

2004 YUKON JUDICIAL COMPENSATION COMMISSION

Government of Yukon
and
Territorial Court of Yukon

REPORT OF THE COMMISSION

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THE 2004 YUKON JUDICIAL COMPENSATION COMMISSION

REPORT

1 Appointments and Terms of Reference

- 1.1 The Commission was appointed by Order-in-Council 2004/115 dated June 4, 2004. The members are John Lawson, nominated by the Government of Yukon and approved by the Court, Roger Kerans, nominated by the Court and approved by the Government of Yukon, and Shirley Adamson, nominated by the Government of Yukon and the judges and selected by the first nominees.
- 1.2 In the case of Mr. Kerans, the Government of Yukon explicitly waived the disqualification arising from the fact that he is a deputy judge of the Yukon Supreme Court.
- 1.3 Mr. Lawson and Mr. Kerans were named on March 31, 2004 and then proceeded with the process required to select a third member.
- 1.4 The Commission is charged by the Yukon *Territorial Court Act* RSY cap 217 s. 14:
- “. . . to inquire into and make recommendations respecting all matters relating to judicial remuneration of judges, and respecting other related matters as the Minister and the chief judge agree to submit to the commission.”
- 1.5 Also, the *Act* provides that the Commission set remuneration for justices of the peace. Section 58 provides:
- “Subject to section 59, judicial remuneration for salaried justices shall be set by the commission in accordance with Part 3 of this *Act* modified to suit the case.”
- 1.6 In addition to considering any matter it considers relevant in fulfilling its mandate, the Commission is charged, by s. 19, to address in its report submissions presented to it regarding:
- (a) the current financial position of the government;
 - (b) the need to provide reasonable compensation to 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 or decline in real *per capita* income; and
 - (h) any submissions by the public filed under s. 26.

2 Proceedings

Public Notice

- 2.1 The Government of Yukon, at the request of the Commission, gave public notice of a call for submissions by publication in newspapers circulated throughout the Yukon, as directed by s. 26(1), and by other means, and also gave notice that submissions should be filed by July 31, 2004.

Submissions

- 2.2 The Commission met and took steps prior to the formal appointment, and, in that regard, on May 25, 2004, requested, further to s. 25(4), that the Court, the justices of the peace, and the Government identify unresolved issues within 30 days.
- 2.2.1 The Commission received statements of unresolved issues from the Government, the Court, and the Senior Justice of the Peace.
- 2.2.2 Commissioner Kerans attempted an informal preliminary mediation on July 9 with the Government of Yukon and the judges and Senior Justice of the Peace on the topic of representational costs, but the effort failed.
- 2.2.3 Written submissions were received from the Yukon Territorial Court, the Yukon Justice of the Peace Association, the Senior Justice of the Peace, and Barry Stuart, Yukon Territorial Court Judge, retired, and the Government of Yukon.
- 2.2.4 The judges in their brief raised an issue about a subject between Judge Barry Stuart, before his retirement, and the Government of Yukon about interpretation of the educational leave provisions. We are pleased to note that the immediate parties have resolved this matter in a process encouraged by the Commission.
- 2.2.5 The Commission called upon those who made submissions to make oral submissions at a public hearing set for September 16, 2004 at Whitehorse, Yukon.
- 2.2.6 Notwithstanding s. 26(3), the Commission called upon the public, by advertisement, to make oral submissions at the hearing set for September 16, 2004. The only response was from Judge Barry Stuart, retired.

2.3 *Special Application*

The Commission heard and rejected an application by the Yukon Territorial Court judges for a preliminary hearing to hear and decide their claim that this Commission could and should decide whether they had a right to be paid reasonable representational costs in full by the Government of Yukon. The Commission ruled that it would be fair and reasonable to hear this application along with other submissions at the scheduled hearing. The Ruling is attached.

