

NOVA SCOTIA PROVINCIAL JUDGES' SALARIES AND BENEFITS TRIBUNAL  
(2014 – 2017)

REPORT AND RECOMMENDATIONS FOR THE PERIOD  
APRIL 1, 2014 to MARCH 31, 2017

TRIBUNAL MEMBERS

Professor Bruce P. Archibald, Q.C.  
Mr. Brian G. Johnston, Q.C.  
Mr. Ronald A. Pink, Q.C.

September 23, 2014  
Halifax, Nova Scotia

## A. Introduction

1. This is the Report of the 2014–2017 Tribunal for the Determination of Salaries and Benefits for Provincial and Family Court Judges of the Province of Nova Scotia for the period running from April 1, 2014 to March 31, 2017. The Tribunal is established under sections 21A through 21M of the *Provincial Court Act*, R.S.N.S. 1989, c. 238 as amended. The first report under the then new sections of the *Provincial Court Act* was issued on March 19, 1999. This current Report therefore reflects 15 years of experience under what many observers might consider to be the most constitutionally enlightened system for a judicial compensation commission in Canada. The Nova Scotia Provincial Court Judges Salary Tribunal is the only one in the country whose recommendations are by statute binding on the Government, rather than being merely advisory. This circumstance has no doubt led to the fact that, in Nova Scotia, the Government and the Provincial Judges Association have avoided the unproductive spectacle of periodic litigation between them as in other jurisdictions, where governments have been tempted to ignore compensation commission recommendations and judges have taken the government to court. The Nova Scotia model, thus complies admirably with the Supreme Court of Canada's various decisions mandating an independent compensation commission to ensure a proper separation of powers between government and judiciary in a constitutional democracy.

Nonetheless this places on our Tribunal a particularly heavy burden to ensure that its recommendations represent a careful, sensitive and objective exercise of its statutory mandate.

2. The current Tribunal was formally established in September 2013, and consists of Professor Bruce P. Archibald, Q.C., Chair, and members Brian G. Johnston, Q.C. (appointee of the Minister of Justice) and Mr. Ronald A. Pink, Q.C. (appointee of the Nova Scotia Provincial Judges' Association). In compliance with section 21D of the *Provincial Court Act* ("the Act"),

which provides an opportunity for public participation in the Tribunal's proceedings, the Tribunal (with the assistance of the Court Services Division of the Department of Justice) caused notice of its public hearing to be placed in various newspapers in the Province. Written submissions were received from Ms. Connie Brauer and Mr. Victor Harris, from Ms. Robyn Elliott (President of the Canadian Bar Association), from Dr. Grainne Neilson, a forensic psychiatrist, and retired Provincial Court Judge, Sandra E. Oxner. We appreciate these submissions which were gratefully received, and taken into consideration where relevant to our deliberations. Written submissions and voluminous materials were also received from Ms. Sarah Bradfield and Ms. Agnes MacNeil, on behalf of Judith Ferguson, Deputy Minister of Justice representing the Government of Nova Scotia ("the Government"), as well as from Mr. S. Bruce Outhouse, Q.C. and Mr. Lester Jesudason, Q.C., representing the Nova Scotia Provincial Judges' Association ("the Association").

3. At the request of the Government, the oral hearing tentatively scheduled for earlier in the spring was put off until May 29, 2014 in order for the Government and the Association to address the implications of the Provincial Budget for the Tribunal's deliberations. On May 29, 2014, therefore, the Tribunal convened to hear oral argument from the Government and the Association. Ms. Jillian Cormier from *AllNovaScotia.com* and Mr. Andrew Douglas from *Frank Magazine* were present as public observers of the event.

4. The mandate of the Tribunal is set out in section 21E(1) of the Provincial Court Act which reads:

**21E(1)** A tribunal shall inquire into and prepare a report containing recommendations with respect to

- (a) The appropriate level of salaries to be paid to judges of the Provincial Court and the Family Court, including the chief judge and associate chief judge of each court;
- (b) The appropriate level of per diem payments, or payments for part of a day, made to judges for presiding in the Provincial Court or the Family Court where those judges are not receiving salaries;
- (c) The appropriate vacation and sick-leave benefits to be provided to judges of the Provincial Court and the Family Court;
- (d) Pension benefits and increases thereto in respect of increases in the cost of living, long-term disability benefits or salary continuation, life insurance and health and dental benefits for judges of the Provincial Court and the Family Court and the respective contributions of the Province and the judges for such benefits; and
- (e) Other non-discretionary benefits for judges of the Provincial Court and the Family Court.

This provision is similar to that found in analogous statutes across Canada.

5. In the exercise of its mandate, the Tribunal must be guided by the non-exhaustive list of factors set out in section 21E(3) of the *Act*, which reads as follows:

- (3)** When making recommendations pursuant to this Section, a tribunal shall take into consideration the following:
- (a) The constitutional law of Canada
  - (b) The need to maintain the independence of the judiciary;
  - (c) The need to attract excellent candidates for appointment as judges;
  - (d) The unique nature of the judges' role;
  - (e) The manner in which salaries and benefits paid to judges in the Province compares to judicial compensation packages in other jurisdictions in Canada, including the federal jurisdiction, having regard to the differences between those jurisdictions;
  - (f) The provision of fair and reasonable compensation for judges in light of prevailing economic conditions in the Province and the overall state of the Provincial economy;

- (g) The adequacy of judges' salaries having regard to the cost of living and the growth or decline in real per capita income in the Province;
- (h) The relevant submissions made to the tribunal;
- (i) The nature of the jurisdiction and responsibility of the court; and
- (j) Other such factors as the tribunal considers relevant to the matters in issue. 1998, c. 7, s. 1; 2001, c. 5, s. 34; 2013, c. 27, s. 2

These provisions reflect the kind of factors mentioned in other legislation across Canada, but each statute has its subtle differences. The point, however, is that these factors establish what the Nova Scotia Legislative Assembly determined to be the relevant considerations which reflect both constitutional imperatives and the public interest in so far as the setting of the terms and conditions of employment are for Provincial Judges in this jurisdiction. One of the important implications of this statutory list of factors is that this Tribunal must act differently than a private-sector interest arbitration, where the agenda and the parameters of a collective bargaining dispute are largely set by the "parties". This proceeding is thus different than a private-sector labour dispute in that regard.

