

NORTHWEST TERRITORIES JUDICIAL
REMUNERATION COMMISSION

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REPORT AND RECOMMENDATIONS
OF THE
1999 JUDICIAL REMUNERATION COMMISSION

July 12, 1999

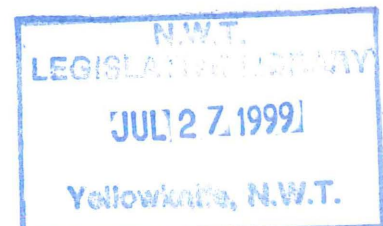


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CHAPTER 1: THE JUDICIAL REMUNERATION COMMISSION

Mandate:

The Northwest Territories Judicial Remuneration Commission (the Commission below) is established pursuant to section 12.1 of the *Territorial Court Act*¹ (the Act below). The Commission consists of not more than three members appointed by the Commissioner in Executive Council. One member is nominated by the Minister responsible for Justice; one member is nominated by the Chief Judge, in consultation with the Territorial Court Judges' Association; and one member is nominated by the other two members. The member appointed upon the nomination of the other two members is the chairperson of the Commission.

Certain persons are not eligible for appointment to the Commission. A member or a former member of a law society in Canada; a member or former member of the Legislative Assembly of the Northwest Territories; and an employee as defined in the *Public Services Act* of the Northwest Territories cannot be appointed to the Commission.

The mandate and responsibilities of the Commission are outlined in the Act. Section 12.8 specifies that the Commission shall submit a report as outlined in subsection 12.5(2) of the Act within sixty days of the coming into force of the section; within sixty days after January 1, 2001; and within sixty days after January 1 in every third year after January 1, 2001. At any time during the period between the submission of the reports required by section 12.8, either the Minister or the Chief Judge may request in writing that the Commission inquire into and make recommendations with respect to the salaries and benefits of Territorial Court Judges.

Membership:

The current members of the Commission are:

Chair:	Mr. John E. Hill, of Hay River, Northwest Territories;
Judges' Nominee:	Mr. Gerald Avery, F.C.G.A , of Yellowknife, Northwest Territories; and
Minister's Nominee	Mr. Pierre Alvarez, of Yellowknife, Northwest Territories.

¹ R.S.N.W.T. 1988, c.T-2, as amended.

Conduct of the Present Inquiry:

The amendments to the *Territorial Court Act* establishing the Commission were proclaimed in force June 3, 1998. The members of the Judicial Remuneration Commission were appointed July 21, 1998. They met July 23, 1998 and produced their first report on July 31, 1998. That report recommended that the "status quo" with respect to salaries, benefits, pensions and other entitlements be maintained on an interim basis until the Commission has completed a thorough review and that the Minister or the Chief Judge reconvene an inquiry into Judicial Remuneration in the near future.

In February of 1999, the Chief Judge of the Territorial Court, the Chairman of the Commission and the Government representative met and agreed to a time frame for the Commission to reconvene and make further inquiries. The parties agreed to the following timetable for the filing of written submissions with respect to Territorial Court Judges' salaries and benefits:

- (1) the Territorial Court Judges and the Government of the Northwest Territories would file with the Commission and exchange written submissions on March 31, 1999;
- (2) Each party would have until April 15, 1999 to file a written response to the other party's March 31, 1999 submissions; and
- (3) On April 15, 1999 the Chief Judge would request that the Commission inquire into and make recommendations with respect to the salaries and benefits of Territorial Judges pursuant to section 12.92(1) of the *Territorial Court Act*.

The Chief Judge corresponded with the Commission as agreed and requested that an inquiry into the salaries and benefits of Territorial Judges be initiated. Throughout these proceedings the Territorial Court Judges were represented by their counsel, Mr. Garth Malakoe. The Government was represented by Mr. Lew Voytilla, Secretary of the Financial Management Board.

Notice of the Public Inquiry was published in the "News North", May 10, 1999. Interested parties were advised to file written submissions with the Commission by May 20, 1999 in order to give evidence of their intention to participate in a hearing scheduled for May 27, 1999. No submissions were received by the Commission. The hearing on May 27 thus proceeded on the basis of the written submissions and the oral representations of the Territorial Court Judges and the Government of the Northwest Territories.

The Territorial Court Judges tabled a revised pension proposal during the course of the May 27, 1999 hearing. As a result, the hearing was adjourned in order to allow the Government of the Northwest Territories to analyze the new pension proposal and

respond. Counsel for the Judges outlined the new pension proposal in writing for the Commission by letter dated May 28, 1999. Counsel for the Commission corresponded with the parties on June 1, 1999 requesting a valuation of the Judges pension plan as of April 1, 1999 and also sought information with respect to other matters. Counsel for the Territorial Court Judges responded to this letter on June 3, 1999. The Government of the Northwest Territories responded to the revised Judges pension proposal and the Commission's questions of June 1, 1999 on June 10, 1999. A final submission was received from counsel for the Territorial Court Judges on June 24, 1999.