2.4 *Mediation*

- 2.4.1 Section 25(4)(b) provides that the Commission shall employ those consensus processes that the Commission considers advisable “to assist the government and the judiciary in resolving their differences within 60 days of the Commission having been appointed”, and s. 24(2) provides that the Commission shall make “every effort to use mediation and other consensus processes to resolve differences between the parties”.
- 2.4.2 Further to these provisions, the Commission, on August 11, 2004, called upon the persons who made submissions to make submissions about “consensus process” procedures, including appropriate topics for the process.
- 2.4.3 The Government of Yukon, the Yukon Justice of the Peace Association, the Senior Justice of the Peace, and the Yukon Territorial Court judges all responded that they preferred interest-based mediation respecting all issues listed by the parties in the statements of issues referred to earlier in this report, save that the Government of Yukon would not agree to mediate the question whether the Commission had the power to order the Government to pay any representational costs for the judges and the justices of the peace, beyond the parameters of the *Territorial Court Act*”.
- 2.4.4 As a result, the Commission issued a directive establishing the mediation process in these terms:

Rules for the Informal Meetings

1. Each party must come with people with authority to make decisions.
 2. Each may make brief opening statements by counsel and by authorized decision-maker. We urge emphasis on possible areas of acceptable compromise.
 3. All issues between the parties will be on the table except the question reserved by the Government of Yukon.
 4. Each party may then respond to opening comments of the other. We urge emphasis on possible areas of acceptable compromise.
 5. The Commission may intervene with comment or questions.
 6. From time to time the Commission may adjourn the plenary session when it deems fit.
 7. The Commission may invite each party to caucus and make offers on all, or any, issues.
 8. The Commission may or may not offer to meet privately with one or both parties, depending on the circumstances.
 9. The purpose of the discussions will be that the parties agree on a joint submission to the Commission on all, or some, issues.
 10. All discussions will be without prejudice and confidential and will form no part of the record before the Commission.
 11. The Commission promises to disregard the discussion when making its decision on issues, and the parties will be asked formally at the outset to accept this undertaking.
 12. Any comment by any member of the Commission will not be taken as decisive, but merely as a possible basis for a compromise.
- 2.4.5 The mediation meetings began September 15, 2004 and continued into September 16th, 2004. On that day, the Commission further to the rules set by it met with the Yukon

Territorial Court judges, the Government of Yukon, Justice of the Peace Burgess for the Justice of the Peace Association, and with Senior Justice of the Peace Cameron.

2.4.6 After the mediation, the judges and the Government of Yukon filed a joint submission, as did the Government and the Yukon Justice of the Peace Association.

2.5 *Hearings*

2.5.1 No person appeared before the Commission on September 16, 2004 other than those who had earlier filed submissions.

2.5.2 On that day, the Yukon Territorial Court judges and the Government of Yukon presented to the Commission a joint submission on many issues but also jointly requested an adjournment to continue direct discussions of some remaining issues.

2.5.3 The Government of Yukon and the Yukon Justice of the Peace Association also filed a joint submission.

2.5.4 On that day, the Commission also proceeded to hear the oral submissions of the Senior Justice of the Peace and the Government of Yukon about the remuneration of the Senior Justice of the Peace.

2.5.5 Later, the Commission asked questions of the Government and the judges about their joint submission, and their joint reply is referred to herein as the Second Joint Submission.

2.5.6 The Commission is pleased to note that on January 12, 2005, the Government, the Territorial Court judges, the Senior Justice of the Peace, and the Yukon Justice of the Peace Association were able to make an agreement to deal with many process issues for the future, in a manner consistent with the provisions of the *Act*.

3 **General Conclusions about Remuneration**

3.1 The *Act* contemplates and encourages mediation to resolve issues between the parties. The Commission acted to facilitate this process, but with no purpose or goal beyond that. Thus, the Commission accepts and considers the results of mediation and all joint submissions as the free and voluntary action of the participants.

3.2 Notwithstanding the directions about mediation, and the joint submissions received, the Commission is of the view that it is the scheme of the *Act* that the Commission itself must decide what is fair and reasonable compensation.

3.3 Notwithstanding contrary submissions, the Commission, in its opinion as a result of the principle just stated, must proceed on the basis that the Commission has no authority to consider itself as having any kind of appeal or review role regarding the work of earlier commissions.