6. The constitutional dimensions of this Tribunal's mandate were described in the 2004–2007 Tribunal's Report in the following manner:

4. Judicial compensation commissions, such as this Tribunal, became a constitutional necessity following the decision of the Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3. The purpose of these commissions is to safeguard judicial independence, the hallmarks of which are security of tenure, administrative independence and financial security. Judicial compensation commissions are intended to do this by creating an "institutional sieve", or structural separation, between government and the judiciary so as to prevent direct negotiations between judges and the government. This institutional distance is intended to "de-politicise" the relationship between governments and judges, and ensure that there can be no manipulation of the judiciary by government, or appearance thereof, through the process of establishing terms of remuneration and other employment benefits for judges.

5. Judicial independence, of course, is not an end in itself. It is a key component of maintaining the rule of law in a free and democratic society, without which democratic institutions and a properly functioning civil society are at risk of being undermined. Unlike some other jurisdictions, the legislature of Nova Scotia has agreed to treat the recommendations of this Tribunal as binding, rather than merely advisory, subject to a request by the Minister of Justice or by the Association to the Tribunal to reconsider aspects of its Report (see *Provincial Court Act* sections 21(J) 21(K), 21(L) and 21(M)). Thus, the Tribunal has read with interest the recent decision of the Supreme Court of Canada in *Provincial Court Judges Association of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judge's Association v. Ontario Management Board*; *Bodner v. Alberta*; *Conférence des juges du Québec v. Québec*; *Minc v. Québec (Attorney-General)* 2005 S.C.C. 44 decided July 22, 2005. While the Tribunal recognizes that certain *obiter dicta* comments in the reasons for that decision may be relevant to the exercise of this Tribunal's discretion, its holdings do not in any way alter this Tribunal's statutory mandate since they arise in the context of government rejection of commission recommendations where there is no statutory commitment to treating the particular recommendations as binding.

In the "New Brunswick" case (which also dealt with the situation in Ontario and Quebec), the Supreme Court at para. 15 specifically recognizes, as has this Tribunal in the past, that each triennial round does not require the Tribunal to start from a "clean slate" as it were. A Tribunal can take as a starting point the circumstances which have emerged from prior Tribunal recommendations. However, the Tribunal has the duty to consider new circumstances and the current validity of previous approaches in making its current recommendations.

7. Thus, the approach taken by the current Tribunal has been to accept the status quo as the starting point with respect to the salaries and benefits or conditions of employment of Nova Scotia Provincial Court judges unless they have been the subject of comment or requests for change from the Government, the Association or other interested members of the public. On this basis, the following topics have emerged to be addressed in this round of Tribunal deliberations: (1) Salaries; (2) Professional Allowances; (3) Adjustment of the Formula for Payment of Per Diem Judges; (4) Amendment of the LTD Plan re Cost of Living Concerns; (5) Public Service

Superannuation Plan Indexation; and (6) Proposals for a Home Office Allowance for Per Diem Judges. The preceding enumeration of topics forms the essence of the structure of this Report. Each of these issues will be addressed in the light of the 10 factors enumerated in section 21E(3), although the bulk of the factor analysis will be presented prior to the heading “Salaries” and will be adapted for each subsequent substantive issue.

## **B. General Analysis of the Statutory Factors**

8. The first two factors in Section 21E(5) of the *Act*, (a) the constitutional law of Canada and (b) the need to maintain the independence of the judiciary, were alluded to in the introduction to this Report. This is not the place to engage in a full exegesis of Canadian constitutional law in so far as it impacts on the judiciary. Suffice it to repeat that the Nova Scotia system for establishment of salaries and benefits for provincially appointed judges is compliant with constitutional requirements. This is a proposition over which there was no dispute among those making submissions to the Tribunal, and which has been common ground over the past 15 years of deliberations by various incarnations of the Tribunal. It is also common ground that the current salaries, benefits, working conditions and institutional arrangements for Nova Scotia’s provincial judges are generally such as to protect judicial independence, in relation to the executive branch of government and in relation to the private litigants who appear before our judges. These are the main concerns with respect to the capacity of the Province’s judges to maintain their neutrality and objectivity when dealing with those who come before them, so as to sustain and promote the rule of law in our corner of Canada’s constitutional democracy. Thus, while constitutional law and the need to maintain judicial independence are foundational to this whole exercise, these factors are not determinative for resolving the particular questions which relate to the issues under consideration in this round of recommendations.

9. The third factor in section 21E(3) is (c) the need to attract excellent candidates for appointment as judges. The documents submitted jointly by the Government and the Association provided information on those judges appointed since the Tribunal's last Report, and we are generally familiar with the corps of 35 full-time and 5 part-time (that is retired, but still active) Provincial Judges who serve the Province's justice system. The Tribunal is confident that this is a group of highly professional, dedicated, experienced, expert and diverse individuals who are living proof, as it were, of the fact that the salaries and benefits available to our Provincial Judges are attracting excellent candidates for appointment. This is important. For while some might argue that provincial judges occupy the "lowest rung" on the ladder of Canada's judicial hierarchy, they handle the lion's share of the cases in criminal matters of varying degrees of seriousness and complexity, and they play a critical role in important family disputes. Thus, there is a continuing need for excellent candidates to fill vacancies on the provincial court bench. Levels of salaries and benefits must continue to be sufficient to allow recruitment from a diverse pool of legal practitioners in both the public and private sectors from around the Province. This factor must therefore constitute an important element in assessing the issues currently before the Tribunal.

