

2008 REPORT OF THE NORTHWEST TERRITORIES JUDICIAL REMUNERATION COMMISSION

Commission Members:

Don Sian, Chair, David McPherson, and Daniel McKinley FCA

Counsel for the Territorial Court Judges (the "Judges"):

Garth Malakoe

Counsel for the Government of the Northwest Territories (the "GNWT"):

Darren Proctor and Brad Patzer

Counsel for the Commission:

Gerard Phillips

This is the report of the Northwest Territories Judicial Remuneration Commission (the "Commission") pursuant to section 12.5(2) of the *Territorial Court Act* R.S.N.W.T. 1988, c.T-2 (the "Act").

The Commission is charged under section 12.5(1) with conducting an inquiry with respect to

- (a) the salaries paid to Territorial judges; and
- (b) the pension, vacation leave, sick leave and other benefits provided to territorial judges;

The factors it must consider are set out at section 12.9 of the Act and are as follows:

- (a) the nature and extent of the legal jurisdiction of the territorial judges;
- (b) the adequacy of the territorial judges salaries and benefits having regard to the cost of living and changes in real per capita income;
- (c) salaries and benefits of provincial and territorial judges in other jurisdictions in Canada;
- (d) the working conditions under which the territorial judges carry out their duties;
- (e) economic fairness;
- (f) the economic conditions of the Territories;
- (g) any other factors that the Commission may consider relevant to its review.

This report is applicable to the Judges salaries and benefits for the period April 1, 2008, to March 31, 2012.

Counsel for the Judges in his submission says there is only one issue facing the Commission as previous Commissions during the past ten years have dealt with and resolved virtually all of the issues between the parties pertaining to salaries and benefits. That one issue is salary and Mr. Malakoe submits that it should be increased by 12% effective April 1, 2008, from \$209,255.00 to \$234,366.00 with annual adjustments for inflation on a compounded basis in an amount based on the increase in the Northwest Territories consumer price index for the previous twelve months.

In his submission to the Commission, Mr. Malakoe considers all of the factors listed in section 12.9 of the Act and the Commission has reviewed his analysis of those factors on the matter of salary carefully.

For its part the GNWT also says that there is only one issue to be addressed but that that issue is the sabbatical leave benefit. However it also goes on to address the matter of salary in anticipation of the Judges raising it. Counsel for the GNWT submit that the current salary of the Judges is fair and appropriate and that the onus rests with them to provide clear and cogent evidence that an increase beyond cost of living indexing is required. As did counsel for the Judges, counsel for the GNWT undertook an analysis of the factors at section 12.9 of the Act as they pertain to salary and the Commission has considered that analysis closely in making this report.

SABBATICAL LEAVE BENEFIT

However, before dealing with the matter of salary, the Commission will address that of the sabbatical leave benefit.

The GNWT submits that this benefit requires amendment. At page 9 of its submission it describes what it understands this benefit to be and that is as follows:

- (a) Judges are permitted one year sabbatical leave for every four full years of service at the discretion and upon the consent of the Minister of Justice at the recommendation of the Chief Judge.
- (b) A Judge that has been granted sabbatical leave shall be entitled to an allowance in lieu of and equal to a maximum of up to 70% of their salary.

That understanding is confirmed by counsel for the Judges at page 7 of his Response submission where he refers to the same wording being used to describe this benefit at section 5.0 of *Judges of the Territorial Court of the Northwest Territories Benefits* document.

The GNWT has twice previously asked earlier panels of the Commission to eliminate the sabbatical leave benefit and replace it with a deferred leave benefit similar to that available to GNWT public servants. These previous Commission panels have declined to do so.

The GNWT submits that its desire to amend this benefit is based on the principle that the Judges salary and benefits should be sensible and should be set out in a sensible manner.

The Judges, while opposed to a removal or change to this benefit are amenable, "to working with the Government to introduce guidelines as to when the Judges Sabbatical Benefit can be exercised." Accordingly it would appear that there is some recognition that the rules relating to the use of this benefit by the Judges could be improved.