CHAPTER 2: CONTEXT FOR THE INQUIRY

The Territorial Court of the Northwest Territories:

The Territorial Court of the Northwest Territories was formed on June 22, 1978 as a result of the enactment of the *Territorial Court Act*. Pursuant to the Act, and other federal and territorial legislation, Judges of the Territorial Court deal with the majority of adult criminal prosecutions in the Northwest Territories; all young offender cases in the first instance; prosecutions under federal and territorial environmental, fisheries, wildlife and other regulatory legislation; child welfare matters; family law matters; municipal by-law prosecutions in the communities; and civil law cases for matters involving amounts up to five thousand dollars.

Territorial Court Judges have participated in the training of Justices of the Peace and work with local Community Justice Committees in communities throughout the Northwest Territories.

The Territorial Court system requires Judges to spend a considerable amount of time traveling to communities by road and small aircraft. The Chief Judge schedules the court sittings and assigns the Judges to them. The large geographical area served by the Territorial Court has resulted in a circuit court system on a scale not seen in any other Canadian jurisdiction. There are three Court Houses with Territorial Court staff, located in Yellowknife, Hay River and Inuvik. Although none of the Judges has an appointment for a specific community, there is one Judge consistently assigned to each region. Each Judge is away from home traveling within the assigned region on a regular basis and is required to travel elsewhere as scheduled by the Chief Judge. During their extensive travel on circuit Territorial Court Judges often experience adverse working and living conditions.

The Judges of the Territorial Court:

Territorial Court Judges are appointed by the Commissioner in Executive Council upon the recommendation of the Judicial Appointments Advisory Committee until age 65, unless their term is extended. Judges may not be removed from office before attaining retirement age except by order of the Commissioner upon recommendation of the Legislative Assembly and the Judicial Council, following a complaint and a full inquiry.

There are currently three full time resident judges of the Territorial Court of the Northwest Territories, including the Chief Judge. There are also a number of Deputy Judges who are called upon to assist resident Judges as required.

Summary of the Current Compensation Arrangement:

The current compensation arrangements for Judges of the Territorial Court are established and described in both agreement and regulation. The agreement is outlined in a letter and attachment from the Honourable Kelvin Ng, Minister of Justice, Government of the Northwest Territories to the Honourable Chief Judge Robert W. Halifax, dated January 17, 1997 (the "1997 agreement"). The relevant regulations are the *Judges' Registered Pension Plan Regulations*² and the *Judges' Supplemental Registered Pension Plan Regulations*.³

In 1996, Territorial Court Judges' base salaries were negotiated and set at \$128,133.00 dollars per annum. In 1997, by agreement negotiated between the Chief Judge of the Territorial Court and the government, Judges' base salaries were reduced as part of the general cost reduction applied across the public service. For that year, the base salary was \$122,584.00 per annum. On April 1, 1998, pursuant to the 1997 agreement, the salaries of Territorial Court Judges were linked to Judges of the Northwest Territories Supreme Court salaries and calculated by subtracting \$32,000.00 dollars from the base salary of a Superior Court Judge. This raised the base salary of a Territorial Court Judge to \$143,881.00 effective April 1, 1998. The 1997 agreement also called for the salary of Territorial Court Judges to be set at \$24,000.00 less than a Superior Court Judge's salary, effective April 1, 1999. The base salary for Territorial Court Judges for 1999 was therefore \$151,800.00.

The Chief Judge of the Territorial Court receives a "Chief Judge's Differential" of \$10,000.00 which is added to his base salary.

Territorial Court Judges are also eligible for the following benefits:

Severance pay of one week of pay for each year of employment on resignation or retirement, to a maximum of 30 weeks.

Sabbatical leave after four consecutive years of employment at a rate of 70 percent of salary. To date, three sabbatical leaves of a duration of eight months and one leave of a duration of twelve months have been taken by Judges of the Territorial Court. Sabbatical leave requires the recommendation of the Chief Judge and the consent of the Minister of Justice.

Annual leave entitlements for Territorial Court Judges include 31.5 days with eligibility for an additional four winter bonus days.

² R.N.W.T. 010-93 as am.

³ R.N.W.T. 121-93 as am.

Judges of the Territorial Court participate in a non-contributory pension plan and can retire at age 60. The plan is structured to provide for a pension of 70 percent of the Territorial Court Judge's salary during his or her last year of service, after 35 years on the bench. Pension benefits accrue at the rate of two percent for each year of pensionable service and there is a penalty or a reduction factor applied if a Judge retires before reaching 60 years of age.

CHAPTER 3: DETERMINING JUDICIAL REMUNERATION

Judicial Independence:

Preserving and protecting the judicial independence of the Territorial Court of the Northwest Territories is of paramount importance in the process of determining judicial remuneration for Judges of that court. In affirming the principle of judicial independence the Commissioners have paid close attention to a number of constitutional principles articulated by the courts. A brief summary of these considerations is provided below.