10. The fourth factor from section 21E(3) is (d) "the unique nature of the judge's role". This has been described in different ways by different tribunals over the years. Key elements have included: the exacting nature of adjudicating complex matters which have a serious impact on other people's lives; ethical considerations surrounding a judge's status as a role model in society which impose limits on a judge's social activities; and the prohibition in *Provincial Court Act* section 11 against judge's engaging in any other remunerated activity. Thus, while provincial judges may have a degree of elevated social status in the community, their role imposes unique

forms of stress, social isolation and financial constraint which must be weighed in the balance when establishing their salaries and benefits as respected public servants.

11. The fifth factor in section 21E(3) is (e) “the manner in which salaries and benefits paid to judges in the Province compare to judicial compensation packages in other jurisdictions in Canada, including the federal jurisdiction, having regard to the differences between those jurisdictions”. As will be seen below, and as can be seen from previous reports of this Tribunal, the interpretation this factor represents a continuing bone of contention between the Association and the Government. This is because there is considerable variation among judicial compensation packages in jurisdictions across Canada, and in particular because there is a massive gap between the salaries and pensions of federally appointed judges (that is, judges in superior courts and courts of appeal across Canada) and the judges in the provincial courts of most provinces. Historically, different tribunals in this Province have sometimes taken different approaches to achieving an appropriate balance in this comparative exercise. However, this difficult and demanding task is an essential and mandatory aspect of this Tribunal’s role. It will be seen below that, once again, this Tribunal has struggled with the usual mass of statistical information from the other jurisdictions in its effort to embody the wisdom of King Solomon on the topic. The joint documentation from the Association and the Government thus included the reports of judicial compensation commissions from all other Canadian jurisdictions for the period 2010 to 2013. This information played a prominent role in the submissions from these parties and in the Tribunal’s deliberations.

12. There are two sets of factors in section 21E(3) which deal with economic matters. Subsection (3)(f) speaks of “the provision of fair and reasonable compensation for judges in light of prevailing economic conditions in the Province” as well as “the overall state of the Provincial economy”. These two notions have been largely treated by the Government as a proxy for the idea of “the capacity of the Government to pay” in relation to the Provincial budget and the Government’s level of tax revenue. The other economic subsection is (3)(g) which speaks of “the adequacy of judges’ salaries having regard to the cost of living and the growth or decline in real *per capita* income in the Province”, which has elements of both the absolute well-being of judges in relation to their living costs, as well as their relative degree of affluence by comparison to how other people in the Province are doing. To assist the Tribunal in making judgments in relation to these broad economic criteria, we were jointly provided by the Association and the Government with a host of useful documents: a 22 page “Fiscal Brief” from the Nova Scotia Department of Finance; the Speech from the Throne from November 2013; a Government Business Plan from the Premier; the Department of Justice’s Statement of Mandate for the Fiscal Year 2014–2015; the Provincial Budget Address from the spring of 2014, as well as related Budget Assumptions and Schedules” and “Budget Highlights 2014–2015”; the Government’s “Capital Plan—2014–2015”; a 20 page assessment from the Department of Finance of the “Current Economic Environment” (April 2014); Consumer Price Index information from the Nova Scotia Department of Finance; the Bank of Canada “Business Outlook Survey (April 7, 2014)” as well as its “Monetary Policy Report (January 2014)”; information from some of the chartered banks (BMO, CIBC, TD); information from the Government of Canada on Transfers to the Provinces (Equalization, Canada Health Transfer, Canada Social Transfer, and Nova Scotia Offshore Arrangements); Conference Board of Canada 2014 economic outlooks/forecasts for Canada as a whole and for the provinces; Quarterly Demographic and Population Estimates from Statistics

Canada; Statistics Canada reports dealing with high income trends of tax filers, average weekly earnings for employees in selected industries (including legal services), salaried average weekly earnings for selected industries; labour force survey estimates, consumer price index information, and documents dealing with the provincial gross domestic product and nominal gross domestic product. The documentation also included the full text of *Now or Never: An Urgent Call to Action for Nova Scotians* which is the Report of the Nova Scotia Commission on Building Our New Economy (February 2014), otherwise known as “the Ivany Report”. Needless to say, the Tribunal found all of this information to be relevant and helpful to our deliberations in varying degrees, and it was used by the parties in their submissions in various ways.

13. The final substantive factor in section 21E(3) which needs to be addressed is “the nature of the jurisdiction and responsibility of the Court”. This, of course, relates to the fact that in Nova Scotia, Provincial Court Judges deal with criminal and family matters, but have no significant civil jurisdiction. The provincial courts from some provinces have small claims jurisdiction, which is not the case in Nova Scotia, where such matters are handled by part-time appointees (lawyers) to the Small Claims Court. The Government pointed out in its brief that Nova Scotia has a Summary Offence Court, Night Court and Justice of the Peace Centres, which deal with certain work (particularly “after-hours”) done by regular provincial judges in other jurisdictions. Also, highlighted was the fact that some Provincial Judges are now assigned to the specialized Mental Health Court and Domestic Violence Court. Not mentioned by the parties was the fact that significant volumes of criminal cases in Nova Scotia, both at the youth and adult levels, are now dealt with by the Restorative Justice Program. Thus, there are a variety of possible reasons why case volumes in Provincial Court were down by 4% in 2012–2013 and have declined by 11% since 2008–2009. Anecdotal evidence would suggest, however, that while

case volumes are down, the length and complexity of cases in Provincial Court are increasing. In the main, however, there have not been significant changes in the nature of the jurisdiction and responsibility of the Court since the last tribunal report which would have any determinative impact on this Tribunal's recommendations.

### C. Salaries

14. After an analysis of the foregoing statutory factors in relation to salary, the Government asked that "...a fulsome consideration of the prevailing economic conditions and the fiscal constraints facing Nova Scotia be a primary aspect of this Tribunal's determination". The Government then asserted that "[t]hese realities should be particularly significant if the Tribunal is satisfied that other factors do not presently mandate any upward adjustment". In effect, the Government was asking the Tribunal to hold the line on provincial judges' salaries, because current rates of annual remuneration to provincial judges, at \$222,993.00, put them in the top 1% of Nova Scotia taxpayers, and they do not require any increase by virtue of the other statutory factors. The fact that this approach might leave Nova Scotia Provincial Court judges at or near the bottom of judicial salaries in Canada was not a particular matter of concern to the Government, as long as the considerations surrounding the statutory conditions are met, which the Government believes is the case.