Both the GNWT and the Judges through their respective counsel have provided detailed submissions to this Commission on this benefit and again the Commission has reviewed those submissions closely in preparing its report. The Commission supports the concept of the sabbatical leave program but believes that some adjustment of the rules are needed. Specifically, the Commission is of the view that annual leave, special leave and sick leave should not accrue during the sabbatical leave period and the reason being that it is inequitable and simply doesn't make much sense for these to accrue while one is on sabbatical. All other benefits are to continue to accrue during the sabbatical.

The Commission is of the view that some maximum time period must be set down for the length of any sabbatical and that period should be set at one year. Further, any Judge taking a sabbatical must return to his/her position as a Judge for a minimum period of one year regardless of the length of sabbatical taken. This minimum return period will apply except where health issues intervene or for some legal reason (e.g a discipline action) the Judge cannot return. Failure to return either for the full year or for a part thereof would require reimbursement by the Judge to the GNWT of the remuneration the Judge received while on sabbatical on a pro rated basis. Also, sabbaticals cannot be taken within two years of his/her scheduled mandatory retirement date.

With respect to the number of years of service required of a Judge before a sabbatical leave can be taken, the GNWT submitted that a judge should be eligible for a seven month sabbatical leave after seven years of service, or a one year sabbatical leave after ten years on the bench or some combination of these requirements.

The Judges believe that if the Commission intends changing from the current four year minimum requirement then it should be between four and seven years.

After reviewing the submissions of both parties it is the Commission's decision that six years is a reasonable period of time before the first sabbatical can be taken and that there be a minimum period of six years between sabbaticals. (The said six year period between sabbaticals is not to include the year of the sabbatical itself.) However, the current Judges shall be grandfathered as far as this specific change is concerned so that they will continue to be covered by the existing terms pertaining to sabbatical leave. That is they may take their first sabbatical after four years and the minimum period of time between sabbaticals for them shall continue to be four years.

The Commission is of the view that rules are needed concerning the purpose of sabbaticals and the parties made submissions on this point.

The GNWT submits that the rule should provide that sabbatical leave may be taken to allow the applicant to participate in an educational program that will demonstrably contribute to the Judge's knowledge and thereby enhance the Judge's ability to perform his or her duties in the Northwest Territories.

The Judges desire something broader than this and suggest that the applicant be allowed to participate in an educational program, travel, or study or a combination thereof, which will contribute to the Judge's knowledge, awareness, understanding, experience, or training and thereby contribute to the Judge's performance of his or her duties in the Northwest Territories.

After considering the relative positions of the parties on this point the Commission has decided that the Judges broader approach is the more desirable of the two. The Commission does not wish to place unnecessary restrictions on the activities of Judges while on sabbatical; it simply wants to ensure that the sabbatical is going to in some measure benefit the justice system of the Northwest Territories.

Accordingly it finds that a rule worded as follows be established:

The purpose of the sabbatical leave is to allow the applicant to:

- (a) participate in an educational program or study or a combination thereof, which will contribute to the Judge's knowledge, experience or training and thereby contribute to the Judge's performance of his or her duties in the Northwest Territories; or
- (b) undertake a project that will contribute to the operation or efficiency or effectiveness or overall value of the Territorial Court in the Northwest Territories.

Insofar as who must approve a sabbatical before it can be taken, the Commission agrees with the GNWT that applications for sabbatical leave must be approved by the Chief Judge and remain subject to discretionary ministerial approval. However, the Commission rejects the GNWT's submission that the Chief Judge not be entitled to a sabbatical during his/her tenure as Chief Judge. The rules pertaining to sabbaticals of the Judges of the Territorial Court apply equally to the Chief Judge with the exception that his/her sabbatical requires approval of the Executive Council.

