

# Saskatchewan Provincial Court Commission Report December 31, 2005

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# 1 Introduction

## 1.1 Provincial Legislation

The current Provincial Court Commission was appointed in September 2005 pursuant to section 36 of *The Provincial Court Act, 1998 (The Act)*. This is the third commission appointed under this legislation.

The Commission's jurisdiction is provided for in sections 38 and 51 of *The Act*, which are as follows:

38(1) A commission shall inquire into and make recommendations with respect to the following:

- (a) the salaries to be paid to:
  - (i) the chief judge;
  - (ii) an associate chief judge;
  - (iii) judges other than the chief judge, associate chief judges and temporary judges; and
  - (iv) temporary judges;
- (b) the remuneration to be paid to judges who perform administrative duties assigned to them pursuant to clause 8 (f);
- (c) the allowances to be paid to judges who reside in the Northern Saskatchewan Administration District;
- (d) professional allowances;
- (e) vacation leave;
- (f) pension benefits and additional retirement benefits.

(2) A commission may inquire into and make recommendations with respect to the following:

- (a) the support staff, facilities, equipment and security of the court;
- (b) the benefits to be provided to judges pursuant to regulations made pursuant to clause 65 (d).

(3) The salary recommended by a commission cannot be less than the salary being received by the judges on the day on which the report containing the recommendation is submitted to the minister.

(4) No commission regulation respecting pension benefits or additional retirement benefits shall reduce a person's benefit that accrued before the coming into force of the regulation.

51(1) At the request of the minister or the association made at any time during the term of the members of the commission, the commission may inquire into and make recommendations with respect to any matter of significance to the court.

(2) Within six months after the day on which a matter is referred to a commission pursuant to section (1), the commission shall submit a report to the minister and the association containing any recommendations of the commission with respect to the matter.

This Commission's term expires on June 30, 2008.

## **1.2 Membership of the Commission**

The Commission has three members. As required by section 36(2) of *The Act*:

- (i) one is appointed by the Minister of Justice
- (ii) one is appointed by the Saskatchewan Provincial Court Judges' Association
- (iii) these two members appoint a chairperson

The Commission members are:

- (i) Dr. David T. Barnard, Chairperson
- (ii) Silas E. Halyk, Q.C., appointee of the Saskatchewan Provincial Court Judges Association
- (iii) Daniel Ish, Q.C., appointee of the Minister of Justice

## **1.3 Process**

Advertisements calling for submissions to the Commission were placed in the Regina *LeaderPost* and the Saskatoon *StarPhoenix*. The advertisements indicated that submissions would be received by the Commission. In addition, specific notices were sent to the Law Society of Saskatchewan and the Canadian Bar Association. Advertisements were again placed in the same papers notifying of the dates and locations of the Commission Hearings.

The Commission was assisted by written submissions received from:

- Saskatchewan Provincial Court Judges Association
- Deputy Minister of Justice, on behalf of the Government of Saskatchewan
- Canadian Bar Association – Saskatchewan Branch
- Saskatoon Criminal Defence Lawyers Association
- Honourable Chief Judge Gerald T.G. Seniuk

and by replies from

- Saskatchewan Provincial Court Judges Association
- Deputy Minister of Justice, on behalf of the Government of Saskatchewan

These documents and other material can be found at [www.provincialcourtcommission.sk.ca](http://www.provincialcourtcommission.sk.ca)

The Commission heard oral submissions on November 14, 2005 in Saskatoon and on November 16, 2005 in Regina.

## **2. Background and Context**

### **2.1 Previous Judicial Compensation Commissions**

There have been four previous Provincial Court Commissions in Saskatchewan:

- The Schmeiser Commission reported in 1991
- The Irwin Commission reported in 1993
- The Bundon Commission reported in 1998 and 1999
- The Vicq Commission reported in 2002

The Bundon and Vicq Commissions reported under the current legislation. The first three subsections of this Background and Context section of our report are a very slight reworking of the corresponding material in the Report of the Vicq Commission.

The provincial government rejected the recommendations of the Schmeiser and Irwin Commissions. The initial salary recommendation of the Schmeiser Commission was for a salary of \$104,000 (October 1, 1990) and the initial salary recommendation of the Irwin Commission was \$108,000 (April 1, 1993).