15. The Association, as has often been the case, put emphasis on the statutory factor found in section 21E(3)(e) of the *Act*, that is, the comparison with judicial compensation packages in other provincial jurisdictions as well as the federal jurisdiction. With respect to the other provinces, the Association provided a helpful table which summarized the available information as follows:

<b>Jurisdiction</b>	<b>Last Report Period</b>	<b>Salary</b>	<b>Notes</b>
Newfoundland & Labrador	2009–2013	\$215,732.00	This is the 2012/13 salary. A commission is pending.
Prince Edward Island	2008–2011	\$239,472.00	This is the 2013/14 salary. A report was done in 2013, but not tabled. It recommends continued use of the national average.
New Brunswick	2008–2012	\$204,700.00	This is the 2011/12 salary. A commission is pending.
Quebec	2013–2016	\$236,722.00	This is the 2013/14 salary. The last report provides for Cost of Living increases in 2014/15 and 2015/16.
Ontario	2010–2014	\$274,574.00	This is the 2013/14 salary. ON's Framework Agreement provides an adjustment for 201/15 based on change in IAI.
Manitoba	2011–2014	\$230,155.00	This is the 2013/14 salary. A commission is pending.
Saskatchewan	2011–2015	\$260,819.00	This reflects an increase of CPI + 1% to the 2013/14 salary; effective April 1, 2014.
Alberta	2009–2013	\$263,731.00	This is the 2012/13 salary. A commission is pending.
British Columbia	2014–2017	\$236,950.00	The JCC recommended \$241,500.00 for 2014/15. The Judges' Association is expected to seek judicial review.
Northwest Territories	2012–2016	\$256,055.00	This reflects a CPI increase to the 2013/14 salary; effective April 1, 2014.
Yukon	2010–2013	\$250,103.00	The report for 2013-2016 is awaiting approval. It recommends \$257,606 (2013/14), \$262,758 (2014/15), \$268,013 (2015/16).

<b>Canadian Averages as of April 1, 2014</b>	
Provincial & Territorial Courts (excl. NS)	\$242,637.55
As above, but incl. Federal Jurisdiction	\$247,484.42

The Association, of course, notes that for several jurisdictions, compensation commission reports are pending, that will retroactively change the figures in this Table, which formally reflects the situation as of April 1, 2014. This is particularly significant in relation to Newfoundland and Labrador as well as New Brunswick, which are currently well below Nova Scotia salary levels. It is also significant in relation to Alberta, whose provincial judicial salaries are some \$40,000 higher than those in Nova Scotia, to say nothing of the province of Ontario, whose annual salaries are more than \$50,000 higher than Nova Scotia's.

16. The Association once again stressed the perennial problem of the federal-provincial salary gap. Some incarnations of this Tribunal, or of its predecessors, have put emphasis on trying to reduce what is often described as the difference between what a Provincial Court judge in Halifax earns by comparison with the salary of a federally-appointed member of the Nova Scotia Supreme Court or the Nova Scotia Court of Appeal, who might also happen to reside in Halifax. The Association set out the historical record in this regard via the following Table:

<b>YEAR</b>	<b>Nova Scotia Provincial &amp; Family Courts Salary</b>	<b>County Court Salary</b>	<b>Difference</b>	<b>Nova Scotia Supreme Court Salary</b>	<b>Difference</b>
1987	\$68,251	\$116,300	-\$48,049	\$121,300	-\$53,049
1988	\$85,000	\$122,700	-\$37,700	\$127,700	-\$42,700
1989	\$89,000	\$128,800	-\$39,800	\$133,800	-\$44,800
1990	\$97,000	\$135,400	-\$38,400	\$140,400	-\$43,400
1991	\$102,100	\$142,800	-\$40,700	\$147,800	-\$45,700
1992	\$102,100	\$150,800	-\$48,700	\$155,800	-\$53,700
1993	\$102,100	\$150,800	-\$48,700	\$155,800	-\$53,700
1994	\$102,100	\$150,800	-\$48,700	\$155,800	-\$53,700
1995	\$102,100			\$155,800	-\$53,700
1996	\$102,100			\$155,800	-\$53,700
1997	\$102,100			\$159,000	-\$56,900
1998	\$124,000			\$175,800	-\$51,800
1999	\$130,000			\$179,200	-\$49,200
2000	\$137,000			\$198,000	-\$61,000
2001	\$144,000			\$204,600	-\$60,600
2002	\$157,000			\$210,200	-\$53,200
2003	\$160,140			\$216,600	-\$56,460
2004	\$163,342			\$232,300	-\$68,958
2005	\$172,000			\$237,400	-\$65,400
2006	\$176,300			\$244,800	-\$68,500
2007	\$180,708			\$252,000	-\$71,292
2008	\$197,000			\$260,000	-\$63,000
2009	\$202,910			\$267,200	-\$64,290
2010	\$207,577			\$271,000	-\$63,423
2011	\$214,000			\$281,100	-\$67,100
2012	\$216,182			\$288,100	-\$71,918
2013	\$222,993			\$295,500	-\$72,507
2014	\$222,993			\$300,800	-\$77,807

The Association was at pains to point out that, subject to any readjustment by this Tribunal effective April 1, 2014, ... “[t]he current federal/provincial salary gap of \$77,807 is the largest it has ever been”. Despite the dire warnings from the Ivany Commission about future problems for

Nova Scotia's economy and gloomy demographic projections, the Association notes that ... "the general pattern of public sector wage increases for fiscal 2012, 2013 and 2014 are 2%, 2.5% and 3% respectively". Moreover, the Association asserts that the Province's economic outlook is not nearly so serious as the period in the 1990's when the Provincial Government imposed wage controls in the public and para-public sectors. In the end, the Association argues that the Tribunal should set the 2014 base salary for Nova Scotia Provincial Court judges at our Province's historical situation of being in "close relative proximity to the Canadian average while, at the same time, taking meaningful steps to reduce the entirely unjustifiable federal/provincial salary gap".