Finally, any Judge who has taken a sabbatical must submit a report within ninety days of the completion thereof setting out the activities undertaken vis-a-vis the originally stated purpose of the sabbatical and this report must be submitted to the Chief Judge and the Minister. In the case of the Chief Judge the report must be submitted to the Executive Council.

To summarize the Rules pertaining to sabbatical leaves, they are to be as follows:

1. While on sabbatical Judges are to receive 70% of their annual salary. With respect to the Chief Judge s/he shall not receive the \$15,000.00 annual payment for administrative services and that shall instead be paid to the Judge who assumes those duties during that time frame.
2. Annual leave, special leave and sick leave shall not accrue during the sabbatical leave period. All other benefits are to continue to accrue during the sabbatical.
3. The maximum length of a sabbatical is set at one year. Further, any Judge taking a sabbatical must return to his/her position as a Judge for a minimum period of one year regardless of the length of sabbatical taken. This minimum return period will apply except where health issues intervene or for some legal reason (e.g a discipline action) the Judge cannot return. Failure to return either for the full year or for a part thereof would require reimbursement by the Judge to the GNWT of the remuneration the Judge received while on sabbatical on a pro rated basis. Also, sabbaticals cannot be taken within two years of his/her scheduled mandatory retirement date.
4. The individual taking the sabbatical must have served a minimum of six years as a Territorial Court Judge before the first sabbatical can be taken and there shall be a minimum period of six years between sabbaticals. Notwithstanding the foregoing, the current Judges shall continue to be governed by the existing rules requiring four years before a sabbatical can be taken and a minimum of four years between sabbaticals.

5. The purpose of the sabbatical leave is to allow the applicant to:
 - (a) participate in an educational program or study or a combination thereof, which will contribute to the Judge's knowledge, experience or training and thereby contribute to the Judge's performance of his or her duties in the Northwest Territories; or
 - (b) undertake a project that will contribute to the operation or efficiency or effectiveness or overall value of the Territorial Court in the Northwest Territories.
6. Applications for sabbatical leave must be approved by the Chief Judge and remain subject to discretionary ministerial approval.
7. The rules pertaining to sabbaticals of the Judges of the Territorial Court apply equally to the Chief Judge with the exception that his/her sabbatical requires approval of the Executive Council.
8. Any Judge who has taken a sabbatical must submit a report within ninety days of the completion thereof setting out the activities undertaken vis-a-vis the originally stated purpose of the sabbatical and this report must be submitted to the Chief Judge and the Minister. In the case of the Chief Judge the report must be submitted to the Executive Council.

SALARY

The first issue regarding salary that has to be addressed is one left over by the recommendations made by the previous panel of the Commission and relates to the Chief Judge's remuneration. As a result of recommendations made by the 2004 panel of the Commission the \$12,500.00 administrative allowance that was paid to the Chief Judge was rolled into that Judge's salary resulting in the difference between that Judge's salary and those of the other Judges of the Territorial Court growing each year due to the indexing of the respective amounts on an annual basis. Both parties agree that this should not continue. Accordingly the Chief Judge's salary is to be capped at \$15,000.00 per year above whatever the salary of the other Judges is determined to be by this panel of the Commission. This \$15,000.00 will be comprised of the aforesaid administrative allowance. The increasing differential resulting from the annual indexing was never intended; thus the \$15,000.00 cap in order to satisfactorily address the problem.

With respect to the overall salary issue, Mr. Malakoe submits that it should be increased by 12% effective April 1, 2008, from \$209,255.00 to \$234,366.00 with annual adjustments for inflation on a compounded basis in an amount based on the increase in the Northwest Territories consumer price index for the previous twelve months.

Messrs Proctor and Patzer for the GNWT submit that the current salary of the Judges is fair and appropriate and that the onus rests with them to provide clear and cogent evidence that an increase beyond cost of living indexing is required.

In its analysis of the factors set out in section 12.9 the Judges urge the Commission to find that there have been significant changes thus necessitating an increase in salary. We will briefly address these submissions and then provide our conclusions on salary.

