



**Executive  
Council**

Nova Scotia

*A certified copy of an Order in Council dated  
September 8, 2020*

2020-240

The Governor in Council on the report and recommendation of the Attorney General and Minister of Justice and pursuant to Section 21K of Chapter 238 of the Revised Statutes of Nova Scotia, 1989, the *Provincial Court Act* (the “**Act**”), Governor in Council confirms recommendations 3 (education and training allowance) and 4 (pension indexation), and varies recommendations 1 (salary) and 2 (long-term service award) of the Nova Scotia Provincial Judges’ Salaries and Benefits Tribunal chaired by William Kaplan (the “**Tribunal**”) set out in the Tribunal’s reports dated November 12, 2019, January 7, 2020 and January 13, 2020, (collectively the “**Reports**”) issued for the reasons set out herein.

The Tribunal held a hearing in Halifax on October 10, 2019. The Minister of Justice & Attorney General of Nova Scotia (the “**Province**”) and the Nova Scotia Provincial Court Judges’ Association (the “**Association**”) filed written briefs and reply briefs. A report on fiscal conditions in Nova Scotia prepared by the Department of Finance & Treasury Board was submitted by the Province (the “**Fiscal Brief**”<sup>1</sup>), and the authors of the Fiscal Brief, Thomas Storrington and Michael Ingram provided evidence before the Tribunal in October, 2019. Written submissions were also made by the Chief Judge of the Provincial and Family Courts, the Honourable Pamela Williams.

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<sup>1</sup> Fiscal Brief, Volume 5, Part I, Tab 26, Submission of the Province, “Fiscal Brief”. Provincial Court Judges’ Salary and Benefits Tribunal, August 2019, (“**Fiscal Brief**”).

As one of three branches of government, the judiciary is a critical component of a well-functioning democracy. Ensuring the independence of the judiciary is equally important and Governor in Council acknowledges the important work of the Tribunal in considering judicial compensation. Governor in Council respects the efforts of the parties and the Tribunal.

Section 21E of the *Provincial Court Act*<sup>2</sup> sets out the criteria the Tribunal must consider in making recommendations:

- (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;

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<sup>2</sup> *Provincial Court Act*, RSNS 1989 c. 238. s.21E

- (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.

The Tribunal made the following four recommendations:

**Recommendation 1: Salary.** The salary be set at \$269,198.00 for April 1, 2020 with CPI increases in 2021 and 2022.

**Recommendation 2: Long-Term Service Award.** The long-term public service retiring award would be abolished effective April 1, 2020. Judges will have the option to cash out their service award on the effective date or on retirement. This recommendation is contingent on government accepting recommendation 1.

**Recommendation 3: Educational and training allowances for per diem judges.** The current number of days allocated for continuing education (and the compensation and mileage arrangements for those days) is sufficient but recommended *per diem* judges should be reimbursed for registration and incidental

expenses for conference attendance up to \$500 and subject in each case to the approval of the Chief Judge.

**Recommendation 4: Pension Indexation.** The Tribunal recommended maintaining the status quo for pension indexation.

In *PEI Reference*, the Supreme Court of Canada considered the important role of Tribunals in setting compensation. It found that judicial salaries can be maintained or changed only by recourse to an independent commission; no negotiations are permitted between the judiciary and the government; and that salaries should not fall below a minimum level.<sup>3</sup>

In its 2005 decision, *Bodner v Alberta* (“**Bodner**”), the Supreme Court of Canada established the test that a government must meet in order to justify rejection of a judicial compensation commission recommendation:

- (1) Has the government provided legitimate reasons for rejecting the commission’s recommendations?
- (2) Do those reasons rely upon a reasonable factual foundation?
- (3) Viewed globally, has the commission process been respected? Have its purposes – preserving judicial independence and depoliticizing the setting of judicial compensation – been achieved?<sup>4</sup>

In *Bodner*, the Supreme Court of Canada also recognized that new facts or

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<sup>3</sup> *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (“PEI Reference”).