The rejection of the Irwin Commission salary recommendations resulted in the commencement of a lawsuit against the Provincial Government by the Saskatchewan Provincial Court Judges Association. In June 1997 the Minister of Justice announced that a settlement had been reached in the lawsuit. Under the terms of the settlement, the amount of the salary for provincial court judges was \$112,961 effective April 1, 1997.

The first Bundon report addressed a joint submission from the Minister of Justice and the Saskatchewan Provincial Court Judges Association (SPCJA) and the recommendations of the Commission followed the 1997 settlement.

The second Bundon report addressed the period from April 1, 2000 to March 31, 2003. On January 13, 2000 the Provincial government announced that it would accept all of the recommendations of this Commission. The salary recommended by the Commission was \$143,000 for the period ending March 31, 2003.

The Vicq report addressed the period from April 1, 2003 to March 31, 2006. The Provincial government announced in January of 2003 that it accepted all of the recommendations of this Commission. The recommendations resulted in a salary of \$165,190 for the period ending March 31, 2006.

### **2.2 Judges Reference**

The work of this Commission is ultimately founded on the principle of judicial independence. The basis for and constitutional importance of that principle was discussed at length by Chief Justice Lamer in the majority judgment in *Reference re Provincial Court Judges*, [1997] 3 S.C.R. 3, (*Judges Reference*). In that case, the Supreme Court of Canada held that an independent, efficient and objective judicial compensation

commission process is imperative for ensuring judicial independence. The three core characteristics of judicial independence are security of tenure, financial security and administrative independence.

In the *Judges Reference*, Chief Justice Lamer confirmed that the three “core characteristics” of judicial independence also have two “dimensions”, being the individual independence of a judge and the institutional or collective independence of the court of which the judge is a member. [*Judges Reference*, paragraph 118] He also explored the relationship between these three core characteristics and the two dimensions at some length, noting that financial security has both an institutional and a collective dimension. [*Judges Reference*, paragraphs 119-121] This collective dimension of financial security is, in turn, the foundation on which the Chief Justice builds the requirement for an independent commission interposed between the judiciary and other branches of government. His findings in this regard are summarized as follows in the Headnote of the *Judges Reference*:

Financial security has both an individual and an institutional dimension. The institutional dimension of financial security has three components. First, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of some or all persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, to avoid the possibility of, or the appearance of, political interference through economic manipulation, a body, such as a commission must be interposed between the judiciary and the other branches of government. The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature. Provinces are thus under a constitutional obligation to establish bodies which are independent, effective and objective. Any changes to or freezes in judicial remuneration made without prior recourse to the body are unconstitutional. Although the recommendations of the body are non-binding they should not be set aside lightly. If the executive or legislature chooses to depart from them, it has to justify its decision according to a standard of simple rationality – if need be in a court of law ...

The requirement for an independent body to recommend the level of judicial remuneration is, accordingly, the first component of financial security. The second component is also concerned with process. That is, the judiciary cannot engage in negotiations concerning remuneration with the executive or representatives of the legislature. The third component is substantive, being the requirement that judicial salaries cannot be reduced or permitted to fall below a “floor” or minimum which might bring judicial independence into question. As noted by the Chief Justice:

I have no doubt that the Constitution protects judicial salaries from falling below an acceptable minimum level. The reason it does is for financial security to

protect the judiciary from political interference through economic manipulation, and to thereby ensure public confidence in the administration of justice. If salaries are too low, there is always the danger, however speculative, that members of the judiciary could be tempted to adjudicate cases in a particular way in order to secure a higher salary from the executive or the legislature or to receive benefits from one of the litigants. [*Judges Reference*, paragraph 192]

In the *Judges Reference*, the Supreme Court of Canada provided governments with a blueprint for a process to determine judicial compensation in a way that respects judicial independence. The Saskatchewan response was *The Provincial Court Act, 1998*.

### **2.3 Mandate and the Vicq Commission**

Although the *Judges Reference* mandated independent review of judicial compensation, it did not specify the exact details of that review. Indeed, the Chief Justice explicitly stated that the exact shape and powers of judicial compensation commissions should be left to the executive and the legislature. [*Judges Reference*, paragraph 167] As noted above, the Chief Justice stated that such commissions must be independent, effective and objective, and confirmed the requirement that judicial salaries not fall below a floor or minimum. He also cited with approval language from the *Draft Universal Declaration on the Independence of Justice* that judicial salaries should be “adequate [and] commensurate with the status, dignity and responsibility of their office”. [*Judges Reference*, paragraph 194] He did not list criteria, instead commenting as follows:

... I recommend, (but do not require) that the objectivity of the commission be ensured by including in the enabling legislation or regulations a list of relevant factors to guide the commission’s deliberations. These factors need not be exhaustive. A list of relevant factors might include, for example, increases in the cost of living, the need to ensure that judges’ salaries remain adequate, as well as the need to attract excellent candidates to the judiciary. [*Judges Reference*, paragraph 173]

*The Provincial Court Act, 1998* – unlike the legislation in many other jurisdictions – does not list relevant factors that might guide the Commission’s recommendations. It states only that the Commission shall “inquire into and make recommendations” as to the matters listed in section 38.