In September, 1997 the Supreme Court of Canada released its decision in *Reference re: Public Sector Pay Reduction Act (P.E.I.), s.10*⁴ (the Provincial Court Judges case). This case clearly stated that the independence of the Provincial Courts is constitutionally protected. The Chief Justice speaking for the majority described judicial independence as a "foundational principle" of our constitution. He described the importance of judicial independence in the following words:

" In conclusion, the express provisions of the *Constitution Act, 1867* and the [*Canadian Charter [of Rights and Freedoms]*] are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located."

Certain principles arise from the Provincial Court Judges case which will be important to the determination to be made by the Commission. They include the need to ensure the financial security of our Judges.

Financial security was initially identified by Le Dain, J. in *R. v. Valente*⁵ as one of the three core characteristics of judicial independence, the other two being security of tenure and administrative independence. In the Provincial Court Judges case, Chief Justice Lamer expressed the view that financial security has both an individual and a collective or institutional dimension. He went on to say that the financial security of our courts, as an institution, is based on three parameters which are a result of the constitutional requirement that the relationship between the three branches of government be depoliticized to the extent possible.

First, the salaries of Provincial Court Judges may only be reduced, increased or frozen through a special process for determining judicial remuneration which is independent, effective and objective. Second, under no circumstances is it permissible for the judiciary to engage in negotiations over remuneration with the Executive branch of

⁴ 118 C.C.C. (3d) 193(S.C.C.).

⁵ [1985] 2 S.C.R. 673.

government or representatives of the Legislature. The recent amendments made to the *Territorial Court Act*, including those establishing this Commission and setting in place the procedures for this inquiry, are intended to satisfy these first two parameters.

Third, any reduction to judicial remuneration, including reductions through the erosion of salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a Judge. The Commission is of the view, based on the authority of the *Provincial Court Judges* case, that the financial security of Territorial Court Judges is an important means to secure the goal of judicial independence and is therefore for the benefit of the public.

The issue in the *Provincial Court Judges* case was the reduction of Judges' salaries by the Executive branch of government. The Supreme Court of Canada does not, however, through that ruling, appear to have intended to prescribe a minimum acceptable level of judicial remuneration. Instead, the court was trying to articulate broad standards of remuneration which would ensure judicial independence. Notwithstanding the need for the Commission to ensure judicial independence by establishing an appropriate level of remuneration for Territorial Court Judges, it should be understood that the judiciary is not exempt from the effects of government deficit reduction.

The Commission is bound by and will pay special attention to the constitutional principles outlined in the *Provincial Court Judges* case.

The Legislature has also, in s.12.9 of the *Territorial Court Act*, specified a number of other factors which the Commission must consider in making its report and recommendations on Judicial remuneration. They are considered briefly below:

The Laws of the Northwest Territories and the Jurisdiction of the Territorial Court:

The *Territorial Court Act* outlines the jurisdiction and responsibilities of Territorial Court Judges and, at least in part, determines the legal basis for the cases which they will hear. Consideration of this Act and other relevant territorial and federal laws conferring jurisdiction on the Territorial Court is one way to understand the workload and responsibilities of Territorial Court Judges in comparison to Judges of other Provincial and Territorial Courts. Our Territorial Court Judges' responsibilities appear to the Commission to be as broad if not broader than those of Provincial Court Judges in many jurisdictions.

Comparisons with Other Jurisdictions:

An inquiry into the remuneration of Territorial Court Judges requires a comparison with the salaries and benefits of Judges in other Provincial and Territorial courts. Both parties to this inquiry submitted detailed information and comparative analyses on this topic. These materials were reviewed and considered by the Commission. Our Territorial Court Judges are among the best paid of any Provincial or Territorial Court Judges.

It seems clear to the Commission that the work of other Provincial and Territorial Court Judges will be very similar to that of our Judges and that such salary and benefit comparisons are helpful indicators of appropriate levels for Judges' remuneration.

The Unique Demands and Working Conditions in the Northwest Territories:

The Judges of the Territorial Court must travel extensively and frequently in order to bring justice to our northern communities. This involves travel in small aircraft and on roads in extreme weather conditions at times of the year when such travel can be uncomfortable, possibly even dangerous. Each Judge sits approximately 210 days a year, many of them in communities without Court Houses, in gymnasiums, church halls and hotels. Our Judges often work longer hours, travel and are away from home more than Judges of Provincial Courts.

Economic Fairness:

It seems unlikely that a lawyer would seek a judicial appointment primarily for the compensation but one way of gauging the general fairness of Judicial remuneration is to compare Judges' salaries to those of lawyers with an equivalent number of years of experience. Good lawyers are highly paid professionals. Their salaries or earnings increase with experience. All of the Judges of our Territorial Court have significant legal experience both on and off the bench. The need to attract excellent candidates to the Judiciary and to retain experienced and capable Judges are factors that have guided the Commission's recommendations on Judicial remuneration.

Economic Conditions in the Northwest Territories:

The economy of the Northwest Territories has been characterized by both parties to the inquiry as being in a state of transition. It appears that the cost of living is stable in Yellowknife and the most recent collective agreement between the government and its employees included a modest increase in salaries. However, as a result of the creation of the Nunavut Territory and other changes to funding arrangements for the Northwest Territories government, the Finance Minister recently indicated that yet another period of deficits may ensue.