<sup>4</sup> *Provincial Court Judges’ Association (New Brunswick) and (New Brunswick Minister of Justice)*, 2005 SCC 44 (*Bodner*)

circumstances that occur after the release of a Tribunal's report may be relied on as a reason to vary a Tribunal's recommendations.<sup>5</sup>

After careful consideration of the Tribunal's recommendations, Governor in Council is accepting recommendations 3 and 4 and is varying recommendations 1 and 2 for the following reasons:

1. The Tribunal gave undue weight to the criteria in clause 21E(3)(e) and did not adequately consider components outside of salary as part of total compensation.
2. The Tribunal did not adequately analyze and consider the criteria in clause 21(3)(f)- prevailing economic conditions in the Province and the overall state of the Provincial economy, and clause (g)-the adequacy of the cost of living and the growth or decline in real *per capita* income in the Province, when determining salaries in determining appropriate compensation.
3. The Tribunal considered the perception of judges as a relevant factor in its consideration.
4. The Tribunal erred in placing a caveat on its recommendation to abolish the Long-Term Service Award that tied the recommendation to acceptance of

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<sup>5</sup> Ibid, pp. 25-27

another recommendation by government, akin to a negotiation where “gains” and “losses” are traded off.

5. There has been a change in circumstances as a result of Covid-19 and new economic and fiscal evidence that was not known when the Tribunal considered this matter and justifies a departure from the Tribunal’s recommendations on salary.

**Reason 1: The Tribunal gave undue weight to the criteria in clause 21E(3)(e) and did not consider components outside of salary as part of total compensation.**

One of the nine factors the Tribunal must consider in determining compensation is the comparison of salary and benefits of judges in Nova Scotia to the compensation of judges in other Canadian jurisdictions. Compensation is more than just the salary paid to a judge; it includes vacation, pension benefits, training, allowances and service awards. In its decision, the Tribunal recommended tying Nova Scotia judges to the salary paid to New Brunswick judges:

We recommend for this Report that the salary of Nova Scotia Provincial and Family Court judges be set at the rate of \$269,198 which is the amount anticipated to be paid to New Brunswick provincial court judges on April 1, 2020.<sup>6</sup>

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<sup>6</sup> November 12, 2019 Report, p.15

While the November 12, 2019 Report suggests a full consideration of all the factors in Section 21E(3), there does not appear to be an analysis of the factors other than the comparison of judicial salaries. The Tribunal decided that the difference in salaries between Nova Scotia and other jurisdictions was a “delta” that is too large to overcome. While salary comparison is one factor to consider, it should not be the determinative or overriding consideration. In failing to consider the total compensation package in each jurisdiction compared to the total compensation (not just salaries), the Tribunal has erred by not adequately considering the accrued value of the service award as part of compensation when conducting interjurisdictional comparisons, particularly with New Brunswick. For example, it has failed to consider that a judge who was appointed in Nova Scotia in 1996 and retires in 2020 will be eligible for a non-merit based payment equivalent to 24 weeks of accrued pay at the judge’s final level of remuneration. This considerable portion of compensation was not adequately considered.

Given the relatively limited prospect for mobility from one province’s provincial court to another, and the relative reasonableness and fairness of the total compensation level is one factor of nine statutory factors to be considered, Governor in Council has found the Tribunal placed undue weight on this comparative factor and did not fully consider and compare the total compensation package in each jurisdiction.

**Reason 2: The Tribunal did not adequately analyze and consider the criteria in clause 21E(3)(f)- prevailing economic conditions in the Province and the**

**overall state of the Provincial economy and clause (g)-the adequacy of the cost of living and the growth or decline in real per capita income in the Province when determining salaries.**

Governor in Council has determined that the Tribunal did not fully consider and analyze the financial and economic criteria required to be considered in clause 21E(3)(f) and (g). Pursuant to clause 21E(3)(f), the Tribunal is required to consider "...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". Pursuant to clause 21E (3)(g) of the Act, the Tribunal must consider 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."