17. The Tribunal has concluded, taking into account the statutory factors, and in the light of the submissions it received on the salary issue, that the base salary as of April 1, 2014 for Nova Scotia Provincial and Family Court Judges is to be set at \$231,500.00. Representing a 3.8% increase in the Provincial Judges salaries, this nonetheless appropriately balances the statutory considerations the Tribunal must take into account. Next, of course, comes the question of what should be done with respect to salary increases for the subsequent two years of this Tribunal's mandate. The Government urged the Tribunal to abandon its use of the Industrial Aggregate Index (IAI), now known as the Average Weekly Earnings index (AWE), and to revert to use of the Consumer Price Index (CPI) as a salary escalator, if one were required. The Government argues that increases in the AWE may not be related directly to increases in the cost of living in the Province or the overall state of the provincial economy which are the primary concerns of factors 21E(3)(f) and (g). Moreover, the Government asserts that the CPI statistics are released on a more current, regular schedule and provide the best, and most up-to-date snapshot of any of the statistical indicators available. The Association argues that the Tribunal should stick with the

IAI or AWE to which it moved from the CPI in 2008. It notes that at that point, the Tribunal believed that the IAI would better "...reflect the performance of the provincial economy in a time of uncertainty", and also notes that the Government acknowledges that the AWE reflects a "cost of living component". Finally, the Association notes that the federal jurisdiction, Ontario and Manitoba all use the AWE/IAI and that the latter jurisdiction mentioned that, in doing so, it was following Nova Scotia's lead as a close comparator jurisdiction. In the result, nearly two-thirds of Canada's judges (in the Association's estimation) are covered by judicial compensation schemes which use the IAI/AWE in their approach to salary escalators.

18. The Tribunal, with all due respect to the Manitoba Tribunal which may now feel it followed a false lead, has come to the conclusion that it is on balance best to revert to the CPI as a salary escalator for the final two years of the mandate. As it turns out, even the Association acknowledges that "...the overall difference in the aggregate change between the CPI and the IAI from 1991 to 2008 was only 1% in Nova Scotia". Given the Government's substantive concerns about the IAI, and its concerns about administrative difficulties in calculating salary increases using an index which does not appear in accordance with a helpful schedule, the Tribunal is willing to revert to the use of the Consumer Price Index as an escalator for potential increases in the salaries of Nova Scotia Provincial Court Judges on April 1, 2015 and April 1, 2016. Therefore, the Tribunal makes the following recommendation with respect to salary increases for the period of its 2014–2017 mandate:

#### **Recommendation 1 – Salaries**

The Tribunal recommends:

- (a) That Provincial Judges' salaries for the year beginning April 1, 2014 be set at \$231,500.00; and

- (b) That for the subsequent years beginning April 1, 2015 and April 1, 2016, the Provincial Judges' salaries be increased by the percentage increase (if any) in the Consumer Price Index for the Province for the previous calendar year.

**D. Professional Allowances**

19. Since 2005, the Government has, upon the Tribunal's recommendation, put in place an annual professional allowance for Provincial Judges in the amount of \$3,000.00. In making this provision, the then Tribunal stated:

"...Judges must have robes and other appropriate attire to fulfill their role. Judges must keep up with new developments in the law, and be provided with reasonable means to attend conferences, to buy texts and to access online legal resources etc. in order to do so. In the world in which we live, an appropriate professional allowance for judges is a necessity, not some sort of luxury, in relation to the administration of justice."

At the time, the amount reflected a rough calculation of the average amount then made available annually by the Government to judges on an ad hoc basis. It was felt, in the interests of judicial independence, that this benefit should be regularized as a matter within the purview of the Tribunal rather than a matter of unpredictable Government largesse.

20. The Association argued that the allowance should be increased to \$3,6000.00, since there had been no adjustment in the amount since 2005. The \$600.00 increase reflects the change in the Consumer Price Index since April 1, 2005, which is roughly 20%. The Government responded that, while it has no objection in principle to an annual professional allowance for Provincial Judges, it questions the usefulness of the CPI as an escalator in relation to the judges' actual needs and seeks a rationale in accordance with the statutory factors at play under section 23E(3) of the *Provincial Court Act*.

21. The Government submission provides comparative information on annual professional allowances found in judicial compensation schemes across the country. The following table reflects that information:

*Table 3*

BC	Alta	Sask	Man	ON	Que	NB	NWT	Nfld	Yukon	Can
\$4,000	\$3,750	\$3,650	\$2,000	\$2,500	\$4,000	\$2,500	\$2,500	\$3,000	\$3,000	\$5,000

It is said that PEI continues to address “necessary incidentals and professional development by means other than an allowance”. The Government calculated that the averages for all the allowances provided is \$3,117, while it drops to \$2,945 if the federal jurisdiction at \$5,000 is removed. Furthermore, the Government indicates that in Nova Scotia there are sometimes additional moneys made available for professional development, and that the current system is administered in ways that may allow judges to carry over unspent moneys or deficits from year to year.

22. The Tribunal has concluded that a modest increase in the amount of the annual professional allowance is justified for the term of this Tribunal’s mandate. The Tribunal is mindful of the original rationale for the annual allowance, based on a Tribunal recommendation rather than a discretionary allowance by the Government from time to time, is still warranted by the principle of judicial independence. With respect to an increase, the Tribunal is concerned that the unique nature of the jurisdiction (s. 21E(3)(d)) and responsibility of the court (s. 21E(3)(i)), necessitate continuing judicial training through attendance at educational conferences etc. and require an amount adequate to meet current costs in that regard. The current comparative figures for professional allowances in other Canadian jurisdictions give some indication of the relative

assessments of this sorts of costs across the country. But, of course, there are some jurisdictions where current judicial compensation reviews are outstanding. In the light of the foregoing considerations, the Tribunal has concluded that the amount of the annual professional allowance be raised to \$3,300.00. It therefore makes the following formal recommendation:

### **Recommendation 2 – Annual Professional Allowance**

That the annual professional allowance for Provincial Court Judges for the period from April 1, 2014 to March 31, 2017 be \$3,300.00.