CHAPTER 4: SUMMARY OF SUBMISSIONS

The March 31, 1999 Submissions:

a) The Territorial Court Judges -

Page 6 of the submissions filed on behalf of the Judges outlines the recommendations requested from the Commission:

(1) The salary formula included in the January 17, 1997 agreement between the Minister of Justice and the Judges of the Territorial Court should be maintained, that is their base salary should be calculated by subtracting \$24,000.00 from the salary paid to Judges of the Supreme Court of the Northwest Territories.

(2) The rate of accrual of pensionable service be increased from 2 percent per year to 3.5 percent per year so that a Territorial Court Judge can retire with a full pension after 20 years of service.

(3) The penalty or reduction factor for retirement prior to 60 years of age be removed.

(4) The annual salary allowance for the Chief Judge be increased from \$10,000.00 to \$15,000.00.

(5) The per diem salary for Deputy Judges of the Territorial Court be 1/210 of the Territorial Court Judge's annual salary for each sitting day and 50 per cent of this amount for a non-sitting day.

(6) All other terms and conditions of the current compensation package remain the same.

The March 31, 1999 submissions made on behalf of the Territorial Court Judges provide detailed rationales for each of the above recommendations.

b) The Government of the Northwest Territories -

The written submissions filed by the Government included a careful analysis of the factors relevant to Judicial remuneration. The Government position included a series of proposals for changes to Judges' compensation. The Government agreed that other elements of the current remuneration scheme based on the 1997 agreement should remain in effect.

The Government's proposals are summarized below:

(1) The salaries and benefits [of Territorial Court Judges] be based on the average salary of Western Provincial Court Judges and their benefits package.

(2) That Territorial Court Judges' annual salaries, as of April 1, 1999 be as follows:

	<u>Judge</u>	<u>Chief Judge</u>
Average of Western Judges	120,627.00	128,327.00
Average Cost of Living Differential	14,601.00	14,811.00
Adjusted Average Salary	135,228.00	143,138.00
Working Condition Differential	<u>12,000.00</u>	<u>12,000.00</u>
Proposed NWT Salary	147,228.00	155,138.00

(3) Deputy Judges be paid an amount based on the annual salary of a Territorial Court Judge divided by 250, or \$566.00 per sitting day and half that amount for a half sitting day or a non-sitting day, or \$288.00.

(4) The increase to Territorial Court Judges' salaries on April 1, 2000 be based on the annual general cost of living increase measured using the Consumer Price Index for Yellowknife for the calendar year ending December 31, 1999.

(5) The Territorial Court Judges' sabbatical leave be converted into an optional deferred salary leave plan with the Judges paying 20 percent of their salary into a deferred salary plan over four years with the salary during the sabbatical being paid out of the deferred salary plan.

(6) Remove the current mandatory five days of unpaid leave from the current agreement.

(7) No changes be made to other benefits, including pension, leave, insurances and allowances until the next Remuneration Commission is convened to cover the period subsequent to April 1, 2001.

The April 15, 1999 Responses:

a) The Territorial Court Judges -

The April 15 submission made on behalf of the Territorial Court Judges analyzed the Government's March 31 proposals with respect to those areas where the parties initial recommendations to the Commission had varied.

The areas of disagreement included:

- Salary level and method of calculation of Judges' salaries, whether based on the 1997 agreement or on the Government's new averaging proposal;
- Calculation of the Chief Judge's salary, whether based on an average of Western Chief Judges' salaries or on the Territorial Court Judge's base plus a differential;
- Deputy Judge's salaries, whether based on 1/210 or 1/250 of Territorial Court Judge's salary;
- Whether the mandatory 5 days of unpaid leave should continue or not;
- Whether the Territorial Court Judges' pension arrangements should be altered as proposed by the Judges or stay the same as proposed by the Government.

Based on the analysis and argument included in the Territorial Court Judges' April response, the following recommendations were made:

- (1) Retain the 1997 agreement's formula for calculating the base salary of Territorial Court Judges.
- (2) Retain the sabbatical program in its current form.

b) The Government of the Northwest Territories -

The Government reviewed the Territorial Court Judges March submission, and made no changes to its proposals for the calculation of Judges' salaries, the Chief Judge's allowance or the salary paid to Deputy Judges.

The Government responded to the changes proposed by the Territorial Court Judges to their pension plan. The following proposals are included in the Government's April submission:

- (1) A new optional pension plan be initiated based on an annual accrual rate of 3 percent on judicial service beginning April 1, 1999 with a contribution rate of 6 percent from the Territorial Court Judges. The pension would be calculated on the average salary over the final three years of Judicial Service.

The Government indicated that if the new pension plan were recommended by the Commission the present Judges could choose to stay with the present plan or elect to move to the proposed new plan. Judges appointed after April 1, 1999 would have to be part of the new plan.

The Government also suggested that early retirement provisions⁶ would be appropriate. The proposed approach was based on the elimination of the early retirement penalty now in place. Instead, a Territorial Court Judge could retire with no penalty once the combination of his age and the number of years of Judicial Service added up to 75. The Government proposed a pension of 60 percent of the average of the best three years of salary. This suggestion was not identified as a formal proposal in the Government's April 15 response.

