

**THE YUKON JUDICIAL COMPENSATION COMMISSION**

**REPORT AND RECOMMENDATIONS**

**DECEMBER 1998**

## ACKNOWLEDGMENTS

The Commission expresses its appreciation to the Court and representatives of the Yukon Government for their efforts and professionalism exhibited in their respective submissions and presentations to the Commission.

Since a number of areas under consideration required expert analysis and advice, the Commission sought and obtained the assistance of:

Mr. Brendan George, Actuary  
AON Consulting Inc., Vancouver

Ms. Lynda Fraser, Pension and Insurance Administrator  
Public Service Commission, Government of Yukon

Mr. Scott Gilbreath, Statistician  
Bureau of Statistics, Government of Yukon.

Thank you for your invaluable assistance.

And to Ms. Sylvia Neschokat, who took minutes during the Commission's hearings and transcribed them, our thanks for your excellent work.

The time lines imposed on the Commission were tight. This required that it extrapolate information from the presentations made to it and from discussions with officials in other jurisdictions on an expedited basis.

If there are any errors in the Commission's analyses, they are entirely attributable to the Commission.

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## 1.1 Appointment and Terms of Reference

The determination of appropriate levels of salary and other forms of compensation for judges has been the subject of considerable controversy for many years. This has been the case not only in the Yukon, but also in other parts of the country where the inability to successfully conclude acceptable arrangements has resulted in litigation between members of the judiciary on the one side and both the executive and legislative branches of government on the other.

In Yukon, the applicable issues were no less difficult than in other parts of the country. It is significant, however, that the regrettable spectacle of litigation was avoided as the parties endeavoured to find their way to a satisfactory conclusion through negotiation. The credit for this goes to the resident Judges of the Territorial Court of Yukon and, perhaps more significantly, to the Minister of Justice for Yukon and to her Deputy Minister, who recognized the importance and value of bringing to a close the outstanding issues associated with the compensation question and with respect to other concerns touching upon the administration of justice in Yukon.

It should be noted that achieving success in the resolution of these issues came about as a result of the commitment of those involved to continue dialogue when, at times, it would have been easier to do otherwise. In addition, the parties demonstrated both the capacity and the courage to call upon the assistance of others when required. This was certainly evident when the Minister asked Mr. E.N. (Ted) Hughes to examine the outstanding issues and to make recommendations regarding possible resolutions for those issues. The work done by Mr. Hughes identified considerable common ground and established the framework for the removal of irritants which had impacted adversely upon the relationship between the Territorial Court and the government for many years. Mr. Hughes also established the foundation for meaningful progress on the compensations issues.

In addition to the work undertaken by Mr. Hughes, the other significant development was the decision of the Supreme Court of Canada in what has come to be known as the P.E.I. Reference (1997), 118 C.C.C. (3d) 193, which determined that compensation disputes between judges and government would in future require the assistance of independent compensation commissions. The Yukon Judicial Compensation Commission was established for the purpose of providing a fair and objective process for the resolution of the compensation issues specifically relevant to the circumstances of Yukon and of the court which serves the public interest through the administration of justice in Yukon.

By agreement between the parties, the Yukon Judicial Compensation Commission was given the mandate to make binding recommendations. The willingness of the parties to proceed on this basis again demonstrated their collective commitment to bringing the outstanding issues to a close. They are to be commended for this.

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Addressing the compensation issue for Judges of the Territorial Court of Yukon first required an understanding of the circumstances relevant to the performance of judicial functions by members of the Court.

The Court sits throughout Yukon and, in addition to regular sittings at Whitehorse, operates in the context of a "circuit court" environment. The conditions are often difficult and are consistently demanding. Despite this, the Court has a considerable reputation well beyond the borders of Yukon as a hard-working, dedicated and innovative group strongly committed to the best interests of the administration of justice.

The Court has responsibility for more than 90% of criminal proceedings in Yukon and has a jurisdiction in non-criminal matters which exceeds the scope of jurisdiction exercised by their colleague judges in other provincial jurisdictions.

