

Report and Recommendations of the 2019 Yukon Judicial Compensation Commission

PRESENTED TO: THE JUDGES AND JUSTICES OF THE PEACE OF
THE TERRITORIAL COURT OF YUKON AND TO THE
GOVERNMENT OF YUKON

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I. INTRODUCTION

1. The 2019 Yukon Judicial Compensation Commission (the “Commission”) was established, as required every three years since 2001, under the *Territorial Court Act*, RSY 2002, c. 217, as amended (the “*Act*”).
2. The Commission is directed by the *Act* to inquire into and make binding recommendations on salary and other benefits payable to Judges and Justices of the Peace of the Territorial Court of Yukon (referred to as the “Judges” and the “JPs” respectively), here for the three fiscal year period, April 1, 2019 – March 31, 2022.
3. Together with any matter it considers relevant, the Commission bases its recommendations on the submissions presented to it by the parties and the public regarding the factors set out under section 19 of the *Act*.
4. As is encouraged under the *Act* and a 2005 Letter of Understanding, the parties presented joint submissions regarding salary increases for JPs and medical travel insurance coverage for Deputy Judges to the Commission for review and if determined appropriate, recommendation.
5. The Judges and Government of Yukon were unable to agree on salary increases for the Judges. As a result, the Commission conducted a formal hearing on the salary issue.
6. This report sets out the Commission’s recommendations on the disputed salary issue as well as the compensation issues agreed to by the parties following the Commission’s completion of its inquiry in accordance with the *Act*

II. THE COMMISSION AND ITS MANDATE

7. The 2019 Commission, the seventh such commission under the *Act*, was established by Order in Council 2019/80, effective June 14, 2019.
8. Section 13 of the *Act* allows for a commission to consist of one commissioner or three commissioners. With the parties’ approval, Debra Fendrick was appointed as the sole Commissioner of the 2019 Commission.
9. Part 3 of the *Act* sets out the Commission’s mandate and process. The Part 3 provisions direct the Commission to conduct an independent inquiry after receiving submissions from the parties in order to make recommendations respecting all matters relating to judicial compensation submitted to it.

10. Section 19 of the *Act* lists the factors the Commission must consider in carrying out its mandate. These factors are set out and discussed in detail in this report.
11. The Commission's recommendations pertain to compensation for both the Judges of the Territorial Court, including Deputy Judges, as well as the Justices of the Peace of the Court.
12. The Commission is to operate efficiently and economically and use mediation and other consensus processes to resolve differences between the parties.
13. The consensus model principles are echoed in a 2005 Letter of Understanding ("LOU") entered into between the Yukon government and the judiciary. The LOU promotes the making of joint submissions by the parties and outlines the process for the review or hearing of the parties' submissions by the Commission.
14. The Commission is required to provide written reasons for all its final recommendations. The Commission's recommendations are binding on the Yukon government, subject to a review by the Commission if it fails to deal with a matter required of it or an error is manifest in its recommendations.
15. The Commission's role is to contribute to maintaining and enhancing the independence of the Territorial Court of Yukon (the "Court") and its judiciary through the inquiry process and the report containing its recommendations.

III. THE 2019 COMMISSION PROCESS

16. The parties and their respective representatives before the Commission are:
 - The Yukon Territorial Court Judges and Deputy Judges, represented by Alison Latimer, lawyer,
 - The Yukon Government, represented by Gary Bainbridge, lawyer, and
 - The Yukon Territorial Court Justices of the Peace, represented by Steve Smyth, president of the Yukon Justices of the Peace Association
17. As outlined under the LOU, the parties communicated with each other identifying outstanding issue and possible areas of agreement before and during a series of teleconference "check in" meetings with the Commission during the fall and winter of 2019/2020.
18. In January, 2020, the Commission caused a notice under section 26 of the *Act* to be published in Yukon newspapers advising of the Commission's creation and purpose and seeking submissions from the public.
19. No submissions from the public were received in response to the notice.

20. In January, 2020, the parties advised the Commission that they were working on possible Joint Submissions. With the parties' agreement, the Commission set a hearing date for August 7, 2020.
21. On June 26, 2020, the Government and the Judges filed a Joint Submission on medical travel insurance for Deputy Judges.
22. On July 7, 2020, the Government and the JPs filed a Joint Submission on salary, that being the only outstanding issue of compensation between those parties.
23. The Government and the Judges filed individual written submissions on the issue of salary for the Judges on July 7, 2020, together with extensive supporting materials and as well as casebooks of legal authorities.
24. Lawyers for the Government and Judges appeared before the Commission at the August 7, 2020 virtual hearing. The JPs' representative had earlier advised the Commission that he would not be attending the hearing as there did not appear to be any issues affecting the Joint Submission of the JPs and the Government.
25. At the close of the August 7, 2020 hearing, the Government and Judges requested the Commission adjourn its proceedings until sometime after the Fall 2020 sitting of the Yukon Legislature so that it could be determined whether additional submissions to the Commission in respect of judicial pensions were required.
26. Section 18 of the *Act* provides that subject to a limited review provision under section 29, the Commission's term of office ends on the filing of its recommendations. The parties jointly requested that any recommendations on salary not be filed until the parties advised, or the Commission determined, that the pension issue was resolved or need not be addressed.
27. On September 23, 2020, the parties notified the Commission that they had agreed to withdraw the pension issue from the 2019 Commission, with the Judges reserving the right to raise the pension issue before a future Commission if the pension matter was not resolved to their satisfaction.
28. On October 23, 2020, to ensure that the public had an adequate opportunity to participate in a hearing before it, the Commission determined that a further call for public submissions was necessary. A public hearing date was scheduled for December 18, 2020. Notice of the public hearing was published in the *Whitehorse Star* and the *Yukon News* on November 20, 2020. The submissions filed on behalf of the Government, the Judges and the JPs were made publicly available on the Government's website.

29. No one from the public appeared at the December 18, 2020 virtual hearing. No further submissions were received from the parties at that time.
30. On January 4, 2021, given the time lapse since the August hearing, the Commission asked for additional submissions from the Judges and the Government regarding the current financial position of the Yukon government, a factor for consideration identified under section 19(a) of the *Act*.
31. The Judges and the Government filed written submissions on January 15, 2021 regarding the following documents:
 - Yukon Government 2020 – 21 Interim Fiscal and Economic Update, October 2020 (the “Update”)
 - Yukon Monthly Statistical Review, November 2020
32. On January 22, 2021, the Commission granted leave to the Judges to file further submissions in reply to a Crime Statistics Report attached to the Government's January 15, 2021 submission, with an opportunity for the Government to respond if it wished. The Judges filed their reply on January 29, 2021. The Government advised it would not be responding to that reply.
33. On January 22, 2021, the Commission also ruled that it would consider reports of judicial compensation commissions in comparator jurisdictions described under the *Act* that had been published following the hearing and delivery of submissions. The Commission made this ruling based on the inquiry-based model of the Commission process and the past practice of the 2010 Yukon Judicial Compensation Commission, which considered judicial salary figures made known following the filing of the parties' submissions.

IV. LEGAL PRINCIPLES APPLICABLE TO JUDICIAL COMPENSATION

34. Judicial independence is an unwritten legal norm, recognized and affirmed under Canada's *Constitution* and *Charter of Rights and Freedoms*, section 11(d). Judicial independence is necessary because the judiciary's role is to protect the *Constitution* and the values embodied in it and applies to both the individual, relating to the independence of a particular judge, and institutionally, relating to the independence of the court the judge sits on. Public confidence depends on the judiciary both being independent and being seen to be independent.¹
35. Judicial independence necessarily includes financial security for the judiciary, whose salaries are paid by the government of the province or territory where the court is situated.

¹ *Cameron v. Yukon*, 2011 YKSC 35 at para. 12

36. Prior to the Supreme Court of Canada's decision in the *PEI Reference* case², salary negotiations occurred in some provinces between provincial court judges or their associations and the government, sometimes resulting in lawsuits and public debate with the danger that the public might think that judges, no matter how independent they were in fact, could be influenced either for or against the government because of issues arising from the salary negotiations.
37. As a result, the Supreme Court of Canada declared that judicial compensation commissions were to be the sole forum for discussion, review and recommendations to a provincial government on judicial compensation issues.
38. Based on recommendations by Ted Hughes in 1998, following an inquiry requested by Yukon's Minister of Justice, the *Territorial Court Act* was amended to establish a judicial compensation commission process for Territorial Court Judges. Subsequent amendments were passed to include Justices of the Peace in the same process.
39. The Commission process is designed to operate efficiently and economically and encourages the use of consensus for parties to resolve their compensation differences. Only if the parties are not able to reach consensus, does the Commission hold a hearing.
40. The Commission itself is directed to employ consensus processes to assist the government and judiciary in resolving their differences.
41. Following the first few Commission reviews and pursuant to the direction in section 24(2) of the *Act* that mediation and other consensus processes be used, the Judges, the JPs and the Government signed a Letter of Understanding in January, 2005. The LOU outlines informal procedures for the parties to follow to address their outstanding compensation issues consistent with the established legal principles and the *Act*, while preserving a formal hearing procedure if the informal procedure proves unworkable.
42. If the discussions between the parties under the LOU result in agreement, the Commission is to examine any Joint Submission(s) arising from that agreement and if accepted, disclose them in the Commission's report and recommendations.
43. The judicial compensation commission process is neither adjudicative interest arbitration nor judicial decision-making. Its focus is to be on identifying the appropriate remuneration for the judicial office in question.³ The Commission is not obliged to adopt a Joint Submission, but should exercise caution in substituting its opinion in place of the parties' agreement.⁴

² *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1973] 3 SCR 3

³ *Cameron v. Yukon*, *supra* at para. 100

⁴ 2016 Yukon Judicial Compensation Commission Report, p. 15

44. It is preferable that reasonably detailed reasons be given for the Commission's recommendations, even when it has accepted a Joint Submission, in part because the reasons may be of assistance to the work of future commissions.⁵
45. Section 19 of the *Act* states that “the commission shall, in addition to considering any matter it considers relevant, address in its report submissions presented to it regarding” certain enumerated or mandated factors.
46. The enumerated factors under section 19 are:
- a. the current financial position of the government;
 - b. the need to provide reasonable compensation to judges;
 - c. the need to build a strong core by attracting qualified applicants;
 - d. the unique nature of the Yukon;
 - e. compensation provided to judges in the Northwest Territories, British Columbia, Alberta and Saskatchewan;
 - f. the laws of the Yukon;
 - g. the cost of living in the Yukon; and
 - h. any submissions filed by the public.
47. The Commission is of the view that section 19 should not be interpreted to apply only to “unresolved issues” but also where submissions are joint, that is where there is no disagreement or dispute on the issues between the parties.
48. Ultimately, whether the parties reach consensus or present unresolved issues to the Commission, it remains the mandate of the Commission to inquire into and make recommendations to the Yukon government on all matters of judicial compensation. The Commission must consider the parties’ submissions on the criteria described under section 19 of the *Act*, together with any matter the Commission considers relevant, in making its recommendations.
49. The Commission’s recommendations regarding judicial remuneration are binding on the Yukon government except to the extent that they exceed the highest total value of judicial remuneration provided to territorial or provincial judges of British Columbia, Alberta, Saskatchewan or the Northwest Territories.