The May 27, 1999 Hearing:

This hearing provided the parties with an opportunity to reply to the April 15, 1999 submissions, to address the Commission directly in oral submissions and argument and to question the positions advanced by the other party.

The Territorial Court Judges tabled a revised pension proposal during the hearing. The Government requested the opportunity to study and reply to the new proposal. This reply and the Judges final response will be summarized below under separate heading.

a) The Territorial Court Judges -

The Territorial Court Judges made one change to their proposed salary and benefits position during the hearing. A revised pension proposal was tabled.⁷ The revised proposal suggested that :

- (1) An accrual rate of 3 percent per year of pensionable service be set.
- (2) Territorial Court Judges would contribute 7.5 percent of their salary to the new registered pension plan commencing on April 1, 1999.
- (3) The Territorial Court Judges would consent to the current and future surplus in the Registered Pension Plan being set aside to offset the contingent liability for the accrual of retroactive pension benefits.
- (4) The Territorial Court Judges would be able to retire with a pension without reduction where a combination of pensionable service and age equals 75. (The "Rule of 75" as proposed by the Government of the Northwest Territories.)

⁶ See page 5 of 6, "Early Retirement", April 15, 1999 submissions.

⁷ The details of this proposal were clarified in writing in by counsel for the Territorial Court Judges on May 28, 1999 in satisfaction of undertaking number 2 from the hearing.

b) The Government of the Northwest Territories -

The Government did not alter its original proposals or offer any new proposals during its oral presentation and argument at the May 27 hearing.

Response to Revised Judges Pension Proposal and Final Response from the Territorial Court Judges:

a) Government Response -

On June 10, 1999 the Government of the Northwest Territories responded to the new pension proposal tabled by the Territorial Court Judges during the May 27, 1999 hearing. The Government rejected the proposal for a retroactive benefit change to the Judges' pension plan. The Government made no amendments in its June 10 submissions to its earlier pension proposal.

b) The Final Response from the Territorial Court Judges -

On June 24, 1999 counsel for the Territorial Court Judges submitted a final proposal for the Judges' pension plan. It is outlined below:

- 1) The accrual rate is changed from 2 percent to 3 percent per year of future and past judicial service for all Territorial Court Judges. The accrual rate of 2 percent shall remain for non-judicial pensionable service.
- 2) The computation of the pension shall be based on the last year of salary.
- 3) The Territorial Court Judges will contribute 7.5 percent of their salary to the Registered Pension Plan commencing on April 1, 1999.
- 4) The Territorial Court Judges consent to the current and future surplus in the Registered Pension Plan being set aside to offset the contingent liability for the increased rate of accrual for past judicial service.
- 5) A Territorial Court Judge will be able to retire with a pension without reduction at any age when he or she has pensionable service of 23 1/3 years. If a Territorial Court Judge retires before the age of 60 and does not have 23 1/3 years of pensionable service, then the existing reduction of 3 percent for each year before 60 will be applied.

This constitutes a summary of all the submissions received by the Commission.

CHAPTER 5: THE COMMISSION'S RECOMMENDATIONS

Salary:

The Government and the Territorial Court Judges' ultimate positions with respect to the base salary amount are virtually the same whether calculated on the basis of the 1997 agreement or the new formula proposed by the Government. As Mr. Voytilla noted during his submissions to the Commission on May 27:

"Mr. Chairman,factoring in those two recent increases were due to what we are proposing as a base salary for Territorial Judges and the Chief Territorial Judge, it would change our proposal that was initially made to you for the Territorial Judges from \$147,228 to \$153,793 which is within \$300.00 of what their adjusted April 1, 1999 salary level is. For the Chief Judge, we would change our proposal from \$155,138 to \$163,803 again about a \$300.00 difference from where their salary stands using the current formula, so as you can see, the issue for the Government is not so much the absolute amounts. It's the appropriateness of the comparator..."⁸
(Emphasis added)

The Commission is therefore of the view that there is no issue between the parties with respect to the final amount of the base salary for the Territorial Court Judges.

The most important remaining issue with respect to the salaries of Territorial Judges relates to the formula with which it should be calculated. The Judges' position is that the formula negotiated in the 1997 agreement should continue to be used, that is the base salary should be determined by subtracting \$24,000.00 from the salary paid to Judges of the Supreme Court of the Northwest Territories. Thus, Territorial Judges salaries would only change as Supreme Court salaries change. The Judges propose that the Chief Judge's salary be based on the puisine Judges' salary plus a differential of \$15,000.00 per annum.

The Government rejects the Territorial Court Judges' proposal for determining a Judge's base salary on the basis of the 1997 agreement. The Government has developed and put forward a new formula based on the average of salaries paid to Judges in western jurisdictions, an average cost of living differential and a northern working conditions differential. The parties have agreed on current salaries paid to Judges in western jurisdictions and consequently on the average salary currently paid to these Judges.⁹

⁸ Transcript page 11-12.

