

Bill 174

Law Amendments Committee

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Speaking Notes

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representing the Nova Scotia Provincial Judges Association

Brief Background

1. Nova Scotia has had a Judges Salary Tribunal since 1988.
2. It has always been a binding process.
3. In 1997, the Supreme Court of Canada issued a decision (the 'PEI Reference' case) which established a number of basic principles and rules with respect to setting judicial salaries. These rules are:
 - (a) Judges are not "public servants or government servants".
 - (b) Judges and the Courts must be independent of government because of "their roles as protector of the Constitution and the fundamental values embodied in it, including the rule of law, fundamental justice, equality and preservation of the democratic process".
 - (c) Consequently, to ensure judicial independence, Government and Judges are prohibited from negotiating about judicial salaries and benefits.

- (d) Governments cannot unilaterally set salaries and benefits for judges.
 - (e) Instead, judicial salaries can only be maintained or changed by recourse to an independent tribunal.
 - (f) The salary tribunals so established must be independent, objective and effective.
 - (g) The purpose of establishing the tribunals was to “de-politicize” the setting of judicial salaries and benefits.
- None of these principles and rules are in dispute.
 - Following the 1997 Supreme Court’s decision, all of the provinces had to establish salary tribunals. Nova Scotia already had a tribunal but it made some changes in the Tribunal process to better conform with the Supreme Court’s decision.
 - A number of provinces opted not to give the salary tribunals the authority to make binding decisions and reserved to government the right to reject

tribunal recommendations. Nova Scotia retained its binding model, and NWT and the Yukon also adopted binding models. Ontario adopted a binding model except for pensions. Manitoba has a binding model on salary, provided the salary does not exceed the average of judges salaries in N.S., N.B. and Saskatchewan.

- Saskatchewan also has a binding model on salary, provided that the salary does not exceed the national average for the other provinces and territories. As an aside, both Saskatchewan and N.B. have “negative resolution” provisions. If the government doesn’t reject the salary tribunal recommendations within a fixed time, the recommendations automatically become binding. The Association’s position is that the proposed amendments to the *Provincial Court Act* should not be enacted at all; however, if they do go forward in some form, a negative resolution provision similar to Saskatchewan’s or N.B.’s should be included.
- Predictably, some governments essentially ignored the recommendations of their salary tribunal. The judges in those provinces became frustrated and sued the government. Protracted litigation ensued across the country. Four of the cases, one from N.B., one from Alberta, one from Quebec, and one

from Ontario were heard together by the Supreme Court of Canada in 2004 (the “Bodner” case). The Court was clearly displeased with the litigation. It stated:

The salary tribunals “were intended to remove the amount of judges’ remuneration from the political sphere and to avoid confrontation between governments and the judiciary”.

9 ...Prior to the *Reference*, salary review was between Provincial Court judges, or their association, and the appropriate minister of the provincial Crown. Inevitably, disagreements arose.

10 The often spirited wage negotiations and the resulting public rhetoric had the potential to deleteriously affect the public perception of judicial independence. However independent judges were in fact, the danger existed that the public might think they could be influenced either for or against the

government because of issues arising from salary negotiations. The *Reference* reflected the goal of avoiding such confrontations. Lamer C.J.'s hope was to 'depoliticize' the relationship by changing the methodology for determining judicial remuneration (para. 146).

11 Compensation commissions were expected to become the forum for discussion, review and recommendations on issues of judicial compensation. Although not binding, their recommendations, it was hoped would lead to an effective resolution of salary and related issues. Courts would avoid setting the amount of judicial compensation, and provincial governments would avoid being accused of manipulating the courts for their own purposes.

Those were the hopes, but they remain unfulfilled. In some provinces and at the federal level, judicial

commissions appear, so far, to be working satisfactorily. In other provinces, however, a pattern of routine dismissal of commission reports has resulted in litigation. Instead of diminishing friction between judges and governments, the result has been to exacerbate it. Direct negotiations no longer take place but have been replaced by litigation. These regrettable developments cast a dim light on all involved....