Over the years, and particularly since the proclamation of the Canadian Charter of Rights and Freedoms, the work of the Court has been subject to dramatic increase. Unlike other jurisdictions, where caseload backlogs have mounted, the Territorial Court of Yukon has managed to keep ahead of the caseload demands and has also engaged in innovation designed to more directly address the causes of crime in Yukon communities. The significance of these achievements should not be underestimated. The life of a judge of the Territorial Court of Yukon is far from easy. The demands they face are best expressed in the submission made by the Judges to the Commission where, at p.6, the following comments are made:

"The Court's circuit schedule means long hours and extensive travel by car and small aircraft in all months of the year, and in all kinds of weather. The conditions under which the Judges preside and the facilities for overnight accommodation and meals are usually far from ideal. The efforts of the Court in fostering community justice result in the Judges participating in many meetings and training sessions in addition to the regular court sittings. The small size of the judiciary and the large area served means that Judges will receive calls at all hours from police officers in Whitehorse, or in any of a dozen rural detachments, seeking search warrants, telewarrants, or Feeny arrest warrants.

The unique nature of the Territory affects the Judges in other ways as well. Given the small population, a greater proportion of cases are reported by the media and court matters, particularly criminal cases, are frequent topics of media, public and political comment. In a small community, the Judges routinely encounter persons they have dealt with in court. For this reason, Judges must be especially circumspect in their social interactions. These pressures and constraints add considerably to the stress of what is already a difficult job."

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The primary issue the Commission has been asked to consider is whether, having regard to all the Circumstances set out in the OIC, the current salary level of \$112,135 per annum and other elements of compensation for Judges are adequate. Our conclusion, based upon the nature of the work, the demanding environment within which that work is performed and based upon increases provided to Judges of similar level in other jurisdictions, is that current levels of compensation fall well short of what can reasonably be considered to be appropriate. Having come to this conclusion, the task before the Commission was to assess, and make recommendations, regarding the levels appropriate to a revised compensation arrangement.

The Commission was constituted on September 18, 1998 pursuant to the provisions of Order-in-Council 1998/168 (the "OIC"). The Commission's function, operating principles, procedures, factors it must consider and the requirement for a written report are defined in the OIC. The OIC states, in part:

"The Commission shall inquire into and make recommendations respecting any matter relating to the remuneration and other benefits received by a judge of the Territorial Court..." and,

"Unless the Court and the Minister otherwise agree, no recommendation by the Commission dealing with the remuneration or other benefits to be received by a judge of the Territorial Court shall result in the reduction of the remuneration or other benefits received by the judge in place at the time the Commission was established" (emphasis added) and,

"The Commission shall provide written reasons for all of its final recommendations" and,

"In its inquiry and in its recommendations, the Commission shall consider and address:

- (a) the current financial position of the government,
- (b) the need to provide reasonable compensation to the Judges of the Territorial Court,
- (c) the need to build a strong Territorial Court by attracting qualified applicants,
- (d) the unique nature of Yukon,
- (e) the salaries and other benefits provided to territorial judges in the Northwest Territories and to provincial court judges in British Columbia, Alberta and Saskatchewan, (emphasis added)
- (f) the laws of Yukon,
- (g) the cost of living in the Yukon, including the growth or decline in real per capita income,
- (h) any submissions filed by the public in accordance with section 10, and
- (i) any other matters the Commission considers relevant" (emphasis added) and,

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"... the Commission's recommendations are binding on the government and shall be given effect as of the date of the coming into force of these regulations, by order of the Commissioner in Executive Council" (emphasis added).

The Commission has kept the OIC's dictates uppermost in mind during Commission hearings, deliberations and in the formulation of the recommendations described herein.

The Commission is aware that relations between the Court and the administration have been strained. The Yukon Government and the Court are to be commended for their efforts in reversing this trend.

The decision to retain the services of Mr. E.N. (Ted) Hughes, Q.C. to inquire into the administration and operation of the Territorial Court was progressive and courageous. Mr. Hughes' efforts in addressing differences between the parties has gone a long way to resolving same.

### 1.2 Conduct of the Commission Hearings

The Commission held hearings in Whitehorse on Wednesday, November 11 and Thursday, November 12, 1998 with representatives of the Court and Yukon Government. Both parties submitted proposals and made oral presentations. Although public notice was given regarding the Commission hearing, members of the public did not submit submissions or appear to make oral presentations. While the hearings and resulting discussions were informal, they were thorough and professional. Both parties made positive efforts to assist the Commission with its deliberations. Both parties, in the assessment of the Commission, are strongly committed to addressing the public interest by improving the administration of justice in the Yukon.