#### **E. Adjustment of the Formula for Payment of *Per Diem* Judges**

23. By virtue of the *February Holiday Act*, S.N.S. 2013, c. 35, a new statutory holiday was created for Nova Scotians on the 3rd Monday in February, starting in February 2015. This *Act* involved consequent amendments to the *Interpretation Act*, the *Labour Standards Code*, the *Retail Business Uniform Closing Day Act*, and the *Retail Business Designated Day Closing Act*. The Association argues that this additional yearly one day holiday should change the current formula for the payment of *per diem* judges from 1/219 times the annual salary of full-time judge to 1/218 times that annual salary. The approach of Nova Scotia Judicial Salary Tribunals to payment of *per diem* judges has changed over time. For the period from 1988 to 1998 the Tribunals set a flat rate (\$300.00), and in 1994 the Tribunal rejected the notion that a formula should be adopted to set the *per diem* rate which would be derived by dividing the annual salary by the number of calendar days in a year less Saturdays, Sundays, statutory holidays and vacation days. However, without full explanation, the 1998 Tribunal set the rate at 1/248th of the annual rate, which was then the New Brunswick *per diem* rate, and put Nova Scotia in the mid-range of *per diem* rates nationally. The approach apparently was based on the notion that vacation days were not to be subtracted from the denominator when creating the formula.

24. The 2002 Tribunal took the additional step of factoring in the vacation time of full-time judges and thus came up with a fraction of 1/224. The 2002 Tribunal summarized its reasoning as follows:

The Tribunal recognises the importance, under present circumstances, of per diem judges and is concerned to set a fair rate based on a rational principle. The starting principle must be that per diem judges are entitled to be compensated at a level which reflects the current worth of a day's judging, and to be paid in relation to the work which they actually do, balanced by some appreciation of the opportunity cost notion. All things considered, the Tribunal concludes that, assuming a minimum five weeks vacation, the per diem should in principle be set at 1/224 of full salary. However, this is a significant change which should be phased in over three years. On the half day per diem issue, the Tribunal agrees with the Government that setting a half day per diem at the 50% rate is appropriate. However, the half day rate should only be applicable where the per diem judge commits in advance to sit only for a half day or less. Where the judge is called in for a full day, and the docket collapses or the work terminates early for reasons over which he or she has no control, the judge is entitled to a full per diem payment.

That reasoning was the basis for the 2008 Tribunal's recommendation to change the formula to 1/219 when, as a result of the 2005 Tribunal recommendations, the vacation of a full-time judge was raised from five to six weeks. This brings us to the position of the Association's current argument that the formula should be changed to 1/218 as a result of the new February Holiday.

25. The Government argues that: "Rather than viewing this as an automatic adjustment to be implemented, the introduction of an additional statutory holiday provides an opportunity for the Tribunal to review the rationale for the current formula and whether its continued usage is appropriate". The Government then advanced a number of reasons for rejecting the formula approved by the Tribunals in 2002 and 2008, and concluded that *per diem* payment revert to the 1988-1998 approach of having a fixed amount, which might be adjusted by Tribunals on a triennial basis. The Government proposed the adoption of a rate of \$1,020 per day for *per diem* judges for the next three years. As the Association pointed out in its Reply, this amount

represents, 1/218th of the current full-time salary which is \$222,993.00. In other words, the Government proposes that the Tribunal establish the current 1/218 formula outcome as a fixed rate, not move to a new formula of 1/219, and not provide a mechanism for *per diem* rates to increase proportional to the salary levels which will likely move up in accordance with possible increases in the Consumer Price Index. The Government concluded: "If the figure is not set at an appropriate level, it will become apparent with the withdrawal of services by the retired judges".

26. This Tribunal is charged under section 21E(1)(b) with making recommendations with respect to "the appropriate level of *per diem* payments, or payments for part of a day, for presiding in the Provincial or Family Court where those judges are not receiving salaries". The retired judges who act as *per diems* are not receiving salaries, though they do receive pensions, which they have earned by virtue of their previous service. Previous Tribunals in this Province, and in several other Canadian jurisdictions, have concluded that per diem judges ought to be paid "the value of a day's judging" in accordance with a rational formula proportional to what full-time judges earn. The Government is concerned with what it characterizes as "more and more concessions made by the Tribunal over-time", and proposes that the Tribunal go to a fixed formula for payment of *per diem* judges which would be tested in accordance with principles of supply and demand. It stated: "The position of the Minister is that the Tribunal should not set its mandatory *per diem* payment at a level which exceeds the rate needed to ensure the administration of justice is well served and the factors of the *Act* are considered *to the extent applicable* (emphasis added).

27. The Tribunal must indeed make recommendations on a *per diem* rate as guided by the statutory factors established by the Nova Scotia Legislative Assembly in section 21E(3) of the

*Act.* In assessing the factors, the Tribunal notes that the “unique nature of the judges role” (section 21E(3)(d)) does not change simply because one is performing the role on a post-retirement basis. Moreover, the “nature of the jurisdiction and responsibility of the court” does not change for post-retirement per diems in so far as their role in court is concerned. This Tribunal did not have full and up-to-date information or submissions on the details of how all other jurisdictions are approaching this issue, but it is clear that a rational formula rather than a fixed rate for *per diem* payment has recently been the preferred approach in terms of comparator jurisdictions (section 21E(3)(e)). Then there is the matter of “the provision of fair and reasonable compensation for judges in the light of prevailing economic conditions in the Province and the state of the Provincial economy” (section 21E(3)(f)). Surely the principle of “payment of the value of a day’s judging” is fair and reasonable, and in relation to five retired judges who currently do this work, not beyond the capacity of the Government to pay under prevailing economic conditions in the Province. Finally, the “adequacy of judges salaries” (section 21E(3)) is not the issue here. The Government seems to believe that those who are willing to come out of retirement as *per diem* should have what they deserve to be paid for “a day’s judging” be somehow set off against their pension. Limiting the total compensation for *per diem* judges, based on what they might earn if pressed into service and paid fairly for “a day’s worth of judging” by assessment of the additional value of their pensions, is not a reasonable or appropriate way to treat per diem judges under section 21E(1)(b). Paying them what they are worth in accordance with the factors under 21E(3) is reasonable and appropriate. The Tribunal therefore makes the following recommendation:

### **Recommendation 3 – Remuneration of Per Diem Judges**

- (a) That *per diem* judges presiding in the Provincial or Family Court who are not receiving salaries be paid a full-day rate calculated at 1/218<sup>th</sup> of the applicable annual salary for full-time provincial judges as calculated pursuant to Recommendation 1; and
- (b) That payment for partial days for per diem judges be carried out in accordance with current practices at the 1/218 rate.