In its November 12, 2019 Report, the Tribunal sets out the respective positions of the parties that appeared before it. However, it does not demonstrate that it conducted a factual analysis of the evidence before it on the economic factors contemplated in clauses 21E(3)(f) and (g), or that it analyzed how those factors compared against the factor on which it placed apparently predominant emphasis (being clause 21E(3)(e)), "...the manner in which salaries... 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."

This observation is particularly important given the paucity of financial analysis submitted by the Association to the Tribunal.

The November 12, 2019 Report makes the declaratory statement that the Tribunal considered all the Section 21E(3) factors, but there is no support of this bold statement in the form of a reasoned review or itemized assessment of the relevant economic data and their application to the statutory factors to be considered. The Tribunal's analysis<sup>7</sup>, contains vague statements relating to Nova Scotia's economic circumstances, but no analysis demonstrating a review and consideration of specific economic evidence that was before it. For example, there is no reference to either the growth or decline of *per capita* income of Nova Scotians as required by s.21E(3)(g). The uncontradicted evidence in the Fiscal Brief, established that Nova Scotia had a per capita income of \$44, 931 in 2017, which was the second lowest in the country and just over 76% of the national average.<sup>8</sup> The omission of a full and detailed consideration of this factor leads Governor in Council to the conclusion the Tribunal's salary recommendation (which represents an increase of over \$30,000 in the first year) has not been subjected to any relativity analysis relating to the adequacy of the existing salary (or the proposed increase) in terms of cost of living and the growth or decline of Nova Scotia's *per capita* income as required by clause 21E(3)(g), or to the prevailing economic conditions and overall state of the Provincial economy as required by clause 21E(3)(f).

The evidence before the Tribunal was that the Nova Scotia consumer price index for 2018 was 2.2% and this was the first year since 2011 that CPI for Nova Scotia exceeded 2%.<sup>9</sup>

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<sup>7</sup> Tribunal Report, November 12, 2019, "General Discussion" from pp.13-15, and at "Recommendation" from pp.15-16

<sup>8</sup> Fiscal Brief, p. 9

<sup>9</sup> Fiscal Brief, p.25

The conclusion of the Fiscal Brief, which summarizes the Province's economic and fiscal position, provided in part:

Nova Scotia is on the path to achieving fiscal sustainability, but budgets are balanced by thin margins over the four-year planning horizon. The province's finances need to be managed carefully in order to stay on this path. Adding additional pressure to the province's fiscal objectives is the expectation that economic growth will slow over the short-term as recent positive trends dissipate, the population continues to age, and global economic conditions are slower and more volatile.

The province's net debt continues to increase, while the net debt to GDP ratio is on a slow decline. Although debt servicing costs seem as if they will decline by a significant amount over the next four years, this increased capacity is needed because debt servicing costs are anticipated to rise above current forecasts once the QEII redevelopment project is completed. Surpluses generated from balanced budgets need to be at least partially dedicated to reducing the net debt in order for Nova Scotia to be fiscally sustainable<sup>10</sup>.

Despite the evidence before the Tribunal that CPI was 2.2% in the previous year, that Nova Scotia had the second lowest per capita income and that the current salaries did not impact judicial independence, the Tribunal recommended an increase of over 12% in the first year of a three-year period. The recommended increase, which is notably not needed to ensure or safeguard judicial independence, does not reflect a reasoned analysis of the economic and fiscal information before the Tribunal. There is no nexus between the evidence and the recommendation. Governor in Council is not satisfied the Tribunal considered at all or failed to fully consider the factors in clauses 21E(3)(f) and (g) in arriving at its recommendations respecting salary.