Salary Table

- Includes salaries for Provincial and Family Court Judges from all ten provinces, the Northwest Territories and the Yukon as well as the salary of all Federally appointed judges.
- Covers the period from fiscal 2003/04 to 2016/17.
- If you look at the 2003/04 column, first you'll see the salary for provincial and family court judges in Nova Scotia was \$160,140.
- That ranked 8th highest out of the 13 jurisdictions including the NWT, Yukon and Federally appointed judges.
- Considering just the provinces, the N.S. salary was 6th out of 10 – behind Ontario, Alberta, B.C. and P.E.I. in that order.
- However, you will also notice that the salaries in N.S., Newfoundland, P.E.I., Saskatchewan, Manitoba and B.C. all fell within a range of \$5,000.

- Then look at column 2015/16 (the fiscal year just completed). (It's the most appropriate comparator because there are 7 jurisdictions, including N.S., where the actual salary figures for 2016/17 aren't known yet.)
- So when you look at 2015/16, you'll see that N.S. Provincial and Family Court judges are now next to the lowest paid in Canada. Only provincially appointed judges in Newfoundland & Labrador are paid less and that is because they haven't had a salary increase since 2012/13. The Newfoundland & Labrador Salary and Benefits Tribunal has recently recommended increases for the years from 2013/14 to 2016/17. Those salaries are set out in footnote 11. The recommended salaries are \$238,025 for last year and \$247,546 for 2016/17.
- The Tribunal's report has been tabled in the Newfoundland & Labrador House of Assembly and the Government has until next month to respond.
- Obviously, if the recommendations are accepted, Nova Scotia' Provincial and Family Court judges will become the lowest paid in the country.

- You should be aware that Newfoundland & Labrador governments have previously rejected recommendations from their Tribunals.
- They rejected the 1997 Roberts Tribunal as well as the 2011 Hoegg Tribunal. The judges there took the Government to court and won in both cases.
- Regardless of whether Nova Scotia judges wind up as the lowest paid or second lowest paid in the country, however, one thing is perfectly clear. The existing binding process in N.S. has not resulted in judicial salaries which can by any means be seen as unreasonable or unaffordable.
- The provinces where the governments have the power to reject recommendations of their tribunals have wound up paying higher salaries than Nova Scotia.
- And in the process, most of them have spent hundreds of thousands of dollars embroiled in unseemly litigation with their judges – only to see the Tribunal recommendations ultimately implemented as a result of that litigation.

- More importantly, the litigation put a great deal of strain on the relationship between those governments and judges which is in nobody's best interest.
- Nova Scotia has been spared all this. There has been no litigation of any kind related to the recommendations of our Judicial Salary Tribunal, going back over a period of nearly 30 years. Why? Because the Tribunal process has been binding. In the Government's written submission to the 2014-17 Judicial Salary Tribunal, it lauded the existing system:

“Nova Scotia has long benefitted from such an independent process for judicial remuneration, having established and followed a binding Tribunal process since the late 1980s, with the exception of periods of wage restraint. The process dictates both salary and benefits for the provincial court judges.

The existence of this Tribunal establishes financial security for judges. It is clear to all that the compensation of the judges are not fixed by the executive, but set independently of it. No reasonable person would consider any provincial court judge in

this province, or the court as a whole, to be possibly influenced in their determination of a case by a concern over their salary or benefits at the hands of the executive.”

IF IT'S NOT BROKE, DON'T FIX IT!

- The system which currently exists has worked well in the past and there is absolutely no reason to believe it won't continue to work well in the future if it's left as it is.
- Conversely, based on the experience in other provinces where governments have the power to reject Tribunal recommendations, it is almost certain that removing the binding nature of the Tribunal's recommendations will politicize the setting of judges salaries. Doing so would inevitably lead to litigation and, as you can see from the salary table, very probably lead to higher judicial salaries in this province than would be the case under the present system.

The Proposed Amendments won't Achieve the Government's Objectives

Although the amendments would give the Government the right to reject the Tribunal's recommendations and, for example, set a lower salary than recommended by the Tribunal, they by no means guarantee that the recommendations won't be implemented. The Government has to give reasons for rejecting the Tribunal's recommendations. If those reasons are challenged in the Supreme Court of Nova Scotia and are found wanting, then the Tribunal's recommendations will prevail. The bottom line is that the Government does not and cannot have the final say with respect to the salaries of Provincial and Family Court judges. That simply isn't permissible under the Constitution.

