tab 8].

50. The case was appealed to the Supreme Court of Canada.<sup>10</sup> In upholding the Government's decision to reject the Commission's recommendations, the Supreme Court specifically commented on the "parity" argument as follows:

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

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

¶ 72 The role of the reviewing court is not to second-guess the appropriateness of the increase recommended by the Commission. *It can, however, consider the fact that the salaries of federally appointed judges are based on economic conditions and lawyers' earnings in major Canadian cities, which differ from those in New Brunswick. As a result, while the Commission can consider the remuneration of federally appointed judges as a factor when making its recommendations, this factor alone cannot be determinative.* In fact, s. 22.03(6)(a.1) of the *Provincial Court Act* requires the Commission to consider factors which may justify the existence of differences between the remuneration of Provincial Court judges and that of other members of the judiciary in Canada, yet the Commission chose not to address this. *Moreover, it is inappropriate to determine the remuneration of Provincial Court judges in New Brunswick by applying the percentage ratio of average incomes in New Brunswick to those in Canada to the salary of federally appointed judges, because the salary of federally appointed judges is based on lawyers' earnings in major Canadian cities, not the average Canadian income.* [emphasis added; at paras. 71 & 72]

51. The 2004 NWT Commission explained the reason for rejecting the concept of parity this way at page 9 of its report:

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<sup>10</sup> *Provincial Court Judges' Association of New Brunswick et al v. New Brunswick (Minister of Justice) et al* [2005] SCJ No. 47 [Tab 9]

While we have considered the salaries of those [superior court] Justices in making our recommendation on salaries for the [Territorial Court] Judges, we are not convinced that salary parity between the two levels of Court is appropriate. While recognizing over the years the significance of the differences and level of complexity in the types of cases and the significance of those cases handled by the two levels of Courts have lessened, the fact remains that the Superior Courts are constitutionally recognized as having inherent jurisdiction, something which cannot be said of the Provincial/Territorial Courts. The Provincial/Territorial Courts derive their jurisdiction strictly from the statutes which create them. Thus, the jurisdiction of the Superior Courts is, and always has been, far broader than that of the Provincial/Territorial Courts. That is an important historical distinction in the view of this Commission.

52. Finally, at the 2004 Yukon JCC, the Commission made these comments on this point:

No doubt because of the joint submission, the issue of parity was not raised in oral argument. Nevertheless, and because the Commission must decide what is fair and reasonable, the question was considered by the Commission. Without any claim to bind the hands of any future commission, the Commission feels obligated to say only that, in its opinion, fair compensation has regard to work done but more so to level of responsibility. The Commission should consider both. In this regard, the Commission notes that the present judicial system offers different responsibility, whether as between general jurisdiction courts like the Yukon Supreme Court compared with limited jurisdiction courts like the Yukon Territorial Court, and as between the Yukon Territorial Court judges and the Territorial Court Justices of the Peace. Moreover, the salaries of the Supreme Court are set by the Government of Canada for judges all over Canada, and this may involve criteria different from those set out in s. 19 of the *Act*.

### **Nunavut Court of Justice**

53. There has also sometimes been suggestions that a comparison with the remuneration of the Judges of the Nunavut Court of Justice should be specifically read into sections 17 or 19 as a comparator jurisdiction under the TCA in determining remuneration for the Judges because NWT and Nunavut were, prior to April 1, 1999, one jurisdiction. The Government does not agree with this suggestion.

54. The unified Nunavut Court of Justice was created at the same time Nunavut was created on April 1, 1999. It is acknowledged that prior to April 1, 1999, the NWT Territorial Court and the NWT Supreme Court had jurisdiction in the eastern Arctic. However, the jurisdictions of those 2 courts have been brought together and a new court created. The judges of the Nunavut

Court of Justice are federally appointed, have the jurisdiction of superior court Justices and are remunerated pursuant to the federal *Judges Act* and the federal compensation commission process.