⁹ The figures are presented on page 22 of the June 10th submission from the Government of the Northwest Territories.

The Government proposes to calculate the Chief Judge's salary separately based on an average of western Chief Judges' salaries and the other two factors mentioned above.

If accepted, the Government formula would be applied, salaries would be calculated once and only changed in the period between now and the next mandatory review of Judges remuneration, in January of 2001, on the basis of a cost of living escalator.

The Commission received submissions and heard argument suggesting that the Territorial Court Judges salaries should be based on a framework developed in comparison to other Judges doing comparable work. The Government emphasized that the appropriate comparators were other Provincial Court Judges and not the Judges of the Supreme Court of the Northwest Territories.

Considering the nature of the work in our communities, the Northwest Territories cultural context and the rigours of northern work and travel, however, the Commission is of the view that Territorial Court Judges share much in terms of working conditions with our Superior Court Judges. The Territorial cost of living would also affect Judges in the Territorial and Supreme Courts of the Northwest Territories in similar fashion.

The Commission also notes that the jurisdiction and responsibilities of our Territorial Court Judges are unique and more extensive than those of many Provincial Court Judges in other jurisdictions. The Commission acknowledges the recent changes to the *Criminal Code*, the expansion of the Territorial Court's criminal law jurisdiction and the trend toward increased use of the Territorial Court to completely resolve criminal matters. Finally, the Commission accepts that the nature of our Territorial Court's caseload has increasingly come to include constitutional and Charter issues, matters hitherto more likely to be handled in the Supreme Court.

The Government's proposed approach would establish a Judge's salary on the basis of a unique combination of factors. However, the Commission recognizes that this formula would be based on a snapshot of western Judges' salaries taken each time the Commission held an inquiry. Western Judges' salaries will continue to change in response to each jurisdiction's ongoing review of Provincial Court Judges' remuneration. Thus, over the course of the period between reviews in the Northwest Territories, as salaries change in the western jurisdictions, our Judges could actually slip behind this average.

It also appears to the Commission that there are certain components of the Government's proposal which may be somewhat arbitrary. For example, the "working conditions differential" of \$12,000.00 per annum. When asked about that component of the proposed Judges' salary in the hearing, Mr. Voytilla responded :

" The \$12,000.00 is an estimate, Mr. Chairman, of what we...a reasonable estimate of what we consider to be the portion of difference in the working conditions between judges in the North and judges in the South. In our investigation into working conditions and in recognition of some of the issues that judges have to deal with in the North

respecting travel and facilities and inconvenience, we felt that some recognition of that was appropriate and so we proposed a \$12,000.00 amount to compensate for those working condition factors.”¹⁰

This differential would represent almost 8 percent of the Government’s proposed base salary for Territorial Court Judges. Consideration of Territorial Court Judges’ working conditions is, of course, mandatory and although the Commission sees some merit in the concept of a “working conditions differential”, the Government has articulated no objective basis for the calculation of the proposed \$12,000.00 amount.

Accepting as it does that the establishment of an acceptable remuneration package may always incorporate some element of subjectivity, the Commission is nonetheless concerned that adopting this “differential” as proposed could leave the Judges vulnerable in future reviews to differences between their view and the Government’s view of Territorial Judges’ working conditions

There can be no doubt that the approach proposed by the Government is more complex than that recommended by the Territorial Court Judges. The Government’s approach would also involve separate calculation of the Chief Judge’s base salary and the possibility that this salary might vary independently of regular Judges’ based on different factors. The Commission is of the view that the Government’s proposed approach would result in greater uncertainty about Judge’s salaries than the alternative approach urged by counsel for the Judges.

The Commission sees clear advantages to adopting a simple and predictable formula for the calculation of Territorial Court Judges’ salaries. Although the Commission is not bound to accept the 1997 agreement, we also see definite benefits in adopting an approach that was developed cooperatively and was acceptable to the parties.

The Commission therefore recommends, that the formula contained in the 1997 agreement for calculating Territorial Court Judge’s salaries be retained at least until the next periodic review of Judges’ remuneration. The Territorial Court Judges’ base salaries should be set on the basis of this formula.

Mandatory Days of Unpaid Leave:

The Government recommended that the requirement for Territorial Court Judges to take five days of unpaid leave be eliminated. The Territorial Court Judges recommended that this requirement remain untouched until the five days unpaid leave was eliminated for members of the Court’s administration who are members of the Public Service.

As was noted by Mr. Voytilla in his presentation to the Commission:

¹⁰ Transcript, pages 19-20.

"This is, of course, the requirement for judges to take five days of unpaid leave, formerly known as "Donny Days". This requirement should be removed and any such linkages to public service compensation avoided in the future."¹¹ (Emphasis added)

The Commission agrees with the view expressed by Mr. Voytilla and finds that the requirement to take unpaid leave in the same fashion as members of the Public Service represents a close and unacceptable linkage between the Territorial Court Judges remuneration arrangements and those of government employees. The Commission therefore recommends that the five days of mandatory unpaid leave be eliminated.

