



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Newfoundland and Labrador Association of Provincial Court Judges v.
Newfoundland and Labrador*, 2025 NLSC 103

Date: July 10, 2025

Docket: 202301G2292

BETWEEN:

**THE JUDGES OF THE PROVINCIAL
COURT OF NEWFOUNDLAND AND
LABRADOR as represented by THE
NEWFOUNDLAND AND LABRADOR
ASSOCIATION OF PROVINCIAL
COURT JUDGES**

FIRST APPLICANT

AND:

JACQUELINE BRAZIL

SECOND APPLICANT

AND:

LYNN COLE

THIRD APPLICANT

AND:

ROBIN FOWLER

FOURTH APPLICANT

AND:

WAYNE GORMAN

FIFTH APPLICANT

AND:

PHYLLIS HARRIS

SIXTH APPLICANT

AND:

KYMIL HOWE

SEVENTH APPLICANT

AND: **JACQUELINE JENKINS** EIGHTH APPLICANT
AND: **MARK LINEHAN** NINTH APPLICANT
AND: **MICHAEL MADDEN** TENTH APPLICANT
AND: **LORI MARSHALL** ELEVENTH APPLICANT
AND: **JENNIFER MERCER** TWELFTH APPLICANT
AND: **PAUL NOBLE** THIRTEENTH APPLICANT
AND: **DAVID ORR** FOURTEENTH APPLICANT
AND: **KARI ANN PIKE** FIFTEENTH APPLICANT
AND: **HAROLD PORTER** SIXTEENTH APPLICANT
AND: **ROLF PRITCHARD** SEVENTEENTH APPLICANT
AND: **BRUCE SHORT** EIGHTEENTH APPLICANT
AND: **LOIS SKANES** NINETEENTH APPLICANT
AND: **LLOYD STRICKLAND** TWENTIETH APPLICANT

AND: **WYNNE ANNE TRAHEY** TWENTY-FIRST APPLICANT

AND: **ANDREW WADDEN** TWENTY-SECOND APPLICANT

AND: **JAMES WALSH** TWENTY-THIRD APPLICANT

AND: **HIS MAJESTY THE KING IN
RIGHT OF THE PROVINCE OF
NEWFOUNDLAND AND LABRADOR
as represented by THE LIEUTENANT-
GOVERNOR IN COUNCIL** FIRST RESPONDENT

AND: **JOHN HOGAN, K.C., MINISTER OF
JUSTICE AND PUBLIC SAFETY
AND ATTORNEY GENERAL** SECOND RESPONDENT

Before: Justice David G. Conway

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: February 18-19, 2025

Summary:

The Association of Provincial Court Judges sought a declaration that certain recommendations set out in a judicial remuneration tribunal report should be of full force and effect and that Government implement these recommendations.

STATUTES CONSIDERED: *Provincial Court Act, 1991*, S.N.L. 1991, c.15; *Judgment Interest Act*, R.S.N.L. 1990, c. J-2; *Financial Administration Act*, R.S.N.L. 1990, c. F-8

REASONS FOR JUDGMENT

CONWAY, J.:

INTRODUCTION

[1] This is a judicial review concerning the process for establishing judicial pay and benefits for the Provincial Court Judges of Newfoundland and Labrador (“Judges”), as represented by the Newfoundland and Labrador Association of Provincial Court Judges (“Association”).

[2] The First Respondent and the Second Respondent represent the Government of Newfoundland and Labrador (“Government”) with respect to judicial pay and benefits.

[3] The *Provincial Court Act, 1991*, S.N.L. 1991, c.15. (“Act”) establishes a judicial remuneration tribunal process in terms of judicial pay and benefits.

[4] The Association filed an Amended Originating Application (“Application”) based upon Government’s response to and implementation of the Report of the 2021 Newfoundland and Labrador Provincial Court Judges Salary and Benefits Tribunal (“May Tribunal”).

[5] The Association challenges the legitimacy of Government’s reasons for varying and rejecting the recommendations of the May Tribunal. The Association also challenges Government’s reclamation of judicial education funds.

BACKGROUND

[6] There is a long and difficult history between the Association and Government concerning judicial pay and benefits. Justice Boone commented upon this history at paragraph 13 in *Newfoundland and Labrador (Provincial Court) v. Newfoundland and Labrador*, 2022 NLSC 47 (“*Provincial Court*”):

The history of the remuneration process since 1991 has been fraught with difficulty. This history to 2000 was recounted thoroughly by the Court of Appeal in *Newfoundland Association of Provincial Court Judges v. Newfoundland*, 2000, at paras. 6-66; the history from 2000 to 2018 was set out in the findings of Faour J in *Newfoundland and Labrador Association of Provincial Court Judges v. Newfoundland and Labrador*, 2018 NLSC 224, at paras. 26-65. I will not repeat that detailed history, but I will allow the conclusions of Green JA writing for the majority of the Court of Appeal and of Faour J to summarize it:...

[7] At paragraphs 14-30 in *Provincial Court*, Justice Boone went on to outline the more recent history between the parties leading up to early 2022.

[8] Similar to the approach in *Provincial Court*, the detailed history between the parties concerning judicial remuneration will not be repeated. The more recent history leading up to the filing of the Application will be outlined.

Amendments to the *Act*

[9] In September 2021, Government sought the Association’s position regarding a number of possible changes to the *Act*.