12.9

(a) The nature and extent of the legal jurisdiction of the territorial judges

Despite Mr. Malakoe's arguments that this jurisdiction has been expanded significantly, the Commission is not convinced that the change in jurisdiction has been sufficient to justify an increase in salary on this basis alone. No statistics or concrete evidence has been produced to support the contentions made on behalf of the Judges pertaining to this factor.

(b) The adequacy of the territorial judges' salaries and benefits having regard to the cost of living and changes in real per capita income

The Commission agrees with the submission of the GNWT on this factor. To paraphrase the GNWT's submission on this point, cost of living has been considered by previous Commissions, and it is therefore reflected in the Judges' current remuneration. Further, the judges relatively high salaries provide some insulation against a higher cost of living, as a much smaller percentage of their incomes must be dedicated to the purchase of life's necessities. The Judges have not provided anything new that could be used to support their argument for a raise in salary based solely on this factor.

(c) Salaries and benefits of other Provincial and Territorial Court Judges

The Commission reviewed all of the information submitted by the parties showing the salaries of Judges in the other jurisdictions of Canada. It has also taken into consideration the points made by respective counsel

concerning this factor and has concluded that the salary increase decided upon by it, and elaborated on in detail later herein, is fair in light of the salaries and benefits paid to Judges elsewhere in Canada.

(d) The working conditions under which the territorial judges carry out their duties

It is important to note that this section refers to "working conditions" as opposed to "workload" and the Commission is of the view after reviewing the submissions and evidence that working conditions have not deteriorated. This Commission considers workload to be an administrative matter and one that has nothing to do with this particular factor. There are other mechanisms to deal with the increase in workload that has apparently occurred.

(e) Economic fairness

It is important that the Judges incomes increase due to the impact of inflation and the increases in other professional incomes. As mentioned earlier herein, the use of indexing has created unintended anomalies which is one of the reasons this Commission has decided to go to a fixed annual increase of \$6,000.00 per year which it believes is fair.

(f) The economic conditions of the Territories

The Commission recognizes the current fiscal environment the GNWT finds itself in but this factor did not play a significant role in the Commission's decision to increase the Judges salaries. However, we believe that a flat annual increase in salary will assist the GNWT in its budgeting process.

(g) Other factors

- the ability to recruit and retain quality Judges

The evidence shows that there has been no difficulty recruiting good candidates and therefore this factor had no impact on the Commission's decision on salary.

- Judicial independence

The Commission is certainly mindful of this factor as it is one of the underlying reasons for the creation of the Commission and it has been careful in its deliberations to ensure that none of its decisions could in any way undermine that independence.


- Salaries and Benefits of Supreme Court Justices

Mr. Malakoe on behalf of the Judges urged us to consider these salaries and benefits but we have declined to do so on the basis that the 2004 Commission dealt with this aspect at some length and it would serve no purpose to repeat that process at this time.

Accordingly, primarily based on the economic fairness factor, the Commission has decided that there be a \$24,000.00 increase in the salaries paid to the Judges over the four year term that this report applies to. That is to be an annual increase over the said four year term of \$6,000.00 each year. This Commission agrees in part with the GNWT on page two of its Reply when it submitted that on examination of the section 12.9 factors the amount requested by the Judges was not warranted, but that examination did show that an increase of \$6,000.00 per year is warranted. However, as mentioned above, we do not believe indexing is appropriate as the said annual increase is large enough to adequately address the cost of living increases issue. The first increase of \$6,000.00 shall be implemented over the course of the year commencing April 1, 2008.

The Commission noted the gap of one year between Commissions but since the Judges received a cost of living increase for that gap they have not really suffered any loss.

Finally, the Commission has considered where this increase will place the Judges four years from now in relation to other Judges across Canada and it is confident that they will not be disadvantaged with respect to their relative standing amongst other Provincial Court Judges across the country.



Don Sian
Chair



David McPherson



Daniel McKinley, FCA