55. Section 19 of the TCA sets out that the Commission is to address in its report submissions presented to it on compensation provided to the **territorial or provincial judges** in the NWT, B.C., Alberta and Saskatchewan. It also provides that the JCC may, in fulfilling its mandate, consider any matter it considers relevant. However, section 17 sets out that the recommendations of the JCC are binding only to the extent they do not exceed the highest total value of the judicial remuneration provided to **territorial or provincial** judges of B.C., Alberta, Saskatchewan or the NWT [emphasis added].

56. While the Commission may consider any matter it considers relevant, it is not appropriate to read into sections 17 or 19 of the TCA a reference to the Justices of the Nunavut Court of Justice. To do so would require one to disregard the clear reference in the TCA to Territorial and Provincial Judges and would, it is submitted, be a step in the direction of achieving parity with the superior court Justices, a concept which has been rejected by Courts and compensation commissions alike.

57. Given the recent growth in judicial salaries, the relative financial position of the judiciary to others in the community they serve and the pension plan the judiciary enjoys, it is submitted that the salary increases and other remuneration suggested by the parties is reasonable, and ensures the level of compensation of the Judges remains well above the adequate minimum level required by the *PEI Reference* case to maintain judicial independence. At the same time, the increases are not so large so as to undermine public confidence in judicial independence.

### 3) ***The Need to Build a Strong Court by Attracting Qualified Applicants***

58. The Yukon Government wants a strong court as does the public. There are several factors that attract lawyers to the judiciary including a professional desire to discharge the important and challenging role a Judge plays in our society. The ability to make a difference and have a

meaningful impact on society through one's work, especially in a small jurisdiction like the Yukon, is certainly one of the non-monetary rewards. Judges, like elected officials, assume these positions in the government structure to serve the public and accept the fact that public service may have some drawbacks.

59. Compensation is also one of the factors in attracting qualified candidates to the bench and keeping them. The compensation must be seen to be reasonable given the responsibilities and challenges of the position.

60. Certainly, there has been very low turnover at the Territorial Court. The three current Judges were appointed to their positions in 1989, 2004 and 2008. Prior to the last appointment to fill a retired position, the retiring Judge left in 2005, and had been with the Court since 1979. This is evidence that the remuneration associated with the position of Judge has not been a deterrent to staying with the Court.

61. There are approximately 130 resident members of the Yukon Law Society. Of the 130 resident members, more than half are members of the bar of at least 10 years standing, the threshold required for appointment to the bench.

62. The table found at Tab 10 of the Supporting Materials (drawn from the 2006 Census figures) reveals that the average employment income in 2005 for lawyers across Canada was \$142,345.

63. Note as well that the highest average income for lawyers in any jurisdiction was in Alberta at \$176,478.

64. It is acknowledged that these numbers represent average incomes, and are now dated. One would generally expect that lawyers with 10 or more years of experience would be earning more than the average income. Nevertheless, the numbers are reflective of the relative incomes of lawyers across the country.

65. The Judges of the Territorial Court earn \$228,880, which is well above any of these numbers.

66. Moreover, the Judges have a valuable pension plan as noted above that must be considered in terms of the ability to attract qualified candidates. As stated by the New Brunswick Court of Appeal at paragraph 168:<sup>11</sup>

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....This is because lawyers in private practice do not have the benefit of pension arrangements or pension schemes and are obliged to save for their retirement.

67. Given the foregoing, it is submitted that there is little risk that qualified candidates would be deterred from applying for the position of Territorial Court Judge on the basis that the compensation proposed by the Government is not adequate.

#### **4) *The Unique Nature of the Yukon***

68. The Yukon is a wonderful place to live and raise a family. Wilderness activities including hiking, paddling and camping are easily accessible and Yukoners live in a rugged and beautiful landscape. Interesting sporting events are a part of life as well including the Chilkat Bike Relay from Haines Junction to Haines, the Skagway to Whitehorse Road Relay, various triathlon events and the Yukon River Quest to name a few.

69. Whitehorse also boasts a vibrant arts scene which includes local, national and international musical and theatrical presentations at the Yukon Arts Centre and the Guild Hall; music, storytelling and writers' festivals; and several art galleries. The Yukon also enjoys a varied demographic, enriched by First Nations' culture, and has been in the forefront of some major social changes, including the settlement of modern day treaties and the implementation of self government arrangements for First Nations. All of this makes the Yukon an exciting place to live.