[10] The consultation by Government concerning possible changes to the *Act* was done in accordance with paragraph 68 of the decision of Justice Faour in *Newfoundland and Labrador Association of Provincial Court Judges v. Newfoundland and Labrador*, 2018 NLSC 224.

[11] Government, among other potential changes to the *Act*, put forward the following to the Association in correspondence dated September 27, 2021:

... That the salary of Provincial Court Judges be adjusted yearly based on the average salary of Provincial Court Judges in the other Atlantic provinces, including retroactive increases where applicable, so that salary matters are no longer determined by the Tribunal...

[12] In reply correspondence dated October 14, 2021, counsel for the Association objected to this Government proposal:

... It is our strong view that it would be unconstitutional to remove the determination of salary from the Tribunal process. The constitutional principles set out in *PEI Reference*, [1997] 3 SCR 3 and *Bodner v. Alberta*, 2005 SCC 44 require that any change to judicial compensation must be first proposed to a [Judicial Compensation Commission]. That said, the Association supports in principle the adoption of a statutory provision requiring the annual indexing of the salary, to a salary equal to either the average salary of Provincial Court Judges in the other Atlantic provinces, or 80% of the salary paid to federally appointed judges, including retroactive increases where applicable. Each Tribunal would need to still consider, in light of the statutory adjustment, whether the salary is appropriate for the relevant years based on the relevant objective criteria...

[13] In further correspondence to the Association dated November 2, 2021, Government stated, in part, the following:

... In respect of your position regarding the constitutionality of removing salary deliberation from the Tribunal process and your comments regarding the executive rather than the House of Assembly responding to Tribunal recommendations, the Province will take these under advisement.

[14] The *Act* was amended in May 2022. A significant amendment included the introduction of the following:

Judges' salary

27.1 (1) Effective July 1, 2021, and on July 1 in every year after that, the annual salary of judges, not including the chief judge and the associate chief judge, shall be adjusted to an amount equal to the average annual salary of provincial court judges in Nova Scotia, Prince Edward Island and New Brunswick as determined on April 1, 2021 and on April 1 in every year after that, as applicable.

(2) Effective July 1, 2021, and on July 1 in every year after that, the annual salary of the chief judge shall be adjusted to an amount equal to the average annual salary of chief judges in Nova Scotia, Prince Edward Island and New Brunswick as determined on April 1, 2021 and on April 1 in every year after that, as applicable.

(3) Effective July 1, 2021, and on July 1 in every year after that, the annual salary of the associate chief judge shall be adjusted by a percentage equal to the percentage by which the annual salary of the chief judge is adjusted under subsection (2), with retroactive effect where applicable.

(4) For the purposes of subsections (1) and (2) where it is determined that the average annual salary of judges or chief judges in Nova Scotia, Prince Edward Island and New Brunswick for a prior year or years has increased as a result of a retroactive salary increase, the adjustment of salary shall include, with retroactive effect, an amount equal to the difference between

(a) the increased average annual salary for that year or years with retroactive application; and

(b) the average annual salary as calculated under subsection (1) or (2).

[15] Section 27.1 of the *Act* requires salaries for Judges to be adjusted annually based upon the average salaries of Provincial Court judges in the Maritime provinces (“Maritime Average”). The annual adjustment for the salary of Judges is to be made on July 1, 2021, and in each year thereafter.

[16] Sections 28(1) and 28.2(1)(a) of the *Act* state that:

28. (1) The Lieutenant-Governor in Council shall, on or before June 1, 2022, appoint a tribunal consisting of 3 persons to prepare a report on the adequacy of the salaries payable to judges, the associate chief judge and the chief judge under this Act and on the benefits of judges, the associate chief judge and the chief judge for the period of April 1, 2021 to March 31, 2027.

...

28.2 (1) (1) Notwithstanding section 28.1,

(a) the tribunal appointed under subsection 28(1) shall review and report on the adequacy of the salaries payable to judges, the associate chief judge and the chief judge under this Act and on the benefits of judges, the associate chief judge and the chief judge and shall present its recommendations together with reasons to the minister and the president of the judges' association...

The May Tribunal

[17] The May Tribunal was appointed by an Order-in-Council dated July 8, 2022, composed of Stephen J. May, K.C. as Chairperson, Thomas Johnson, K.C., on behalf of the Association and Christopher Peddigrew, K.C., on behalf of Government.

[18] Thomas Johnson, K.C. was subsequently appointed to the Supreme Court of Newfoundland and Labrador and he was replaced by Ian Patey as the May Tribunal member on behalf of the Association effective October 13, 2022.

May Tribunal Hearing

[19] The Association and Government provided written submissions in advance of a hearing before the May Tribunal.

[20] Government took the following position concerning salary and benefits in paragraphs 3, 18, 19 and 22 of its initial written submissions to the May Tribunal dated September 30, 2022:

... On May 16, 2022, the Legislature Amended the [Act] changing the Tribunal process to set judicial salary as [the Maritime Average]... Consequently, much of the time spent in receiving evidence on and considering economic issues is now unnecessary.

... This was a substantial and significant change as prior legislation had left the determination of salaries and benefits of judges to the Tribunal for its review and recommendations...