### **Reason 3: The Tribunal considered the perception of judges as a relevant factor in**

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<sup>10</sup>Fiscal Brief, p. 27

**its consideration.**

The object of the Tribunal exercise is to preserve judicial independence. The Tribunal exists to safeguard the judicial compensation process from improper influence. Assessment of judicial independence involves an objective test: would a reasonable person fully apprised of the circumstances consider that a court or judge could carry out its functions free from influence? This was acknowledged by the Tribunal:

“We begin with the following observation: this is a constitutional process and it is one in which it is absolutely paramount that this Tribunal pay special heed to its role in promoting and safeguarding the independence of the judiciary. While no single criterion is determinative, the public interest in an independent judiciary that recognizes its constitutional role is paramount.”<sup>11</sup>

The Tribunal expressly found that the current salary level does not compromise judicial independence *per se*:

**We agree with both the Association and the Government that the current salaries do not compromise judicial independence per se.** They are not so low as to create any impression that the Provincial Court judges are susceptible to political pressure or otherwise through economic manipulation. However, as the lowest paid provincial judges in the country, **the perception nevertheless does exist that their status and role is not being appropriately recognized** especially when their compensation is compared to that enjoyed by all of the other provincial court judges in Atlantic Canada, the rest of Canada and, of course, Federally appointed judges<sup>12</sup>. (emphasis added)

Having found the current level of compensation does not compromise judicial independence or impede the appointment of qualified judges, the Tribunal went on to assess whether provincial court judges would or should be satisfied with their

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<sup>11</sup> Tribunal Report, November 12, 2019, p. 12

<sup>12</sup> Tribunal Report, November 12, 2019, p.14

compensation or feel they were being “appropriately recognized” by government or by the Tribunal. If this subjective element were relevant (which Governor in Council is not satisfied it is), the pre-appointment compensation levels of judges would need to also be compared to the pre-appointment compensation of judges in other jurisdictions as part of the analysis.

The perception of the judges is not an enumerated statutory factor for consideration. Judicial independence, after ensuring financial security is achieved and relative fairness and reasonableness assessed having regard to the economic considerations for the jurisdiction, should not involve the Tribunal undertaking an additional exercise of trying to avoid a “...perception [among judges]...that their role is not being appropriately recognized especially when their compensation is compared to that enjoyed by all other provincial court judges in Atlantic Canada, the rest of Canada and, of course, Federally appointed judges.” In fact, judicial independence could be perceived to be compromised if the executive branch of government were in any way motivated by a desire to satisfy provincial court judges with a level of compensation it is believed they should “enjoy”.

Aside from considering perception as a relevant factor, there was no evidence before the Tribunal of the perception of judges or members of the public respecting the salaries paid to judges. The evidence before the Tribunal included the data on the “Top 1%” of income earners. In Nova Scotia in 2018, the average income was \$51,559 and the top 1% earned an average of \$176,500, the latter being substantially well below the salary paid to

provincial court judges<sup>13</sup>. The salary paid to provincial judges was over 4.5 times more than the average Nova Scotia income in 2018. Despite this massive delta, the Tribunal focused on what is perceived to be the perception of judges and recommended an increase that would be over five (5) times the average salary in Nova Scotia in 2018.

Governor in Council acknowledges and accepts the recommendation that an increase in salary is warranted given the importance of the work of the provincial court judges and to ensure the cost of living increases do not unduly erode compensation levels, but varies the recommendation on the basis that an increase should be arrived at that reflects all of the factors set out at Section 21E(3), and that the current salaries do not compromise judicial independence rather than primarily a comparison of salaries in other jurisdictions and the perception of the judges, as the Tribunal did.

#### **Reason 4: Long-Term Service Award**

With the exception of Yukon, Nova Scotia is the only jurisdiction in Canada that maintains a significant Long-Term Service Award for provincial court judges. Likewise, such a benefit is not paid to federally appointed judges. No public service employees currently paid by the Provincial government receives a Long-Term Service Award, as this benefit was ended in April 2015.

Governor in Council accepts the Tribunal's recommendation that the Long-Term Service Award should accrue to, but then cease to accrue for provincial court judges effective

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<sup>13</sup> Fiscal Brief, p. 33

March 30, 2020, and that judges be offered the option of an immediate or deferred payout with no further accrual beyond March 30, 2020. The Governor in Council does not accept the Tribunal's caveat that the abolition should be contingent on the acceptance of the salary recommendation of \$30,685 in 2020-21 with annual adjustments for CPI in years 2021 and 2022.

