

NOVA SCOTIA PROVINCIAL JUDGES' SALARIES AND BENEFITS TRIBUNAL

REPORT AND RECOMMENDATIONS FOR THE PERIOD APRIL 1, 2020 to MARCH 31, 2023

TRIBUNAL MEMBERS

**William Kaplan
M. Patricia Towler
Ronald A. Pink, QC**

A hearing took place in Halifax on October 10, 2019

Introduction

This is the Report of the 2020-2023 Tribunal for the determination of Salaries and Benefits for Provincial and Family Court Judges (hereafter “Provincial Court judges”) with proposed recommendations for the period April 1, 2020 to March 31, 2023. This Tribunal is established by statute: The *Provincial Court Act*, RSNS, c. 238, as amended (hereafter “the Act”). Tribunal recommendations are not binding, and may be rejected, confirmed or varied. The Tribunal’s role is set out in Section 21E (1) of the Act:

Duties of tribunal

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

- (a) the appropriate level of salaries 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.

In making its recommendations, the Tribunal is required to consider the following factors:

- (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 compare to judicial compensation packages in other jurisdictions in Canada, including 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 factors as the tribunal considers relevant to the matters in issue.

Issues to be Determined

1. Salaries for the period April 1, 2020 to March 31, 2023.
2. Maternity and Parental Leave Benefits.
3. Long-Term Service Award Benefits.

Both the Minister of Justice & Attorney General of Nova Scotia and the Association filed detailed written briefs, and reply briefs. An expert report on economic conditions in Nova Scotia was submitted by the Department of Finance & Treasury Board, and the authors of that Fiscal Brief testified when the Tribunal met in Halifax on October 10, 2019. Public notice of the proceedings was provided and public participation invited. It is also worth pointing out that the statutory time lines for hearing and report were, by agreement, waived in order to provide the Tribunal with sufficient time to carefully consider the briefs, reply briefs, and Fiscal Brief, not to mention the submissions made at the hearing.

The process was respectful and non-adversarial although the Government and the Association had diametrically opposed views about two of the recommendations that might properly issue. Finally, it is appropriate to note that the Chief Judge of the Provincial Court, Her Honour Pamela S. Williams, wrote the Tribunal, appeared at the hearing and requested that the Tribunal include a recommendation in its Report providing funding for continuing education opportunities for *per diem* judges. At the hearing, the parties decided that the Report of the Tribunal should not be delayed while the Government considered and then replied to that

request – the Association was in agreement with it – and it was, accordingly, decided that the matter could be brought back before us.

Background

This is the second Tribunal constituted since May 20, 2016 when the *Financial Measures (2016) Act* was given Royal Assent. That legislation repealed those sections of the *Act* that made the recommendations of Tribunals binding on the Government. Significantly, the Tribunal's jurisdiction to recommend judicial salaries and benefits, and the factors to be considered in doing so, remain unchanged. On November 18, 2016, a Tribunal chaired by Professor Bruce P. Archibald QC, following a lengthy and detailed review, unanimously recommended a substantial salary increase (providing parity with New Brunswick provincial judges in the first year followed by CPI increases in years two and three). That recommendation was rejected by Government and a two-year wage freeze followed by a 1% increase in the third year was imposed in its stead. That rejection and imposition are currently the subject of a judicial review.

As is well-established in the governing authorities, and well-accepted by the parties, each Tribunal must make its own assessment in determining the appropriate level of judicial compensation, and must only do so after all of the relevant criteria have been considered. In discharging this mandate, the work of previous Tribunals is relevant as their recommendations form part of the background and context; background and context that is appropriately considered as the successor Tribunal goes about making its recommendations. We have carefully reviewed the previous Tribunal Report, along with the reports of earlier Tribunals.

Salary

Issue: The Association asks the Tribunal to recommend that compensation be set at the average of the (in place and recommended) provincial judge salaries for the Atlantic provinces. This would result in an annual salary of approximately \$274,070 commencing April 1, 2020, with a further recommendation that this salary be adjusted by CPI in years two and three. The Government proposed that salaries increase by 2% per year beginning on April 1, 2020 until April 1, 2022, for a total of 6%.

Association Submissions

The Association began its submissions by observing that Nova Scotia Provincial Court judges were the lowest paid provincially-appointed judges in all of Canada, a long-standing and unjustified disparity that has worsened over time. At the very least, if only the average salaries of provincially appointed judges in Atlantic Canada was considered that would require an increase to \$274,070 effective April 1, 2020 (from the status quo April 1, 2019 amount of \$238,513 resulting from rejection of the 2016-2020 Tribunal's recommendation and, as noted above, imposition of a two-year salary freeze followed by a 1% adjustment in year three). This gap, the Association noted, did not arrive overnight but was the result of years of erosion and neglect. Even if the single comparator of New Brunswick was adopted – as was the recommendation of the previous Tribunal – the delta was still substantial. The current low level of compensation was not even limited to salary, the Association referred to a report that situated Nova Scotia provincial judicial pensions in the bottom half of the pack.