- 3.4 A further consequence of the principle just stated is that no person is entitled to an increase in compensation just because this review is mandated.
- 3.5 A further consequence of the principle just stated is that the task of the Commission is to review circumstances arising after the implementation of the previous Commission report and determine what impact those circumstances have had on the fairness of existing compensation, and if there is impact, suggest changes. Moreover, the Commission is of the view that, this now being the third independent review of Territorial salaries, some principles, in its view, have become clear.
- 3.6 The Commission acknowledges that the judges and the Government expressed differing views on the appropriateness of salary parity between them and the judges of the Yukon Supreme Court.
- 3.7 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*.
- 3.8 The Commission makes these comments about the mandated factors:
- *The current financial position of the government:*
The financial position on the basis of the submissions of the Government of Yukon and, in the judgment of the Commission, is relatively healthy, and not a negative influence on any decision.
 - *The need to provide reasonable compensation to judges:*
Compensation must be fair and reasonable having regard to all circumstances reviewed in this part of the report.
 - *The need to build a strong court by attracting qualified applicants:*
The tradition in the Yukon has been to seek judges not just from candidates living and working in the Yukon but elsewhere, and earnings elsewhere therefore are a factor.
 - *The unique nature of the Yukon:*
The Yukon has many unique qualities that appeal to many people. It is also somewhat remote. Both factors must be weighed.

- *The compensation provided to judges in the Northwest Territories, and British Columbia, Alberta, and Saskatchewan:*

These are all matters to be considered, as are the differing working and living conditions.

- *The laws of the Yukon:*

No particular law was drawn to our attention as being a complication, detriment or an advantage. In the view of the Commission, the overall legislative framework is neither so complex, simple, or unique as to substantially affect performance or comparisons with other jurisdictions. Later, we comment on issues related to the *Act*.

- *The cost of living in the Yukon, including the growth or decline in real per capita income:*

This in our view is a significant factor, particularly when one notes the much higher cost of living in the NWT; but that jurisdiction is only one of three the *Act* mandates that we review.

- *Submissions filed:*

The joint submissions filed are of great significance and assistance.

4 Specific Conclusions about Remuneration for the Yukon Territorial Court Judges

- 4.1 **Joint Submission.** The Commission is of the view that the original and Second Joint Submission as to compensation fairly reflect the changed circumstances since the implementation of the report of the previous Commission, and it adopts the submissions subject to the comments that appear throughout this report.
- 4.2 **Salaries.** Effective April 1, 2004, the salaries of the Territorial Court Judges shall be \$189,900 per annum. This salary shall be adjusted for inflation on a compound basis on April 1, 2005 and April 1, 2006 in an amount based on the percentage increase over the previous calendar year in the Whitehorse Consumer Price Index, as reported by the Yukon Bureau of Statistics, based on the data compiled by Statistics Canada. In other words, the adjustment on April 1, 2005 will be the percentage increase in the Whitehorse consumer price index from January 1, 2004 to December 31, 2004. The adjustment on April 1, 2006 will be calculated in a similar fashion.
- 4.3 **Effective Date.** Notwithstanding that this Commission was created on June 4, 2004, and arguably has no jurisdiction to back-date salaries, the Commission was persuaded by the parties that it had been the object of the *Act* to give the Commission authority from April 1. In that regard, the Commission notes that the parties jointly submitted that the Commission can and should make its recommendations effective as of April 1, 2004, but the Government wishes to note that this is not to be taken as a concession as to the ability of this or any other Commission to make retroactive recommendations.
- 4.4 **Incidental Expense.** As part of the remuneration package, and in recognition of the fact of incidental expenditures by the judges for the better performance of their judicial duties, effective April 1, 2004 each judge shall be paid an annual professional allowance in the amount of \$3,000 for reasonable expenditures approved by the Chief Judge that the fit and proper execution of the office of judge may require, which expenditures shall be supported by receipts. Where a judge's expenses in one year exceed \$3,000, the judge is entitled to claim the excess in the following year. Unexpended amounts can be carried over from year to year, provided that any unexpended

amount as of April 1, 2007 shall lapse. This professional allowance shall not be included as part of pensionable earnings.