Governor in Council is accountable to the Legislature and through it to the people of Nova Scotia for public expenditures. Having found the Long-Term Service Award should be abolished, the conditional nature of this finding is not consistent with the Act, particularly Section 21K which is consistent with the Constitution of Canada and makes the executive branch of government accountable for public spending. This inter-twining of elements is sometimes a feature of collective bargaining and has the hallmarks of a negotiation. In *PEI Reference*, the Supreme Court of Canada referred to negotiations for salary in the following context:

When I refer to negotiations, I use that term as it is understood in the labour relations context. Negotiation over remuneration and benefits involves a certain degree of "horse-trading" between the parties. Indeed, to negotiate is "to bargain with another respecting a transaction" (Black's Law Dictionary (6th ed. 1990), at p. 1036).<sup>14</sup>

In that case, the Supreme Court of Canada made it clear that negotiation in the context of the setting of judicial remuneration is prohibited. The Tribunal's presentation of this recommendation as contingent also stands in direct contrast to its own assertion that, "Judges cannot bargain with Government but must instead rely upon an independent process where Tribunals such as this one make recommendations."<sup>15</sup> . The parties made

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<sup>14</sup> *PEI Reference*, [1997] 3 S.C.R. 3, para 188

<sup>15</sup> Tribunal Report, November 12, 2019, p.15

no submissions to the Tribunal requesting such contingency and the acceptance of such a bargain should not be a feature of the judicial compensation process.

**Reason 5: Change in Economic Circumstances: Covid-19**

The economic forecasting evidence before the Tribunal included the Fiscal Brief. The Fiscal Brief and evidence before the Tribunal noted that the Nova Scotia economy is influenced by internal developments in Nova Scotia and Canada and by what has been happening in the global economy. In the first two quarters of the 2019-2020 fiscal year, when the issues of judicial compensation were being considered by the Tribunal, Nova Scotia’s current economic conditions appeared to be improving slightly<sup>16</sup>.

The finance Fiscal Brief noted “in the near term, Nova Scotia’s real GDP growth is forecast to remain positive but at a slower pace than observed in recent years: 0.8 per cent in 2019 and 0.9 per cent in 2020 (chart 6.5). Nominal GDP is forecasted to grow by 2.8 per cent in 2019 and 2.9 per cent in 2020, like the pace observed in 2017.<sup>17</sup> The table below summarizes the four-year projection for economic growth in the Province of Nova Scotia.

<b>Figure 2.5 Four-year Fiscal Plan (\$ millions)</b>	<b>2019-20</b>	<b>2020-21</b>	<b>2021-</b>
	<b>22</b>	<b>2022-23</b>	<b>2022-23</b>
<b>General Revenue Fund</b>	<b>Estimate</b>	<b>Estimate</b>	<b>Estimate</b>
<b>Revenue</b>			
Ordinary Revenue	9,962.7	10,185.3	10,521.8
Ordinary Recoveries	658.5	641.3	637.2
Net Income from Government Business Enterprises	389.2	396.0	401.1
	<b>11,010.5</b>	<b>11,222.6</b>	<b>11,560.0</b>
			<b>11,930.3</b>

<sup>16</sup> Fiscal Brief, pp. 32-33

<sup>17</sup> Fiscal Brief, pp. 49-51

<b>Expenses</b>				
Departmental Expenses	10,101.8	10,209.5	10,550.6	10,969.4
Refundable Tax Credits	134.3	135.3	136.3	137.3
Pension Valuation Adjustment	51.8	54.7	59.2	58.6
Debt Servicing Costs	856.1	787.1	757.0	700.7
	<b>11,144.1</b>	<b>11,186.6</b>	<b>11,503.2</b>	<b>11,865.9</b>
Consolidation and Accounting Adjustments	167.2	16.0	9.0	9.0
<b>Provincial Surplus (Deficit)</b>	<b>33.6</b>	<b>51.9</b>	<b>65.8</b>	<b>73.4</b>
Net Debt	15,276	15,568	15,652	15,729
Nominal GDP	5,219	6,537	8,232	9,766
<b>Debt to GDP Ratio</b>	<b>33.8%</b>	<b>33.5%</b>	<b>32.5%</b>	<b>31.6%</b>