Relevant information placed before the Commission included Alberta's and BC's Judicial Compensation Commission reports, the submissions of the Court and the Yukon Government and information obtained by direct contact between Commission members and agencies in the three provinces and NWT. As required by the OIC, the Commission made comparisons in all areas examined between Yukon and BC, Alberta, Saskatchewan and Northwest Territories.

In the end, however, the Commission focused on the uniqueness of the Yukon and its particular social, cultural and economic environment and the particular circumstances of the Territorial Court of Yukon. It is the Commission's view that its recommendations must be Yukon based and Yukon sensitive, while keeping in mind comparable remuneration and benefits provided to Provincial and Territorial court judges in its neighbouring jurisdictions.

## 2. COMPARATIVE ANALYSIS WITH OTHER JURISDICTIONS

### 2.1 Cost of Living Comparisons

Cost of living comparisons between Whitehorse and Yellowknife and Whitehorse and Saskatchewan were not available. Price comparisons were made between Whitehorse and Alberta, and Whitehorse and BC with Alberta and BC both set as a base of 100 when each, separately, was compared to Whitehorse.

The June 1997 price comparison survey compared prices in seven categories. Each category is further broken down in sub categories. For instance, housing is subdivided into shelter, household operations, household furnishings and equipment. Retail prices in June 1997, the last available figures, for all categories combined, averaged 25.7% higher in Whitehorse than in Alberta and 11.5% higher in Whitehorse than in BC. The BC prices include the 7% provincial sales tax where applicable.

### 2.2 Income Tax Comparisons

#### Saskatchewan

Personal Income Tax Rate effective July 1, 1998 - 48% of Basic Federal Tax

Surcharges:

Flat tax of 2% on Net Income

10% deficit surtax on all Saskatchewan tax payable including the flat tax

15% surtax on Saskatchewan tax payable in excess of \$1400

#### Alberta

Personal Income Tax Rate - 44% of Basic Federal Tax

Surcharges:

8% of Alberta tax payable in excess of \$3500 (This surcharge is scheduled to be eliminated on January 1, 2000)

#### British Columbia

Personal Income Tax Rate effective January 1, 1999 - 49.5% of Basic Federal Tax

Surcharges:

30% of British Columbia tax payable between \$5300 and \$8745 and 54.5% on British Columbia tax payable in excess of \$8745

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Northwest Territories

Personal Income Tax Rate - 45% of Basic Federal Tax

Surcharges:

Nil

Yukon

Personal Income Tax Rate - 50% of Basic Federal Tax

Surcharges:

5% of Yukon tax payable in excess of \$6000

Currently, Yukon's income tax levies place it near the middle of the cross Canada levies.

**3. RECOMMENDATIONS**

**3.1 Salaries**

In the P.E.I. case, the Supreme Court of Canada held that:

- (a) Any reduction to judicial remuneration, including de facto reductions through the erosion of salaries by inflation, cannot take salaries below a minimum required by the office, and
- (b) Judges cannot be paid at a low rate of pay such that they could be perceived as being susceptible to political pressure through economic manipulation.

Salaries for Yukon Court Judges were rolled back unilaterally by 2% in 1993 and have not been restored in the intervening period of time. In addition it is noted that Territorial Court Judges have not received salary increases since 1993.

Judicial Salary Comparisons

NWT	\$143,881	per annum	
Alberta	\$125,000	per annum	{{(a) and (d) below}}
BC	\$134,000	per annum	{{(a) below}}
Saskatchewan	\$112,961	per annum	{{(b) and (e) below}}
Yukon	\$112,179	per annum	{{(c) below}}

- (a) These salaries have recently been set as a result of those jurisdictions Judicial

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Compensation Commissions' recommendations.

- (b) Saskatchewan's Judicial Compensation Commission has not yet made its recommendations.
- (c) Yukon's salary level represents the current salary level and was established at the time of the rollback in 1993.
- (d) Alberta's salary was \$113,964 per annum. That province's Commission recommended an increase to \$142,000 per annum effective April 1, 1998. The Alberta Cabinet amended the recommendation by lowering it to \$125,000 per annum. As a result, Alberta's provincial court judges have taken their pay dispute back to court. Unlike Alberta's government workers, Alberta judges were not rolled back in 1994.
- (e) Judges in Northern Saskatchewan receive an additional \$5,000 per annum.