... Previously [the *Act*] required the Tribunal ... to prepare a report containing recommendations on the salaries and benefits of judges and the chief judge. The amended section 28 now requires the Tribunal to prepare a report on the adequacy of the salaries and benefits payable to judges, the associate chief judge and the chief judge...

... The purpose and intent of the 2022 amendments was to provide certainty for the calculation of judicial salaries...

[21] In paragraph 2, 3 and 5 of its written reply submission to the May Tribunal dated October 11, 2022, the Association disagreed with Government's position that the May Tribunal did not have to consider objective factors based upon section 27.1 of the *Act*:

...Put simply, this proposition is entirely inconsistent with the constitutional requirement for an independent, effective, and objective Tribunal to act as an "institutional sieve" between the judiciary and the other branches of government by identifying fair and appropriate remuneration. Judicial compensation must be determined on its own merits, based on consideration of objective criteria, not by legislative fiat.

... the Government's Submission demonstrates an ongoing misapprehension of and lack of respect for the Tribunal process...

... At paragraph 3, the Government states that, in light of the amendments to the *Act* changing the Tribunal process to set judicial salary at the Maritime Average, much of the time spent receiving evidence on and considering economic issues is now unnecessary. As discussed in detail below, the Association disagrees. The task of the Tribunal is to recommend an appropriate level of remuneration based on consideration of all relevant objective factors...

[22] Government restated its position at paragraphs 2, 3 and 78 of its written reply submission to the May Tribunal dated October 14, 2022, as follows:

In enacting these legislative changes, the Legislature has removed the burden on past Tribunals to carry out detailed economic assessments in order to develop their recommendations. Section 28 now requires the Tribunal to "review and report on the adequacy" of the salaries and benefits payable to judges, the associate chief judge and the chief judge. These salaries are determined in accordance with the formula in section 27.1. The Tribunal is no longer required to make salary recommendations *per se* but to report on the "adequacy" of the salaries generated by the formula.

The essential effect of this legislative change is that the single question before the Tribunal is whether the Maritime average is adequate to maintain the judicial independence of the Provincial Court Judges of this province. It is respectfully submitted that the Tribunal's consideration of the relevant factors should lead it to conclude that the average of the salaries paid in the other three Maritime provinces achieves that objective...

... It is respectfully submitted that the Association's salary proposals should not be accepted as it has not been shown that the statutory formula is inadequate to maintain judicial independence...

[23] The May Tribunal held a public hearing on November 9-10, 2022, which included oral submissions from counsel and evidence from expert witnesses.

The May Tribunal Report

[24] The May Tribunal delivered its Report on November 30, 2022 ("Report"). The Report described the mandate of the May Tribunal, the historical context and the impact of sections 27 and 28 of the *Act*.

[25] The Report also outlined the factors that the May Tribunal had to consider in making its recommendations. The Report went on to consider the aspects of compensation identified by the parties and explained its recommendations based upon the relevant factors.

[26] Paragraph 35 of the Report concluded that Government's position on salaries and benefits was not consistent with the legislative role of the May Tribunal:

With respect to the Act, Section 28 requires the Tribunal to "prepare a report on the adequacy of the salaries payable... under this Act and on the benefits of judges..." The provision does not preclude the Tribunal from considering and weighing any objective criteria that it may consider relevant to the assessment of judicial financial security. Read in the context of the entire Act, Section 28 further contemplates this Tribunal fulfilling its constitutional mandate to make recommendations on judges' remuneration by reference to objective criteria...

[27] Paragraph 37 of the Report also concluded that Government's position on the May Tribunal's role in determining judicial compensation was contrary to the constitutional role of judicial compensation committees:

The Tribunal therefore interprets its jurisdiction, consistent with the tribunals that preceded it, to make recommendations that ensure judicial independence through consideration of various factors designed to maintain financial security of Provincial Court Judges... The Tribunal's view...is that the Maritime Average should not serve as the starting point for assessing the adequacy of judicial remuneration in this Province. Rather the Tribunal finds that it is obligated constitutionally to establish and review objective criteria relevant to recommending judicial salaries and benefits that maintain judicial financial security, including whether the Maritime Average or another comparator is sufficient to achieve it.

[28] The Report made recommendations relating to judicial salaries, salary differentials for the Chief Judge and the Associate Chief Judge positions and the judicial professional allowance. The Report also recommended that Government pay a proportion of the costs incurred by the Association in participating in the May Tribunal process.

Government Response to the Report

[29] Section 28.2(4) of the *Act* requires Government to approve, vary or reject a judicial remuneration tribunal report within sixty days of receipt. Section 28.2(5) of the *Act* requires Government to provide reasons for varying or rejecting a report.

[30] Government's response to the Report was issued in a letter dated January 27, 2023 ("Response"). The Response lists the recommendations in the Report from numbers 1 through 10.

[31] The Response accepted the Report's recommendations on the professional allowance, which is recommendation 7, and costs, which are recommendations 8, 9, and 10.

[32] The Response rejected and varied the May Tribunal's salary recommendations, which are recommendations 1-6. Instead, the Response substituted the statutory Maritime Average formula as per the *Act*, except for partly agreeing to the recommendation in the Report for the payment of interest on retroactive salary payments.

[33] Judges received a retroactive adjustment to their compensation based upon the Response on February 15, 2023. This adjustment included the annual adjustments that were statutorily required to have been made on July 1, 2021, and on July 1, 2022.