Note: Pension Valuation Adjustment is comprised of current service cost, employee and employer contributions, amortization of net actuarial gains and losses, any changes in plan asset valuation allowance and any plan amendments which occur during the fiscal year. It represents the net amount to convert expenses to the accrual basis of accounting from the cash-based government contributions to benefit plans recorded at a departmental level.

*Source: Nova Scotia Department of Finance and Treasury Board, Budget 2019-20<sup>18</sup>*

The evidence in the Fiscal Brief describes the projections as follows:

Over the projection period, growth in Nova Scotia's revenues is predicted to average 2.4 per cent per year, which is below the 2.9 per cent growth rate of the previous four years (2015-16 to 2018-19). Growth in total expenses and consolidation and accounting adjustments is predicted to average 2.3 per cent per year over the projection period, which is slightly above below the average growth rate of 2.2 per cent for the previous four years.

The conclusion of the Province's Fiscal Brief summarizes the state of the economy in Nova Scotia as it appeared in the summer of 2019 when the document was prepared:

Nova Scotia is on the path to achieving fiscal sustainability, but budgets are balanced by thin margins over the four-year planning horizon. The province's finances need to be managed carefully in order to stay on this path. Adding additional pressure to the province's fiscal objectives is the expectation that economic growth will slow over the short-term as recent positive trends dissipate, the population continues to age, and global economic conditions are slower and more volatile.

The province's net debt continues to increase, while the net debt to GDP ratio is on a slow decline. Although debt servicing costs seem as if they will decline by a significant amount over the next four years, this increased

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<sup>18</sup> Fiscal Brief, pp 23-24

capacity is needed because debt servicing costs are anticipated to rise above current forecasts once the QEII redevelopment project is completed. Surpluses generated from balanced budgets need to be at least partially dedicated to reducing the net debt in order for Nova Scotia to be fiscally sustainable.

In order to ensure revenue growth continues to outpace expenditure growth, collective agreements and other compensation packages must be held to fiscal plan expectations. If actual wage increases exceed projections, necessary additional funding would have to come through a reallocation of existing resources or be taken from program areas. Either scenario would negatively impact the provincial government's long-term capacity to provide adequate public services to Nova Scotians.<sup>19</sup>

Governor in Council has determined that new facts and circumstances have arisen since the release of the Report with reference to the economic and fiscal criteria which justify a departure from the Tribunal's recommendations.

In late 2019, while the Tribunal was still considering all of its recommendations, the Wuhan Municipal Health Commission in China, reported a cluster of cases of pneumonia in Wuhan, Hubei Province, China, which eventually became known as a novel coronavirus. On January 10, the World Health Organization (“**WHO**”) issued advice to all countries on how to detect, test and manage potential cases, based on experience with SARS and MERS. Later that month evidence of human-to-human transmission began to be reported as well as cases outside of China. By January 30, the WHO declared a public health emergency. On March 11, 2020, WHO made the assessment that Covid-19 can be characterized as a pandemic.<sup>20</sup>

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<sup>19</sup> Fiscal Brief, p. 27

<sup>20</sup> <https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19>

On March 11, 2020, there were approximately 120,000 reported cases worldwide and 103 in Canada. Just two days later, the United States, Canada's largest trading partner declared a national emergency. Later that month Canada closed its borders to the United States<sup>21</sup> and was requiring everyone who travelled internationally to self quarantine<sup>22</sup>. In Nova Scotia, public health orders were issued under the *Health Protection Act* requiring social distancing, closing schools and daycares and requiring several restrictions for businesses that continued to operate. A provincial declaration of emergency was first issued on March 22, 2020 and has been renewed numerous times since then.