### Judicial Salary Escalators

NWT Territorial judges salaries are tied to a formula which establishes a fixed differential between the salaries of judges of the Supreme Court and that paid to Judges of the Territorial Court. NWT salaries are expected to be increased to approximately \$151,881 effective April 1, 1999. It may have been reasonable to expect that Judges of the Territorial Court of Yukon would ask to receive benefits similar to their colleagues in the NWT given that the circumstances of the Courts are substantially the same. They did not. The Yukon Judges made it clear that they have considered all aspects the OIC and moderated their position accordingly. The Commission commends them for having taken that approach.

The Alberta Commission recommended a salary of \$152,000 per annum effective April 1, 1999. This recommendation was not accepted by the Alberta Cabinet and it directed instead that the salaries of Provincial Court judges should be increased effective April 1, 1999 by the same increase as in the Average Weekly Earnings for Alberta as reported by the Statistics Canada Survey of employment payroll and hours for the period from January 1, 1998 to December 31, 1998. The Commission has assumed that this deviation from Alberta's Commission's recommendation is part of the Alberta Provincial Court judges' court challenge.

BC's Commission recommended, and the BC Government accepted, salaries of \$139,000 per annum effective January 1, 1999 and \$144,000 per annum effective January 1, 2000.

Recommendations

- (a) That salaries for Yukon Territorial Court Judges be set at \$135,000 per annum effective September 18, 1998.
- (b) That these salaries be adjusted annually, effective April 1, by the Whitehorse CPI of the preceding year (thus the April 1, 1999 salary adjustments would equal the Whitehorse CPI of December 31, 1998)

**3.2 Chief Judge's Salary**

In addition to the judges' base salaries, Chief Judges receive an additional sum to compensate for their supervisory and administrative duties. At present, the Chief Judges of NWT and BC each receive \$10,000 per annum while Alberta's Chief Judge receives \$15,000 per annum. Yukon's Chief Judge currently receives \$6,850 per annum. The Yukon Judges took the position that they were not seeking significant increases to the salary of the Chief Judge.

Recommendation

That Yukon's Chief Judge receive \$7,000 per annum above the judges' base rate.

**3.3 Justices of the Peace of Supervising Judge**

Under the proposed new Territorial Court Act, one of the Judges will be assigned special responsibility to train and oversee Yukon's Justices of the Peace. This will entail a significant additional workload and responsibility including the likelihood of considerable evening and weekend work. The Commission notes that it was a recommendation of Mr. E. N. (Ted) Hughes, Q.C. that the Territorial Court Act be amended in this regard.

Recommendation

That if the new Territorial Court Act is enacted and if it designates a Territorial Court Judge to train and oversee Justices of the Peace, that judge receive \$3,500 per annum in addition to the judges' base salary.

**3.4 Deputy Judges**

Whereas the Territorial Court currently consists of only three judges, the absence of a judge due to illness or some form of leave usually requires the retention of Deputy Judges. Deputy Judges who are sitting judges in other jurisdictions are not paid while substituting for an

absent Yukon judge. However, other Deputy Judges may be retired judges or come to assist the Yukon Court on their own time. Deputy Judges occupying this latter category are paid. The rate of compensation is currently \$400 per day and this has remained unchanged for 12 years.

### Recommendation

That those Deputy Judges who are paid be compensated at a rate of \$500 per day.

### 3.5 Pensions

This is by far the most complex aspect of the compensation issue. Currently, Yukon's Judges are included, as are the Yukon Government's eligible employees, in the federal Public Service Superannuation Plan ("PSSP"). The same plan applies to NWT government employees, but not the NWT judges, and to federal civil servants. Canadian provinces have similar plans for their government workers. Judges in all other jurisdictions identified in the OIC have separate plans particular to the circumstances of members of the judiciary.