The scope of the Commission’s mandate was, however, addressed at some length in both the written and verbal submissions of the Minister of Justice and the Provincial Court Judges Association to the Vicq Commission. In brief, the Minister of Justice took the position that the Commission should find it had a restricted mandate, despite the fact that the *Act* describes the Commission’s task only in the most general terms. More specifically, the Minister submitted that the second Bundon Commission went through a rigorous process to set the “base” compensation package for Saskatchewan judges, and

... that the task of the current [Vicq] Commission is not to establish a new compensation package. Rather, it is to review the compensation package that has already been established, in light of events since the previous Commission's report, to determine what adjustments are needed to it. [page 8 Justice submission]

The Minister argued that this approach was not only consistent with, but required by, the reasoning in the *Judges Reference*. The Minister also relied on the reasoning in *Provincial Court Judges Association of New Brunswick v. New Brunswick (Minister of Justice)* (2002), 213 D.L.R. (4<sup>th</sup>) 329.

The Saskatchewan Provincial Court Judges Association, on the other hand, took a more expansive view of the Commission's mandate. The Association did not suggest that the work of the second Bundon Commission or its predecessors should be ignored. It described their recommendations as providing "an informative and helpful backdrop to the deliberations of the Commission." The Association's approach may be best summarized by the following passage:

... the work of the Provincial Court Commission is to evaluate all relevant factors to meet legislative and constitutional tests for judicial remuneration and benefits. This arguably requires a fresh analysis each time so that the public can be confident that all issues have been considered in formulating recommendations. [page 2, Reply to Saskatchewan Justice Submission, Saskatchewan Provincial Court Judges Association]

In addition to this principled disagreement at the Vicq Commission hearings, the Association and the Minister also differed on the specific factors that should inform the Commission's work, and the weight to be accorded to those factors. The Association, despite its support for a "fresh analysis", proposed a narrow view of what should be considered relevant. It submitted, for example, that the appropriate salary comparators are limited to Queen's Bench salaries and the salaries paid to judges in other jurisdictions. It placed particular emphasis on Queen's Bench salaries, arguing that a judge is a judge and comparing the nature and quantity of the work of our two trial courts. It argued that it is inappropriate to take any account of the salaries of civil servants. It also submitted that the Commission should not take account of the value of benefits such as the judicial pensions, and that it is inappropriate to take account of general economic conditions in Saskatchewan.

The Minister, on the other hand, argued that judicial salaries should be "made in Saskatchewan", and should take account of general fiscal and economic conditions. The Minister presented evidence in relation to the compensation paid to both public and private employees, the cost of living in Saskatchewan and the overall level of Saskatchewan salaries as compared to other provinces. He also took the position that Queen's Bench salaries are at best of "peripheral" interest to the work of the Commission, and that salaries paid to judges in Ontario and Alberta are also largely

irrelevant due to the very different economic and compensation conditions in those wealthiest of Canadian provinces.

The Vicq Commission was keenly aware throughout its deliberations of the foundation principle of judicial independence. The Commission's task – as Chief Justice Lamer made very clear – is to make recommendations based on *objective* factors, and it should be “fully informed” before doing so. [*Judges Reference*, paragraph 172] In the view of the Vicq Commission, the interpretation of the *Provincial Court Act, 1998* which best meets these objectives is that the Commission has the jurisdiction to and should consider a broad range of “objective” factors. This approach is also consistent with Chief Justice Lamer's recommendation that legislation contain a “non-exhaustive” list of relevant factors, and that the list might include the need for “adequate” salaries. The notion of “adequacy” is inherently flexible, and invites the Commission to consider all factors it considers relevant in the course of discharging its constitutionally mandated task.