Reclamation of Judicial Education Funds

[34] Prior to the Report, the last judicial remuneration tribunal to make a recommendation regarding judicial professional allowances was the first Wicks Tribunal, which made recommendations for the four-year period from April 1, 2013 to March 31, 2017 ("first Wicks Tribunal").

[35] The first Wicks Tribunal's recommendation regarding the judicial professional allowance was set out at pages 75-76 of its report dated December 21, 2015:

The sum of \$1000.00 for each full time Judge and \$500.00 for each per diem Judge from each professional allowance will be reserved in a pool, retroactive to April 1, 2013, exclusively to fund the costs of an annual mandatory judicial education event (including the costs of educational resources, travel, and/or electronic attendance). This event would be for a minimum of one day for all full time and per diem Judges. The judicial education event shall be planned in consultation between the Chief Judge and the Association. For greater certainty, whether or not entirely expended for the judicial education event, the amounts annually assigned to the pool from each professional allowance, shall not be available to the individual Judge, but rather shall be used only for the cost of the annual judicial education event.

[36] Government accepted the first Wicks Tribunal's recommendation concerning the judicial professional allowance on May 26, 2016, as noted in the House of Assembly Proceedings on that date in Hansard.

[37] Consistent with the first Wicks Tribunal's recommendation, annual sums were reserved in a pool to fund the costs of an annual mandatory judicial education event ("Judicial Education Funds").

[38] As of March 31, 2021, a total of \$191,667.00 in Judicial Education Funds had been reserved. From that amount certain expenses were paid relating to education events, such that the remaining pooled amount was \$130,583.24. Judicial Education Funds that were not expended from the pooled Judicial Education Funds were not reclaimed by Government.

[39] During the May Tribunal process, one of the Association's proposals was that effective April 1, 2021, the amount of each full-time Judge's annual professional allowance should be increased from \$4,000.00 to \$5,000.00, with \$1,000.00 continuing to be pooled in order to fund the costs of the judicial education event.

[40] The Association also proposed that the amount of each *per diem* Judge's annual professional allowance should be increased from \$1,000.00 to \$1,400.00, with \$500.00 continuing to be pooled in order to fund the costs of the judicial education event.

[41] Government did not oppose increasing the professional allowance for full-time Judges, subject to the May Tribunal recommending a time limit cap. The time limit cap would be placed on the \$1,000.00 of the Professional Allowance earmarked for the judicial education event, such that if the \$1,000.00 was not spent on the judicial education event within the fiscal year it would not be carried over.

[42] The Association indicated at the May Tribunal hearing that it took no issue with a time limit cap being recommended concerning the \$1,000.00 portion that is allotted to the reserve for the judicial education event.

[43] There were no proposals, submissions or discussions during the May Tribunal process regarding the pooled Judicial Education Funds that were reserved prior to April 1, 2021.

[44] The Report recommended an increase in the judicial professional allowance retroactive to April 1, 2021. The Report did not recommend a change in the amount of the judicial professional allowance that was pooled and reserved for the judicial legal education event.

[45] The Report, at paragraph 168, recommended that, retroactive to April 1, 2021, the annual sums pooled and allocated to judicial legal education would have to be spent in the year that they were allocated and would no longer be reserved:

Retroactive to 1 April 2021, the annual allowance for the Judges of the Provincial Court be increased to \$5,000.00 with \$1000.00 pooled and allocated to judicial legal education to be spent in the year it is allocated and for the per diem judges to

\$1,400.00 with \$500.00 pooled and allocated to judicial legal education to be spent in the year it is allocated.

[46] On June 8, 2023, the Deputy Minister of Justice advised the Chief Judge that Government considered the Report to be clear and that, as per the judicial professional allowance recommendation, the Judges would have no access to Judicial Education Funds accumulated from prior years. That is, the Judges could only access the funds provided in that current fiscal year and the pooled Judicial Education Funds that had been reserved prior to April 1, 2021, in the amount of \$130,583.24, had been reclaimed.

[47] In correspondence dated October 10, 2023, counsel for the Association wrote to Government and advised that the Association's position was that reclamation of the Judicial Education Funds was done in contravention of the first Wicks Tribunal's recommendation and without lawful authority. Counsel for the Association maintained that the Report's recommendation on judicial professional allowances had no application to the Judicial Education Funds that pooled in the period prior to April 1, 2021.

POSITIONS OF THE PARTIES

[48] The Association and Government have differing views on how the Response dealt with recommendations 1-6 of the Report.

Recommendations 1 and 2

[49] The Report made recommendations for the 2021 and 2022 fiscal years. This involved initial adjustments to a specific salary figure for each year and then further adjustments once judicial salaries in the other jurisdictions were finalized for each fiscal year. The following is a summary of the specific recommendations at paragraph 167 of the Report for recommendations 1 and 2:

[Recommendation 1] For 1 April 2021 to 31 March 2022:

- (i) salary be adjusted retroactively to 1 April 2021 to \$273,315.00 with interest calculated and paid to reflect the rate of inflation from the end date of each pay period to which the retroactive increase is applied to the date of its actual payment;
- (ii) once the final value of the Maritime Average is set for 1 April 2021, the salary be adjusted retroactively to 1 April 2021 in accordance with the Act to reflect the final value of the Maritime Average as of that date with interest calculated and paid on the retroactive adjustment to reflect the rate of inflation from the end date of each pay period to which any increase is applied to the date of its actual payment.