V. ISSUES BEFORE THE COMMISSION

50. The following is a summary of the issues the parties asked the Commission to consider in making recommendations for the Judges’ and JPs’ compensation for the term of the Commission’s review:

⁵ *Cameron v. Yukon*, *supra* at para. 104

Salary:

1. What should the Commission recommend Judges receive for salary for the period April 1, 2019 – March 31, 2022?
2. What should the Commission recommend JPs receive for salary for the period April 1, 2019 – March 31, 2022?

Medical Travel Insurance for Deputy Judges:

1. Should the Commission recommend Deputy Judges of the Territorial Court receive an annual stipend to defray the cost of medical travel insurance while travelling to or working on court business in Yukon?

VI. SUMMARY OF PARTIES' POSITIONS ON THE ISSUES

51. As has been the practice regarding the setting of judicial remuneration across Canada since the *PEI Reference* case and expressly reflected in the *Territorial Court Act*, the parties are encouraged to identify and reach common ground on any outstanding issues of compensation prior to a hearing before the Commission.
52. In the case of the JPs and the Government, the parties agreed and presented a Joint Submission that the JPs receive a 2% per year increase to their hourly wage, effective April 1st of each year from 2019 – 2021, for all three JP categories.
53. The Government and JPs further agreed that all other terms, benefits, allowances and stipends in effect for the hourly paid JPs were to remain unchanged.
54. Similarly, the Government and the Judges were able to agree on one compensation benefit: medical travel insurance for Deputy Judges of the Court. In a Joint Submission, the Government agrees to provide a once annual stipend of \$220.00 to a Deputy Judge attending Yukon to cover the premium cost of medical insurance during the travel of the Deputy Judge to and from Yukon, as well time actively working in the Yukon. If the Deputy Judge chooses not to purchase travel insurance, the Deputy Judge may keep the annual payment of \$220.00.
55. The Government and the Judges also agree that all other compensation benefits for the Judges should remain unchanged. They agree that the single remaining issue between them is the salary to be paid to the Judges.
56. Both the Government and the Judges agree that the Judges' salaries should be increased, effective April 1 of each year, 2019 – 2021. Where they differ is on the amount of that increase.
57. The Judges say that for Yukon Judges to “catch up” and retain parity with judges in comparator jurisdictions, specifically the Northwest Territories and Saskatchewan, the

Judges should receive a one-time lump sum salary increase of \$14,000.00 (4.9% of their 2018 salary) effective April 1, 2019.

58. For 2020 and 2021, to allow for the economic uncertainty due to the pandemic but prevent erosion due to inflation, the Judges ask that their salaries be increased by the greater of 0% or a percentage equal to the Consumer Price Index increase for Whitehorse for the previous year ending December 31.
59. In response, the Government says that the increase in income for the Judges, relative to inflation, over the last 19 years, together with their robust judicial pension and other benefits, ensures that the Judges are sufficiently compensated to maintain their judicial independence. As a result, given the grave economic uncertainty caused by the COVID-19 pandemic, the Government proposes that the Judges salaries be increased by 0.5% effective April 1, 2019 followed by a further 0.5% increase on April 1st in each of 2020 and 2021.
60. The Government and the Judges expanded on their positions in their filed written submissions as well as their verbal submissions at the August 7, 2020, hearing before the Commission. Each party referred extensively to information they filed in support of their submissions regarding the section 19 factors under the *Act*, which must be considered by the Commission in making its recommendations.

VII. SUBMISSIONS OF THE PARTIES AND COMMISSION'S ANALYSIS

A. Joint Submission: Justices of the Peace Salary

- The JPs and the Government of Yukon were able to agree on the amount of a reasonable salary increase for JPs and placed a joint submission before the Commission for approval, if considered appropriate.
- The joint submission proposes an increase of 6% in total over the three years covered by the Commission's mandate. The parties ask the Commission recommend that effective April 1, 2019 the pay rate for hourly paid JPs be increased by 2% per year as follows:

- JP 1:** April 1, 2019: from \$45.00/hour to \$45.90/hour [2% increase]
 April 1, 2020: from \$45.90/hour to \$46.82/hour [2% increase]
 April 1, 2021: from \$46.82/hour to \$47.75/ hour [2% increase]
- JP 2:** April 1, 2019: from \$50.00/hour to \$51.00/hour [2% increase]
 April 1, 2020: from \$51.00/hour to \$52.02/hour [2% increase]
 April 1, 2021: from \$52.02/ hour to \$53.06/hour [2% increase]
- JP 3:** April 1, 2019: from \$70.00/hour to \$71.40/hour [2% increase]
 April 1, 2020: from \$71.40/hour to \$72.83/hour [2% increase]

April 1, 2021: from \$72.83/hour to \$74.29 per hour [2% increase]

61. In their December 2, 2019 position letter in support of the Joint Submission, the JPs refer to a recent 12% increase in electrical rates as well as an expected \$460 per year increase in food prices. The JPs anticipate that other consumer expenses will rise as fuel costs rise because of new carbon taxes.
62. The JPs submit that a number of its members are retired people living on fixed incomes so that any increase in income is helpful.
63. The JPs submitted that Justice of the Peace are the "front line" of the Yukon justice system and that most Yukoners who become involved with the justice system interact with JPs or are impacted by a decision of a JP.
64. The JPs referred to a Yukon Judicial Council statement that "Justices of the Peace have evolved as an indispensable and essential part of Yukon's judicial system. Access to justice requires trained active justices in each community." Further "owing to the widely dispersed Yukon population, a properly functioning and vigorous justice of the peace program is essential for the proper administration of justice in the territory."
65. The JPs also refer to the dynamic state of the laws in Canada and Yukon, with the consequence that Yukon JPs must stay current with changes in the law. They refer to changes in the *Criminal Code* relating to impaired driving and bail hearings, new Cannabis legislation, new summary conviction tickets and new forms and court procedures which impact their work.
66. The JPs submit that they are actively engaged in working with the Judges of the Territorial Court to ensure their training needs meet the needs of the Court. The JPs confirm their commitment to training to improve their ability to deliver quality services to the Court and people of the Yukon.
67. The Government submitted that that proposed hourly rate increases for the JPs are comparable to salaries of Justice of the Peace positions in the comparator jurisdictions identified under section 19 of the *Act*:
 - In British Columbia, Justices per day rate is \$778 or \$93.38 per hour although new Justices must have a law degree and been practicing for five years
 - In Alberta full-time Justices' wage rate is \$120 per hour; since 1999, sitting Justices must have a law degree and practice for five years
 - In Saskatchewan, Justices are entitled to 51% of the Provincial Court Judges' salary, which works out to an hourly rate of \$88.11 per hour
 - Northwest Territories Justices of the Peace receive \$480/year for being "active"; they also receive \$55/hour or \$65/hour to a maximum of \$335 or \$395 per day (respectively) depending upon whether assigned administrative or sitting duties
68. The Government and JPs agree that all other terms, benefits, allowances, stipends in effect for hourly rated Justices of the Peace in the Yukon should remain unchanged.

Commission Analysis

69. First, regarding process, the Commission notes each party had their own reasons for supporting the Joint Submission, indicating an absence of pressure or coercion. There was no indication that the process leading to the joint proposal was inappropriate in any way.
70. Second, in terms of substance, the Commission reviewed the Joint Submission in light of section 19 of the *Act* and concludes as follows:
- (a) For reasons more fully set out in the report pertaining to Judges' salaries, the current financial position of the Yukon government, although showing a deficit in 2020, as a result of pandemic relief measures, is relatively strong and appears able to provide for the proposed hourly rate increases;
 - (b) JPs, as judicial officers of the Court, are entitled to financial security as part of ensuring judicial independence in the Court
 - (c) JPs perform an important and essential role in Yukon's justice system; there is a need to attract and maintain qualified applicants, a component of which is reasonable compensation, particularly to JPs who are retired persons living on a fixed income
 - (d) JPs reside in Whitehorse as well as the outlying communities and can be called upon outside typical working hours to perform their judicial responsibilities; the JPs undergo ongoing training outside their sitting responsibilities to keep current on the law and procedure in the Court
 - (e) The hourly rates proposed place Yukon JPs in relative parity with their counterparts in NWT; the salaries are lower than in the provincial comparators, noting that two of the provinces require that JPs have law degrees and five years' experience as a lawyer, which is not a requirement in Yukon
 - (f) JPs have broad judicial duties, particularly in Yukon communities to which Judges travel only on circuit court; JPs need and want ongoing training in the laws they administer
 - (g) The cost of living in Yukon has increased according to the Whitehorse CPI statistics for 2019 and 2020 and the evidence provided by the JPs in terms of electrical rate and food cost increases.
71. After reviewing the evidence in light of the section 19 factors, the Commission concludes that the joint proposal regarding the salary increase for the JPs is reasonable and recommends it be implemented.
- B. Joint submission of the Judges and Government of Yukon regarding medical travel insurance for Deputy Judges**
72. The Judges and the Government agreed on the issue of medical travel insurance coverage for Deputy Judges of the Court and submitted a Joint Submission for consideration by the Commission for approval, if considered appropriate.

73. In their written submission, the Judges propose that Deputy Judges be provided with medical travel insurance for the periods that they are working as Deputy Judges, including travel to and from Yukon.
74. In its written submission, the Government stated that because they are not considered to be employees, Deputy Judges are not eligible to enroll in the medical insurance plan available to Territorial Court Judges for travel to and from Yukon, or their work while in Yukon. The Government states that the Joint Management Committee, comprised of Yukon government employee representatives, cannot be mandated to allow Deputy Judges to enter into the plan. The JMC has previously refused or limited access to the plan to individuals employed at arm's length from the Government of Yukon. The Government submits that the JMC may have concerns how the external group of Deputy Judges would affect the experience or cost of the plan.
75. The Government further submits that the current plan includes specific terms and conditions for eligibility which Deputy Judges would not be able to satisfy, for example active employment for minimum of 90 days before coverage comes into effect.
76. As a result, the Government has sought alternatives, such as providing insurance through a private carrier. Medical insurance coverage for out-of-province travel is understandably quite difficult to obtain at present given the concerns of the COVID- 19 pandemic.
77. The Government located one private carrier insurance plan which would require proof of medical eligibility for applicants over 59 years of age and a self-declaration if an individual is a smoker. The Government submits these requirements may raise potential privacy concerns for the Deputy Judges.
78. The Government submits that to meet the Judges' request for medical travel insurance coverage for Deputy Judges, an annual payment be made to each Deputy Judge who travels to work in Yukon. The payment would be comparable to the premium that would be charged for medical travel insurance.
79. The Government submits that each individual Deputy Judge could decide if they wish to obtain insurance or not. If not, the Deputy Judge could then simply keep the annual payment. The government submits that the annual premium payment of \$220.00 should be sufficient to cover all or the majority of the premium for all or the majority of Deputy Judges.
80. The Government and Judges propose that the Yukon government provide a once annual stipend of \$220.00 if a Deputy Judge attends the Yukon. This stipend is intended to cover the premium for medical insurance during the travel of the Deputy Judges to and from Yukon as well as time actively working in the Yukon as opposed to presence for personal reasons.
81. The parties further agree that if Deputy Judges choose not to purchase insurance, the Deputy Judge may keep the annual stipend.