As of June 1, 2020, the WHO has reported 6,057, 853 confirmed cases of Covid-19, including 371, 166 deaths<sup>23</sup>. In Canada, the federal government is reporting over 90,000 cases and over 7,000 Covid-19 related deaths.<sup>24</sup> In Nova Scotia, as of June 1, 2020 there were 1057 reported cases and 60 deaths.

The financial impacts of Covid-19 are as unprecedented as the social impacts. In considering this matter, Governor in Council has considered the fiscal state of the economy as it presented in late 2019 and the economic and fiscal information from various private sector forecasters<sup>25</sup>.

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<sup>21</sup> <https://orders-in-council.canada.ca/attachment.php?attach=38991&lang=en>

<sup>22</sup> <https://orders-in-council.canada.ca/attachment.php?attach=38989&lang=en>

<sup>23</sup> <https://covid19.who.int/>

<sup>24</sup> [https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection.html?utm\\_campaign=gc-hc-sc-coronavirus2021-ao-2021-0005-10020125402&utm\\_medium=search&utm\\_source=google-ads-107800103024&utm\\_content=text-en-434525470059&utm\\_term=%2Bcoronavirus%20%2Bcanada](https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection.html?utm_campaign=gc-hc-sc-coronavirus2021-ao-2021-0005-10020125402&utm_medium=search&utm_source=google-ads-107800103024&utm_content=text-en-434525470059&utm_term=%2Bcoronavirus%20%2Bcanada)

<sup>25</sup> CIBC Economics, Provincial Outlook: All in the Same Boat? In Focus, April 24, 2020, <http://economics.cibccm.com>

TD Economics, Provincial Forecast Update, Provinces Poised for Severe Contractions in 2020. April 23, 2020, <http://economics.td.com>

<https://www.conferenceboard.ca/focus-areas/canadian-economics/provincial-outlook/nova-scotia>

The economic information that is currently available is in strong contrast to the information that was available in the fall of 2019 when the Tribunal was considering the issue of judicial compensation. The table below compares October 2019 private sector forecasts for GDP, employment growth and unemployment in Nova Scotia. While there is variance in each forecast and revision, the overall picture suggests 2020 will result in steep declines in GDP and employment growth with a corresponding increase in the unemployment rates.

Comparison Table – October 2019 private sector forecasts for 2020 revision from October 2019 to May 2020<sup>26</sup>.

Forecaster	Date	Real GDP growth		Employment growth		Unemployment rate	
			revision		revision		Revision
BMO	Sep 27	+0.7%	-4.5%	+0.3%	-4.6%	7.2%	+3.0%
CIBC	Sep 30	+1.0%	-8.4%	n/a	n/a	n/a	n/a
Conference Board	Aug 21	+1.2%	-5.0%	+0.5%	-3.8%	6.6%	+5.0%
National Bank	Oct 3*	+1.0%	-7.4%	+0.5%	-7.2%	7.2%	+3.1%
RBC	Sep 11	+0.9%	-6.8%	+0.6%	n/a	7.5%	+3.6%
Scotiabank	Sep 6	+1.3%	-9.6%	+0.3%	-8.0%	6.8%	+4.9%
TD Economics	Sep 19	+1.1%	-6.6%	-0.2%	n/a	7.6%	+3.0%

The economic circumstances of the Province are relevant to the factors to be considered by

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Scotiabank, Global Economics, Scotiabank's Forecast Tables, April 17, 2020, [www.scotiabank.com/economics](http://www.scotiabank.com/economics)

BMO Capital Markets, Provincial Economic Outlook/Our key forecasts for the Canadian Provinces, May 22, 2020, Provincial Economic Outlook for May 22, 2020 <http://economics.bmo.com>

National Bank of Canada, Financial Markets, May 2020, Monthly Economic Monitor, Economics and Strategy, <https://nbfm.ca>

The Conference Board of Canada, Summary Sharp Deep Unprecedented Provincial Outlook Spring 2020, April 15, 2020, [www.conferenceboard.ca](http://www.conferenceboard.ca)

