Presentation to the Nova Scotia Law Amendments Committee May 16, 2016

Good Morning, I am Judge David Walker, I am from New Brunswick, where I was appointed to our Provincial Court in 1997, I am also a Deputy Judge of the Territorial Court of the Northwest Territories.

I am President of the Canadian Association of Provincial Court Judges, also known as CAPCJ, and I appreciate very much the opportunity to say a few words here today, in regards to the intended changes to the **Nova Scotia Provincial Court Act.**

In 1973 a small group of judges from across Canada gathered in St. John's Newfoundland to create a national association. This was CAPCJ.

Those were different times. The role and stature of provincially and territorially appointed courts was unclear. The concept of Judicial Independence was not understood as it is today.

In the 40 years that has passed CAPCJ has grown to represent all of the nearly 1100 provincially and territorially appointed judges in Canada. While the Nova Scotia Provincial Court Judges are members of CAPCJ, I really come to speak on behalf of our national membership..

The Preamble to the CAPCJ Constitution provides:

WHEREAS the independence of the judiciary is the cornerstone of a free and democratic society;

Whereas the Canadian Association of Provincial Court Judges affirms that it has a primary responsibility to protect and maintain the principle of judicial independence for the benefit of all Canadians;

And it is Judicial Independence and its benefit to all Canadians that I wish to speak today.

Not many years after our founding, in 1982 the **Canadian Charter of Rights and Freedoms** came into force. It provides in s11:

Any person charged with an offence has the right

d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The SCC has written that 'litigants who engage our judicial system should be in no doubt that they are before a judge who is demonstrably independent and motivated only by a just and principled result" (**Bodner** para1)

And further: "The judiciary must both be and be seen to be independent: (para 6)

"The components of judicial independence are: security of tenure, administrative independence and financial security"(para 7).

When it was perceived that the financial security or independence of judges was been compromised by arbitrary decisions on the part of various governments, litigation resulted and in 1997, the SCC released its decision commonly referred to as the **PEI Reference Case.**

This decision, written by Chief Justice Lamer, required that the various provinces and territories create independent commissions or tribunals to determine the compensation of judges. Various versions were put in place across the country, and not long after, the Tribunal in Nova Scotia was created with its first members appointed by December 1998.

The proposed amendments seek to fundamentally change a model that has, I submit stood the people of Nova Scotia in good stead for nearly 30 years.

The SCC did not require that the Tribunal Recommendations be binding-in fact, it said the opposite at para 176:

The model mandated as a constitutional minimum by s. 11(*d*) is somewhat different from the ones I have just described. My starting point is that s. 11(*d*) does not require that the reports of the commission be binding, because decisions about the allocation of public resources are generally within the realm of the legislature, and through it, the executive. The expenditure of public funds, as I said above, is an inherently political matter. Of course, it is possible to exceed the constitutional minimum mandated by s. 11(*d*) and adopt a binding procedure, as has been done in some provinces.

CAPCJ does not take the position that the amendments are unlawful, your government is within its rights to do so. While we ask that you be mindful of and protect Judicial Independence, be assured that the judiciary recognizes that there must also be political independence.

While CAPCJ acknowledges that the removal of the binding recommendations made in Nova Scotia by its tribunal is not an interference with the judicial independence of provincial court judges in Nova Scotia, it does diminish that independence.

The concern of CAPCJ is that it is clear from the **PEI Reference** case that one of the objectives of the Supreme Court in mandating a form of a commission, or tribunal to make recommendations to government on the salary and benefits which should be paid to the judiciary, is to depoliticize as far as possible the process of fixing judicial remuneration.

If the tribunal recommendations are binding it means that there is not only a total absence of any suggestion of political interference, there is a guarantee of that absence. As importantly, especially to the public, the ordinary citizen of Nova Scotia, there is an unmistakable appearance of judicial independence, an assurance of judicial independence, and a confidence in judicial independence, which will not otherwise exist.

If you remove the binding nature of the tribunal recommendations, then in each of those ways judicial independence will be diminished.

Only where recommendations are binding is there an absence of even the hint of politicization in the tribunal or commission process.

It is perhaps ironic that the existing tribunal process has in the result, kept the salaries and benefits of Nova Scotia judges near the bottom of the range of compensation for all judges across Canada. Indeed, the salary of a Nova Scotia judge is currently the second lowest of any of the 12 provincial/territorial court judges of Canada, and will fall to the lowest if the current recommendations of the tribunal in Newfoundland are followed.

There is a school of thought that believes that where a tribunal or committee is empowered to make recommendations which are binding, rather than being subject to review by its empowering authority, that tribunal or committee will exercise far greater restraint than it might otherwise because it is aware that its recommendations are not the final word. Knowing that its mistakes cannot be challenged or even corrected, it tends to act far more cautiously and prudently than it otherwise might.

And this is the true testament of Judicial Independence and your judges here in Nova Scotia, for it is in their fundamental acceptance of the validity of your process, their assurance that their independence is protected that they and all judges in Canada are so concerned. In plain language you currently have the gold standard of Judicial Independence, a model which is the envy of almost every other Court in Canada. That is because Judicial Independence which is for the benefit of the public seems to find voice only through the judiciary even though it may result in a lower level of compensation for the judges. It is a further irony that Judges of other Courts have ultimately achieved success in circumstances where reports are non-binding, but only after great expense and years of litigation.

You can be assured that the Nova Scotia Provincial Court is of the highest quality, respected throughout Canada its decisions referenced and relied upon.

It has been an honour to say a few words on behalf of my Association. I would be happy to answer your questions.