- 4.5 **Chief Judge Stipend.** As in other Canadian jurisdictions, the Chief Judge must fulfill several additional administrative responsibilities relating to the administration of the Court system. In recognition of this additional burden, the Chief Judge shall be paid a stipend of \$8,000 per annum. This stipend shall be included as part of pensionable earnings.
- 4.6 **Supervising Judge Stipend.** The *Territorial Court Act* provides that one of the judges must be designated as the Supervising Judge for the Yukon Justice of the Peace program, which appointment involves significant additional duties. This stipend shall be \$4,000 per annum, which shall be included as part of pensionable earnings.
- 4.7 **Related Benefits**
- 4.7.1 The Commission accepts that, historically, judicial benefits have been largely the same as the benefits established for members of the management group of the Yukon Public Service. With the establishment of the Judicial Compensation Commissions, a question has arisen as to whether any changes to these benefits during the period between Judicial Compensation Commission hearings would automatically apply to the judiciary. This question was answered when the Judges and the Government of Yukon agreed that these benefits would accrue to the Judges as they become available to senior management employees. They also agreed that the changes in benefits set out in the September 20, 2002 memorandum addressed to "All Yukon Government Management, Lawyer and Deputy Minister Group - Members" announcing improvements to the Management Benefits Plan are to be made available to the judiciary. In addition, it is agreed that for the next three year period, any changes in benefits involving increased costs to or reductions in the level of benefits will apply to judges, provided they also apply to all management group employees.
- 4.7.2 The Commission concludes that the benefits of the Territorial Court Judges continue to be those established for members of the Management Group of the Yukon Public Service under "Section M, Conditions of Employment" except as varied by this or a previous Judicial Compensation Commission, and except as the Government of Yukon and the Chief Judge may agree that any benefit is inapplicable to the judiciary by virtue of the nature of the judicial office.
- 4.7.3 By way of clarification, and in light of the agreement to this effect, the Commission accepts that these benefits *shall* be included:
- Yukon Bonus (Section M - Part 4)
 - Community Allowance and Travel Bonus (Section M - Part 5)
 - Designated Paid Holidays (Section M - Part 7)
 - Leaves of Absence (Section M - Part 8) – except:
 - ~ subparagraphs (a)(i)(b), (a)(i)(e), and (a)(i)(f) under "Vacation, Long Service and Managers' Leave" (not applicable as the accrual rate of vacation leave entitlement for Judges and the SPJP were set at 35 days per year by 2001 JCC); and

~ paragraph (h) "Leaves of Absence - Other" (not applicable as per 1998 JCC recommendation and given that the Judges have educational leave)

- Benefits (Section M – Part 9)
- Severance (Section M – Part 14), except subparagraphs 14(a)(i) Lay-off, 14(a)(v) Rejection on Probation, and 14(c)(i) Removal Expenses – Rejection on Initial Probation or Lay-off.

4.7.4 Similarly, and for greater clarity, and in addition to the exceptions noted in the previous paragraph, the following sections of the "Section M Benefits" *shall not* apply to the Territorial Court judges:

Part 3 - Salary Administration;

Part 6 - Hours of Work (except that leave entitlements will continue to be calculated at the rate of 7.5 hours per day or 37.5 hours per week as provided for in paragraph 6(b));

Part 10 - Pension;

Part 11 - Conflict of Interest;

Part 12 - Discipline;

Part 13 – Harassment; and

Part 15 - Deputy Ministers.

5 Conclusions about Remuneration for the Justices of the Peace

5.1 The Commission is of the view that the joint submission as to compensation fairly reflects the changed circumstances since the implementation of the report of the previous commission, and it adopts the submissions subject to the comments made in this report.

5.2 Effective April 1, 2004 the hourly rate for Justices of Peace shall increase as follows:

- Classification JPI from \$25 per hour to \$30 per hour
- Classification JP II from \$30 per hour to \$35 per hour
- Classification JP III from \$50 per hour to \$55 per hour.

Effective April 1, 2004, the monetary cap on maximum fees which can be charged on any one day shall be removed, subject to it being understood by the parties that the Government of Yukon may bring this issue before future commissions should it deem that a need for such arises.

5.3 Effective April 1, 2004 the hourly rate payable to Justices of the Peace while on official training session shall increase from \$25 per hour to \$30 per hour

5.4 The parties agreed and wish the Commission to note that the travel training allowance remains at \$100, so as to ensure that this amount is paid to the Justices of the Peace for attendance at training colleges. In its original submission the Justice of the Peace Association asked for an increase in the stipend from \$100 per day to \$125. The joint submission was silent on the topic. In our view, the Justice of the Peace Association had a valid complaint about the cuts and we agree with the joint submission that they be restored for the future, but not retroactively. Nor do we agree that at this time an increase is warranted.