A broad approach to relevance is also consistent with legislation and regulations in other jurisdictions, which the Commission found helpful in understanding this key issue. The Federal process, for example, is governed by the *Judges Act*, which lists the following factors:

- prevailing economic conditions in Canada, including the overall economic and financial position of the federal government;
- the role of financial security in ensuring judicial independence;
- the need to attract outstanding candidates; and
- *any other objective criteria that the Commission considers relevant* (emphasis added)

Similarly, section 25 of the *Alberta Provincial Judges Compensation Commission Regulation* (AR 100/2000) contains a list of criteria that is broad and “non-exclusive”:

- 25 The Commission, in making recommendation in its report, must give every consideration to the following criteria:
- (a) the constitutional law of Canada;
  - (b) the need to maintain the independence of the judiciary;
  - (c) the unique nature of the judges' role;
  - (d) the need to maintain a strong court by attracting highly qualified applicants;
  - (e) how the Alberta compensation package compares to compensation packages in other jurisdictions, having regard to the differences between these jurisdictions in Canada, including the federal jurisdiction;
  - (f) the growth and decline in real per capita income;
  - (g) the need to provide fair and reasonable compensation for judges in light of prevailing economic conditions in Alberta and the overall state of the economy;
  - (h) the cost of living index and the position of the judges relative to its increases;
  - (i) the nature of the jurisdiction of the court and masters in chambers;



- (j) the current financial position of the government; and
- (k) any other factors relevant to the matters in issue

So to summarize, it was the Vicq Commission's view that while all of its deliberations must be framed by and fully respect the principle of judicial independence, it was, within that framework, entitled to take account of a wide variety of "objective" factors. Those factors include the history of judicial remuneration, changes in cost of living, prevailing economic and fiscal conditions in Saskatchewan, public and private sector salary comparators both within and outside Saskatchewan, recruitment and retention issues and the unique responsibilities and work environment of Provincial Court judges.

The Vicq Commission did not agree with the suggestion that because judges are not civil servants, public sector compensation is irrelevant, or that the only significant comparator is the salary of other judges. Similarly, the Commission did not agree with the Minister's submission that the jurisdiction of the Commission is limited to a review of the current salary and compensation of Saskatchewan Provincial Court Judges in light of events since those were last determined. The Vicq Commission built its recommendations on the foundation established by the Courts and by its predecessors, which were located within a provincial and national universe. It did, however, also undertake a "fresh analysis". In the Commission's view, that was both sensible and constitutionally appropriate.

The Vicq Commission accordingly took account of a wide variety of factors in reaching a recommendation that was intended to result in compensation for Provincial Court judges that was "adequate [and] commensurate with the status, dignity and responsibility of their offices." [*Judges Reference*, paragraph 194]

## **2.4 The Vicq Commission and Government's Response**

The material in this section is taken from the Submission on Behalf of the Government of Saskatchewan to the 2005 Provincial Court Commission.

The Vicq Commission issued its Final Report on December 31, 2002. The Commissioners were unanimous in their conclusions. They stated that the constitutionally recognized principle of judicial independence informed all of their deliberations. When crafting their ultimate recommendations the Commissioners weighed an array of factors. The Vicq Commission enumerated these factors in no particular order, including:

- The history of judicial remuneration in Saskatchewan
- Changes in the cost of living
- Prevailing economic and fiscal conditions in Saskatchewan
- Public and private comparators both within and outside Saskatchewan
- Recruitment and retention
- The unique responsibilities and work environment of Provincial Court judges

As of April, 1, 2005, the monetary values of the various recommendations made by the Vicq Commission are as follows:

- Chief Judge – Annual Salary: \$175,190

- Associate Chief Judge – Annual Salary: \$170,190
- Judge – Annual Salary: \$165,190
- Pension and Retirement Benefits: Benefit rate of 3% per year of service, maximum of 23 1/3 years, times average salary over best 3 years. Full pension of 20% times average salary over best 3 years, when age and years of service equal 80, at age 58 with minimum of 18 years’ service. Contributory 5%. Pensions are indexed to 75% of CPI.
- Northern Allowance: \$8,259
- Professional Allowance: \$3,000
- Remuneration for Judges who perform Administrative Duties: \$3,000
- Annual Sick Leave: 18 days
- Annual Vacation: 30 days
- Group Life Insurance: \$400,000 plus \$100,000 for accidental death
- Disability Benefits: 100% of salary for temporary disability (up to 1 year); 70% for permanent disability. On recommendation of Judicial Council. No employee premiums.
- Dental Plan: No employee premiums.
- Extended Health Plan: No employee premiums.
- Monetary Allowance for travel and Meals: Actual and reasonable traveling and sustenance expenses.