Each and every one of the criteria, the Association argued, supported a recommendation for a substantial salary increase. Governing constitutional law principles, together with the need to foster judicial independence, were placed at the top of the statutory list for a reason: they were critical. The lowest judicial salaries in Canada could not be countenanced as they were completely inconsistent with judicial financial security and were, in that way, an affront to governing principles of constitutional law. Likewise, judicial independence demanded that judges be compensated in a manner commensurate with the status of their office, and being the lowest paid in the country was completely inconsistent with that categorical imperative even if the current salary did not, in the most narrow sense, directly compromise independence.

Other factors likewise drove the result that the Association sought. The Association argued that there was substantial and increasing evidence that many candidates for judicial appointment directed their applications to superior court appointments because of the low(er) salaries of Provincial Court judges. The quality of the bench was obviously excellent but it was undeniable based on the appointment data that the most senior and experienced counsel had concluded that a provincial appointment was less attractive than a federal one (and a notable number of Provincial Court judges had been elevated to the federal bench – undoubtedly motivated to apply, the Association argued, at least in part, by the higher compensation paid to federal judges). This evidence suggested that salary was affecting both recruitment and retention. The impact on diversity, and the shared goal of having a bench reflecting the face of Nova Scotia society, was also worth bearing in mind. Salaries should be set at a level that invited interest from the broadest swath of qualified lawyers.

Turning to some of the other criteria, the Association submitted that the unique nature of the role of Provincial Court judges, and the jurisdiction and responsibility of the court, were factors that supported the sought-after salary recommendation. The work of the Provincial Court judges, in both criminal and family law, was stressful and important. It was increasingly complex and time-sensitive. In criminal law, the very liberty of the subject was at stake. This was clearly professional activity of the highest responsibility. Provincial Court judges performed their duties in relative social isolation and under the closest of public scrutiny. Their salaries had to reflect these fundamental facts and paying them the lowest rate in the country was completely inconsistent with that objective. The criteria also required a comparison with other judicial salaries. The existing delta was, in a word, inexplicable, and in two other words, totally unjustified. The fact was that virtually every single Tribunal that had looked at this issue concluded that the gap, which has grown over time, could not be justified.

The Association also took issue with the Government's Fiscal Brief, and pointed to its own economic analysis indicating an improving economic outlook: at the very least it was moderately positive. The 2019-2020 provincial budget documents, and a number of other studies, were cited in support. As importantly, there was no evidence whatsoever that judicial salaries had ever had any impact on any other wage settlements in Nova Scotia. In addition, given the rejection of the last Tribunal recommendation, and imposition of the two-year freeze followed by the 1% salary increase, Provincial Court judge salaries had continued to fall below inflation – and this engaged the criterion relating to the cost of living. Judicial income was dropping because of inflation.

In summary, and for the foregoing reasons, the Association asked the Tribunal to recommend that the salaries of Provincial Court judges for the next three years be the average of the (in place and recommended) provincial judge salaries for the Atlantic provinces. This would result in an annual salary of approximately \$274,070 commencing April 1, 2029, and this salary should be adjusted by CPI in years two and three.

The Government

In the Government's submission, the constitutional law of Canada and need to maintain judicial independence were not engaged as there was nothing in the current rate of compensation that undermined either of these factors. Indeed, the opposite was true: the compensation and other terms of conditions more than established that Provincial Court judges held a rarefied place in Nova Scotia society consistent with their unique and critical role in upholding the rule of law. The proof of this was that excellent candidates were being attracted at current rates. Recent appointments – and profiles were pointed to – confirmed that the composition of the current bench was superb. Provincial Court judges had a unique role, and it was reflected in their annual base salary.

The Government pointed out that considered wholly and in context, Nova Scotia's Provincial Court judges were extremely well-paid and also enjoyed a handsome pension, not to mention many other benefits. The law was clear that while the constitutional law of Canada and judicial independence were cornerstones of Canadian democracy, and that this Tribunal, like its predecessors, was constitutionally required to protect the independence of the judiciary, this

did not mean that judges were shielded against financial reality. Put another way, Nova Scotia's Provincial Court judges had to bear their fair share of the financial burden. Judges were not civil servants, but they were paid from the same source and subject to the same fiscal and economic pressures. Wage restraint, reflected across the public service, amply demonstrated the Government's resolve to deal with the structural deficit. Achieving sustainability required the participation of everyone who derived their salaries from the public purse. This objective informed the Government's position following the last Tribunal Report, and informed it in these proceedings. And it was one, the Government argued, that was easily and readily justified given the salaries, benefits and pension that Provincial Court judges currently enjoyed.