### **F. Amendment of the LTD Plan re Cost of Living Concerns**

28. Judges are entitled to long-term income protection, that is long-term disability (LTD) benefits, pursuant to Part 3 of the *Income Protection Plan for Provincial Court and Family Court Judges in Nova Scotia*, which was recommended by the 2001-2004 Tribunal in a Supplementary Report dated July 16, 2003. Section 14 of that Plan states that cost of living increases in LTD Benefits are to be "...calculated in the same manner and subject to the same limitations as the cost of living adjustment on pensions paid under the *Public Service Superannuation Act (PSSA)*". Since the establishment of the Judges' Plan, however, the structure and administration of the PSSA pension and benefits system has been altered, such that it is now a jointly sponsored plan regulated by a separate pension agency, and benefits are not simply set by rules set out in the PSSA. Public service LTD benefits are reviewed periodically, in so far as cost of living adjustment is concerned, by the "Nova Scotia Public Service LTD Trust Fund Plan Sponsors". Both the Association and the Government agree that it would be inconsistent with judicial independence, and inconsistent with the role of this Tribunal in recommending the establishment of salaries and benefits for provincial judges, for the LTD benefit cost of living adjustment to be determined by the joint sponsors of a different LTD benefit plan. Rather cost of living adjustments are properly mandated by this Tribunal which recommended the establishment of the separate Judges LTD Benefit Plan.

29. This Tribunal must therefore recommend how the provincial judges' "Income Protection Plan" should deal with the issue of making cost of living adjustments for LTD benefits accruing to eligible Provincial Judges. This does not mean, however, that this Tribunal must "reinvent the wheel" in this regard. The Government in its Reply Submission provided the Tribunal with the information that the current public service LTD plan provides that benefits payable shall be increased by the cost of living increase in any year to a maximum of 6%. This strikes the Tribunal as a rational approach, and it was one which the Association thought workable. Therefore, the Tribunal formally recommends:

#### **Recommendation 4 – LTD Benefit Cost of Living Adjustment**

The Tribunal recommends that, on a go forward basis from April 1, 2014, LTD benefits under the *Income Protection Plan for Provincial Court and Family Court Judges* increase annually by an amount equal to the averages increase to the Consumer Price Index for Canada (published by Statistics Canada) for the twelve month period preceding each October 31, but to a maximum of 6%.

#### **G. Provincial Judges Superannuation Plan/Pension Indexation**

30. The pensions of Nova Scotia Provincial Judges are governed by the *Provincial Court Act* but funded in large part through the *Public Service Superannuation Act*. Section 22 of the *Provincial Court Act* provides that "a judge shall be an employee within the meaning of the *Public Service Superannuation Act (PSSA)*". This does not mean that Provincial Judges are civil servants, but it does mean that their pensions are partly funded through the *PSSA*. This Tribunal is tasked with setting indexation rules for judges' pensions, and the 2011–2014 Tribunal set the indexation of Provincial Judges' pensions benefits at 75% of the Canadian Consumer Price Index to a maximum of 5% for the period January 1, 2011 to March 31, 2014. That period has now come to an end, and the indexation process needs to be set again. By virtue of section 23(6) of

the *Provincial Court Act*, any excess of a judge's pension over that which would be paid to other members of the PSSP comes out of the Consolidated Revenue Fund of the Province.

31. The linkage between the Nova Scotia Pension Agency, which administers the regular PSS pensions, and the Judges' pension plan is delicate. The PSS Trustee sets indexation rates for general members of the PSSP on an annual basis to commence January 1 of each year, based on what has happened to the Consumer Price Index in the previous year and in light of the funding status of the Plan relative to its liabilities. In the period from 2011 to 2014, while the amount set by the 2011–2014 Tribunal was below the indexation set by the legislation for PSSP pensioners for 2014, the average for judges was still more than the amount prescribed for other PSSP pensioners. This is because, as of May 10, 2010, the system for regular PSSP pensioners changed dramatically in order to correct an underfunding problem and to set the general scheme on a sound economic footing. Be that as it may, the parties both acknowledge that, as a result of the Tribunal's prior recommendations, any judge retiring now will take that pension under the PSSP as it stood on May 10, 2010, as well as being supplemented by any additional benefits under the *Provincial Court Act* pension scheme.

32. The upshot is that the Tribunal must set the indexation rate or rates for the period of its mandate—that is from April 1, 2014 to March 31, 2017. The Tribunal has before it, from the Government's Reply Submissions, information on indexation of judicial pensions for all jurisdictions across Canada. Approaches to this issue vary widely. As the Government notes, Alberta and the Northern Territories appear to be the only jurisdictions with guaranteed inflation protection. Most jurisdictions provide for indexation based on a percentage of the Consumer Price Index ranging from one-half to 75%. Some jurisdictions have placed a cap on indexation

ranging between 1.2% and 5%. British Columbia and Manitoba have indexation which is discretionary depending on the health of the plan, not unlike the current system in Nova Scotia's PSSP. The Tribunal takes the view that the current system, or at least that advocated by the 2011–2014 Tribunal, strikes an appropriate balance among the factors in section 21E(3) of the *Act* which govern our recommendations. Thus the Tribunal makes the following recommendation on the indexation of pensions:

#### **Recommendation 5 – Pension Indexation**

That the rate of pension indexation for Provincial Judges for the period from January 1, 2014 to March 31, 2017 continue to be 75% of the Consumer Price Index to a maximum of 5%.