Considering the recommendations for improving the Judges' compensation package included in this report and the benefits accruing to the Judges based on the proposed continued application of the 1997 formula for calculating Judges' salaries, the Commission does not recommend any additional compensation be provided for these days.

The Chief Judge's Differential:

Given the Commission's recommendation with respect to Territorial Court Judges' salaries and the formula for calculating these salaries, a decision must also be made on the question of the Chief Judge's differential or allowance.

The parties both recognized the additional responsibilities shouldered by the Chief Judge and there was no dispute over the proposal that an additional amount should be paid to compensate for the special duties of the Chief Judge.

The Territorial Court Judges have recommended that an additional \$15,000.00 per year is appropriate and point out that the current differential of \$10,000.00 has been in place for many years and that the Chief Judge's duties have expanded since that amount was determined.

The Commission recognizes the importance of the extra responsibilities entrusted to the Chief Judge but also notes that since April 1, 1999, supervision of the Courts in Nunavut, including one of the former Territorial Court Judges is no longer the responsibility of the Chief Judge.

The Commission recommends that the Chief Judges' allowance be set at \$12,500.00 per annum.

¹¹ Transcript page 13.

Sabbatical Leave:

The submissions of the Territorial Court Judges indicate that only three eight month and one twelve month sabbatical leaves have been taken by Territorial Court Judges since the inception of the program. In his presentation to the Commission Mr. Malakoe had the following to say about the Judges' sabbatical program:

"the Government is suggesting that we go to a civil servant program. The current sabbatical program recognizes the needs of these judges. It works well....it was designed so that there was no additional cost to the GNWT when a Territorial Court Judge goes on sabbatical. The other judges were prepared to take on the additional work load and the 30 percent salary reduction that the judge on sabbatical leave gets compensated for the deputy judges that were required....the sabbatical program provides an opportunity for the Territorial Court Judge to go out and rejuvenate himself or herself without having to plan for it four or five years in the future, and that's important given the situation in the North..."¹²

As the Commission understands the current program, the Judge on sabbatical leave receives 70 percent of his or her regular salary for the period of the sabbatical. The 30 percent foregone is available to pay for the increased use of Deputy Judges during the period of the absence and the other Judges simply sit more days and bear a greater caseload to offset their colleague's absence. This system does not therefore impose any cost on the Government. Furthermore, any sabbatical is subject to the approval of both the Chief Judge and the Minister of Justice. Thus this system ensures that the Court's administrative requirements and the personal and educational needs of Territorial Court Judges are considered before a sabbatical leave is granted.

The Government proposes converting the sabbatical program to one modeled on that available to senior managers in the government. A Judge would have to contribute 20 percent of his or her annual salary to a deferred leave plan over four years with the sabbatical being taken in the fifth year at 80 percent of annual salary.

During the hearing, Mr. Voytilla described the current sabbatical program as a non-contributory benefit and suggested that the program represented "an extra burden to public expenditures".¹³ The Commission cannot agree with this characterization of the program. Judges taking sabbaticals contribute 30 percent of their regular salary in the period they are absent. The Judges as a group also contribute to the program by shouldering an extra workload in support of their colleagues.

There is no evidence that the current system is subject to any abuse. It does not impose any additional cost on the Government and it is much more flexible than the approach proposed by the Government which would require a Judge to plan a sabbatical four

¹² Transcript page 38 and 39.

¹³ Transcript, page 13.

years in advance. Finally, the change proposed by the Government would establish a system for Judges with all the appearance and characteristics of the system in place for senior managers in the civil service.

The Commission sees no reason to disturb the current system for sabbatical leave for Territorial Court Judges and recommends that the current system be retained.

Deputy Judges Payment:

Both the Government and the Territorial Court Judges recommended that payment for the services of Deputy Judges be based on a fraction of the annual salary set for Territorial Court Judges. The Government suggested the fraction be $1/250$ of the annual salary. The Territorial Court Judges recommended that the fraction be set at $1/210$ of the annual salary.

The difference resulted because the Judges urged in their submission that annual leave, educational leave and statutory holidays be subtracted from the total of number working days in a year in order to determine the number of "sitting days". The Government proposed the subtraction of only statutory holidays.

The Commission notes the important role played by Deputy Judges in supporting the work of our Territorial Court and the need to ensure that they are fairly compensated for the assistance they provide. Counsel for the Territorial Court Judges advised the Commission during the hearing that the hourly rate paid Deputy Judges was less than that paid most lawyers representing legal aid clients:

" You have asked an interesting point about the figure of \$66.67. I think that you would be interested to know that current legal aid rates for lawyers in the Northwest Territories say that lawyers with less than four years experience get \$65 an hour. Lawyers with four or more years experience and less than seven get \$75 an hour. 7 to 11, \$92 and lawyers with 11 years get \$109 an hour, so the \$66 figure is somewhat low."¹⁴

The Commission also notes that Deputy Judges receive no benefits other than the remuneration paid for their time. The Commission wishes to ensure that highly qualified and motivated Deputy Judges will continue to be available to assist our Territorial Court.