It was important to look at judicial salaries in other jurisdictions – that was one of the criteria – but these salaries had to be considered in context and an important part of the context, the Government submitted, were prevailing economic conditions in Nova Scotia. When the salaries of Nova Scotia Provincial Court judges were compared to judicial compensation packages in other jurisdictions, the Government argued that the case could not be made that any other jurisdiction appropriately drove Nova Scotia results – the differences outweighed any similarities – while the Nova Scotia economic situation indicated high debt, less than robust growth, and the continuing need for governmental fiscal restraint. This fiscal reality was central to the Government's submissions.

To be sure, real GDP rates had improved somewhat in recent years, but the improvement was nevertheless modest and Nova Scotia was behind virtually every other jurisdiction in the

country when standard economic metrics were examined. Nova Scotia Provincial Court judges were paid appropriately with tax dollars generated within their province. The provincial economic outlook projected a further slowing of growth. Inflation – CPI – was a benchmark, but it was one that affected everyone in the province equally and could not stand as an independent basis for a recommendation to increase judicial salaries. There was a serious sustainability problem, and any doubt about that was put to rest in the Fiscal Brief submitted by the Government. Meanwhile, other criteria, for example, the nature and responsibility of the court, did not lead to a conclusion that a massive increase in compensation was appropriate for as important as the work of this court was, it could not support a finding that there was some deficiency in remuneration.

In the Government's submission, when all of the factors were considered it was indisputable that that the salary currently being received more than satisfied the applicable requirements most notably the independence of the judiciary. The salaries of the Provincial Court judges exceeded even the median within the top 1% of all Nova Scotians. An increase of 6% over three years would maintain the very high salary level that judges received. It would allow the Government to continue to be fiscally responsible through debt management and exercising wage restraint. The constitutional requirement to treat judges differently, and provide a much higher salary, was clearly being met. Accordingly, and for all of these reasons and others, the Government asked that its recommendation be adopted.

Maternity and Parental Leave Benefits

Issue: Introduction of Maternity and Parental Leave Benefits. No provision currently.

Association Submissions

The Association also asked, in its submissions and as elaborated at the hearing, that the Tribunal recommend introduction of a Maternity and Parental Leave Benefits regime. The Association acknowledged that provisions of this kind were not a standard feature of provincial judge compensation in Canada, but submitted that this was not a justification for not introducing them as the benefits to recruitment and retention were self-evident, the cost was likely to be minimal – given the demographics of appointees, and introduction of these leaves would promote gender equity and overall diversity – objectives both the Association and the Government shared.

Government Submissions

The Government took the position that this proposal was one that merited immediate attention. Indeed, it proposed the introduction of a regime providing for paid pregnancy leave and additional unpaid parental leave to be available to both parents, including adoptive parents.

Long-Term Public Service Award Benefits

Issue: The Government seeks abolition of the Long-Term Public Service Award Benefits as of April 1, 2020.

Government Submissions

Under the Government's proposal, and mirroring the process that has already applied to civil servants in the province, the Long-Term Public Service Award would stop accruing as of April 1, 2020 with current incumbents offered the option of receiving a lump sum payout of their accumulated benefit, or receive the present value of that benefit upon retirement. In the Government's submission, the evidence overwhelmingly established that this compensation feature was anomalous across Canada, and it was, moreover, completely unjustified. Nova Scotia was one of only two jurisdictions in Canada with a public service award for provincial court judges, and the other jurisdiction – Yukon – was not an appropriate comparator. Simply put, a retirement bonus may have once made sense, but it was never required to support judicial independence, or any of the other factors that are to be taken into account in establishing judicial compensation. In an era of ample judicial pension, the Long-Term Service Award Benefits were unnecessary to give effect to any of the governing criteria.

Association Submissions

In the Association's view, the Long-Term Service Award Benefit was a feature of Provincial Court judge remuneration when provincial court judges were hired and should not be eliminated. The Association pointed out that in its submissions to the 2017-2020 Tribunal, the Government emphasized that the lower salaries paid to Nova Scotia provincial court judges was partly justified on the basis that Nova Scotia judges received these benefits. It was hardly appropriate, in these circumstances, especially where the Government unilaterally rejected the last Tribunal's recommendation for a salary increase, to now seek elimination of a financial

feature of judicial compensation that it had previously argued mitigated against otherwise raising salaries. The Association asked that the Government's proposed recommendation be rejected. However, it should be pointed out that the Association also indicated that it would not object to future appointees to the bench not being eligible for the service awards provided the salary issue was adequately addressed.

General Discussion

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. As outlined below, all of the factors have been carefully considered in coming up with recommendations that we believe achieve a fair result in all of the circumstances.