6 Conclusions about Remuneration for the Senior Justice of the Peace

6.1 *Submissions by Senior Justice of the Peace, Dean Cameron*

- He expressed dissatisfaction about the salary review process in the past, which he says was cumbersome and crushingly expensive, and, in his view, failed to settle on a suitable methodology to calculate his compensation.
- He asserted that it is the role of the Commission to fix a fair and reasonable compensation, and not engage in horse-trading or unseemly compromise.
- He proposed that his salary be expressed as a percentage of the salary of a judge of Yukon Territorial Court both as a way to symbolize his status as a senior judicial officer and to simplify future salary review.
- He contended, for the same reason, that all other remuneration, including educational leave, should be the same as that for the Yukon Territorial Court judges.
- He proposed a change in his pension start date to July 1994 with corresponding buy back provisions.
- He noted that he is the only full-time justice of the peace, and his workload is heavy and very similar to that of the judges, and, since a recent judicial vacancy, has reached a very high percentage of the workload of Yukon Territorial Court judges.
- He asserted that, while his position does not require a law degree, he does work similar to that done by legally trained justices in Alberta, for whom the pay is 65% of that of the judges.

6.2 *Submissions by Government of Yukon about Senior Justice of the Peace, Dean Cameron*

- Senior Justice of the Peace, Dean Cameron, is a judicial officer with serious duties to perform and rightly is a person of high esteem and importance in the community, and his salary should reflect his status.
- The Commission has a duty to set for him a salary that is fair and reasonable, and that will reflect this status.
- An automatic percentage formula tied to Yukon Territorial Court judicial salaries offends principle because it does not permit a review of altered circumstance.
- Urged a 7.5% increase over 3 years to reflect increased workload and some new duties.
- Noted that after review by the 2001 commission he went from \$67,000 per annum to \$87,000.
- Agreed that “horse-trading” is inappropriate.
- Submitted that the Commission should not permit itself to become an appeal commission from the last commission, and in that respect opposed reconsideration of pension issues.
- Noted that inflation in Yukon for the past three years has been very low.

6.3 *Conclusions of the Commission*

- Remuneration for a Senior Justice of the Peace, Generally

- 6.3.1 The office of Senior Justice of the Peace is an important judicial office, one deserving of respect and recognition.
- 6.3.2 The Commission observes that, in general, pay for a judicial office should be set without regard to the personal circumstances of the person holding the office. Notwithstanding this general rule, the office of Senior Justice of the Peace is unique for two reasons: it may be filled by a person without legal training or experience, and many highly sophisticated demands can be made upon the recipient so that on-the-job experience is of critical importance. A conscientious full-time justice of the peace can develop highly sophisticated skills through years of experience on the job, and thus the respect and recognition of the community for a job well done - as well as an increasingly challenging workload. In the result, although it is not necessary for the Commission to deal with the issue, there is an argument that there ought to be a starting salary and increments based upon developed experience.
- 6.3.3 A position required to be filled by a lawyer, or other highly trained professionals in our society who can command high salaries, inevitably must have a salary commensurate with lawyers in other jobs to attract new people, and, fairly or not, a position that lacks that training condition need not be so commensurate.
- 6.3.4 A Yukon Territorial Court judge may often do the same or very similar work as a justice of the peace, but on the other hand a Territorial Court judge can and is asked to take on greater responsibilities than those ordinarily allotted to any justice of the peace.
- 6.3.5 Earnings elsewhere for a somewhat similar office can be a valuable but not always appropriate guide.
- 6.3.6 No undue distinctions between this office and that of Territorial judge should be permitted.

6.4 ***Conclusions of the Commission***
- Remuneration for Senior Justice of the Peace, Dean Cameron.