Commission Analysis

82. The lawyers representing the Government and the Judges are very experienced and knowledgeable in the issues of Yukon judicial compensation. The parties they represent are highly sophisticated in matters of law and procedure. The Commission, like its predecessors, is cautious of substituting its opinion for a joint position of the parties regarding compensation, unless the Commission is convinced that the joint position is unreasonable, illogical or otherwise questionable as stated by the Yukon Supreme Court in the *Cameron* case.⁶
83. The Commission sees no need either on the basis of process or substance to not approve the joint submission on the issue of medical travel insurance coverage for Deputy Judges.
84. The modest amount proposed satisfies the need for Deputy Judges, an important component of the administration of the work of the Territorial Court, to be protected while on Court business in Yukon. The Commission recommends the joint submission regarding medical travel insurance for Deputy Judges be implemented.
- C. Individual submissions on Judges' Salaries**
85. The Judges and Government advise that the single compensation issue on which they could not agree was salary for the Judges.
86. The parties did not propose any modifications to any other terms, benefits, allowances or stipends in effect for the Judges save for salary and medical travel insurance for Deputy Judges.
87. Regarding salary, the Judges and Government agree that the Judges are entitled to an increase in salary. They differ on the percentage or amount of the salary increase, as summarized in the table below.

	Government Submission	Judges' Submission
April 1, 2019–March 31, 2020	\$288,650.00 (0.5% increase)	\$301,213.00 (4.9% increase)
April 1, 2020–March 31, 2021	\$290,093.00 (0.5% increase)	2019 salary + 0% or CPI % increase for Whitehorse (whichever is greater)
April 1, 2021–March 31, 2022	\$291,543.00 (0.5% increase)	2020 salary + 0% or CPI % increase for Whitehorse (whichever is greater)

⁶ *Cameron v. Yukon*, *supra* at para. 100

88. Each party presented evidence and written and oral submissions to the Commission to support their respective positions according to the factors enumerated under section 19 of the *Act*.
89. In conducting this inquiry, the Commission is mindful that no one section 19 factor is deemed more important than another; the Commission's report must show the Commission considered all the factors. However, the Commission must look at what is reasonable on the unique facts and context before it. Depending on those facts and context, the importance of each factor will vary from commission to commission.⁷
90. Although each commission makes its assessment in its own context, the starting point is ideally the date of the previous commission's report.⁸ The 2016 report was filed on January 18, 2019 for the fiscal period April 1, 2016-March 31, 2019 and recommended the joint proposals filed by the parties.
91. In conducting its inquiry and considering the section 19 factors, the Commission must review the circumstances arising after the previous Commission report and determine what impact those circumstances have had on the fairness of the existing compensation and if there is impact, suggest changes.⁹
92. Below is a summary of the submissions of the Judges and the Government, followed by the Commission's analysis, according to each section 19 factor.

s. 19(a): the current financial position of the government

92. **Judges' Submissions**

- Yukon's economy is strong and robust.
- COVID19 did not impact Yukon's economy in 2019
- COVID19 may have some economic impacts in 2020 –2021
- Such impacts not likely to be significant in Yukon
- Structure of Judges' submission is flexible to accommodate impacts
- The Conference Board of Canada [CBC], from summer of 2019 forecasts Yukon's economy to grow 10% in 2020, 5.3% in 2021 and 3.6% on average to 2025
- The CBC report forecasts increase in the consumer price index (CPI) as follows:
 - 2019 – 2.1%
 - 2020 – 2.1%
 - 2021 – 2.0%
- Actual CPI for Whitehorse in 2019 was 2%
- The Yukon government budget passed in March 2020 forecast GDP to grow as follows:
 - 2019 – 1%
 - 2020 – 6.2%
 - 2021 – 2024 – 3.3% on average

⁷ Report of the 2016 Judicial Compensation Commission, British Columbia, p. 42

⁸ Report of the 2016 Judicial Compensation Commission, British Columbia, p. 4

⁹ 2005 Yukon Judicial Compensation Commission Report, p. 5

- The Yukon government 2020-21 Interim Fiscal and Economic Update based on August 2020 data, revised the forecast for growth in Yukon's GDP as follows:
 - 2019 – 1%
 - 2020 – 0.8%
 - 2021 6.9%
- The government revised its forecast for increases in CPI
 - 2019 – 2.0%
 - 2021.2%
 - 2021 2.0%
- Yukon's March 2020 budget did not signal any concern about economic impact of COVID-19 on Yukon's economy
- Budget documents suggest mining is a major driver of Yukon economy
- Mining declared an essential service in March 2020 and not likely to be impacted by COVID-19
- First quarter of 2020 Yukon's economy outpaced national growth in earnings
- Yukon saw a decline in economic activity because of COVID-19 pandemic
- Government has increased operating and maintenance expense spending, to 0.8% above the 20-year average
- Yukon and Nunavut are only jurisdictions expected to see the real GDP growth in 2020 despite the pandemic
- Yukon has seen continued growth in personal incomes and average earnings continue to increase, outpacing the national growth rate
- Yukon has seen continued strength and resilience in the housing sector
- Yukon retail sales have rebounded to almost the same level as 2019
- Yukon government has been progressing and staying largely on target on most capital projects planned
- Yukon has seen robust strength in the mining sector
- Yukon's unemployment rate remains among the lowest in Canada
- Yukon continues to have population gains for the 17th consecutive year and growth is forecast to continue
- Whitehorse's population has increased by 24.2% in last 10 years
- The federal transfer payments to Yukon for 2020 – 2021 will round \$1,116 million, an increase of \$59 million from 2019 – 20
- Yukon's construction industry remains active; residential construction exceeded 2019 and non-residential construction would will be buoyed in the medium term by development of mining operations
- Yukon attained a balanced-budget in 2019
- Yukon's response to the COVID 19 pandemic resulted in increased spending, which was offset by federal transfers
- Revised forecast shows a deficit of \$31.6 million in 2020 – 21; no revised forecast offered for the following years
- Submit there is optimism for projected balanced budget and about the Yukon economy in general.
- Note that as of May 1, 2020 11 people had been infected with COVID 19; as of January 12, 2021, Yukon had six active cases of COVID 19

- Yukon is scheduled to receive sufficient vaccines to immunize all adult Yukoners who would like to receive the vaccine in the first three months of 2021 with vaccinations already underway

93. **Government Submissions**

- According to its budget documents of March 2019, Yukon government projected the following deficits and surpluses:
 - 2018 – 2019 [Main]: \$4.5 million deficit
 - 2018 – 2019 [sup estimates]: \$7.1 million deficit
 - 2019 – 2020 [main estimates]: \$5.9 million deficit
 - 2020 – 2021 [plan]: \$5 million surplus
 - 2020 – 2021 [plan]: \$3.7 million surplus
- Government relies on accumulated financial resources and surpluses to offset recent annual deficits
- Prior to the onset of the COVID-19 pandemic, governments net financial resources show debt was \$60,768,000
- Projections of net debt are expected to change in fall of 2020, given the effects of COVID-19
- Now is simply not the time for significant pay increases; appropriate watchword is caution
- Treat financial information available at the time of hearing in August 2020 with caution as all pre-COVID
- Legitimate that pandemic concern does not apply to 2019 financial position
- Rationale is to take money available from 2019 and spread it over 3-year term of this review
- Recommend that *status quo* be maintained because of COVID-19, with any necessary salary catch up at future review if economy rebounds
- Refer to Update statement that deterioration in outlook since March demonstrates how much uncertainty there is in economy and how dramatically economic conditions can shift; when budget tabled on March 5, 2020, there were just under 105,000 confirmed COV ID – 19 cases worldwide and financial markets appear to be improving; by March 19, 2020 confirmed cases would triple and financial markets would collapse with the TSX losing 26% of its value
- While there is a case for optimism, recovery is some distance away
- COVID-19 presents much uncertainty for the future
- Even with the gradual reopening of the economy underway, 2020 will be a challenging year for Yukon's economy; fallout from the virus is expected to extend into next year and possibly beyond with potential ramifications affecting Yukon's economic and fiscal outlook.

Commission Analysis

94. The financial position of the Yukon government as described in the 2020-21 Interim Fiscal and Economic Update (the “Update”) is not as rosy as forecast in the March 2020 Budget. The Budget forecast a 1% growth in GDP in 2019, increasing to 6.2% in 2020 and falling to 3.3% on average to 2028. These figures were slightly more conservative than the

Conference Board of Canada report from the summer of 2019 which predicted a GDP increase of 2.2%, 10% and 5.3% for 2019 – 2021.

95. Both sets of positive growth figures were anchored in the operation and development of several large mines. These projects were forecast to provide significant revenue based on rising mineral prices but at the same time, put pressure on the labour market and housing and infrastructure resources.
96. The Budget and the CBC Report also forecasted the expected rate of inflation for Whitehorse, the largest Yukon community. The budget forecast inflation to increase by 2% in 2019; 2.5% in 2020 and 2% in 2021. The CBC figures were slightly different in forecasting inflation to rise by 2.1% in 2019; 2.1% in 2021 and 2.0% in 2022
97. In short, Yukon's revenues were expected to increase, relative to expenses, and inflation was expected to remain in the low single digits
98. The parties made their submissions referring to these pre-pandemic forecasts and the prevailing economic circumstances when they appeared before the Commission in August, 2020. When the Commission resumed its deliberations, the Commission asked the parties for further submissions on the economic information in the governments Update as section 19(a) refers to the "current" financial position of the government. Given the uncertainty about the economy in the early days of the pandemic, the Commission considered that more current economic information would be relevant.
99. The Commission is of the view that even though it is difficult to predict the future with certainty, the information in the government's Update shows the current financial position of the Yukon government to be relatively healthy, compared to other provinces and territories.
100. Total government revenue for 2020/2021 is now forecast at \$1.3 billion, a decrease of 0.8% or \$10 million, primarily due to the pandemic-related effects on economic activity. The Yukon government projects a 0.8% growth in GDP in 2020/21. The government forecasts a net operation and maintenance expense increase of 3.3% or \$38 million after recoveries from the federal government and third parties. 94.5% of this increase is related to the pandemic relief measures. Capital spending has decreased by 1% or \$3.7 million.
101. The Update points to growth in metal prices in 2020 and that the near – term outlook for mineral production has improved since March 2020. The projected triple increase in the value of mineral production is in contrast to the decline in tourism revenue, 5% of Yukon's GDP. At the time of this report, Yukon's mines are still operating and have not experienced any shutdowns due to the pandemic.
102. The Update notes that construction remains active with residential building construction exceeding 2019's total. Further, despite significant job losses, average earnings have grown in Yukon, increasing 6.9% from the same period in 2019.