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<sup>11</sup> Supra, footnote 8.

70. At the same time, direct air connections to Vancouver, Edmonton and Calgary allow residents to easily travel south. Affluent residents make regular trips to destinations outside of the Yukon for holiday, shopping or to attend cultural events.

71. However, it is acknowledged that in a small community like Whitehorse, there is some social isolation for the judiciary.

72. Moreover, it is recognized that the substantial First Nations population in the Territory requires the Court to be familiar with and sensitive to aboriginal culture and practices.

73. The Government is aware of the contribution which the Territorial Court makes to life in the Yukon and the innovative approaches it has utilized to assist in the administration of justice. As a result, the remuneration proposal put forward by the parties includes what are expected to be real income increases. However, because of economic factors, including the significant economic growth rates that prevail in Alberta, salary differences between the Judges in the Yukon and those proposed in Alberta are appropriate.

5) ***The Compensation Provided to Judges in the Northwest Territories, British Columbia, Alberta and Saskatchewan / Cost of Living in the Yukon, Including the Growth or Decline in Real Per Capita Income***

74. To assist the Commission in comparing the salary and benefits of Judges in the comparator jurisdictions, the Government has included the most current reports of Judicial Compensation Commissions, as follows:

1. Report of the 2008 NWT Judicial Remuneration Commission, recommending judicial salaries and benefits for April 1, 2008 to March 31, 2012 [Tab 11 of Supporting Materials];
2. Report of the Saskatchewan Provincial Court Commission dated November 27, 2008, recommending judicial salaries and benefits for April 1, 2009 to March 31, 2012 [Tab 12 of Supporting Materials];

3. Report of the Alberta Judicial Compensation Commission dated August 14, 2006, recommending judicial salaries and benefits for April 1, 2006 to March 31, 2009 [Tab 13 of Supporting Materials]. The JCC for Alberta is currently underway; and
4. Report of the 2010 British Columbia Judges Compensation Commission, recommending judicial salaries and benefits for April 1, 2011 to March 31, 2014 [Tab 14 of Supporting Materials], and the BC Government's response to the same [Tab 15 of Supporting Materials].

75. The salaries of the Judges in the four comparator jurisdictions set out in the TCA are as follows:

**PROVINCIAL AND TERRITORIAL COURT JUDGES'  
SALARIES FOR COMPARATOR JURISDICTIONS**

	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>
Yukon	\$228,880	\$235,746 <i>proposed</i>	\$242,818 <i>proposed</i>	\$250,103 <i>proposed</i>
NWT	\$221,255	\$227,255	\$233,255	TBD
Alberta <sup>12</sup>	\$250,000 Judges' proposal	\$261,500 Judges' proposal	\$273,529 Judges' proposal	\$286,111 Judges' proposal
Saskatchewan	\$220,916	\$229,753	\$238,943	TBD
BC <sup>13</sup>	\$225,500	\$231,138	\$231,138	\$231,138

76. The salary rates for Judges in other provinces for 2010 are as follows:

- Manitoba: \$197,736
- Ontario: \$252,274
- Quebec: \$225,737

<sup>12</sup> Alberta's JCC is currently underway. Alberta Judges currently earn \$220,000

<sup>13</sup> The BC Government has rejected the recommendation of the BC JCC for an increase from \$231,138 in 2012 to \$260,000 in 2013, and has instead substituted a further 0% increase for that year.

- NB: \$264,700
- PEI: \$216,268
- NS: \$207,577
- Nfld.Lab: \$177,062

### **Cost of Living**

77. Cost of living increases in Whitehorse over the last 25 years have been very modest. At Tab 16 of the Supporting Materials are the historical summaries maintained by Statistics Canada of provincial CPI rates. On average, the annual rate of inflation has been 1.956% over this period, and about 1.58% per annum over the last 10 years.