From an historic perspective, it's fair to say that the superior courts tended to give governments some leeway when assessing their reasons for rejecting the salary recommendations of Tribunals; in more recent years, however, the Courts have shown an increasing tendency to rule against government adjustments including in the provinces of New Brunswick, British Columbia, Newfoundland & Labrador (twice) and Alberta (twice). In fact, since the Bodner case in 2004, no government rejections of judicial salary recommendations have survived challenge in the superior courts.

In summary, enacting the proposed amendments to the *Provincial Court Act* would be a regressive step which would ultimately reflect badly on the administration of justice in this province. It would lead to litigation and would not achieve the government's objective.

Therefore, I strenuously urge each and every member of this committee to treat this matter with the careful consideration it deserves and not to support the proposed amendments.

Provincial Judges Salaries Across Canada

| Jurisdiction | 2003/04 | 2004/05 | 2005/06 | 2006/07 | 2007/08 | 2008/09 | 2009/10 | 2010/11 | 2011/12 | 2012/13 | 2013/14 | 2014/15 | 2015/16 | 2016/17 |
|--|---------|---------|---------|---------|-------------------------------|---------------------------------|---------|---------|---------|------------------------|------------------------|------------------------|---------|------------------------|
| Federal | 216,600 | 232,300 | 237,400 | 244,700 | 252,000 | 260,000 | 267,200 | 271,400 | 281,100 | 288,100 | 295,500 | 300,800 | 308,600 | 314,100 ^[1] |
| British Columbia | 161,250 | 161,250 | 161,250 | 198,000 | 202,356 | 220,000 | 225,500 | 231,138 | 231,138 | 231,138 | 242,464 ^[2] | 236,950 ^[3] | 240,504 | 244,112 |
| Alberta ^[4] | 200,000 | 210,000 | 220,000 | 220,000 | 220,000 | 220,000 | 250,000 | 255,000 | 257,550 | 263,731 | 273,000 | 279,825 | 286,821 | 293,991 |
| Saskatchewan ^[5] | 158,000 | 161,634 | 165,190 | 195,000 | 198,900 | 204,552 | 220,916 | 229,753 | 238,943 | 248,010 | 254,458 | 260,819 | 272,295 | 282,184 |
| Manitoba ^[6] | 156,560 | 161,257 | 168,000 | 173,040 | 178,230 | 192,166 | 201,774 | 211,862 | 218,000 | 224,104 | 230,155 | 239,000 | 249,277 | 254,263 |
| Ontario ^[7] | 206,348 | 213,054 | 219,979 | 228,338 | 234,503 | 242,007 | 248,057 | 252,274 | 262,113 | 267,355 | 274,574 | 279,791 | 287,345 | Next JCC |
| Québec (from July 1 to June 30) | 155,069 | 205,000 | 210,954 | 217,533 | 217,533 + 3,198 for CPI | 220,872 + 3,339 for ½ CPI | 221,270 | 225,737 | 227,488 | 230,723 | 236,722 ^[8] | 238,379 | 241,955 | Next JCC |
| New Brunswick | 150,706 | 172,000 | 177,200 | 182,500 | 186,000 | 199,700 | 204,700 | 204,700 | 204,700 | 204,700 ^[9] | 204,700 | 204,700 | 246,880 | Next JCC |
| Nova Scotia | 160,140 | 163,342 | 172,000 | 176,300 | 180,708 | 197,000 | 202,910 | 207,577 | 214,000 | 216,183 | 222,993 | 231,500 | 234,509 | +NS CPI |
| Prince Edward Island ^[10] | 161,627 | 169,439 | 174,904 | 186,349 | 196,144 | 204,835 | 213,360 | 216,268 | 223,774 | 235,080 | 239,472 | 243,538 | 250,050 | Nat average |
| Newfoundland & Labrador ^[11] | 159,181 | 159,181 | 165,230 | 168,535 | 173,591 | 177,063 | 197,425 | 203,348 | 209,448 | 215,732 | 215,732 | 215,732 | 215,732 | 215,732 |
| Northwest Territories | 182,972 | 199,980 | 201,766 | 206,404 | 209,255 | 215,254 | 221,254 | 227,254 | 233,254 | 249,582 | 252,414 | 256,606 | 260,302 | 2016 JRC |
| Yukon | 178,000 | 189,900 | 195,407 | 199,901 | 215,742 | 222,214 | 228,880 | 235,746 | 242,819 | 250,103 | 257,606 | 262,758 | 268,013 | 2016 JCC |