[Recommendation 2] For 1 April 2022 to 31 March 202[3]:

- (i) Salary be adjusted retroactively to 1 April 2022 to \$277,377.00 with interest calculated and paid to reflect the rate of inflation from the end date of each pay period to which the retroactive increase is applied to the date of its actual payment;
- (ii) Once the final value of the Maritime Average is set for 1 April 2022, the salary be adjusted retroactively to 1 April 2022 in accordance with the Act to reflect the final value of the Maritime Average as of that date with interest calculated and paid on the retroactive adjustment to reflect the rate of inflation from the end date of each pay period to which any increase is applied to the date of its actual payment.

[50] The Response accepted the recommendations in the Report on annual salary amounts for the years 2021/2022 and 2022/2023, based upon the Maritime Average. The Association does not take issue with this.

[51] The Response rejected the recommendation in the Report that salaries be adjusted retroactively to the date of April 1 each year. Instead, the Response applied the retroactive date of July 1 for each year, as set out in section 27.1 of the *Act*.

[52] The Association submits that salaries should be adjusted retroactively based upon the date specified in the Report, being April 1 of each year. Government submits that the retroactive date should be the date specified in the *Act*, being July 1 of each year.

[53] The Response varied the recommendation in the Report concerning the payment of retroactive interest. The Response accepted that interest should apply to retroactive salary payments but calculated that interest using the rate in the *Judgment Interest Act*, R.S.N.L. 1990, c. J-2 (“*Judgment Interest Act*”) rather than the inflation rate.

[54] The Association submits that the interest on retroactive salary payments should be calculated based upon the inflation rate, as specified in the Report. Government submits that the interest on retroactive salary payments should be calculated based upon the rate in the *Judgment Interest Act*.

Recommendations 3 and 4

[55] Recommendations 3 and 4 relate to salary for the period April 1, 2023, to March 31, 2027, as summarized in paragraph 167 of the Report:

[Recommendation 3] 1 April 2023 and continuing forward to 31 March 2027:

- (i) the salary be adjusted as of 1 April in each year by an amount not less than the [Consumer Price Index, “CPI”] as of 1 April that year;
- (ii) once the final value of the Maritime Average for each period commencing on 1 April in each of 2023, 2024, 2025, 2026 is determined, should the Maritime Average in any given year be higher than the CPI-adjusted salary established pursuant to (i) above, the salary be adjusted retroactively to the 1 April date; and

(iii) interest be calculated and paid to reflect the rate of inflation from the end date of each pay period to which any increase is applied to the date of its actual payment.

[Recommendation 4] If Government is of the opinion, based on measures such as Statistics Canada's "average weekly earnings" data for the Province, that the adjustment in salary based on the CPI adjustment recommended [above] is resulting in Judges receiving increases that materially exceed salary/wage growth compared to other workers in the Province, then Government consider a referral of the recommendation [noted] above back to this Tribunal for review pursuant to Subsection 28.1(1) of the Act.

[56] The Response rejected recommendation 3 concerning salary for the period from April 1, 2023, to March 31, 2027. The Response also rejected recommendation 4. Instead, the Response substituted the statutory formula for determining salary as set out in section 27.1 of the *Act*.

[57] The Association submits that salary for the period from April 1, 2023, to March 31, 2027, should be calculated as outlined in the Report. Government submits that salary for this time-period should be calculated in accordance with section 27.1 of the *Act*.

Recommendations 5 and 6

[58] Recommendations 5 and 6 relate to the salary differentials to be paid to the Chief Judge and the Associate Chief Judge positions, as noted in the summary of recommendations at paragraph 167 of the Report:

[Recommendation 5] The Chief Judge receive an 8% differential above that paid to the *puisne* judges of the Provincial Court with interest calculated and paid on any retroactive increase to reflect the rate of inflation from the end date of each pay period to which the retroactive increase is applied to the date of its actual payment;

[Recommendation 6] The Associate Chief Judge receive a 4% differential above that paid to *puisne* judges of the Provincial Court with interest calculated and paid on any retroactive increase to reflect the rate of inflation from the end date of each pay period to which the retroactive increase is applied to the date of its actual payment.

[59] The Response rejected recommendations 5 and 6 concerning the salary differentials for the Chief Judge and the Associate Chief Judge positions. Instead, the Response substituted the statutory formulas for determining salary differentials for the Chief Judge and the Associate Chief Judge positions as set out in sections 27.1(2) and 27.1(3) of the *Act*.

[60] The Association submits that the salary differentials for the Chief Judge and the Associate Chief Judge positions should be calculated as outlined in the Report. Government submits that the salary differentials should be calculated in accordance with sections 27.1(2) and 27.1(3) of the *Act*.

Recommendation 7

[61] Recommendation 7 concerns the judicial professional allowance as noted in the recommendation summary at paragraph 168 of the Report:

[Recommendation 7] Retroactive to 1 April 2021 the annual allowance for the judges of the Provincial Court be increased to \$5,000.00 with \$1,000.00 pooled and allocated to judicial legal education to be spent in the year it is allocated and for the *per diem* judges to \$1,400.00 with \$500.00 pooled and allocated to judicial legal education to be spent in the year it is allocated.