The most important matter to be put before us is compensation. In brief, and in general, in its submissions, before this Tribunal and previously, the Association takes the position that judicial salaries should, at the very least, be set near or at the average of existing and recommended, salaries for other provincially appointed judges in Atlantic Canada. The Government submits here, and before earlier Tribunals, that any salary increases should be modest and limited; 2% a year for three years in line with provincial financial restraints and for the other reasons set out above.

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.

When the Nova Scotia Provincial Court judges are compared to their counterparts in the other provinces, when the economic circumstances of those provinces is canvassed, considered and compared with Nova Scotia, when the cost of living is looked at and analyzed, and when the actual work of the judges is examined – its overriding scope and importance – not to mention, when the shared objectives of recruiting a diverse and exceptional bench that reflects the face of Nova Scotia is taken into account, the conclusion is almost inevitable that the current delta is unjustified. On the other hand, the compensation of Provincial Court judges, cannot be divorced from the economic realities of the province in which they live, and the overall state of the provincial economy must be examined including the ongoing and important efforts to achieve long-term fiscal sustainability. This is but one of the requirements of this Tribunal under s 21E of which we are extremely cognizant.

However, having said this, we do not accept that judicial salaries should be benchmarked by provincial collective bargaining outcomes whether voluntarily agreed upon or imposed by

statute. The law is legion: Judges are not civil servants: they are public servants. It is true enough that they are employed by Government, but they are completely independent of it. They should not, and cannot, be bound by collective bargaining outcomes achieved with or imposed on provincial civil servants. Judges cannot bargain with Government but must instead rely upon an independent process whereby Tribunals such as this one make recommendations. In deciding whether to accept, modify or reject Tribunal recommendations, Government must pay heed to the constitutional underpinning of this process including most importantly ensuring and maintaining judicial independence. In a few words, special circumstances apply in determining judicial compensation. The evidence before us convincingly establishes that judicial compensation results have no impact whatsoever on public sector wage outcomes.

Recommendations

Salary Recommendation

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. For the years 2021-2 and 2022-3, we recommend that the amount be adjusted on April 1 of each year by the amount of CPI (Canada) for the previous year as measured effective April 1 of each year. We reach this recommendation based on the fact that while judicial independence is not threatened *per se* by the current level of compensation, Nova Scotia Provincial Court judges, are now at the minimum level of financial compensation and an adjustment is required to ensure their overall independence, a result that is further supported by other factors such as comparability with

remuneration in other jurisdictions, most notably throughout Atlantic Canada. While the case might be made that Nova Scotia Provincial Court judges should be at or near the top of judicial remuneration in Atlantic Canada, we have concluded that that delta is too large to overcome within the context and confines of the current term. We leave this matter to future Tribunals.

While we are not, as previously noted, bound in any way by the work of any predecessor Tribunal, we are, nevertheless mindful of that body of work, especially the recommendation of the Tribunal immediately prior to this one. In its 2017-2020 Report, the Tribunal recommended that Nova Scotia Provincial Court judges have salaries that were effectively equivalent to those received by New Brunswick provincial court judges. Notably, this is the second time a Tribunal, following a thorough review of the briefs, reply briefs, Fiscal Brief, and submissions made at the hearing, has adopted this specific recommendation.

Maternity and Parental Leave Benefits

The evidence supplied by the Chief Judge indicates that the request for such benefits has been occasional and, when made, addressed *ad hoc*. Both the Government and Association are in agreement that a Maternity and Parental Leave Benefits regime be formally introduced. Both the Association and the Government agree that introduction of these benefits would enhance recruitment and promote diversity. Maternity and parental leave benefits are necessary to meet the legitimate expectations of both society and the members of a modern bench. It is imperative for the administration of justice that policies be in place to promote inclusiveness and human rights. We recommend introduction of appropriate and modern Maternity and

Parental Leave Benefits. We anticipate that agreement will be reached, but to the extent resolution proves elusive, this matter may be referred back to us.

Long-Term Service Award Benefits

We recommend the immediate abolition of this benefit on the terms proposed by Government.

While we do not accept that it has any impact on recruitment or retention, as a matter of fairness we believe that existing Provincial Court judges be offered the option of immediate or deferred payout but no further accrual as of March 31, 2020. However, this recommendation comes with a caveat. This recommendation is contingent upon the Government accepting and implementing our salary recommendation.

Conclusion

The Tribunal members are pleased to have reached a consensus on the matters recommended in this Report, which is respectfully submitted to the Honourable Mark Furey, Minister of Justice & Attorney General of Nova Scotia. As indicated above, we are also willing to reconvene to hear additional submissions regarding maternity and parental leave and the issues raised by Chief Judge Williams regarding *per diem* judges.

DATED at Toronto this 12th day of November 2019.

“William Kaplan”

William Kaplan, Chair

“M. Patricia Towler”

M. Patricia Towler, Government Nominee

“Ronald A. Pink”

Ronald A. Pink, QC, Association Nominee