In accordance with section 43 of the *Act*, the Minister of Justice announced in January 2003 that he accepted all of the recommendations in the Final Report of the Vicq Commission.

## **2.5 Supreme Court of Canada Responding to New Brunswick**

The Supreme Court of Canada has once again considered judicial remuneration since the report of the Vicq Commission was filed. The material in this section is based on a summary of *Provincial Court Judges Association of New Brunswick V. New Brunswick (Minister of Justice)*, 2005 SCC 44 (“*NBPCJA*”) presented as part of the Submission on Behalf of the Government of Saskatchewan to the 2005 Provincial Court Commission.

In this case the Supreme Court revisited the principles it had laid down earlier in the *Judges Reference*. In this judgment that was released on July 22, 2005, the Court refined certain of its earlier pronouncements and clarified the philosophy animating its original ruling. The central issue to be decided in *NBPCJA* was what did Chief Justice Lamer mean when he ruled that “simple rationality” was the standard of judicial review to be applied when any government has to defend its decision to reject – in whole or in part – the recommendations of a judicial compensation commission. The Court in its unattributed opinion clarified that the applicable standard is rationality, and the “adjective ‘simple’ [employed by Chief Justice Lamer in the *Judges Reference*] merely confirms that the standard is rationality alone” (*NBPCJA*, paragraph 29). Further, when applying this in a particular case, reviewing courts are admonished that “deference must be shown to the government’s response since the recommendations are not binding” (*NBPCJA*, paragraph 40). In the course of its analysis, the Court took time to review and elaborate

on the constitutionally required attributes of judicial compensation commissions. Only those aspects of the Court's opinion relating to the nature of the commission process and its recommendations will be summarized here.

The Court characterized compensation commissions as “the forum of discussion, review and recommendations” about judicial remuneration. Although recommendations made by such a commission did not bind the government, the Lamer Court that decided the *Judges Reference* hoped that they “would lead to an effective resolution of salary and other related issues” (*NBPCJA*, paragraph 11). While this hope may not have been realized in other provinces, in Saskatchewan all salary recommendations of Provincial Court Commissions since 1997 have been accepted by successive provincial administrations.

Turning to the issue of how compensation commissions should operate, the Court set out guidelines. First, the Court emphasized the unique function of these commissions, namely, it is “neither adjudicative interest arbitration nor judicial decision making”. The *Charter* does not intend for these commissions to be adversarial or to mediate disputes between the executive and judicial branches of government respecting specific matters of judicial compensation. Rather, their function is consultative as their mandate is to identify, and make non-binding recommendations pertaining to, “the appropriate level of remuneration for the judicial office in question” (*NBPCJA*, paragraph 14).

Second, when fulfilling their constitutional mandate compensation commissions are encouraged to adopt a flexible process that will facilitate consideration of all issues relevant to judicial compensation. The mandate of a compensation commission is prospective in nature, namely to recommend appropriate levels of judicial remuneration for the next three to five years, and while its task is “not simply to ‘update’ the previous commission’s report”, absent reasons to the contrary “the starting point should be the date of the previous commission’s report.” (*NBPCJA*, paragraph 14).

Third, a new compensation commission should take into account the report and recommendations of its predecessor or predecessors. While the commission must assess judicial remuneration “in its own context”, it should build upon the foundation set by previous commissions. However, a commission may reconsider the work of previous commissions if it considers that work to have been constrained by then current circumstances.

The reports of previous commissions and their outcomes form part of the background and context that a new compensation committee should consider. A new commission may very well decide that, in the circumstances, its predecessors conducted a thorough review of judicial compensation and that, in the absence of demonstrated change, only minor adjustments are necessary. If on the other hand, it considered that previous reports failed to set compensation and benefits at the appropriate level due to particular circumstances, the new commission may legitimately go beyond the findings of the previous commission, and after a careful review, make its own recommendations on that issue. (*NBPCJA*, paragraph 15)

## **2.6 Key Arguments Presented to This Commission**

There were several matters before this Commission but it was clear from the beginning of our proceedings that Government and the Judges did not disagree on the disposition of most of these matters. Our recommendations given in a subsequent section address them, as is required by our mandate. The only significant issue on which we needed to consider different perspectives was the issue of the basic salary level for judges.