### **Economic Growth Rates**

78. The following Table demonstrates the real (i.e. inflation-adjusted) economic growth rates for the Yukon, as well as those in Canada as a whole:

	2004	2005	2006	2007	2008	2009	2010
<b>Yukon</b>	<b>5.4%</b>	<b>2.5%</b>	<b>5.4%</b>	<b>5.6%</b>	<b>2.4%</b>	<b>3.6%</b>	<b>2.1%</b>
Canada	3.1%	3.0%	2.8%	2.3%	0.6%	-2.6%	3.3%

### **Tax Rates**

79. Yukon residents enjoy relatively low personal income tax rates. The following chart taken from CCRA published information<sup>14</sup> provides a good comparison with other jurisdictions' provincial tax rates:

<b>Provincial / Territorial tax rates (combined chart)</b>	
<b>Provinces / Territories</b>	<b>Rate(s)</b>
Newfoundland and Labrador	7.7% on the first \$31,904 of taxable income, + 12.5% on the next \$31,903, + 13.3% on the amount over \$63,807
Prince Edward Island	9.8% on the first \$31,984 of taxable income, + 13.8% on the next \$31,985, + 16.7% on the amount over \$63,969

<sup>14</sup> See <http://www.cra-arc.gc.ca/tx/ndvdl/fq/txrts-eng.html#provincial>

Nova Scotia	8.79% on the first \$29,590 of taxable income, + 14.95% on the next \$29,590, + 16.67% on the next \$33,820 + 17.5% on the next \$57,000 21% on the amount over \$150,000
New Brunswick	9.1% on the first \$37,150 of taxable income, + 12.1% on the next \$37,150, + 12.4% on the next \$46,496, + 14.3% on the amount over \$120,796
Ontario	5.05% on the first \$37,774 of taxable income, + 9.15% on the next \$37,776, + 11.16% on the amount over \$75,550
Manitoba	10.8% on the first \$31,000 of taxable income, + 12.75% on the next \$36,000, + 17.4% on the amount over \$67,000
Saskatchewan	11% on the first \$40,919 of taxable income, + 13% on the next \$75,992, + 15% on the amount over \$116,911
Alberta	10% of taxable income
British Columbia	5.06% on the first \$36,146 of taxable income, + 7.7% on the next \$36,147, + 10.5% on the next \$10,708, + 12.29% on the next \$17,786, + 14.7% on the amount over \$100,787
Yukon	7.04% on the first \$41,544 of taxable income, + 9.68% on the next \$41,544, + 11.44% on the next \$45,712, + 12.76% on the amount over \$128,800
Northwest Territories	5.9% on the first \$37,626 of taxable income, + 8.6% on the next \$37,627, + 12.2% on the next \$47,092, + 14.05% on the amount over \$122,345
Nunavut	4% on the first \$39,612 of taxable income, + 7% on the next \$39,612, + 9% on the next \$49,576, + 11.5% on the amount over \$128,800

6) *The Laws of the Yukon*

80. Paragraph 19(f) of the TCA requires the Commission to consider submissions made to it on the laws of the Yukon. There appear to be two possible interpretations of this paragraph. One interpretation is that the Commission is required to consider submissions made to it on the number, nature and complexity of the laws of the Yukon in setting judicial remuneration for the Territorial Court Judges who must interpret and apply that law.

81. However, it is submitted that the interpretation given to a similar provision to consider “the laws of the [Northwest] Territories” in the *Territorial Court Act* of the NWT by the 2007 NWT Judicial Remuneration Commission<sup>15</sup> is the approach to be preferred. At page 2 of its report, the Commission stated as follows:

We view this as requiring the Commission to look generally at the law of the NWT and not at any one particular aspect of it. That is, we must be cognizant of the law in making our recommendations and be certain that none of our recommendations undermine or violate that law.

82. In the Yukon, this means that the JCC must, in making its recommendations, have regard to legislation like the *Taxpayer Protection Act*. Under that Act, the Yukon Government is prohibited from incurring an accumulated deficit without dissolving the Legislative Assembly and recommending that an election be held. The Act also stipulates that new taxes may not be imposed nor fuel taxes increased without first holding a public referendum. Accordingly, the Commission must ensure that none of its recommendations would cause the Government to incur an accumulated deficit as this would “undermine” or “violate” that Act.