- 6.4.1 The salary set for Senior Justice of the Peace Cameron, should fairly reflect the factors noted in the previous clause.
- 6.4.2 Senior Justice of the Peace, Dean Cameron, has held this important judicial office now for 10 years, and has been given steadily enlarged responsibility by the Territorial Court.
- 6.4.3 The additional experience of Senior Justice of the Peace, Dean Cameron, should be recognized by an increase in salary to \$98,500.effective April 1, 2004.
- 6.4.4 As befits the office, he should also have the same cost of living benefits, expressed as a percentage of current salary, that is permitted Yukon Territorial Court judges as of April 1, 2004.
- 6.4.5 As befits the office, he should, like the Yukon Territorial Court judges, have the same access to the Yukon Senior Management benefits as have been defined in this report for Territorial Court judges.

6.4.6 As befits the office he should have the incidental allowance permitted Yukon Territorial Court judges.

6.4.7 As befits the office, he also should have education leave. Leave for him should not necessarily involve extensive periods of academic study at institutions of higher learning, but may be shorter study leaves to enable him to see how other courts handle the sort of work the Yukon justices handle, and look at new initiatives in judicial administration offered by the National Judicial Institute, and the US State Court courses for lay judges at Williamsburg and Reno. As a result, the terms of his leave would be different from those for the Yukon Territorial Court judges. We do say that he should be able to get away for a total of one month each year, with reasonable travel and accommodation paid. Given the relatively short periods and variable nature of such leave, we believe it can reasonably be provided on a fully paid basis, the course or focus of study and timing in each case to be approved by the chief or supervising judge. In these circumstances, leave would not formally accrue or constitute an earned benefit.

We are content for now to leave such a program to be organized on an *ad hoc* basis with the cooperation of the Yukon Territorial Court and the Government. We rely on the parties to undertake this arrangement with the flexibility and intent to make it work in the interests of both. Failing that, it may become a subject of consideration by a future commission.

6.4.8 The Commission notes that pension matters were addressed by the previous commission and declines to make any adjustments to the present pension start date.

7 Other Financial Matters

7.1 **Representation Costs.** The Commission notes the agreement by the parties that the reasonable representation costs attendant upon the Territorial Court judges participating effectively before this Commission shall be paid by the Government of Yukon, up to a maximum of \$50,000 for all judges plus GST if any but less the contribution from judges. It is understood that the judges shall also be called upon to contribute \$500 each toward their legal fees; which is one component of their representation costs.

7.2 **Deputy Judge Travel Compensation.** The Commission accepts that deputy judges must travel from outside to the Yukon to assist the Territorial Court, and often they give up personal or holiday time to do so. At the current time they receive \$800 per sitting day by way of *per diem* salary, but are not compensated for travel time. The Commission adopts the rule agreed to between the parties that the Government of Yukon pay deputy judges a *per diem* of \$400 (being one-half the regular *per diem* salary) to compensate for travel time that deputy judges who hold judicial office elsewhere take to travel to and from the Yukon to discharge their judicial functions, *provided that* travel does not take place on a working day for which judges are paid a normal salary in their original jurisdiction. The travel salary would be payable if the judges travel on weekends, holidays and while on personal leave. Supernumerary or retired judges shall be deemed not to be in receipt of “normal salary” and will be eligible to receive compensation for any travel day.

7.3 Judge Barry Stuart, retired, proposed that the Yukon Legislature adopt, in order to ease competition for funds, a practice of spelling out judicial salaries as separate from other expenses. The Legislature may wish to consider this suggestion, but is beyond our powers to offer a direction. We do make the point that however it may be stated in the public accounts, judicial salaries are profoundly different from many other budgetary items because they are in fulfilment of a constitutional obligation and are subject to independent review.

8 Conclusions about Process Issues

8.1 *Interpretation of Reports and Enabling Legislation*

8.1.1 The parties in their submissions explain that serious issues arose between them after the report of the previous commission in terms of the proper interpretation of the report of the previous commission, and also interpretation and appropriateness of the enabling legislation in terms of correct understanding of the report and in terms of topics not specifically dealt with by the report.

8.1.2 The Commission has sought to minimize disputes about interpretation and implementation of its report by making available a draft copy of this report to the Government and the judges and justices with an invitation to comment on its clarity but not on its conclusions.

8.1.3 The Commission acknowledges with pleasure the undertaking on behalf of the Government of Yukon to show draft regulations and statutes to the Territorial Court judges and the Senior Justice of the Peace, and give due consideration to their views whether the drafts accord with this report. Notwithstanding this accord, the Commission wishes to add some comment, acknowledging at the same time that none of these comments bind the Government of Yukon under the existing statute.