103. Yukon's unemployment rate (2020 expected annual average of 6.9%) is among the lowest in Canada but may be understated and is still well above Yukon's February 2020 figure of 4.1%. Retail sales have rebounded after sharp drops in March and April.
104. As the Update says, COVID-19 impacts in Yukon were "worse than some, but better than most." The catchphrase in the Update, however, is uncertainty regarding the future.
105. Not surprisingly, given its role as stewards of the public purse the Government submits that because of the uncertainty caused by the pandemic, now is not the appropriate time for judicial salary increases above those they present. The Commission prefers the Judges' more optimistic outlook as evidenced by the positive economic growth factors in the Update together with the roll out of the vaccine to Yukon's population.
106. Even though revenues are expected to decrease less than 1%, the government expects to be in a forecasted \$31.6 million deficit position for 2020/2021. However, the deficit is due to pandemic related costs and economic growth is forecast to remain positive due to the underlying pre-pandemic momentum in the economy, namely mining.
107. The Commission also notes that the Yukon government continues to be in a net financial asset position, with a balance of \$171.9 million at March 31, 2020.¹⁰
108. The Commission appreciates the Government's justified concern about the pandemic's medium- and longer-term negative effect on the economy. However, the Commission's mandate is to make recommendations for the fiscal years 2019-2021. In considering the current financial position of the Government, the Commission interprets this phrase to mean relative to the term of the Commission's review. The Yukon government's financial position was positive in 2019/2020 and appears positive, especially compared to other parts of Canada for 2020/2021. The pandemic's effect on the government's financial position for 2021/2022 remains speculative. But any negative effects may well be offset by continued increases in revenue from mining and maintenance of federal transfer payments.
109. To date, the Government has not enacted any broad policy initiatives or cost-saving measures such as salary freezes, in response to anticipated negative economic performance. Universal austerity measures certainly apply to the Yukon judiciary and have been applied in the past.¹¹ These measures may become necessary if the Government's finances slip from their current position and Judges are required to share the burden of difficult economic conditions. That time has not yet arrived.
110. The Commission concludes that the current financial position of the Yukon Government can accommodate the increases in judicial compensation in the ranges sought by the parties for the period April 1, 2019- March 31, 2022.

¹⁰ Government of Yukon, Financial Statement Discussion and Analysis for the year ended March 31, 2020 <https://yukon.ca/en/2019-20-public-accounts-financial-statement-discussion-and-analysis>

¹¹ 1998 Yukon Judicial Compensation Commission Report, p. 6

s. 19(b) the need to provide reasonable compensation to judges

111. Judges' submissions

- An appointment to the bench is viewed as a long-term commitment, not a stepping stone to another career
- Following retirement, options for judges engaging in paying work or limited, as returning to practice law is generally not an option, especially in small jurisdictions such as Yukon
- Preservation from erosion by inflation is key if judicial salaries are to remain at a level to ensure judicial independence and ensure public confidence in the independence of the judiciary
- A Judge has no opportunity to earn income from other sources once appointed to the bench
- Judges are unlike lawyers or civil servants who can engage in business outside their work
- Lawyers can engage in non-legal business to increase the professional income
- Lawyers can choose an academic career or can do consulting work on the side

112. Government's submissions

- Financial security is a component of judicial independence
- Financial security requires judicial salaries be above an adequate minimal level for the office of the Judge
- But large salary increases not justified on an objective basis are to be avoided
- There is a range of compensation, the top and bottom margins of which identify where public confidence in the independence of the judiciary would be undermined
- To determine what is reasonable compensation, survey incomes in the community
- Gain an understanding of the relative financial position of judges to the community they serve
- Effective April 1, 2019, the judges earned \$287,213.60 per year
- Statistics show that the average personal income in Yukon between 2013 – 2017 ran from \$43,110.00. - \$47,520.00
- Compared to other legal and government professionals, judges are better paid
 - For 2020, a government deputy minister earns between \$182,079 – \$243,581
 - For 2018, a senior government lawyer earns between \$118,147 – \$158,036
 - Effective July 1, 2019, teachers with 10+ years of experience earn between \$108,203 – \$117,393
 - Effective April 1, 2019, the Yukon Premier earns \$163,340 plus an expense allowance of \$19,847, subject to a CPI index adjustment every April 1
- Between 2019 – 2021, government employees receive the following increases:
 - 2019:1.75%
 - 2020:1.75%
 - 2021 1.75%
- management and legal officers for the government received a 1.5% increase in January 2017, 1% in January 2018 and 2% in January 2019; a 2.25% increase in 2020 was provided in return for loss of severance pay

- Importantly, all government wage increases were agreed to prior to the COVID-19 pandemic
- Judges' salaries are currently considerably higher than salaries of other sectors
- Judges also receive a Yukon bonus benefit and a robust pension
- Oppose any suggestion that judges salary should be *on par* with Supreme Court judge salaries
- By case law, it is inappropriate to compare provincial court judges' salaries to supreme court judges' salaries because of unique considerations in setting the latter
- Federal salaries are uniform to not reflect regional differences and further, attract qualified candidates in major metropolitan areas where salary levels are much higher than in small urban centres
- Previous Yukon judicial compensation commissions have rejected concept of parity between Territorial Court Judges and Supreme Court Judges
- Although some overlapping interests and needs of both levels of judges, Supreme Court has broader jurisdiction in civil matters
- Finally, Supreme Court Judges are compensated by different government with different financial constraints and expectations
- Also oppose any suggestion that comparison with compensation for Judges of the Nunavut Court of Justice be read into section 19 as a comparator jurisdiction
 - Judges of the Nunavut Court of Justice are federally appointed, paid by federal government and have Superior Court jurisdiction
 - Section 19 of the *Act* refers only to compensation for territorial or provincial judges
 - Even if Commission has discretion to consider this as a relevant point, section 17 provides that recommendations are binding only to the extent they do not exceed the highest total value of judicial compensation provided to territorial or provincial court judges of the named jurisdictions
- To consider a reference to the Nunavut Court of Justice salaries would disregard clear legislation
- Salary increases and other remuneration proposed by government are reasonable, ensure a level compensation above the adequate minimal level to maintain judicial independence and are not so large as to undermine public confidence in judicial independence

Commission Analysis

113. The *PEI reference* case explains why judicial remuneration must be adequate to ensure continued public confidence in the independence of the judiciary. If salaries are too low, there is always the danger, however speculative that judges would be tempted to decide cases a certain way to secure a higher salary from the executive branch of the government or a benefit from a litigant.
114. As a result, a guarantee of a minimum salary for judges is part of the financial security aspect of judicial independence. It prevents a government from reducing judicial salaries (except for austerity measures). It also is a protection against erosion of judicial salaries by inflation.¹²

¹² Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, *supra* at para. 195

115. The Judges say that the Government's submission to increase judicial salaries by .05%/year when inflation is or will be 2% per year or more, would result in erosion. The Government responds that cost of living increases are aspirational and if automatic, would defeat the purpose of the commission process.
116. The Government says that the Judges are already relatively well compensated by comparison to salaries payable to legal and government professionals. Although it can be helpful to survey some of the other sectors of the Yukon economy in making an assessment of reasonable compensation¹³, what is most relevant is the salary paid to other judges, not other government or private sector positions¹⁴. Section 19[e] directs the Commission to consider salaries of other judges. Also, there was no evidence provided of how the other public service positions truly compared to the duties of the Judges, which are a small and unique group in many ways.
117. The Commission agrees with the Government that an increase in compensation is not automatic simply because this review is mandated. At the same time, the Commission is of the view that unless the context or facts before the Commission dictate otherwise, judicial compensation should keep pace with the rate of inflation. Otherwise, the value of judicial salaries naturally erodes over time compared to the cost of living. There could be exceptional circumstances where a cost-of-living increase is not warranted, perhaps because it would cause compensation to exceed the highest total value of judicial remuneration provided in the comparator jurisdictions or if the government enacted broad-based deficit reduction measures.¹⁵
118. The COVID19 pandemic is of course an unprecedented event, affecting the world in many and as yet unknown ways. Its like has not experienced by most of the population, except centenarians. The Commission does not minimize the impact or severity of the pandemic as a public health crisis or that the Yukon government, like its counterparts, responded with robust economic supports for the population. But in the absence of evidence of a significant and widespread, as opposed to potential, effect on the current financial position of the Yukon government, the Commission does not view the pandemic as a reason to not recommend an inflationary increase to judicial salaries.
119. The Commission agrees with the Government that large salary increases must be justified on an objective basis. The Commission interprets "large" to mean any increases in excess of an increase in accordance with the rate of inflation.

s. 19(c) the need to build a strong court

120. Judges' Submissions

¹³ 2010 Yukon Judicial Compensation Commission, p. 30

¹⁴ 2002 Yukon Judicial Compensation Commission, p. 8

¹⁵ Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, supra paras. 133-137

- candidates for the court require 10 – 15 years' experience as a lawyer
- regard should be had of earnings of lawyers with the required years of experience and appropriate degree of ability
- Insufficient data available concerning incomes of private lawyers so do not rely on such data
- Instead focus on other options open to highly desirable candidates for the Court
- Tradition in Yukon has been to seek judges from both Yukon and outside jurisdictions
- need to look at judicial earnings elsewhere
- do not seek parity but submit that comparison with salaries of federally appointed judges is a relevant and important factor because:
 - Supreme Courts recruit from the same pool of candidates
 - And the overall similarity in difficulty and complexity of respective workloads, skills demanded by the work and qualifications to be a judge
 - Nature and function of judicial work shows great similarities amongst various levels of courts
 - both levels of court require same qualities of judicial temperament and legal knowledge and sense of fairness
 - Judges at all levels make decisions that affect people's lives, including potential loss of freedom without bending to public pressure
- Cases coming before the Court are increasingly complex and involving multi-day trials and expect *Criminal Code* amendments will lead to an increased workload
- Bill C – 75 limits the accused's right to preliminary inquiries, make it more likely for cases to proceed to trial in the Territorial Court and Supreme Court
- There are increased opportunities for pretrial applications resulting in the need for more comprehensive written reasons
- Refer to the Police Reported Crime Statistics in Yukon 2019 to submit that if crime is increasing, and the size of the bench remains the same, the work of the Court compared to previous years will increase
- Referred to Report's noted increases in *Criminal Code* violations as well as overall crime rate, violent *Criminal Code* violations, property crime, traffic violations and federal statute violations
- Violent *Criminal Code* violations in Yukon per 100,000 population was third-highest in Canada; increasing by 31.6% compared to 2018
- The Report shows crime severity in Yukon has increased by 26% in 2019, the biggest increase in Canada and placing Yukon third highest in the country
- Referred to other provinces that have linked provincial court judges' salaries to that of Supreme Court judges; Ontario judicial compensation commission set salaries of Ontario judges as a specific percentage of federal judges' salaries
- Yearly salaries of federally appointed judges in Yukon, Northwest Territories and Nunavut are:
 - 2019: \$329,900 plus \$12,000 northern allowance [2.6 increase]
 - 2020: \$338,800 plus \$12,000 northern allowance [2.7% increase]
- Submit that a large gap between Territorial and Supreme Court's affects the Territorial Court's ability to attract the best qualified applicants from the same pool of lawyers; fear Territorial Court will be viewed as distinctly second-best choice

- Judicial compensation must be sufficient to attract best qualified candidates, and also retain and motivate those candidates already appointed

121. **Government's submissions**

- Government wants a strong Court as does the public
- Multiple factors attract lawyers to become a judge
 - Professional desire to discharge important and challenging role as a judge
 - Ability to make a difference through one's work especially in a small jurisdiction
 - Compensation must be seen to be reasonable given responsibilities and challenges of being a judge
- Judges, like of elected officials, assume that public service may have some drawbacks
- Note very low turnover of judges in Territorial Court; retirement to follow lengthy service, all evidence that compensation is associated with being a judge is not a deterrent
- In addition to higher earnings and salaries than government lawyers and managers, judges have a valuable pension plan which is a consideration in terms of attracting qualified candidates
- Submit little risk that compensation as proposed by the Government not being adequate would be a deterrent to qualified candidates

Commission Analysis

122. No one can doubt that a strong Court is in the public interest.
123. A strong Court is composed of the candidates best qualified to hold judicial office.
124. The Commission accepts that compensation, including non-salary benefits like a pension, is a factor in attracting qualified candidates as judges. It also accepts that candidates can be drawn by a professional desire to provide public service and have a meaningful impact on society through their work.
125. The Government says that the low turnover at the Territorial Court and retirements following lengthy service are evidence that the level of compensation is reasonable. However, the question is more whether the level of compensation is sufficient, upon the departure of a present member, to attract qualified candidates to fill vacancies.¹⁶
126. The evidence shows that there are potentially many factors for a potential judicial candidate to weigh.
127. A lawyer must have a minimum 10 years' experience to apply to be a judge of the Court. At that stage of their career, a lawyer is presumed to be entering into the most lucrative years of practice.