83. The salary proposal by the parties would not lead to any contravention of this law.

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<sup>15</sup> Tab 10 of Supporting Materials

**SECTION V: DISCUSSION OF THE JOINT SUBMISSION**

**A. SALARY**

84. The parties are agreed on what an appropriate salary should be for the next three years, as the following demonstrates:

	<b>2010</b>	<b>2011</b>	<b>2012</b>
<b>JOINT PROPOSAL</b>	\$235,746.10 [3%]	\$242,818.92 [3%]	\$250,103.36 [3%]

85. The parties' rationale for the successive 3% increases is as follows.

86. First, the Government takes the position that the mere requirement of an independent commission every three years does not automatically mean that salaries must increase every three years. Constitutional principles require that salaries of the judiciary not increase "just because". Instead, the question for each triennial commission is as follows: what is fair and reasonable compensation at that time?

87. Secondly, there has not been a significant increase in workload for the Judges, or significantly changed duties, since the last Commission which recommended the current salaries.

88. Thirdly, however, the Government does accept that a salary increase is appropriate, both to keep pace with inflation, and in recognition of the salaries in comparator jurisdictions.

89. With respect to the salaries in comparator jurisdictions, especially Alberta, a few points should be noted. First, as reflected in the GDP rates noted above, and as is abundantly clear from popular knowledge, Alberta's oil-fueled economy is second to none in Canada. This significant difference in economies must be borne in mind to ensure that apples are being compared with apples.

90. Second, while the proposed salary increases will move the salaries of Yukon's Judges to (or very near to) the top of the comparator jurisdictions, Alberta's JCC is currently underway,

and increases are inevitable. As such, the anticipated increase of Alberta Judges' salaries is something that must be considered.

91. For all of these reasons, the Government respectfully submits that salary increases of 3% over each of the next three years will more than keep pace with inflation, and keep the salary of Yukon TCJs competitive with other comparator salaries, and easily high enough to attract "the best and the brightest" to the Bench.

#### **B. STIPEND FOR THE CHIEF JUDGE**

92. A review of the stipends in the comparator jurisdictions reveals that Yukon's stipend, which is a reflection of the additional administrative responsibilities that accompany the office of the Chief Judge of the Territorial Court, is quite comparable. The current stipend in the Yukon is \$10,000 per annum.

93. In BC, the Chief Judge receives an additional 12% of base salary. For 2010, this figure is therefore \$27,736 per annum. It is to be noted that the Chief Judge in BC is responsible for 111 full-time judges and 35 part-time judges.

94. In Alberta, the Chief Judge's stipend is \$15,000 per annum, and there are 104 Judges and 9 Assistant Chief Judges.

95. In Saskatchewan, the Chief Judge receives an additional \$10,000 per annum. There are 45 Judges in addition to the Chief Judge.

96. Finally, the Chief Judge in the NWT receives \$15,000 per annum, and there are 3 Judges. As can be seen from the other jurisdictions, the amount paid in the NWT is clearly exceptional, given the few Judges who the Chief Judge oversees. For example, in PEI, the other jurisdiction where there are only 3 Judges, the stipend is only \$5,000 per annum.

97. The Chief Judge's stipend was last increased in 2007, from \$8,000 to \$10,000 per annum. It is also important to note that this stipend is considered part of salary for pension purposes, resulting in increased benefit beyond the amount of the stipend.

98. Based upon the comparability of the stipend with other jurisdictions, and the fact that it has recently been increased, the Government would propose having this stipend remain unchanged.

### **C. SUPERVISING JUDGE'S STIPEND**

99. The Government does not propose that there be any increase to the Supervising Judge's stipend.

100. In general, the Government believes that increases to stipends are not the appropriate mechanism to provide cost of living increases or salary increases over time. Rather, stipends are paid to compensate the supervising judge for the extra administrative workload associated with supervising the Justices of the Peace.

101. In 1998, the Commission recommended that the stipend for the soon to be created position of Supervising Judge be set at \$3,500. The 2001 Commission declined to increase the stipend despite the request of the Judges to increase it to \$7,000, the amount paid to the Chief Judge. However, the 2001 Commission did roll the stipend into earnings for the purposes of pension.