#### **H. Home Office Allowance for Per Diem Judges**

33. The Association asserts that retired Provincial Judges who accept per diem appointments should receive an allowance for use of their home offices in the amount of \$2,500.00. The amount is said to be the equivalent to that which Supernumerary Judges of the Supreme Court of Nova Scotia receive under federal judicial compensation arrangements. The Government acknowledges the important work that *per diem* judges do, and also acknowledges that there is insufficient space in the Province's court houses and judicial centres to provide them with office space. However, the Government asserts that there are important factual issues which need to be researched in order to make a decision on this matter, in addition to legal issues to be explored.

34. The factual and legal questions involved are made more complicated by the inter-relationship among the principle of judicial independence, a judge's status as an "employee" and certain federal income tax rules. The Canada Revenue Agency (CRA) has apparently taken the position that Provincial Judges are "office holders" and are thus "employees" for federal tax

purposes. The Government of the Province, while acknowledging that judges with their constitutionally independent status are not employed by the Government as regular employees, has agreed at the request of certain judges (and with the approval of the Chief Judge of the Provincial Court), to issue these judges a CRA Form T2200E (Declaration of Conditions of Employment) in order to allow them to deduct travel and home office expenses in appropriate cases. It is in this context that the Government argues that it is unclear (1) what the needs and associated costs are for home office use among provincial *per diem* judges, (2) how many judges can take advantage of the current income tax deduction system (which apparently requires home offices to be used more than “50% of the time” in order to qualify for deduction), and (3) whether the Tribunal has jurisdiction to recommend such allowances under section 21E(1) of the *Provincial Court Act*. In relation to this latter point, the Association argues that a home allowance for *per diem* judges is a non-discretionary benefit within the meaning of Section 21E(1) of the *Act*, which clothes the Tribunal with jurisdiction to act in this regard, as did the 2005–2008 Tribunal with respect to education allowances and travel insurance for *per diem* judges.

35. The Tribunal has concluded that, assuming without deciding it has jurisdiction in the matter, it would be premature, given the factual and policy uncertainties on the information before us, to make a recommendation concerning home office allowances for *per diem* judges. It may be that a subsequent Tribunal furnished with a more fulsome evidentiary basis might be willing to do so. However, this Tribunal, at this time and under current circumstances, will refrain from making any recommendation in this regard.

## **I. Conclusion and Summary of Recommendations**

36. In the interests of certainty with respect to the general processes and approach of the Tribunal as described at the outset of this Report, the Tribunal makes the following recommendation:

### **Recommendation 6 – General**

- (a) That all matters of judicial compensation referred to in section 21E(1) of the Provincial Court Act not referred to in this Report shall be governed by the current terms and conditions of employment for Provincial and Family Court Judges as recommended by the 2011–2014 Tribunal or previous Tribunals where applicable; and
- (b) All recommendations in this Report shall have an effective commencement date of April 1, 2014 and run until March 31, 2017 unless otherwise specified or necessarily implied.

37. For convenience, the following is a Summary of the Recommendations made in this Report:

### **Recommendation 1 – Salaries**

The Tribunal recommends:

- (a) That Provincial Judges' salaries for the year beginning April 1, 2014 be set at \$231,500.00; and
- (b) That for the subsequent years beginning April 1, 2015 and April 1, 2016, the Provincial Judges' salaries be increased by the percentage increase (if any) in the Consumer Price Index for the Province for the previous calendar year.

### **Recommendation 2 – Annual Professional Allowance**

That the annual professional allowance for Provincial Court Judges for the period from April 1, 2014 to March 31, 2017 be \$3,300.00.

### **Recommendation 3 – Remuneration of Per Diem Judges**

- (a) That per diem judges presiding in the Provincial or Family Court who are not receiving salaries be paid a full-day rate calculated at 1/218<sup>th</sup> of the applicable annual salary for full-time provincial judges as calculated pursuant to Recommendation 1; and

- (b) That payment for partial days for per diem judges be carried out in accordance with current practices at the 1/218 rate.

**Recommendation 4 – LTD Benefit Cost of Living Adjustment**

The Tribunal recommends that, on a go forward basis from April 1, 2014, LTD benefits under the *Income Protection Plan for Provincial Court and Family Court Judges* increase annually by an amount equal to the averages increase to the Consumer Price Index for Canada (published by Statistics Canada) for the twelve month period preceding each October 31, but to a maximum of 6%.

**Recommendation 5 – Pension Indexation**


That the rate of pension indexation for Provincial Judges for the period from January 1, 2014 to March 31, 2017 continue to be 75% of the Consumer Price Index to a maximum of 5%.

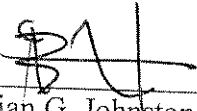
**Recommendation 6 – General**


- (a) That all matters of judicial compensation referred to in section 21E(1) of the Provincial Court Act not referred to in this Report shall be governed by the current terms and conditions of employment for Provincial and Family Court Judges as recommended by the 2011–2014 Tribunal or previous Tribunals where applicable; and
- (b) All recommendations in this Report shall have an effective commencement date of April 1, 2014 and run until March 31, 2017 unless otherwise specified or necessarily implied.

38. The members of this Tribunal are pleased to have been able to have reached a consensus on all of the foregoing matters, and our Report and Recommendations are respectfully submitted to the Honourable Lena Metlege Diab, Attorney General and Minister of Justice for the Province of Nova Scotia. The Tribunal members were once again pleased to have been able to serve the people and the justice system of the Province in this important endeavor, and are available to resolve other relevant issues concerning the compensation of Provincial Judges, if necessary, should such matters arise during the term of our current mandate.

Dated at Halifax, Nova Scotia,  
This 23<sup>rd</sup> day of September, 2014

  
Bruce P. Archibald, Q.C.  
Chair

  
Brian G. Johnston, Q.C.  
Government Nominee

  
Ronald A. Pink, Q.C.  
Association Nominee