¹⁶ 2010 Yukon Judicial Compensation Commission Report, p. 31

128. The Government provided the Commission with salary information for Government lawyers. Those salaries are less than the Judges' salaries.
129. Unfortunately, there was no evidence of private lawyers' incomes. That evidence would be helpful to compare with the judicial salaries, to see if these candidates in fact have to consider a pay reduction.
130. It is fair to say that private lawyers likely don't have pension benefits, which may make a judicial pension attractive, depending on the candidate's age. Government lawyers would likely have the advantage of carrying over their existing pension entitlement upon becoming a Judge.
131. One of the ways in which judges are unique from many others paid out of public funds is the opportunity to earn additional income. Under section 12 of the *Act*, judges cannot directly or indirectly carry out any other occupation, profession or business other than their judicial duties. This foregone opportunity underlines the need for reasonable compensation for judges.
132. It is fair to say that more senior lawyers, public or private, may be involved in business or investment activities separate from their law practice, from which they would have to divest themselves in the event of accepting a judicial appointment. This may be unattractive from both a financial and logistical perspective.
133. The Commission accepts that both the Territorial Court and the Supreme Court draw from a similar pool of candidates. Territorial Court judges are also candidates for appointment to the Supreme Court.
134. Although lawyers across Canada may apply, the most recent appointments to the Territorial Court have been local candidates (save for one candidate who had been a former resident). Similarly, the appointments to the Supreme Court since 2000 have been local candidates. There is no reason to expect that local appointments will not continue to be the norm and future candidates will closely consider both Courts and their respective compensation arrangements when considering a judicial appointment. As a result, the Commission considers the compensation paid to Yukon Supreme Court Judges to be a relevant, but not determinative, consideration.
135. The Commission notes that the Yukon Supreme Court salaries were \$329,900.00 in 2019 and \$338,000.00 in 2020, with an additional \$12,000 northern allowance being paid each year.
136. To be clear, the Commission is not recommending parity with Supreme Court salaries as the caselaw states that is not appropriate. Nor is the Commission recommending a salary escalator formula based on Supreme Court salaries, as that would be a legislative initiative.

137. Neither is the Commission comparing the level of responsibility or workloads of the two courts. The Supreme Court and Territorial Court are constitutionally and practically very distinct courts, each fulfilling a necessary and complementary role in the justice system.
138. The Commission is mindful that attracting highly qualified applicants could become a problem if the compensation for the Territorial Court does not keep pace with other options open for these candidates
139. The Commission concludes that compensation may be a significant consideration for applicants for future vacancies in the Court. It may also be a factor for current members remaining on the bench.

s. 19(d): the unique nature of Yukon

139. **Judges' submissions**

- The Territorial Court has three resident full-time judges, one of whom is the Chief Judge
- There are 27 Deputy Judges who are called upon to assist as needed; they sit in other jurisdictions
- By comparison, NWT has four full-time resident judges
- The population of NWT is similar to Yukon
- The Court provides Circuit Court services to 13 communities outside Whitehorse involving extensive travel, sometimes with limited accommodation and meals
- Circuit Court travelling time and nights away from home have an impact on Judges' family life
- Judges daily face difficult social problems and work to avoid becoming callous while remaining sensitive to circumstances of the parties before them; facts and issues can be profoundly disturbing
- Government initiatives of community and restorative justice place additional demands on the Judges
- Judges need to be familiar and sensitive to First Nations culture, practices and conventions, especially between different communities
- Community justice initiatives require Judges participating in many meetings and training sessions in addition to regular Court settings
- Judges receive calls at all hours from police officers throughout the Yukon seeking warrants
- social isolation is a factor; in a small jurisdiction Judges encounter persons they've dealt with in court and may forego many activities and relationships
- Judges' freedom of expression may be restricted, even on everyday matters

140. **Government submissions**

- Acknowledge the reality of social isolation for the Judges
- Recognize that the Court needs to be familiar and sensitive to First Nations culture and practices

- Government is aware of the Court's contribution to life in Yukon and innovative approaches to assist in administering justice
- Submit that Yukon is a wonderful place to live and raise a family, with many outdoor and arts activities and easy access to urban centres in southern Canada

Commission Analysis

141. The first judicial compensation commission in Yukon wrote that its recommendations on compensation must be "Yukon based and Yukon sensitive" while keeping in mind comparable remuneration and benefits in the courts of neighboring jurisdictions.¹⁷ It is significant that the focus on the uniqueness of the Yukon is codified in section 19 (d) of the *Act*.
142. The life of a judge of the Territorial Court has been described as far from easy¹⁸. The Court sits regularly in Circuit Courts serving 14 communities in addition to regular sittings in Whitehorse. There is no evidence of a decrease in the Court's current responsibility, described in the 1998 report, for more than 90% of criminal proceedings in Yukon as well as jurisdiction in non-criminal matters which exceeds the scope of jurisdiction exercised by colleague judges in provincial jurisdictions.
143. Like their colleagues in the Northwest Territories, the Circuit Court work to the communities outside Whitehorse typically involves an extensive travel schedule and overnight accommodation and meal facilities that may be less than ideal, causing a certain amount of physical stress and fatigue. It is reasonable to conclude that Circuit Court travelling in time away from home would also impact a Judges' family life.
144. Both the Judges and Government recognize the additional demands placed on the Court in delivering the governmental policy the of community restorative justice initiatives. These initiatives require meetings and training sessions in addition to regular court settings. They likewise recognize that the Court has to be familiar and sensitive to First Nations culture and practices, which may differ between communities.
145. Even though the Yukon is large geographically, the community is small. As a result, more cases are reported in the media and may be the subject of public and political comment. It is reasonable to expect that Judges routinely encounter people they have dealt with in court, often in difficult circumstances. This social reality may well lead to Judges foregoing activities or relationships they might otherwise pursue. As with other high-profile positions in, public service positions, there are certain drawbacks. However, the cases that Judges deal with on a regular basis can be highly emotional and disturbing, making a Judge's interaction with the public quite distinct from many public service positions.
146. Clearly there are many lifestyle benefits to living in the Yukon, evidenced by the lengthy service of the Judges.

¹⁷ 1998 Yukon Judicial Compensation Commission Report, p. 4

¹⁸ 1998 Yukon Judicial Compensation Commission Report, p. 2

147. The Commission concludes that the unique nature of the Yukon includes a recognition that judges encounter some social isolation as well as increased challenges in carrying out their judicial responsibilities. This is a relevant but not determinative factor in determining the adequacy of judicial compensation.

s. 19(e): compensation in comparator jurisdictions

148. Judges' submissions

- Most useful to consider salaries and benefits of judges in other jurisdictions because nature of the job as a judge is unique in its constitutional status and function; being a judge is not a job that can be easily compared with other jobs in Yukon
- The key comparators are BC, Alberta Saskatchewan and the Northwest Territories (NWT)
- However, the Government of Alberta rejected that provinces' judicial compensation commission recommendations and imposed a four-year salary freeze; the Alberta Judges Association applied for judicial review and outcome unknown
- In British Columbia, the government rejected the salary recommendations of three successive judicial compensation commissions; litigation ensued but the 2020 commission completed its recommendations
- because Nunavut and NWT split after the passing of the *Act*, both jurisdictions must be considered as comparator jurisdictions for statutory interpretation and policy reasons
- in light of uncertainty regarding BC and Alberta judicial compensation, say Saskatchewan and NWT are most relevant and reliable comparators
- Yukon judicial salaries increased substantially between 1999 – 2009
- by reviewing table of most recent adjustment of salaries, Yukon judicial salaries have begun to fall behind since 2018, particularly NWT judicial salaries
- Submit achieving parity with the NWT is a fair and proper objective so the need to "catch-up" is a live issue now
- Yukon and NWT were consistent in comparable judicial salaries from 2013 – 2017; prior to 2017, Yukon judicial salaries were greater
- Proposed the following salary increases:
 - effective April 1, 2019 a lump sum increase of \$14,000.00
 - effective April 1 of each of 2020 and 2021 and increase by the greater of 0% or percentage equal to the CPI for the preceding year ending December 31
 - Submit Yukon judicial salaries must keep pace with the NWT judicial salaries; a "catch-up" is necessary

149. Government submissions

- Effective April 1, 2018, Territorial Court Judges earn \$287,213.60 per year
- Acknowledge valuable contribution of the Court
- Accept that a moderate salary increase is appropriate to keep pace with inflation and recognize salaries in comparator jurisdictions
- Over the past two decades, Territorial Court Judges have seen substantial increases in their compensation (111% increase in income over 19 years)

- In comparison, inflation over last 19 years has only been 43.6%
- Real increase in income for Judges is approximately 74% over 19 years; well above salary enjoyed by most other sectors of Yukon's workforce
- Propose a salary increase for the Judges of 0.5% 2019, 0.5% in 2020 and 0.5% in 2021 which together with robust judicial pension and other benefits insurers compensation remains well above level required to maintain judicial independence
- Base salary of judges would increase to:
 - \$288,650.00 effective April 1, 2019
 - \$290,093.00 effective April 1, 2020 and
 - \$291,543.00 effective April 1, 2021
- Proposed increases will keep Judges' salaries "in the running" with provincial comparators and attract "the best and the brightest" to the bench
- although recognize that recommendations for British Columbia judges' salaries for 2017 – 2020 were not accepted and that litigation is ongoing, will use BC government substituted salaries for that timeframe
- However, since 2019 judicial compensation commission recommendations have not yet been accepted or rejected, use the BC recommendations for 2020-2023
- In Alberta, use actual imposed salaries rather than recommended salaries as unaware of litigation arising from rejection and substitution
- Also look at salaries for provincial court judges in other non-comparator provinces which show Yukon judicial salaries are very close to the highest compared to other Canadian jurisdictions
- Mere requirement of Commission sitting every three years does not mean that judicial salaries increase automatically; must be based on what is fair and reasonable at the time
- Has not been a significant increase in workload of Judges or significant change in duties since tabling of last Commission report in January 2019
- Submit that crime rate figures in Report of little use because of lack of detail in comparison to other jurisdictions
- Note in Report that most of "other Criminal Code violations" were disturbances of the peace or related to administration of justice
- Also note in Report that violent crime increased in all Canadian jurisdictions with a 1% increase in Yukon, although disconcerting, proportion nationally in range of 0.2% - 2.0%

Commission Analysis

150. The Commission considered the salary ranges for judges in the comparator jurisdictions of Alberta, British Columbia, Saskatchewan and the Northwest Territories as required under section 19.
151. The Commission considers the comparator groups as objective markers of reasonableness¹⁹, while keeping mind there are differences between those jurisdictions and Yukon.
152. The comparison process is complicated because the governments in two of the comparator jurisdictions, Alberta and British Columbia, have substituted salaries lower than those

¹⁹ Report of the 2016 British Columbia Judicial Compensation Commission, p. 4

recommended by the provinces' judicial compensation commissions. Litigation has ensued regarding those government substitutions. At the time of this report, the outcome of the court action in Alberta was unknown. In British Columbia, the Supreme Court ordered that the government reconsider the BC Commission's 2017-19 recommendations. The BC Government has not rejected or approved the commission's 2020-23 recommendations.