[62] The Response accepts recommendation 7 of the Report. The Association does not take issue with this.

[63] The Association submits, however, that Government's subsequent reclamation of the pooled Judicial Education Funds in the amount of \$130,583.24 was done without lawful authority and not in accordance with the Report or the previously accepted first Wicks Tribunal's recommendation. Government submits that the reclamation of the pooled Judicial Education Funds was done in an appropriate and lawful manner.

LAW

[64] This Application involves the judicial review analysis as set out by the Supreme Court of Canada in *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, 2005 SCC 44 ("*Bodner*").

[65] The *Bodner* analysis is described by the Supreme Court of Canada in paragraph 83 of *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 ("*B.C. Provincial Court Judges*") as follows:

... Though necessarily limited in scope, *Bodner* review is a robust form of review. The test requires that the government justify a *departure* from the commission's recommendations. The government must give legitimate and rational reasons for doing so and sound reasoning must be supported by a reasonable factual foundation. The government's response must demonstrate respect for the judicial office, for judicial independence, and for the commission process; as well, the broader objectives of the process must be achieved.

[66] A *Bodner* analysis measures a response on the standard of rationality and justification. A response must express rational and legitimate reasons for departing from the recommendations of a judicial remuneration tribunal.

[67] The *Bodner* standard involves a government addressing issues in good faith with sound reasoning and without summary rejection or disapproval.

[68] Whether the *Bodner* standard has been met in a response has to be examined based upon the record before the judicial remuneration tribunal. This record includes the submissions of the parties, the tribunal report, the tribunal recommendations and the government response to the report, among other possible things.

[69] The potential scope of the record in a *Bodner* review is outlined by the Supreme Court of Canada at paragraphs 52-55 and 84 of *B.C. Provincial Court Judges*.

[70] The *Bodner* form of judicial review has three steps, as set out in paragraph 31 of *Bodner*:

1. Has the government articulated a legitimate reason for departing from the commission's recommendations?
2. Do the government's reasons rely upon a reasonable factual foundation? and
3. Viewed globally, has the commission process been respected and have the purposes of the commission –preserving judicial independence and depoliticizing the setting of judicial remuneration- been achieved?

[71] The first stage of the *Bodner* analysis involves the articulation of a legitimate reason, as stated in paragraphs 23-25 of *Bodner*:

The commission's recommendations must be given weight. They have to be considered by the judiciary and the government. The government's response must be complete, must respond to the recommendations themselves and must not simply reiterate earlier submissions that were made to and substantively addressed by the commission. The emphasis at this stage is on what the commission has recommended.

The response must be tailored to the commission's recommendations and must be "legitimate" ... which is what the law, fair dealing and respect for the process require. The government must respond to the commission's recommendations and give legitimate reasons for departing from or varying them.

The government can reject or vary the commission's recommendations, provided that legitimate reasons are given. Reasons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality. Legitimate reasons must be compatible with the common law and the Constitution. The government must deal with the issues at stake in good faith. Bald expressions of rejection or disapproval are inadequate. Instead, the reasons must show that the commission's recommendations have been taken into account and must be based on facts and sound reasoning. They must state in what respect and to what extent they depart from the recommendations, articulating the grounds for rejection or variation. The reasons should reveal a consideration of the judicial office and an intention to deal with it appropriately. They must preclude any suggestion of attempting to manipulate the judiciary. The reasons must reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence.

[72] The second stage of the *Bodner* analysis requires the reviewing Court to determine whether the government has explained the factual foundation of its reasons in its response. Paragraph 37 of *Bodner* states that the assessment at the second stage involves a determination of whether it is:

...rational for the government to rely on the stated facts or circumstances to justify its response. This is done by looking at the soundness of the facts in relation to the position the government has adopted in its response.

[73] The third and final stage of the *Bodner* analysis involves a consideration of the whole of the process from a global perspective, as explained in paragraph 38 of *Bodner*:

At the third stage, the court must consider the response from a global perspective. Beyond the specific issues, it must weigh the whole of the process and the response in order to determine whether they demonstrate that the government has engaged in a meaningful way with the process of the commission and has given a rational answer to its recommendations. Although it may find fault with certain aspects of the process followed by the government or with some particular responses or lack of answer, the court must weigh and assess the government's participation in the process and its response in order to determine whether the response, viewed in its entirety, is impermissibly flawed even after the proper degree of deference is shown

to the government's opinion on the issues. The focus shifts to the totality of the process and of the response.

[74] In considering a response globally the question is whether, overall, a government has engaged in a meaningful way with the judicial remuneration tribunal process and a government has given a rational answer to the tribunal's recommendations.

[75] With respect to the possible remedies, *Bodner* directs Courts to avoid issuing specific orders to make a tribunal's recommendations binding, unless the governing statutory scheme allows for that option. The appropriate remedy will generally be to return the matter to the government for reconsideration.

ANALYSIS

[76] This judicial review is about the present, not the past. Whether or not Government acted in accordance with its constitutional obligations in rejecting or varying the Report's recommendations must be decided based upon the current circumstances and facts.

[77] The past conduct and past legal positions of Government and the Association will only be considered if they are directly relevant to any of the current issues or the appropriate remedy.