In the Submission Presented on Behalf of the Government of Saskatchewan, the argument about salaries was summarized as:

- the current level of judicial remuneration greatly exceeds the constitutionally acceptable minimum,
- no significant changes have occurred to either the provincial economy or the level of compensation paid to senior public officials or senior members of the Bar in Saskatchewan, and thus
- only minor adjustments to the compensation package currently paid to judges are warranted.

With respect to the first point, the Commission agrees that the current level of remuneration exceeds the constitutionally acceptable minimum. The constitutionally acceptable minimum (a non-defined lowest acceptable standard) is only one of a myriad of factors that the Commission should take into account in determining an appropriate level of compensation.

The second point is disputable. Government argued to the Vicq Commission that the state of the provincial economy was relevant, and that the economic performance at that time was not good. Since then the economic performance in Saskatchewan has been strong. Specifically, the province has, as the Submission by the Saskatchewan Provincial Court Judges Association pointed out, reached a level of economic performance such that it no longer receives equalization payments from the federal government. Further, there has recently been a significant increase in the salaries paid to Deputy Ministers in Saskatchewan.

The conclusion that only minor adjustments are warranted is not obvious to this Commission. The submission from Government argued again, as with the Vicq Commission, that only incremental work was required of us. We see the role of the Commission as requiring us to determine whether in our judgment all factors were appropriately dealt with by our predecessors. This is not, of course, to call into question their decisions, but to recognize that in different circumstances the factors might be assessed differently. And we are convinced that it is required of us to do so, as the *NBPCJA* decision indicates (quoted above).

In the Submission by the Saskatchewan Provincial Court Judges Association it was argued that:

- the workload of the Court has increased,
- the applicants for positions as judges are not diverse enough, with few coming from the large legal firms in the province,

- the Saskatchewan economy has improved its performance,
- legitimate salary comparator groups include judges of the Court of Queen’s Bench working in Saskatchewan, judges in the Provincial Courts of other provinces, and senior public officials in Saskatchewan all of which groups can be used in support of an argument for a substantial adjustment to Provincial Court judges’ salaries in Saskatchewan.

The issue of workload is one that should be addressed by determining the appropriate number of judges in Saskatchewan, rather than be reflected in arguments about the salary to be paid to individual judges.

Government agrees with the second point, but argues that the applicants are strong so there is not a recruitment or retention issue. Nonetheless, there is room to consider how much of a financial disincentive between the salaries earned by members of large firms and salaries earned by judges of the Provincial Court might be in the best interest of the public in terms of the diversity of candidates coming to the Court.

It is indisputable that provincial economic performance has improved. Government argues that there is no guarantee that it will continue to be strong. This is no doubt true, but it is peculiar to argue to the Vicq Commission that an under-performing economy should not be asked to support higher salaries and then to argue to this Commission that a healthy economy should also not be expected to support higher salaries.

Finally, the choice of comparator groups and the manner in which the data from these groups should be used is at the heart of the issue for this Commission. While the expectation that the Commission should be “objective” and should consider “objective” factors is a laudable one, it is not a simple one. And it is certainly not possible to choose factors or to analyze those factors without exercising discretionary judgment. This Commission does not find the argument to compare with the Court of Queen’s Bench to be compelling. The two courts are separately recognized in Canada’s Constitution and the jurisdiction of each is vastly different. While the parity argument, or movement toward parity argument, has been a hallmark of the submissions on behalf of the Provincial Judges before every Commission, our salary recommendation (set out below) proposes a principled and rational basis to determine the appropriate salary for Provincial Court Judges. The salary of Judges of the Court of Queen’s Bench adds very little to our principled approach.

## 3. Factors Considered

### 3.1 *Judicial Independence and Salary Comparators*

The foundational concept for the work of this Commission is the notion of judicial independence from other branches of government, as has been discussed above. But the pragmatic issue facing such a Commission is the discretionary judgment concerning what level of compensation responds to this foundational concept, and the form of analysis used to support that discretionary judgment.

Asking whether 0 is equal to 1 is simple. Asking what comparator groups of salaries are appropriately taken into consideration when looking at the salaries of judges of the Provincial Court of Saskatchewan is not simple. Discretionary choices are necessary. Judges and Governments disagree in the exercise of their discretion on such choices. Members of Commissions are required to make their own discretionary choices.