153. The Commission agrees with the Government that as far as Alberta is concerned, the "law is the law" regarding the amount of judicial compensation payable in that province and will use the Alberta government substituted salaries for comparison. Since the British Columbia Supreme Court rejected the substitution of the commission's 2017-2019 recommendations,²⁰ the Commission will use the recommended BC salary figures for those years, as well as the recommended figures for 2020-2023.
154. The Commission also considered the recommended salary figures in the reports of the Northwest Territories and Saskatchewan Judicial Compensation Commissions, released as of March 2020 and December 2020 respectively. The Commission found these most recent Judicial Compensation Commission Reports very helpful as it is often challenging to reconcile the different salaries because commissions are created and issue their reports at different times.
155. The Commission prepared the following table based on the salary information provided by the parties together with the updated compensation information from the Northwest Territories and Saskatchewan. The table also shows the Judges' submissions on salary for the term of this Commission (in blue) and the Government's submissions (in orange):

²⁰ Provincial Court Judges Association v. British Columbia (Attorney-General) 2020 BCSC 1264

	ALBERTA	BC	SASK	NWT	YUKON
April 1, 2013	\$273,000	\$242,464	\$254,458	\$252,414	\$257,606
April 1, 2014	\$279,825	\$244,889	\$260,819	\$256,055	\$262,758
April 1, 2015	\$286,821	\$248,562	\$272,295	\$260,302	\$268,013
April 1, 2016	\$293,991	\$262,000	\$282,184	\$272,000	\$273,374
April 1, 2017			\$290,848	\$278,828	\$280,208
set by legislation	\$293,991	\$262,000			
<i>Recommended</i>	\$296,382	\$273,000			
April 1, 2018			\$295,792	\$289,733	\$287,213
Set by legislation	\$293,991	\$266,000			
<i>Recommended</i>	\$302,304	\$277,095			
April 1, 2019			\$304,075	\$299,869	J: \$301,213
set by legislation	\$293,991	\$270,000			YG: \$288,650
<i>Recommended</i>	\$309,500	\$281,251			
April 1, 2020			\$304,074 + CPI + 1%	2019 + CPI (1.6%)	J: 2019 + 0% or CPI
set by legislation	\$293,991				YG: \$290,093
<i>Recommended</i>	\$318,500	\$287,000	\$312,286	\$304,667	
April 1, 2021	2021 JCC		2020 JCC	2020 + 0% or CPI	J: 2020 + 0% or CPI
<i>Recommended</i>		\$297,000	\$316,971		YG: \$291,543
April 1, 2022	2021 JCC		2020 JCC	2021 + 0% or CPI	2022 JCC
<i>Recommended</i>		\$307,000	.95% QBJ		
April 1, 2023			2020 JCC	2022 + 0% or CPI	2022 JCC
			.95% QBJ		

156. It can be seen that as of April 1, 2018, Yukon judges were the second lowest paid judges in the comparator jurisdictions. If the salaries were increased effective April 1, 2019 according to the Government's submissions, the salaries would remain second lowest. The salaries would rise to would rise to second highest based on the Judges' submissions.
157. As of April 1, 2020, the Judges salaries would be second highest (based on the Judges' proposal) and second lowest (based on the Government's proposal).
158. The comparison of the salaries as of April 1, 2021 is speculative due to the correlation of salary increases with the Consumer Price Index. However, given the figures available, even with an unknown CPI multiplier, it is reasonable to conclude that the salary proposed by the Government in the last year of this Commission's term would be the lowest in the comparator jurisdictions. In all three years, the Yukon Judges' salaries would lag behind the salaries paid in the NWT.
159. In 2002, the Commission of the day wrote that parity with salaries of judges in the Northwest Territories has been recognized as a fair and proper objective²¹. As a consequence, past commissions have paid close attention to the judicial salaries in the Northwest Territories.
160. The Commission agrees that a comparison of salaries shows that as of March 31, 2019, and the end of the last Commission's review, Yukon Judges' salaries had begun to fall behind their counterparts, most importantly the Northwest Territories Judges.
161. The Commission considers the salaries of the judges in the NWT a relevant consideration carrying significant weight - one because of the similarity in working conditions and workload in the two territorial courts as compared to the southern provinces. But also, because as the 2004 NWT Judicial Compensation Commission stated: "...keeping relative pace with the other territories and provinces, in terms of establishing a competitive remuneration package, is critical to recruiting and retaining Judges. This is consistent with the consideration that living and working in the North often places extraordinary demands upon the Judges...in terms of travel and time away from home, and the nature of the cases."²²
162. The Commission acknowledges the Government's concern and its desire to maintain the *status quo* in the current state of economic uncertainty caused by the pandemic. However, the Government agreed that the uncertainty due to the pandemic did not affect the economic situation for 2019. The Commission is of the view the November 2020 Update provides a more accurate picture of the Yukon government's relatively healthy financial position, even in light of the pandemic. The Government also submitted that it does not lack the ability to pay an increase in the Judges' salaries. Against this backdrop, the request to recommend a .5% increase each year could have the unintended effect of an austerity

²¹ 2002 Yukon Judicial Compensation Commission Report, p. 8

²² Report and Recommendations of the NWT Judicial Remuneration Commission, March 2, 2004, p. 10

measure directed at the Judges alone, which the Supreme Court of Canada has said should be avoided.²³

163. The Commission recommends the following salary increases, including an initial “catchup” percentage increase of 2% in 2019 in addition to an inflationary increase in all three years of the term of this review.
- 2019: \$298,701.52 (2% “catch up” increase + 2% CPI increase = 4% overall increase)
 - 2020: \$304,675.55 (2% increase equal to CPI for Whitehorse as of December 31, 2019)
 - 2021: 2020 salary + greater of 0% or a % increase equal to CPI for Whitehorse as of December 31, 2020
164. With these increases, Yukon Judges’ salaries will be third and second highest (depending on the year) in the comparator jurisdictions, behind Saskatchewan but on par with the Northwest Territories. Depending on the outcome of government or court action in BC and Alberta, that placement could change.
165. As the Yukon Supreme Court said in the *Cameron* case, “the setting of judicial remuneration is not an exact science.”²⁴ Further, as both parties acknowledge, if these increases turn out to be too high or too low, there can be a reckoning before the next Commission.

s. 19(f) The Laws of the Yukon

166. Judges’ submissions

- Territorial court judges in Yukon deal with a wide range of matters compared to provincial courts where judges are assigned to specific divisions
- Examples of additional responsibilities imposed by Yukon laws are emergency intervention orders, reviewing vehicle impoundments and licence suspensions, child protection matters, peace bond applications, coroners’ inquests and prosecutions under territorial regulatory legislation
- further to community and restorative justice initiatives created under government policy, Territorial Court Judges attend community meetings, develop alternative court procedures such as Domestic Violence Treatment Option Court and the Community Wellness Court

167. Government’s submissions

- There are two possible interpretations of “laws of the Yukon”
 - That the commission should consider the number, nature and complexity of Yukon laws in considering judicial compensation for the judges who apply and interpret that law

²³ Reference re Remuneration of the Judges of the Provincial Court of Prince Edward Island, supra at para. 156

²⁴ Cameron v. Yukon, supra at para. 91

- as in NWT, look generally at the laws of the jurisdiction, not one particular aspect
- Submit the *Territorial Court Act*, its regulations, previous reports of Yukon judicial compensation commissions and applicable case law should be considered
- In particular, consider legislation such as the *Taxpayer Protection Act* under which the government cannot incur an accumulated deficit without dissolving the legislature and recommending an election be held
- Submit Commission must ensure none of its recommendations cause the government to incur an accumulated deficit so as to undermine the *Taxpayer Protection Act*
- Even if second interpretation is not favoured, as it was not with a previous commission, the general laws of the Yukon cannot be ignored
- Commission should not recommend changes which undermine the law

Commission's Analysis

168. The Judges and Government have long held differing views of the meaning to be attached to the phrase "laws of the Yukon" under section 19(f).
169. Both parties agree the Commission may consider their submissions on the number, nature and complexity of the laws of the Yukon as a factor in recommending compensation for the judges of the Territorial Court who must interpret and apply that law.
170. The Government urges the Commission however to look not only at the law generally, but also consider legislation such as the *Taxpayer Protection Act* which prohibits the Yukon government from incurring an accumulated deficit except on certain conditions. The Government submits that the Commission should ensure none of its recommendations cause the Yukon government to incur an accumulated deficit to undermine this legislation. It further submits that Government's proposed increases would not lead to such a contravention. The Government did not provide evidence if and how the Judges' proposed increases would contravene the *Taxpayer Protection Act*.
171. The Commission considered the Government's argument carefully as it raises a serious point about the legality of the Commission's recommendations. The Commission finds no reason to depart from the conclusion of both the 2010 and 2013 Yukon JCCs on this same point. The Commission does not expect that its recommendations will run afoul of any legislation, although as past Commissions have noted, that possibility always exists.²⁵ The Commission is not responsible for ensuring that its recommendations do not cause the Government to incur an accumulated deficit. The Executive Council and the Management Board, unlike the Commission, are expressly bound by the prohibition in the *Taxpayer Protection Act* and are in sole possession of the evidence warning of this potential violation. Given that the Government is aware of the range of increases sought by the parties and that the Update on the government's financial position is available, the Commission would expect to hear evidence from the Government if the Commission's

²⁵ 2013 Yukon Judicial Compensation Commission Report, p. 30

recommendations within this range could in fact cause a violation of the *Taxpayer Protection Act*.