[78] Each recommendation in question in the Report will be dealt with in turn based upon the first two steps in the *Bodner* analysis. The first two steps in the *Bodner* analysis involve assessing the legitimacy of the reasons in the Response and the existence of a reasonable factual foundation for those reasons.

[79] The third step of the *Bodner* analysis, which involves an overall assessment of the judicial remuneration tribunal process and the Response, will be dealt with separately.

Recommendations 1 and 2

[80] As previously noted, the Response rejected the recommendation in the Report that salaries be adjusted retroactively to the date of April 1 each year and, instead, it substituted the July 1 date in section 27 of the *Act*.

[81] The Response also varied the recommendation in the Report with respect to the interest rate. The Response accepted that interest should apply to retroactive salary payments but used the *Judgment Interest Act* interest rate, not the inflation rate as recommended in the Report.

Recommendations 1 and 2: April 1 or July 1 date

[82] Adjusting salaries as of July 1 each year instead of April 1 each year results in Judges' salaries aligning with the Maritime average for only 9 months of the year instead of 12 months of the year.

[83] The reasons provided in the Response for rejecting the April 1 adjustment date were stated as follows on page 4:

... the Province has decided to apply the July 1 date for adjustment. Administratively, this is necessary to allow sufficient time to gather salary information from the Maritime provinces for the purpose of salary adjustments. A July 1 date also aligns with salary adjustments for others whose salaries are administered by the Treasury Board.

[84] Turning to the first reason provided, this reason does not follow logically and it is not responsive to the recommendation in the Report. The Report recommended that salaries be “adjusted retroactively” to April 1 each year, not that salary adjustments be made on April 1 each year.

[85] Government can take the necessary time to gather salary information following April 1 each year then implement the retroactive salary adjustments after-the-fact, which is what the Report recommended.

[86] The three provinces included in the Maritime Average adjust their judicial salaries as of April 1 each year. Adjusting salaries for Judges in this province as of July 1 each year would result in Judges receiving less than the Maritime Average for 3 months of each year.

[87] This first reason does not meet the legitimacy threshold required of Government in its Response, nor is it based upon a reasonable factual foundation. That is, this first reason fails both the first and second steps in the *Bodner* analysis.

[88] While this first reason may help to explain why Government chose the date of July 1 when it enacted section 27 of the *Act*, it is not a legitimate or responsive reason for imposing the date of July 1 instead of the April 1 date recommended in the Report.

[89] Turning to the second reason, Government put no evidence before the May Tribunal to establish that the date of July 1 aligns with salary adjustments for others whose salaries are administered by Treasury Board.

[90] Whether or not July 1 aligns with salary adjustments for other employees in the province it is not a legitimate reason for declining to implement the Maritime Average, which is based upon the date of April 1.

[91] There are fundamental differences between the salaries and benefits of Judges and provincial employees in the province. Provincial employees may receive benefits that Judges do not and vice-a-versa. As stated in paragraph 85 of *B.C. Provincial Court Judges*:

... a government that does not take into account the distinctive nature of judicial office and treats judges simply as a class of civil servant will fail to engage with the principle of judicial independence...

[92] This second reason is not a legitimate reason to reject the recommendation in the Report, nor was it based upon a reasonable factual foundation. As such, this second reason fails both the first and second steps in the *Bodner* analysis.

[93] This second reason in the Response may also help to explain why Government chose the date of July 1 when it drafted and enacted section 27 of the *Act*, but it is not responsive to the recommendation in the Report.

[94] In its written submissions in the Application Government also submitted that the date of July 1 is prescribed in the *Act* and, as such, it is lawful unless determined to be invalid pursuant to s. 52(1) of the *Constitution Act, 1982*.

[95] This further basis for rejecting the recommendation in the Report is itself invalid and it lacks legitimacy. The May Tribunal had a legislative and constitutional duty to make recommendations with respect to judicial salaries and benefits.

[96] Government cannot rely upon its own legislative changes to the *Act* as a basis for ignoring the constitutional role of the May Tribunal and the recommendations in the Report concerning judicial remuneration.

[97] To accept this argument would be tantamount to allowing Government to legislate judicial salaries and benefits, subject to potential challenges under s. 52(1)

of the *Constitution Act, 1982*, regardless of the judicial remuneration tribunal process and the recommendations that follow from that process.

[98] Government legislating judicial salary and benefits, subject to an “adequacy” assessment by a judicial remuneration tribunal, is contrary to the established constitutional process for determining judicial remuneration.

[99] As it is, the May Tribunal considered and rejected this submission from Government in the Report. That is, the May Tribunal rejected the submission that its legislative and constitutional role was constrained by the amendments to the *Act*.

[100] This final reason for rejecting the date of April 1 as recommended in the Report fails the first step in the *Bodner* analysis, since it lacks legitimacy.

[101] Given the foregoing, and in conclusion, the Response to recommendations 1 and 2 in terms of the April 1 date versus the July 1 date does not meet Government’s constitutional obligations as set out in *Bodner*.

Recommendations 1 and 2: Retroactive Interest Rate

[102] Page 4 of the Response states that using the *Judgment Interest Act* for retroactive interest payments is consistent with the interest rate awarded to parties who obtain a judgment.

[103] Equating judicial salaries that are established through a judicial remuneration tribunal process with the payment of money pursuant to a Court judgment misapprehends the judicial remuneration process. The role of a judicial remuneration tribunal is to recommend appropriate levels of judicial compensation, not to adjudicate disputes between litigants.