102. In 2004, the stipend was increased 14% from \$3,500 to \$4,000.

103. In 2007, the stipend was increased 25% from \$4,000 to \$5,000 per annum.

104. Since that time, there have been no increased duties or workload associated with this supervising role. Therefore, since there has been a recent increase (2007) which more than keeps pace with inflation, the Government is not proposing an increase for this reason.

**D. DEPUTY JUDGES' SALARIES**

105. The Territorial Court is required to use Deputy Judges from other jurisdictions to assist with judicial duties, on occasion when required.

106. The stipend for Deputy Judges was raised from \$400 per day to \$500 per day by the 1998 Commission. The 2001 Commission raised the stipend to \$800 per day. In 2004, the Commission provided payment of one-half of the *per diem* for travel time occasioned by a Deputy Judge in travelling from another jurisdiction to the Yukon. In 2007, the Deputy Judges' stipend was increased by the same percentage as the Judges' salaries.

107. On behalf of the Deputy Judges, the Territorial Court Judges have requested that the Deputy Judges' salaries increase.

108. The Government is agreeable with such a proposal. More particularly, as with the 2007 JCC, the parties propose that the Deputy Judges' salaries increase by the same percentage, and at the same time, as increases are provided over the next three years to the Territorial Court Judges. Therefore, it is proposed that the Deputy Judges' *per diem* rate be the following:

April 1, 2010: \$943.45 *per diem*

April 1, 2011: \$971.75 *per diem*

April 1, 2012: \$1,000.91 *per diem*

**E. HOURLY-RATED JUSTICES OF THE PEACE**

109. Under the TCA, there are 3 categories of Justices of the Peace (other than the S.P.J.P.). These are JP3, JP2 and JP1. Both JP3s and JP2s may be presiding as well as administrative justices. The JP1 category is for administrative responsibilities only.

110. The hourly rate paid to these Justices of the Peace was increased by the 2004 JCC, and the Government does not propose a further increase at this time. The current rates are as follows:

JP 1: \$30.00 per hour

JP 2: \$35.00 per hour

JP 3 \$55.00 per hour

111. However, these JPs are occasionally called upon to work on designated statutory holidays, and the parties agree that their hourly rate for those days should reflect the same premium as is paid Government of Yukon employees, being time and one half for all hours worked. Accordingly, the new rates proposed for work on statutory holidays are as follows:

JP 1: \$45.00 per hour

JP 2: \$52.50 per hour

JP 3 \$82.50 per hour

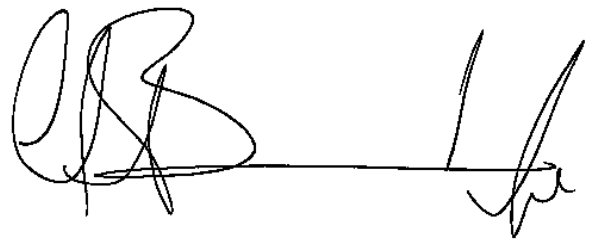
**SECTION VI: CONCLUSION**

112. The Government submits that the Joint Submission as set out above be adopted as the recommendations of the Commission. The proposal by the parties ensures that the Judges' salaries are well above the adequate minimal level required for judicial office. At the same time, the increases proposed can be justified on an objective basis and bear an appropriate relationship to compensation in the comparator jurisdictions given the cost of living and economic growth rates in the Yukon compared to those jurisdictions. Accordingly, with this proposal, the public confidence in the independence of the Territorial Court would be maintained.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 16<sup>th</sup> day of June, 2011.

**BAINBRIDGE JODOUIN CHEECHAM**

A handwritten signature in black ink, appearing to be 'GB' followed by a flourish, written over a horizontal line.