RBC Economics, Provincial Outlook, Let the recovery begin (please)!, May 11, 2020, [www.rbc.com/economics](http://www.rbc.com/economics)

<sup>26</sup> ibid

the Tribunal under the *Provincial Court Act*. Specifically, at subsection (f) and (g):

- (3) When making recommendations pursuant to this Section, a tribunal shall take into consideration the following:

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- (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; (emphasis added)

The information relevant to these factors have changed significantly since the Tribunal considered the evidence in this matter. As confirmed in *Bodner*, the government is permitted to consider new facts or circumstances that arise after the recommendations have been issued. This is particularly so where a new circumstance arises that completely undermines the rationale of the Reports and the Tribunal recommendations.<sup>27</sup>

Governor in Council is accountable to the Legislature and through it to the people of Nova Scotia for public expenditures. The global pandemic and on-going state of emergency in Nova Scotia has had significant and far-reaching social and economic impacts.

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<sup>27</sup> *Newfoundland and Labrador Association of Provincial Court Judges v. Newfoundland and Labrador*, 2018 NLSC 140, paragraph 145.

Since mid-March many government programs and services have been reduced or paused. Government has focused much of its time and resources on addressing the perils of Covid-19 and other intervening tragedies in our Province. Now, as government develops its plans for recovery, all government services and programs are under review as government attempts to address what will undoubtedly be a significant shortfall in provincial revenue coupled with significant increases in expenditures to provide economic assistance to some of the most vulnerable people in our Province. The 2020-21 deficit is now forecasted to be \$852.9 million (revised downward from budgeted surplus of \$55.0 million) for the province. This is a \$907.9 million deterioration. The provincial debt to GDP forecast for 2020-21 has been recently revised to reach 38.7% (revised from budget expectation of 33.3%). This is a 5.4% increase. While government is at the early stages of understanding the extent and scope of damage to the economy, it is already clear that fiscal adjustments will be required in the coming months and years. The burden of this new reality will be felt by all Nova Scotians, including those that rely on public funding for their salaries.

Governor in Council varies recommendation 1 by deciding an appropriate increase in the salary component of judicial compensation is one point five (1.5) percent in fiscal year 2020-21, effective April 1, 2020, with an adjustment of two (2) percent for fiscal year 2021-22, effective April 1, 2021, and with an adjustment of two (2) percent for the fiscal year 2022-23, effective April 1, 2022. The Tribunal expressly found that the salaries do not compromise existing judicial independence thus fulfilling its statutory mandate. A 1.5% increase in 2020-21 followed by 2% in 2021 and 2% in 2022, is determined by Governor

in Council to be an appropriate salary increase given changes to the cost of living and to acknowledge the importance of the work done by the judiciary. These important aspects must also be balanced against the unprecedented circumstances that are facing Nova Scotia as a result of the Covid-19 pandemic, the changing economic circumstances of the Province, Nova Scotia's prevailing economic conditions and the Tribunal's finding that the current salaries do not impair judicial independence. Private sector forecasts are projecting a significant decline in real GDP growth for Nova Scotia in the coming year over the modest amounts projected in the fall 2019. An increase of 1.5%, followed by 2% in each of the subsequent years will ensure that judicial salaries are maintained at a level that ensures judicial independence is not compromised.

With respect to recommendation 2- the Long-Term Service Award- the Province accepts the Tribunal recommendation that it should cease to accrue after March 31, 2020, but in doing so varies the recommendation so it is unconditional and not tied to an acceptance of recommendation 1. Given that the Nova Scotia Long-Term Service Award is unique and the Tribunal has found the award has no impact on recruitment or retention, the Governor in Council is satisfied with following the Tribunal's recommendation that it be abolished. In accepting recommendation 2, in accordance with its authority under Section 21K of the Act the Governor in Council has disregarded the conditional nature of the recommendation.

Governor in Council accepts recommendations 3 and 4.

**Certified to be a true copy**

  
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**Laura Lee Langley**  
Clerk of the Executive Council