- Should judges of other courts here in the province be considered?
- Should judges of provincial courts elsewhere be considered?
- Should other senior appointees paid from public funds be considered? If so, then what other senior publicly funded positions are most relevant?

While both Government and the Judges have views on this matter, the only standard to which our mandate makes reference is the national average. In the *Act*, this is defined to be “the average of the salaries paid to judges of provincial courts or territorial courts of the other provinces and territories of Canada, calculated as of the most recent occurrence of the date January 1”. [*Act*, paragraph 35] The significance of this concept is that in the event a Commission’s advice to Government with respect to salaries is not acceptable, the Minister may

where the report recommends a salary that is higher than the national average, fix a salary, in a manner that meets constitutional tests of judicial independence and in an amount that is not less than the national average, that is to be substituted for the salary recommended in the report [*Act*, paragraph 45(1)(b)(ii)]

This provision is unique because there is no comparable provision in the legislation dealing with Commissions in any other province. Further, it constrained this Commission in a way not anticipated by the reasoning of the Supreme Court of Canada in the 2005 New Brunswick case.

Even if there can be agreement on the choice of comparator groups, a collection of numbers is not as simple as a single number. The science of statistics and statistical analysis deals with the inherent complexity of understanding a set of numbers and, even worse, of comparing one set of numbers to another set. This is another area where discretion must be exercised. Consider the relatively simple matter of determining the comparison between the salaries in the Provincial Court of Saskatchewan and the salaries in other provincial courts, as the *Act* anticipates.

- Should all other provincial courts be considered?

- Should outliers (highest and lowest) be removed, on the assumption that they are so eccentric as to distort the overall picture?
- Should courts that are not “similar” to Saskatchewan’s with respect to mandate be excluded?
- Should only those provinces that are not receiving equalization payments be considered?
- Should the simple average of salaries paid to a group be the relevant comparator statistic or should a weighted average be used (i.e., weighting the salary by the number of judges receiving it so that small exceptional data sets are not given undue significance)?

It is clear that all parties – judges, governments, commissions – make discretionary choices about what comparator groups should be used, and then make discretionary choices about how to analyze the data. This is the heart of the issue before this Commission. The submissions from the Judges and the Government, as well as the other submissions by other parties, all concentrated on this complicated matter of choice.

### ***3.2 Attracting Excellent Candidates***

In the presentations made to this Commission it was stated that there have been excellent candidates in the pools for positions as judges of the Provincial Court of Saskatchewan. However, the Judges and some other presenters argued that there is not sufficient diversity in the pools of candidates. Specifically, it was argued that most candidates come from public practice either having worked for Government or having been public defenders. There are few candidates and thus few appointments that are drawn from, for example, the largest law firms in the province. One explanation presented for this was the disincentive of a significant reduction in salary that such a person would experience in moving from private practice to a judgeship.

While the identified pattern certainly exists, it is only an inference that salary is a significant factor. This is for us supporting evidence that suggests an increase in salaries would be appropriate, but would not be compelling on its own without further analysis to determine the significance of salaries relative to other factors considered when lawyers make career choices.

## 4. Commission Recommendations

### 4.1 Salaries

The Commission has considered a number of factors. In particular, we have examined the reasoning of previous Commissions in considerable detail; we have found the summary of the factors to be considered produced by the Vicq Commission to be very helpful and representative of our own views.

Beyond that, it has been significant to us in our considerations that prior to the current process being established by the *Act*, Government received from the Schmeiser and Irwin Commissions recommendations for increases that it did not accept. Had those recommendations been accepted, the starting point for our work would arguably have been quite different. From one point of view, there is an upward adjustment to the salaries of Provincial Court judges that was recommended some time ago but that was not implemented. Further, it has been significant to us that the only point of comparison established in the *Act* is the national average as a minimum below which Government cannot set salaries if a Commission recommends that they be set at a level above the national average.

After taking into account all the factors, we have decided to recommend a salary for judges of the Provincial Court of Saskatchewan that is set at the national average. But, as we have briefly discussed, even though the *Act* gives a definition to this term, there is still room for interpretation. We stress the principle, and now lay out the details of the calculation we have performed to arrive at our specific numerical recommendation.

Both the Government and the Judges provided us with data on salaries in provincial and territorial courts. The data from Government (exhibit G2 of the material presented to us) was very conservative, presenting only actual and agreed arrangements. The material from the Judges (exhibit J6) was more predictive, projecting what might happen in other jurisdictions under two sets of assumptions. One projection showed current salaries plus an adjustment for cost of living, while the other showed the salaries that will be in place if the recommendations of other Commissions are adopted. This second set of material is more helpful to us, since we are to make a recommendation that will take effect on April 1, 2006.