GARY L. BAINBRIDGE,  
Solicitors for the Yukon Government

**APPENDIX A****SUMMARY OF RECOMMENDATIONS OF YUKON JUDICIAL  
COMPENSATION COMMISSIONS RELATING TO TERRITORIAL COURT JUDGES****1998 Commission****(a) Salary**

- the salary for a Judge was increased from \$114,423<sup>16</sup> to \$135,000 effective September 18, 1998 to be adjusted annually on April 1 by the Whitehorse Consumer Price Index (CPI) of the preceding year which resulted in the following salaries:
  - \$135,270 as of April 1, 1999
  - \$138,246 as of April 1, 2000
  - \$141,702 as of April 1, 2001

**(b) Pension**

- the annual accrual rate was increased from 2% to 3% for service after September, 1998
- retirement with full pension was set at 23.33 years
- pension was to be based on the average of the highest 3 years of income rather than 6 years
- voluntary retirement without penalty was permitted at 60 years of age or 20 years of service, whichever occurs first
- post retirement survival benefits for spousal pension increased from 50% to 60%

**2001 Commission****a) Salary**

- the salary for a Judge, which at the time of the Commission's report was \$141,702, was increased to
  - \$166,000 as of September 1, 2001

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<sup>16</sup> The salary of a Judge as at March 31, 1993 was \$114,423. This was rolled back by 2% as part of a Government wide roll back on April 1, 1993. The annual salary was then restored to \$114,423 for the period April 1, 1993 to September 17, 1998 to comply with the judgment of the Supreme Court of Canada in the *PEI Reference Case*.

- \$172,000 as of April 1, 2002
- \$178,000 as of April 1, 2003

**b) Pension**

- Judges' contributions to their pension plan were increased to a flat 7% for service after September 1, 2001 (from 4% up to the Yearly Maximum Pensionable Earnings (YMPE) and 7.5% above the YMPE)
- the annual accrual rate of 3% was made applicable to service prior to September 18, 1998 as well
- pension was to be based on the average salary of the highest 2 years rather than 3 years

**c) Vacation**

- Annual vacation entitlement for the Judges was increased from 30 days to 35.

**2004 Commission**

**a) Salary**

- the salary for a Judge, which was \$178,000 at the time of the Commission's report, was increased to \$189,900 effective April 1, 2004, to be adjusted annually thereafter by the Whitehorse Consumer Price Index of the preceding year; as of April 1, 2006, this salary had thus risen to \$199,901

**b) Stipends**

- The Chief Judge's stipend was increased from \$7,000 to \$8,000 per annum.
- The stipend for the Supervising Judge (who is the Judge designated to supervise the JP Program) was increased from \$3,500 to \$4,000 per annum.

**c) Other Benefits**

- It was agreed that effective April 1, 2004, each Judge would receive a professional allowance of \$3,000 per annum to cover reasonable expenditures (approved by the Chief Judge) that the office of the Judge may require.
- It was confirmed that the Judges would be entitled to the changes made to the benefit plans available to the management group of the Yukon public service. The terms of those benefit plans (except those terms inapplicable to the judiciary) would continue to apply to Territorial Court Judges in the same manner as they applied to the management group.
- Judges were entitled to be reimbursed by the Yukon Government for their reasonable representation costs attendant upon their participation before a JCC to a maximum of \$50,000 (plus GST), less a contribution of \$500 for each Judge.
- Deputy Judges are to receive payment for travel time of \$400 *per diem* to compensate for travel time to and from the Yukon.

**2007 Commission**

**a) Salary**

- the salary for a Judge, which was \$199,901 at the time of the Commission's report, was increased by approximately 7.9% to \$215,742 effective April 1, 2007, by 3% to \$222,214 effective April 1, 2008, and by 3% to \$228,880 effective April 1, 2009

**b) Stipends**

- The Chief Judge's stipend was increased from \$8,000 to \$10,000 per annum.
- The stipend for the Supervising Judge (who is the Judge designated to supervise the JP Program) was increased from \$4,000 to \$5,000 per annum.

**c) Other Benefits**

- The judicial pension was modified to ensure that any salary increases that took place in the “window period” between the date a Commissioner is appointed and the date of the Commissioner’s recommendations would be included in pensionable earnings, notwithstanding that the Judge may have retired in that period
- Deputy Judge’s salaries were increased by the same percentages as Territorial Court Judges’ salaries were
- Deputy Judges’ travel per diems were increased by the same percentages as Territorial Court Judges’ salaries were
- The Chief Judge was given authority, in exceptional cases, to grant preparation time to Deputy Judges sitting on complex cases