Yukon's Judges are the only judicial officers who are part of the PSSP. The majority of civil servants spend virtually their whole careers in either the public service or enrolled in pension plans which can be transferred to the PSSP. Judges, on the other hand, frequently come to the bench without having been a member of a pension plan. They may have made contributions to a personal or group RRSP, but in many instances there is no pensionable service which can be transferred to PSSP.

As well, Judges are generally appointed to the bench at an older age than most civil servants are at the date of their hire. In order to be considered for judicial appointment, an applicant must possess considerable experience in the practice of law, be mature and have earned the respect of his/her peers. Thus appointees are usually in their mid-forties and because they must retire at age 65, their contribution period is limited to a 20 to 25 year time frame. The PSSP, however, provides for contributions for a maximum of 35 years.

By virtue of their positions Judges are not allowed to engage in other paid employment such as consulting or engage in business activities. Such prohibitions do not apply to civil servants, providing such activities do not create a conflict with his or her public office.

It is thus evident that PSSP is designed for civil servants who can expect to work in the public service for 30 plus years. This plan is not suitable for Judges who are likely to serve on the bench for 20 to 25 years.

Finally, the Supreme Court decision focused largely on the need for the judiciary to be

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independent from direct government actions affecting their remuneration. In the Commission's assessment this includes being treated identical to civil servants for pension purposes.

Current Pension Plan Provisions (PSSP).

- (a) Employees pay 7.5% of salary less CPP contributions and the employer matches this amount.
- (b) For those earning an income above a certain level, the employer contributes a further amount to the Retirement Compensation Arrangement (RCA). The percentage of this additional contribution varies from year to year. For 1998, it is 94.65% of all earnings over \$99,000 per annum.
- (c) Vesting and lock-in occurs after two years service. Vested employees under 50 years of age have the option, upon resignation from the public service, to leave their contributions in the PSSP or transfer the value of their pension to a locked-in annuity or RRSP.
- (d) The pension is based on an accrual of 2% per year of pensionable service based on the average income earned over the highest paid six years.

Example:

An employee retires at age 62 with 30 years service and a best six years income average of \$70,000. That pensioner receives 30 years times 2% = 60% of \$70,000 for an annual pension of \$42,000.

- (e) There is no penalty for retirement between age 60 and 65 or for those who are 55 or over and have at least 30 years of pensionable service. There is a 5% penalty per year before age 60, except as noted above. However, if the employee is age 50 or over and has at least 25 years of service, an additional calculation is made using age and years of service. The better of the two calculations determines the penalty.
- (f) The PSSP is integrated with the Canada Pension Plan. That means when the pensioner reaches 65 years of age, his/her employment pension is drawn down by a defined amount.
- (g) Pension payments are indexed to the Canada Consumer Price Index. In essence they are indexed to the cost of living increases.
- (h) An employee can contribute to the PSSP for a maximum of 35 years. There

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is a 50% surviving spousal pension.

Judicial Pension Plan Comparisons

	Contribution Rate	Annual Accrual	Years to Full Pension	Final Years Average
Saskatchewan	5%	3%	23.33	3
Alberta	7%	2.67%	25	3
British Columbia	6%	3%	23.33	3
NWT	Nil	2%	35	1
Yukon	7.5%	2%	35	6

On the face of it, the annual accrual (2%) and years to full pension (35) seem to be identical in the NWT and Yukon plans. In reality that is not the case. Several years ago, the NWT initiated action to withdraw the NWT judges from the PSSP. At that time, the NWT judges were paid back all their contributions to the PSSP and were able to roll these contributions tax free into RRSP's. This provides a significant supplement to the 2% rate.

It should also be noted that NWT's plan is now non-contributory, as is the case with some other provincial judges' plans. Yukon's judges, however, are required to contribute 7.5% - one of the highest rate of Canadian judges' plans. (Note: We do not have any information on Newfoundland's plan.)

Alberta's plan was non-contributory until March 31, 1998. Effective April 1, 1998 the contribution rate was set at 7%.

CPP Integration

Some plans are CPP integrated while others are not. Saskatchewan, Alberta and NWT plans are not CPP integrated, while BC's plan is being reviewed. That plan is currently integrated. Yukon's plan is CPP integrated.