8.2 *Suggested Reforms for Simplified Procedures*

8.2.1 While the procedure established by the *Act* was no doubt necessary in the past because of the complicated issues to be resolved, much progress has been made over the years and remaining remuneration issues are now, and likely will be in the future, relatively simple.

8.2.2 Unfortunately, the statutory procedure remains complex, time-consuming, and expensive for a small Court or a single judge. It was to emphasize this that the details of the procedure before this Commission were reviewed earlier in the report.

8.2.3 A key complication is the felt need to retain counsel. In the case of a single judge or justice, the cost of counsel can reach one-half ($\frac{1}{2}$) the actual annual earnings of a judge.

8.2.4 The Commission suggests that there is merit in any effort to simplify the procedure and avoid the need to retain counsel in all but the most extraordinary circumstances, but does not seek to bind the Government of Yukon or the judges to any specific changes.

8.2.5 Judge Barry Stuart, retired, proposed that the Commission establish a formula for future salary changes, in order to simplify the process. In the view of the Commission, this probably exceeds our mandate. We would also add that it is inevitable that any formula would be subject to review as circumstances change. We have, however, addressed in this report other ways to simplify the process.

8.3 *Suggested Further Reforms for Consideration of the Government of Yukon*

8.3.1 Amend the legislation to authorize any future commission to seek advice and directions from the Yukon Supreme Court upon any question of law or jurisdiction arising before it.

8.3.2 Amend the *Act* to mandate for the future the practices noted in sub-clauses 8.1.2 and 8.1.3.

8.3.3 Amend the 90-day rule in s. 25(4)[c] of the *Act*. The Commission noted that two of the commissioners, as well as counsel for the Yukon and counsel for the judges, all live and work outside the Yukon, and this created significant communication and scheduling problems. Several persons had vacations and other obligations scheduled during the summer. The Commission in the preliminary stages could only meet by telephone conference call or email, and correspondence with counsel was by email. Only in this way could the Commission set a hearing as soon as 150 days after appointment.

8.3.4 Amend the *Act* to permit some form of simplified dispute resolution if any issues arise about the interpretation of this report or consequent legislation. The Commission has no jurisdiction to deal with issues arising under previous reports. In any event, it is not practical for the Commission to have an extended life; it is best to think of its active life ending upon its making its report. The Commission, however, is of the view that the constitutional requirement for an independent assessment of remuneration includes the requirement for an independent assessment of the appropriateness of enabling legislation, and an independent interpretation of both commission reports and legislation. While judicial review is no doubt available to an aggrieved person in respect of these issues, this is a very expensive process for a single judge or justice, or even a court of three judges.

8.3.5 Amend the legislation to provide that mediation of issues before the commission can be directed by the commission in any case where it is of the view to do so is not contrary to the public interest, but the decisional role of the commission should remain. On the other hand, the legislation should contemplate the possibility that the commission needs not necessarily act as mediator if the commission thinks it best that this office be filled by another person or persons. A mediator encourages resolution by agreement, but the commission is obliged to resolve an issue by its own ruling. This can create a problem. The Commission is of the view that it successfully avoided this problem by the procedures it adopted, but there may be better ways.

- 8.3.6 Amend the legislation to provide that the commission, where it is of the view that to do so is not contrary to the public interest, may dispense with a public hearing, and otherwise may regulate it.
- 8.3.7 Amend the legislation to give the commission clear power to order costs against or for either government or judges upon finding that either has taken an unreasonable position before the commission.

9 Concluding Remarks

- 9.1 The Commission would like to thank Counsel and the parties who made submissions for their assistance, patience, and cooperative attitude.
- 9.2 The Commission makes these proposals in the belief that they are in the best interests of the people of the Yukon, and consistent with the need to affirm judicial independence.
- 9.3 For practical reasons, we have not attached copies of all submissions to the report, some of which were very lengthy. We shall, however, cause a complete set of all submissions to be filed along with this report, so as to ensure a complete record.

Respectfully submitted the 21st day of February, 2005.