Accordingly from these data we have computed the “national average” in several ways. We have used both projections, simple and weighted averages, and have calculated with all other jurisdictions (not including Saskatchewan) as well as without the maximum (Nunavut) and without either the maximum or minimum (Newfoundland). The reason to consider omitting Nunavut is the difference in mandate since there are federal responsibilities there. The reason to consider omitting both the maximum and the minimum is to let the outliers have less impact on the central tendency represented by the average.



Another proposal made to us was that we consider the economic status of other jurisdictions, including only those that are “have” provinces, i.e., that contribute to the federal equalization program rather than draw from it. This proposal does not seem reasonable to us because it is too volatile and because it appears to us essentially to overweight ability to pay. While the ability to pay should be a consideration, it is certainly a lesser consideration than overall comparability with other groups.

Following are the various results of our calculations (some of these were provided in the Judges’ submission).

	Current+COLA		Recommended	
	Simple average	Weighted	Simple	Weighted
All others	190404		196199	
		192282		207162
Omit Nunavut	184977		191299	
		192099		207027
Omit min&max	187557		194511	
		192990		208321

We stress that the principle of the national average underlies our reasoning, but that what follows is clearly pragmatic and circumstantially conditioned and takes into account the various factors earlier discussed. It can be seen that there are arguments for a “national average” in April of 2006 that would range from (to the nearest \$1,000) \$185,000 to \$208,000. It is clear that at least some of the recommendations put forward by other Commissions will be implemented, so that the “Recommended” group of estimates is a more likely prediction of the future than is the “Current + COLA” group of estimates. A simple average omitting the minimum and maximum values yields a value of \$194,511 which we round to the nearest \$1,000 (not wanting to attribute inappropriate precision to this result) to give \$195,000.

The Commission recommends that the base salary for judges be set at \$195,000 for the period April 1, 2006 through March 31, 2007.

For the period April 1, 2007 – March 31, 2008 this amount should be adjusted by the increase in the Saskatchewan Consumer Price Index (CPI) as measured between January 1, 2006 and December 31, 2006. This adjustment shall not be less than zero.

For the period April 1, 2008 – March 31, 2009 the previous year’s salary shall be adjusted by the Saskatchewan CPI as measured between January 1, 2007 and December 31, 2007. This adjustment shall not be less than zero.

The Commission recommends that in each of the years mentioned the Chief Judge receive a salary that is \$10,000 greater than the amount determined for the base salary.

The Commission recommends that in each of the years mentioned the Associate Chief Judge receive a salary that is \$5,000 greater than the amount determined for the base salary.

The Commission recommends that in each of the years mentioned Administrative Judges receive a salary that is \$3,000 greater than the amount determined for the base salary.

The Commission recommends that in each of the years mentioned the daily rate for Temporary Judges be determined by dividing the annual salary by the number of available days of work, as has been the practice in the past.

#### **4.2 Other Matters**

The Commission recommends that pension calculations for the Chief Judge, the Associate Chief Judge and Administrative Judges include the additional compensation mentioned above as part of the salary.

The Commission recommends that the professional allowance available to judges be increased from \$3,000 to \$3,500 in part to address the cost of robes

The Commission recommends that Judge Gerald Morin be entitled to receive the Northern Allowance because his circuit includes multiple court points in the Northern Administration District.

The Commission is of the view that it does have the jurisdiction to award costs, as was the view of the Vicq Commission. However, the Commission orders that the counsel for the Government and Judges attempt to reach an agreement on the appropriate costs, as has been done following the work of past Commissions. If counsel cannot reach an agreement, or if counsel is of the view that such negotiations would violate the principle of the *Judges Reference* to avoid direct negotiations, then the Commission will remain seized of the matter and will hear submissions as to costs.

The Commission does not believe it is in our jurisdiction to address matters concerning retirees. Other matters brought to our attention in the submission by the Judges are being addressed by the Judges and Government together.

This report contains the unanimous recommendations of this Commission.

Dated at Regina, Saskatchewan, the 31<sup>st</sup> day of December 2005.

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Dr. David T. Barnard, Chairperson

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Silas E. Halyk, Q.C., Judges' Nominee

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Daniel Ish, Q.C., Minister's Nominee