172. In summary, the Commission concludes that is required to take appropriate account of the laws of the Yukon generally and in particular as they relate to the Judges interpreting and applying those laws. The latter aspect relates to the Judges' workload on which the parties made submissions at the August hearing.
173. As noted by the 1998 Commission, the Territorial Court is responsible for 90% of criminal proceedings in Yukon. The Court also has many other responsibilities, including exclusive jurisdiction for child protection matters and Coroner's Inquests as well as peace bonds and emergency intervention orders. Many of these extra responsibilities necessarily entail work outside the typical work day or work week, in Whitehorse and while on circuit.
174. Following the August hearing, the parties filed written submissions on the Crime Statistics Report²⁶ referred to in the November 2020 Yukon Monthly Statistical Review.²⁷ The report shows that Yukon's crime rate is third-highest in Canada on a *per capita* basis, with the Northwest Territories and Nunavut having higher rates.
175. Because the Commission's mandate is to review any change in circumstances since the last Commission's report, the increase in the number of actual criminal incidents in Yukon from 2016 - 2018 compared to 2019 (as shown on page 7 – 8 of the report) is of particular interest. Those statistics show an increase in all violations in 2019 compared to the previous three years, save for "other Criminal Code violations" (28.08% of all 2019 violations). The Government points out that "other Criminal Code violations" in Yukon mainly include disturbances of the peace and administration of justice, from which the Commission takes it may be inferred are less demanding of the judiciary than other criminal violations.
176. Individually, the number of some types of violations between 2016 – 2018 were lower than the number of same category violations in the three years prior (2013 – 2016). However, the overall total of actual incidents for all violations in 2019 is the highest since 2010.
177. The Commission agrees that more detail would be required to determine the impact of the number of police reported incidents on the Court's workload due to the increase in terms of the number, length and complexity of trials, compared to other jurisdictions. The Commission also acknowledges that the crime statistics for the first quarter of 2019 are within the term of the previous Commission.
178. However, considering the Yukon statistics on their own, it is reasonable to infer that the demonstrable increase in overall criminal incidents in 2019 would lead to some degree of increased workload for both Judges and Justices of the Peace. This inference is supported in part by the Judges' submission that the number of judicial authorization applications has increased over the past 10 years. The Court dealt with 60 such applications in 2010 and approximately the same number in 2015. However, in 2018, there were 122 applications;

²⁶ Police Reported Crime Statistics in Yukon 2019 https://yukon.ca/sites/yukon.ca/files/ybs/crime_2019.pdf

²⁷ Yukon Monthly Statistical Review November 2020 https://yukon.ca/sites/yukon.ca/files/ybs/mr_nov2020.pdf

in 2019 police made 132 applications. Between January 1 – June 30, 2020 there have been 79 applications.

179. Whether any increases to the Court's workload results from recent amendments to the criminal law remains to be seen.
180. The Commission concludes that while the jurisdiction of the Court has not changed since the 2016 Commission review, the evidence from the Crime Statistics Report and from the Judges, who are in the best position to know, has led to some increase in the volume and complexity of work within the existing jurisdiction, which is relevant to determining reasonable compensation.

s. 19(g): The Cost of Living in the Yukon

182. Judges' submissions

- Section 19 (g) refers to "real per capita income" which is not being tracked by Statistics Canada since 2010
- However other measures are available to track the growth in or decline in earnings and income is generally
- One measure is median total family income
- Incomes of families in the Yukon are consistently higher than any other jurisdiction in Canada, save for NWT
- In 2017, median total family income in Yukon was second-highest at \$120,630 overall Canadian median total family income was \$92,990
- Another measure is Average Income Assessed; in 2017 Yukon had the third-highest Average Income Assessed except NWT and Alberta
- Another measure is primary household income per capital, measuring market income of households including income from labour businesses and property prior to government transfers and taxes
- Conference Board of Canada predicts primary household income in Yukon will increase as follows:
 - 2019 – 3.8%
 - 2020 – 8.7%
 - 2021 – 5.6%
- See also increases in Wages and the Salaries Per Employee which forecast the following increases:
 - 2019 – 2.6%
 - 2020 – 4.3%
 - 2021 – 3.5%
- Real gains in purchasing power are expected as above increases in primary household income exceeded the forecasted increases to CPI for the same years
- Submit that various indicators show that Yukon leads Canada in various income measures which have increased relative to incomes of other Canadians

- Prediction of continued growth by Conference Board of Canada supports proposals for increased compensation

183. **Government submissions**

- Cost-of-living increases in Whitehorse had been modest over the past 20 years: on average, the annual rate of inflation for Whitehorse has been 2.3% [1998 – 2018]
- The all-items CPI for Whitehorse while not directly proportional to any other jurisdiction is similar to that to the rest of Canada
- The 2019 CPI for Whitehorse increased 2.0% over 2018 while Canada's CPI increased 1.9% over the same period
- Appears to be a downward trend in cost of living with the COVID-19 pandemic; CPI fell 0.2% on a year-over-year basis in April 2020 followed by a 0.4% drop in May 2020
- The CPI figure in the November 2020 Yukon Monthly Statistical Review is less than government's proposal for 2020 salary increase and was negative in previous months
- The average personal income in Yukon from 2013 – 2017 increased from \$43,110-\$47,520 [10.23%]; increase in CPI and overseeing five-year period was approximately 7.6%
- annual salary of Territorial Court Judges far exceeds average per capita income
- Fewer than 200 people filed a tax return in 2016 claiming income over \$250,000
- Real economic growth rates for Yukon GDP have ranged from 0.651% in 2014 – 3.243% in 2018
- Yukon residents enjoy relatively low personal income tax rates compared to other jurisdictions
- There is no sales tax in Yukon; fuel taxes are some of the lowest in Canada
- submit that lower tax burden suggest Judges enjoy a higher disposable income relative to other provincial residents

Commission's Analysis

184. The cost of living in the Yukon is a factor in determining the adequacy of judicial compensation.
185. There is no one specific measure for assessing changes in the cost of living in Yukon. However, a number of statistical measures can assist in determining any such changes.
186. The primary statistic referred by the parties is the Consumer Price Index, [CPI]. The CPI is a measure of the rate of the price change for goods and services bought by Canadian consumers and is the most widely used indicator of price changes in Canada. The CPI is measured nationally as well as by province and territory. The Yukon CPI is measured only for Whitehorse.
187. In terms of actual data, the change in the Whitehorse CPI for 2019 was 2.0%.²⁸

²⁸ Yukon Monthly Statistical Review November 2020 https://yukon.ca/sites/yukon.ca/files/ybs/mr_nov2020.pdf, p

188. According to the Yukon Bureau of Statistics information filed with the Commission, the Whitehorse CPI fluctuated between 2000 – 2007 with an overall increasing trend. The CPI increased steadily from 2016 (1.0%) to 2018 (2.4%), before falling slightly to 2.0% in 2019
189. In terms of a forecast for the CPI in the next two years, the Yukon government revised its earlier Budget forecast in its Update as follows:
- From 2.5% to 1.2 % increase for 2020
 - No change for 2.0% increase for 2021
190. At the August hearing, the Government pointed out that Canadian's CPI fell 0.7% in April 2020 on a seasonally adjusted monthly basis. This was the first year – over – year decline in the CPI since September 2009. The non-seasonally adjusted CPI for Whitehorse fell – 0.4% from the previous April. The Government submitted that the CPI data in the November 2020 Monthly Statistical Review showing an increase of 0.4% in the CPI from the negative figure in April reinforced the uncertainty still present in the economy due to the pandemic.
191. The Commission notes that in the November 2020 Monthly Statistical Review data, the major contributors to the CPI increase were the prices of electricity, rent and purchase and leasing of passenger vehicles. These increases were offset by decreases in the price of fuel and telephone services.²⁹
192. The Commission concludes that the cost of goods and services in Yukon as measured by the Whitehorse CPI is increasing, as shown by the 2% increase in 2019, as has been the trend for the previous four years. After a springtime decline in the CPI coinciding with the lockdown due to the pandemic, the current information indicates that the CPI is again on the rise.³⁰
193. The *Act* refers to specific consideration of the growth or decline in real *per capita* income as part of considering the cost of living in the Yukon, which statistic has apparently not been measured since 2010.
194. However, by examining the statistical measures of income of Yukon residents provided by the parties, it can be inferred that Yukon residents in general are enjoying increases in their incomes over time and the forecast is optimistic for further increases:
- the distribution of total income for families has increased steadily from 2015 – 2017³¹

²⁹ Yukon Monthly Statistical Review November 2020 https://yukon.ca/sites/yukon.ca/files/ybs/mr_nov2020.pdf, p 5

³⁰ Yukon Monthly Statistical Review November 2020 https://yukon.ca/sites/yukon.ca/files/ybs/mr_nov2020.pdf, p 5

³¹ Statistics Canada, "Median Total Income-All Census Families", Table 11-10-0012-01

- The total assessed income for tax providers in Yukon has increased from 2008 – 2017 with 2017 being the highest on record showing an average assessed income of \$57,386, an increase of 4.5% from 2016³²
 - During the first six months of 2020, average weekly earnings in Yukon increased 6.9% from the same period in 2019, slightly stronger than the 6.6% growth reported nationally³³
195. As the Government points out, the salaries of Judges are in excess of what it describes as the average personal income of Yukon residents and their salary increases outpace the percentage increase of the CPI. It notes that Yukon residents, similar to residents of the Northwest Territories and Nunavut, are taxed at lower personal income tax rates than residents in the comparator jurisdictions of Saskatchewan, Alberta and British Columbia. The Commission accepts that these lower tax rates would result in somewhat higher net income available to Yukon residents, which includes the Judges.
196. Based on these two points, it could be argued that there is more room for the Judges to absorb the impact of a cost-of-living increase, either because their salaries exceed the average individual's salary substantially or because the percentage increase of the Judges' salaries significantly exceeded the CPI percentage increase in a given time period.
197. However, a review of the statistics presented to the Commission of Average Income Assessed, Canada, Province and Territories (2016)³⁴ leads the Commission to conclude that salaries of judges in the comparator jurisdictions and nationally, substantially exceed individual incomes in the same jurisdictions, for at least that year. The Commission would expect the same evidence to exist for the years after 2016. None of the judicial compensation commission reports or caselaw presented to the Commission are to the effect that this difference in income disentitles judges to an increase in their compensation.
198. The Government submitted that personal income in Yukon from 2013-2017 increased by 10.23% and the CPI over that same time period increased 7.6%. By reviewing past reports, the Commission finds that the increase in judicial salaries over that same four-year time period have increased 11.49%. As a result, the Commission does not find that the increase in Yukon judicial salaries significantly exceeds the CPI increase in recent years.
199. As stated earlier, the Commission recommends that an increase to the Judges' compensation for the term of this review should include an annual percentage increase equivalent to the annual percentage increase in the Consumer Price Index for Whitehorse.
200. The Commission is guided to this conclusion by the cumulative statistical evidence of the increase in the cost of living in Yukon and by the Supreme Court of Canada statement in the *PEI Reference* case that judicial compensation commissions are to be convened within

³² Yukon Bureau of Statistics, "Yukon Income Statistics 2017 Taxation Year"

³³ <https://yukon.ca/sites/yukon.ca/files/fin-2020-21-interim-fiscal-economic-update.pdf>, p. 11

³⁴ Yukon Bureau of Statistics, "Yukon Income Statistics: 2016 Taxation Year", p. 6

fixed periods of time in order to consider the adequacy of judicial salaries expressly “in light of the cost of living and other relevant factors.”³⁵

s. 19(h) Submissions filed by the Public under section 26 of the Act

201. The Commissions did not receive any submissions from the public either in response to the section 26 notice of the Commission’s creation and purpose or at the public hearing on December 18, 2020.