All Salaries run from April 1 to March 31 in each fiscal year, except as noted.

Endnotes on page 2.

[1] Federal judges receive a statutory salary increase effective April 1st each year, which is based on the annual percentage change in the "Industrial Aggregate Index" for Canada, as published by Statistics Canada for the preceding calendar year to a maximum of 7%. The 2016 Quadrennial Commission will consider whether any further increase is appropriate for the fiscal years 2016-2019.

[2] On March 27, 2015, the Court of Appeal for British Columbia ordered Government to implement the recommendations of the 2010 JCC. The salaries recommended by that JCC are therefore shown for the years 2011/12, 2012/13, and 2013/14. The Government was denied leave to appeal to the SCC.

[3] The British Columbia salary rates for 2014/15 to 2016/17 are as per the Government of British Columbia's Response to the Report of the 2013 Judges Compensation Commission (the 2013 Report) and are lower than the 2013 JCC's recommendations, which were as follows for the years 2014/15, 2015/16 and 2016/17 respectively: \$241,500, \$245,122, and

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\$250,024. The British Columbia judges have filed for judicial review of the Government's response to the 2013 Report.

[4] The 2013 Alberta JCC Report was provided to the Minister on March 30, 2015. In July 2015, the Government announced its decision to accept all of the recommendations.

[5] The Saskatchewan JCC issued its Report on December 31, 2014. All recommendations were accepted on January 30, 2015.

[6] The 2014 Manitoba JCC made recommendations for the period April 1, 2014 to March 31, 2017. The salary recommendations were accepted by the Legislature. The JCC recommended a salary of \$239,000 effective April 1, 2014, followed by increases in each of the years following based on the percentage increase in Average Weekly Earnings in Manitoba over the preceding calendar year. According to CanSim Table 281-0027, the % increase in the AWE in Manitoba over 2014 was 4.27%, resulting in a salary of \$249,205 for 2015. According to the same database, the increase effective April 1, 2016 should be 1.99%.

[7] In addition to any salary adjustments recommended by a JCC, Ontario judges receive a statutory salary increase effective April 1st of each year which is based on the percentage change in the "Industrial Aggregate Index" for Canada as published by Statistics Canada for the preceding 12 month period (April 1-March 31) to a maximum of 7%.

[8] The 2013 Rapport du Comité de la rémunération des juges recommended salaries for judges of the Court of Québec at \$238,300 for 2013/14 with increases for 2014/15 and 2015/16 equal to the increases in the Québec Consumer Price Index. On February 18, 2014, the National Assembly adopted a resolution endorsing the Government's response to the Committee's Report, which response reduced the recommended salary for 2013/14 to \$236,722. The Quebec salaries are effective on July 1s of each year, not April 1st as in the other jurisdictions.

[9] In New Brunswick, the 2012 JRC Report was dated June 5, 2015. The Government responded to it in December 2015 and determined that effective April 1, 2015, NB judges would be paid a salary equal to 80% of the salary paid to s.96 judges.

[10] In PEI, successive commissions have recommended that PEI judges should be paid a salary equal to the national average. The figure for 2015/16 has yet to be determined.

[11] In Newfoundland & Labrador, the 2014 Salary and Benefits Tribunal conducted its hearing in late May 2015, and will make recommendations for the four-year period April 1, 2012 to March 31, 2017. The Report has been tabled in the Legislature but the Government has yet to respond to the recommendations. The salaries recommended for are \$222,204 for 2013/14; \$228,870 for 2014/15; \$238,025 for 2015/16 and \$247,546 for 2016/17.