Shirley Adamson, Commissioner

Roger P. Kerans, Commissioner

John Lawson, Commissioner

RULING #1

1. This Commission was formally authorized to act by Order-in-Council on June 4, 2004. The Commission immediately notified the Government and the judges informally that it had set July 31 as the deadline for submissions and Sept 15 for a hearing.
2. On June 17, counsel for the Judges of the Territorial Court gave Notice of an intention to request a preliminary ruling on the question of representation costs. Counsel also requested mediation. The judges asked the Commission to direct that the Yukon Territory pay 100% of their reasonable legal expenses instead of the 65% contribution currently prescribed by the *Territorial Court Act*.
3. On June 19 the Commission met and gave direction to Hon. R. P. Kerans to approach the parties about mediation. On June 20, Mr. Kerans sought a conversation jointly with Mr. Ulyett from the Government of Yukon, and Chief Judge Lilles from the Territorial Court, and was able to have the conversation on July 2. They agreed to mediation of this issue through their lawyers, and Mr. Kerans arranged for a conference call on July 9, and another on July 16. Efforts at mediation failed.
4. On July 19, counsel for the Judges again asked for an early hearing to resolve this dispute and asked for a delay in the deadline for filing submissions. Judge Cameron also wrote a letter in support. On July 20, counsel for the Yukon responded that it would oppose the application. On July 21, counsel for the judges, and Judge Cameron, filed a response. These submissions raised serious and complicated legal issues not readily resolved.
5. On July 21, the Commission met to consider the request for a special hearing. The Commission directs that the parties are at liberty to raise these issues in their regular submissions, and at the regular hearing already set, but the Commission denies the request for a special hearing.
6. The Commission is of the view that its original schedule afforded a reasonable opportunity to all interested parties to be heard. The only reason given for a special hearing was to avoid any chance that judges may personally incur responsibility for legal expenses for the submissions and representation at the regular hearing. It is correct of course that if they are wrong in their submissions for additional remuneration for representation costs, they may never be compensated. In the Commission's view, however, the difference between a risk of liability for costs for a special hearing and the risk of liability for costs for the regular hearing would not be so great as to amount to an overwhelming burden so as to render the established procedure unfair. On the contrary, it may well be that the issue of representational costs will be the most complicated issue at the regular hearing.
7. With respect to Judge Cameron, the Commission sees nothing in the submissions to date would indicate he is taking a position in contradiction to the Territorial Court judges, or has special concerns that do not involve the other judges, or that the other judges have any objection to joint representation. Subject to the Commission's final ruling on this topic, and while of course each and every judge is free to appear or be represented singly, it seems to the Commission that, in the circumstances just described, it is at least arguable that each judge cannot reasonably expect to receive a contribution for sole representation. In the result, his position may be no different than the others.

8. The application for a delay in the filing of submissions is also denied.

Signed this 21st day of July, 2004.

Roger Kerans, Commissioner

Shirley Adamson, Commissioner

John Lawson, Commissioner

RULING #2

The Commission met September 9th to consider the matters raised by Mr. Bainbridge in his fax letter of September 7th and the memoranda earlier by counsel about mediation, and came to these conclusions (which I am authorized to distribute to counsel):

1. Our inquiry is not an adversarial proceeding and no person has the right to call witnesses before us.
2. We will, at the hearing scheduled next week for submissions, consider any submission then made to establish an evidentiary hearing but note that, if we become persuaded that, to fulfill our mandate, it is necessary to conduct an evidentiary hearing, we will have to consider whether to ask for commission counsel.
3. Requests for adjournment will be dealt with when made.
4. The mediations are rescheduled to begin 9:00 a.m., Wednesday, September 15th and continue until completion (or the opening of the Public Hearing, whichever is sooner) and in the same order as before. We will not call on the justices of the peace before noon in any event but at this time offer no further assurances.
5. The Public Hearing will open September 16th at 9:30 a.m. to hear submissions and will continue until there are no more submissions or until adjourned.
6. Should any person wish to abandon a request for mediation we ask that they do so as soon as possible. Otherwise the mediations will proceed as earlier indicated but with the new start time.

Signed this _____ day of _____, 2004.

Roger Kerans, Commissioner

Shirley Adamson, Commissioner

John Lawson, Commissioner