VIII. OTHER RELEVANT CONSIDERATIONS

202. Judges’ submissions

- The COVID 19 pandemic has presented significant challenges for the Court:
 - Substantial addition to administrative workload
 - Resulting stressful and dangerous working conditions
 - Physical distancing measures required significant creativity and adaptability
 - Court remained open, being deemed critical service under the *Civil Emergency Measures Act*
 - Bail hearings and other important matters are heard but most trials and preliminary hearings adjourned at the beginning of the pandemic
 - Once restrictions ease, expect a surge of cases and a heavier workload in the medium term
- IT problems caused difficulties regarding conference calls and video technology and create a difficult work environment
 - A triage judge will oversee and manage files and assize sittings have been scheduled for fall and winter for high volume of trials on the docket
 - Court application for warrants has been modified to reduce in-person contact for ever-increasing amount of judicial authorization applications
- The economy for 2019 of the first quarter of 2020 was not affected by the pandemic
- Yukon saw a decline in economic activity because of the pandemic and an increase in operating and maintenance expense spending [0.8% above the 20-year average]
- Yukon's tourism industry declined resulting in a real GDP forecast decline for 2020 but forecast is still positive
- Yukon and Nunavut are only Canadian jurisdictions expected to see real GDP growth in 2020 despite the pandemic
- There is optimism in Yukon's Fiscal and Economic Update as Yukon experience the following:
 - Successful prevention of significant community spread of COVID-19
 - Continued growth in personal incomes and average earnings
 - Continued strength and resilience and housing sector
 - Rebounding retail sales to almost same level as 2019

³⁵ Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, supra at para. 51

- Resiliency and staying on target on most capital projects
- Expecting to see real GDP growth
- Robust strength in mining sector
- Unemployment rate that remains among the lowest in Canada
- Continued population gain for 17th consecutive year
- Active construction industry
- Total major federal transfer payments to Yukon for 2020 – 21 increase by \$59 million over previous year to \$1,116 million
- Even though forecasting during the pandemic is challenging and economic conditions can shift quickly, submit Interim Fiscal Update is overly conservative and pessimistic
- Revised 2020 – 21 forecast incorporates additional spending room to allow government response to surges
- Surge in infection rates unlikely due to public health measures and availability of COVID-19 vaccine
- Yukon to receive enough vaccines to immunize all adult Yukoners first three months of 2021 and effort underway already
- Yukon's response to pandemic resulting in increased spending but offset by federal transfers
- Revise forecast for 2020 – 21 is a \$31.6 million deficit
- Judiciary not immune to broadly based government actions responding to pressures on the economy but don't focus on compensation provided to Judges
- The pandemic is not a reason to deny Judges a reasonable increase in pay for 2019 or CPI adjustment in subsequent years
- Recommendations sought by Judges can be accommodated within the current forecast of financial position of the government

203. **Government submissions**

- COVID-19 pandemic has disrupted the Canadian and worldwide economies making the pandemic a relevant factor
- Although some cautious signs of improvement from the early days of the pandemic, naïve to think a significant rebound is imminent
- In April 2020, Royal Bank of Canada forecasting recession due to the pandemic
- The Organization for Economic Cooperation and Development June 2020 Economic Outlook speaks of tremendous negative effects of pandemic
- The OECD Report forecasts Canada's annual output to shrink by 9.4% in 2020 in the event of a second virus outbreak [8% if recovery uninterrupted] and rates of unemployment remain elevated
- Submit Yukon's economy will not emerge unscathed from pandemic; March 2020 projected budget surpluses are no longer expected to occur
- Government announced \$26.7 million in relief support
- Too early to understand full impact of pandemic on Government of Yukon and associated costs in terms of reallocating funds or potential deficit
- Yukon's 2020 – 21 Interim Fiscal and Economic Update confirms now is not the time for significant pay increase

- Earlier filed financial information all pre-pandemic; Interim Fiscal Update graphically shows how economy fell off the cliff in spring
- While, as of the winter of 2020, more optimism, the pandemic presents much uncertainty for the future
- Even with the gradual reopening of the economy, 2020 will be a challenging year for Yukon's economy; fallout from the virus expected to extend into 2021 and possibly beyond

Commission Analysis

204. The Commission agrees with the parties that the COVID-19 pandemic is a relevant consideration for the Commission.
205. No previous commission has had to consider the existence of a supervening event like the pandemic in making recommendations on judicial compensation. The question is- how is the pandemic relevant in this context?
206. The Commission confirms that its purpose is to serve as an independent body providing recommendations to government on judicial compensation following consideration of specified factors under the *Act*. As result, the Commission is of the view that it must consider the pandemic's effect as it pertains to those factors identified under section 19(a) – (h) of the *Act*.
207. The Government focused its submissions of the pandemic's effects on the financial position of the Yukon government. The Government's early submissions referred to a predicted recession and the projected reductions of Canada's productivity in the event of subsequent outbreaks and shutdowns. It referred to the Yukon government's outpouring of support initiatives and cautioned that the full financial impact to the government is unknown.
208. Although the picture was more optimistic as of November 2020, the Government cautions that recovery is some distance away and refers to the absence of a timely development of a vaccine.
209. The Commission accepts that the pandemic has caused great uncertainty in the global and national economies. The Yukon economy appears to have been spared large scale damage although the threat of uncertainty remains. As of January 2021, the promised delivery of the Moderna vaccine sufficient to vaccinate all adult Yukoners by early 2021 was being put in place and the vaccination effort is already underway, thereby tempering one of the risk factors identified by the Government.
210. The Judges focused their submissions on the pandemic's effect in terms of workload and working conditions for the Judges. They say the pandemic caused an increased administrative workload of the Court and created more stressful and dangerous working conditions. The Court's processes were deemed a critical service under the *Civil Emergency Measures Act* and it is a given that courts must operate no matter the circumstances. Numerous matters were adjourned but bail hearings and other important

matters continued to be heard. Unfortunate difficulties with technology made video and conference calling difficult. The Court adopted a triage model to ensure an efficient use of court resources. There were no circuit courts and only very limited in-person proceedings for several months in 2020. It is reasonable to conclude that the Court will be dealing with a backlog of cases now that in-person proceedings have resumed.

211. There was no rulebook for responding to this pandemic and both the Yukon Government and the Territorial Court are to be commended for their dedication and resourcefulness in ensuring that the criminal justice system continues to operate in very uncertain times.
212. The Commission concludes that the effects of the pandemic are serious. No one has a crystal ball in terms of the ultimate impact of the pandemic. Those impacts will be much more evident in the next few years. But in light of an effective vaccine already being distributed in Yukon together with the relatively healthy financial position of the Yukon government for at least the next year, the pandemic's effects have been contained in the context of recommending an increase in judicial compensation for the period April 1, 2019-March 31, 2022.

IX. CONCLUSIONS AND RECOMMENDATIONS

213. The Commission carefully reviewed and considered the materials and submissions presented by the parties.
214. First, with respect to the Joint Submissions filed by the parties, applying the test set out in the *Cameron* case, the Commission concludes that the joint submissions of the parties are appropriate for recommendation.
215. The Commission concludes that there is no evidence that the process leading to the joint submission regarding the salaries of the JPs or the medical insurance allowance for the Deputy Judges was questionable or inappropriate. Rather, the Commission views the joint submissions as products of consensus between the parties, consistent with the constitutional principles set out in the *PEI Reference* case.
216. Regarding the substance of the proposed compensation for the JPs, there is no evidence to suggest that the proposal is unreasonable. The Commission is of the view that the proposed increase of 2% in each year of the term of this review is appropriate based on the important first-line role of the JPs in the justice system and the demonstrable increase in the cost of living in Yukon.

Recommendation: JP Salaries

That effective April 1, 2019, the pay rate for the hourly-rated Justices of the Peace be increased by 2% per year, as follows:

JP 1: April 1, 2019: from \$45.00/hour to \$45.90/hour [2% increase]

April 1, 2020: from \$45.90/hour to \$46.82/hour [2% increase]

April 1, 2021: from \$46.82/hour to \$47.75/ hour [2% increase]

JP 2: April 1, 2019: from \$50.00/hour to \$51.00/hour [2% increase]

April 1, 2020: from \$51.00/hour to \$52.02/hour [2% increase]

April 1, 2021: from \$52.02 per hour to \$53.06/hour [2% increase]

JP 3: April 1, 2019: from \$70.00/hour to \$71.40/hour [2% increase]

April 1, 2020: from \$71.40/hour to \$72.83/hour [2% increase]

April 1, 2021: from \$72.83/hour to \$74.29 per hour [2% increase]

217. The Commission also approves the terms of the joint submission of the Judges and the Government regarding the allowance for Deputy Judges for medical insurance coverage while in Yukon. The modest amount proposed satisfies the need for Deputy Judges, an important component of the administration of the work of the Territorial Court, to be protected while on court business in Yukon.

Recommendation: Medical Insurance Coverage for Deputy Judges

That the Government of Yukon will provide a once-annual stipend of \$220.00 to a Deputy Judge attending the Yukon to cover the cost for medical insurance during the travel of the Deputy Judge to and from Yukon, as well as for time actively working in Yukon (as opposed to presence for personal reasons). If the Deputy Judge chooses not to purchase insurance, the Deputy Judge may keep the annual payment.

218. Because the parties themselves have put the joint submissions before the Commission, the Commission expects that the parties, through their representatives, would consent to and approve the wording of the recommendations for proper implementation.
219. Regarding the outstanding compensation issue of the appropriate increase in the Judges' salary, the Commission recommends the increases described below. The Commission views these increases as reasonable because they fairly reflect the changed circumstances since the implementation of the report of the previous Commission. The recommended increases achieve the long-recognized goal of maintaining Yukon judges' salaries near parity with the salaries of judges in the identified comparator jurisdictions, particularly the NWT where the breadth of judicial responsibility is more comparable than in the southern provinces. The increases prevent salary erosion due to the demonstrable increase in the cost of living in Yukon and are appropriate given the current relatively healthy financial position of the Yukon government, indeed the Yukon economy in general. Finally, the recommended increases should help ensure a strong Court, now and in the future, especially as the effects of the COVID-19 pandemic continue to present unprecedented challenges for the justice system as well as society as a whole.

Recommendation: Salaries for Judges of the Territorial Court

1. That effective April 1, 2019, the salaries for Yukon Territorial Court Judges be set at \$298,701.52, a 4% increase.
2. That effective April 1, 2020, the salaries for Yukon Territorial Court Judges be increased to \$304,675.55, a 2% increase which is equal to the percentage increase to the CPI for Whitehorse for the year ending December 31, 2019.
3. That commencing April 1, 2021, the salaries of the Yukon Territorial Court Judge be increased by greater of 0% or a percentage increase equal to the CPI percentage increase for Whitehorse for the year ending December 31, 2020.

X. CLOSING REMARKS

The Commission thanks the parties and their representatives: Alison Latimer on behalf of the Judges, Steve Smith, representative for the Justices of the Peace Association and Gary Bainbridge, on behalf of the Government of Yukon, for their comprehensive and thoughtful written and oral submissions and for assembling a full and helpful evidentiary record. The Commission appreciated the representatives' patient, helpful and cooperative assistance throughout this inquiry.

The Commission also wishes to express appreciation to Patricia Randell, Director, and Michele Campbell, in the Department of Justice for providing assistance whenever requested by the Commission. The Commission also thanks Lorna Hutchinson for her assistance in the preparation of this formal report.

This report is submitted this 5th date of March, 2021.



Debra Fendrick

Commissioner, 2019 Yukon Judicial Compensation Commission