The Commission recommends that Deputy Judges be paid $1/210$ of the annual salary for a Territorial Court Judge for a sitting day and 50 percent of this amount for a non-sitting day.

¹⁴ Transcript page 45.

Judges' Pensions:

The issue of Judges' pensions was the most difficult and complex of the matters raised before the Commission. Chapter 4 above outlines the various proposals put forth by the Territorial Court Judges and the Government. We appreciate the cooperation and assistance of both parties to the inquiry on this issue.

The Commission notes that there are points of agreement between the parties with respect to some aspects of the pension issue. Both parties suggested that the accrual rate should be changed from 2 percent to 3 percent per year of future service.

The Territorial Court Judges have also requested that the 3 percent accrual rate should be applied to past judicial service. The Government of the Northwest Territories opposes retroactive benefit changes, and suggests in its letter of June 10, 1999, that retroactive change to judicial compensation is beyond the mandate of the Commission. The Government further stated that in accepting their appointments, before April 1999, the Judges also accepted the pension arrangements at the time of appointment.

The Commission does not consider a recommendation for a retroactive change to Territorial Court Judges' pensions to be appropriate. Accordingly, the Commission recommends that the accrual rate be changed from 2 percent to 3 percent per year for future Judicial service, effective April 1, 1999. The Commission recognizes that this change to the pension accrual rate will reduce the time to full pension for new Judges to 23 1/3 years and that it will also reduce the time to full pension for current Judges.

The Commission was advised that the increase recommended in the pension accrual rate constituted a significant benefit to the Territorial Court Judges. The Government of the Northwest Territories suggested that Judges should contribute to their pensions at a rate of 6 percent of annual salary. Such a contribution would effectively split the cost of the improvement to the pension scheme between the Government and the Territorial Court Judges. Accordingly, the Commission recommends that Judges be required to contribute 6 percent of their annual salary up to the maximum permitted under income tax legislation to their pensions.

The Territorial Court Judges, in their final submission of June 24, 1999, proposed that the computation of the pension should be based on the last year of salary, as in the current plan. The Government of the Northwest Territories has proposed that this should be changed to the final three years.

The Commission sees no need to change the arrangement now in place and recommends that the Judges pensions be paid at a maximum rate of 70 percent based on the last year of salary.

There should be no change to the provision which allows a Territorial Court Judge to retire with an unreduced pension at age 60. If a Territorial Court Judge retires before the age of 60, then the existing reduction of pension of 3 percent for each year before 60 should continue to be applied.

CHAPTER 6: SUMMARY OF THE COMMISSION'S RECOMMENDATIONS

1. Salary:

Territorial Court Judges base salary be set on the basis of the 1997 agreement until the time of the next inquiry.

2. Mandatory Unpaid Leave:

The requirement for Territorial Court Judges to take five days unpaid leave annually should be eliminated.

3. Chief Judge's Differential:

The Chief Judge's allowance be set at \$12,500.00 per annum.

4. Sabbatical Leave:

No change be made to the current sabbatical leave program.

5. Deputy Judges Payment:

Deputy Judges be paid at a rate based on 1/210 of a Territorial Court Judge's annual base salary per sitting day and 50 percent of this amount for a non-sitting day.

6. Judge's Pensions:

The accrual rate for Territorial Court Judge's pensions should be increased to 3 percent for future Judicial service and Judges should contribute 6 percent of their annual salary to the cost of their pensions up to the maximum permitted under income tax legislation, effective April 1, 1999.

The new accrual rate should only be applied prospectively, effective April 1, 1999.

The Territorial Court Judge's maximum pension should remain at 70 percent of the salary received during the final year of judicial service.

Early retirement provisions, including applicable penalties, in the current pension plan remain unchanged.

7. Other Aspects of Judges' Remuneration

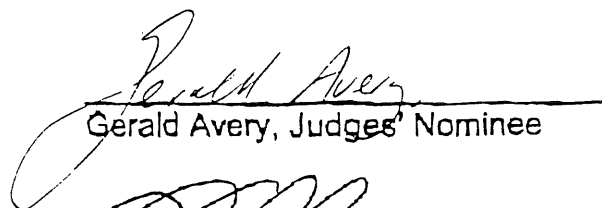
Other benefits and allowances included in the 1997 agreement should remain unchanged.

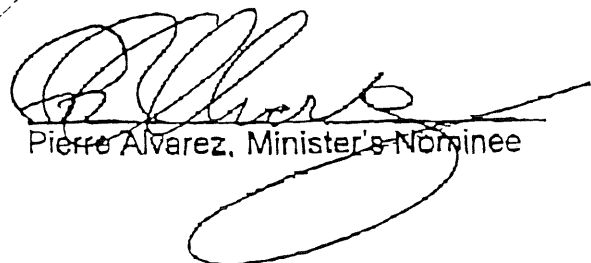
8. Other Matters

The Government of the Northwest Territories should consider amending the Act to increase the time available for the Commission to submit its report from 60 to 120 days.

Respectfully submitted this 12th day of July, 1999.


John E. Hill, Chairperson


Gerald Avery, Judges' Nominee


Pierre Alvarez, Minister's Nominee