In Yukon's case, this means CPP integration represents a reduction of approximately 0.2% to the annual accrual rate. Thus if its plan accrued at 3% (it currently accrues at 2%), an integrated plan would result in a pension payout based on approximately 2.8% with the CPP added for a combined payout based on 3% accrual. A non-integrated plan results in the pension plan payout based on the full 3% accrual with any CPP received being paid in addition to the pension plan payout.

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As a result those in a non-integrated plan receive considerably more pension income.

Finally, most public sector pension plan payouts are indexed to the Canada Consumer Price Index ("CPI"). As the CPI varies, so do the payments to pensioners.

### Yukon Legislative Assembly

Yukon's MLAs have their own pension plan. Contributions are 9%; the maximum period for which contributions can be made is 15 years; pensions are based on indemnities, expense allowances and earnings as an office holder (Minister, Speaker, etc); the accrual rate is 5% and the pension is based on the average annual earnings for the best four years of service.

### Recommendations

- (a) That judges' contributions to the pension plan be maintained at 7.5% of salary.
- (b) That the annual accrual rate be set at 3% without CPP integration.
- (c) That retirement with full pension be set at 23.33 years.
- (d) That pension be based on the average of the highest three years of income.
- (e) That the pension cap of 70% be maintained.
- (f) That voluntary retirement, without penalty, can occur at either 60 years of age or 20 years service, whichever occurs first.
- (g) That CPI indexing of pensions be maintained.
- (h) That post retirement survivor benefits for spousal pensions be set at 60%.
- (i) That the Chief Judge and Supervising Judge allowances be excluded from pension calculations.

### 3.6 Other Benefits

#### 3.6.1 Vacation Leave

Judges currently accrue vacation leave on the same basis as Yukon's senior civil servants.

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That system increases the rate of leave earned as one increases years of service with the government. The maximum vacation leave accrual is 35 working days per annum plus five days additional paid leave after each five year block of service.

### Recommendation

That vacation leave for Judges be set at a flat rate of 30 working days per year regardless of years of service.

### 3.6.2 Leave without pay (LWOP) and Deferred Salary Leave Plan (DSLPL)

#### Leave Without Pay

LWOP for Judges must currently be approved by the Minister of Justice. LWOP is not without cost. When LWOP is granted for up to three months, the government continues to pay its share of pension and other benefit contributions. When LWOP is granted for periods over three months, the employee must pay both the employee and employer shares of contributions upon the employee's return to work. There is a different provision for employees who are on LWOP due to illness.

#### Deferred Salary Leave Plan

Yukon's senior civil servants are eligible to participate in a DSLPL. Individual participants have a portion of their salary withheld for varying periods not exceeding five years and then take off the subsequent year with partial pay resulting from the previous years banking of salaries withheld. Yukon Judges currently have no access to such a plan.

### Recommendations

In the event that Judges agree to relinquish their entitlements to their sabbatical leave, it is recommended:

- (a) That the Chief Territorial Court Judge be provided authority to grant leave without pay (LWOP) to Territorial Judges for periods up to one year.
- (b) That a deferred salary leave plan (DSLPL) for Territorial Judges be established.

3.7 Salary Rollback

As noted, Territorial Court Judges had their salaries rolled back by 2% effective April 1, 1993. The Supreme Court of Canada decision ruled this to be unconstitutional. Other Canadian jurisdictions where such rollbacks occurred, e.g., P.E.I., Manitoba and Alberta, paid back the amounts owing.

Recommendation

That, effective April 1, 1993, Judges salaries be restored to the level existing prior to the 1993 rollback. The amounts resulting from the reinstatement should be paid forthwith to the Judges without any accrual of interest.

3.8 Effective Date of The Commission's Recommendations

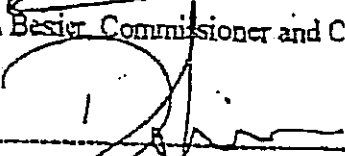
Recommendation

That all changes take effect at and including September 18, 1998 as provided in Section 9(1) of the OIC.

4. FINAL OBSERVATIONS

The individuals who assisted in this process were cooperative and professional. It is hoped that the Commission's report and recommendations will enhance the recent positive dynamics and assist in the functioning of the Territorial Court system in the Yukon.

  
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Jean Besier, Commissioner and Chair

  
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Don Avison, Commissioner

  
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Brenda Riis, Commissioner