[104] Page 4 of the Response also states that the *Judgment Interest Act* provides a reference for interest owing that it is set annually pursuant to Bank of Canada criteria. Government has submitted that this rate of interest is an unambiguous reference to interest owing.

[105] The rate of inflation, through the Consumer Price Index (“CPI”), is also an unambiguous reference for interest owing, albeit one that is set through Statistics Canada criteria.

[106] The Response preferring the *Judgment Interest Act* rate of interest to the CPI rate of inflation without sufficient rationale is not appropriate.

[107] These reasons for varying the recommendation in the Report are not based upon sound reasoning and, as such, they lack legitimacy. This is not in keeping with the first step in the *Bodner* analysis.

[108] Page 4 of the Response also states that the Report did not recommend a particular rate of interest or a method of calculating the rate of interest.

[109] Recommendations 1 and 2 both reference the “rate of inflation” throughout. Paragraph 108 of the Report recommended that:

... Interest be calculated and paid on the retroactive adjustment... to reflect the rate of inflation from the end date of each pay period to which the retroactive increase is applied to the date of its actual payment...

[110] As well, paragraph 110 of the Report recommended that:

... the rate of inflation be determined based on the rate in the Province for the applicable time period, according to the CPI Index as published by Statistics Canada.

[111] Given the foregoing, this reason in the Response does not demonstrate that the recommendation in the Report was meaningfully considered. The Report references a specific interest rate for recommendations 1 and 2 along with a specific method of calculating that rate of interest.

[112] If Government was uncertain as to the recommendation in the Report concerning the interest rate or its calculation it could have sought clarification from the May Tribunal under section 28.2(2) of the *Act*.

[113] Government submits that is not required to seek clarification from the May Tribunal under the *Act*. While this is correct, this does not justify Government imposing its own views in these circumstances contrary to the clear recommendations in the Report.

[114] There is no uncertainty in the Report as to what the interest rate is or how it is to be calculated. The Response came to the opposite view without sufficient justification, which it then used as a basis for varying the recommendation in the Report. This is not in accordance with Government's obligation in the first step of the *Bodner* analysis.

[115] The Report, at paragraph 107, recommended the payment of interest on retroactive salary payments to ensure that Judges receive the "full value" of the Maritime Average:

... Having recommended that the Maritime Average provides for financial security of the Provincial Court Judges, it is important that they receive its full value, once finally determined, for the periods of 2021/22 and 2022/23. The Tribunal therefore sees it as necessary to exercise its discretion to recommend the payment of interest

on retroactive payments in the manner recommended above to ensure that the intent of its recommendation is achieved.

[116] As noted in the Report, if the *Judgment Interest Act* rate of interest is applied it will not ensure that Judges receive the full value of the Maritime Average. This is the reason that the Report recommended the CPI inflation rate of interest instead.

[117] It should be acknowledged that the Report recommended the CPI inflation rate of interest, notwithstanding that the Association itself had proposed using the *Judgment Interest Act* rate of interest.

[118] In total, the Response to recommendations 1 and 2 on the retroactive interest rate does not meet Government's constitutional obligations as set out in *Bodner*.

Recommendations 3 and 4 - Overview

[119] The Response rejected recommendations 3 and 4 concerning the CPI and Judges' salary for the period from April 1, 2023, to March 31, 2027. Instead, the Response substituted the statutory formula for determining salary as set out in section 27.1 of the *Act*.

[120] Overall, the Response concerning recommendations 3 and 4 lacks legitimacy for the following reasons:

- (i) the Response restates previous submissions that were made by Government that had already been rejected by the May Tribunal in the Report. That is, the Response continues to maintain that the May Tribunal's role is very limited in light of the amendments to the *Act*;

- (ii) the Response places less weight on several factors in the Report including cost of living, without engaging with the Report's reasoning, which does not justify this difference in its weighting; and
- (iii) the Response ignores recommendation 4 of the Report and deems it to be unnecessary.

Recommendation 3 - Restating Submissions

[121] The Response, at page 5, starts its reasons for rejecting recommendation 3 by repeating Government's previous submissions to the May Tribunal on the amendments to the *Act*:

... The Province maintains that these provisions meet the constitutional requirements respecting financial security as a component of judicial independence, and embody the salary recommendations of previous salary and benefit tribunals, which have often used the average of compensation paid in the Maritime provinces as a comparator for setting compensation for Provincial Court judges in Newfoundland and Labrador...

[122] The Response later states the following on page 7 with respect to recommendation 3, which repeats submissions that Government had made to the May Tribunal:

... There has been no evidence presented which demonstrates that the statutory formula in s. 27.1 of the *Provincial Court Act, 1991* is inadequate to maintain judicial independence...

[123] The Report very clearly rejected these previous submissions by Government, concerning both the constitutional principles that are applicable and the provisions of the *Act* itself. Simply put, the Report rejected Government's previous submissions that the *Act* serves to override the fundamental role of the May Tribunal in determining judicial compensation.

[124] The Report concluded that the May Tribunal was constitutionally required to establish and review objective criteria when making recommendations concerning judicial salaries and benefits, not merely assess the adequacy of the Maritime Average formula in the *Act* in terms of judicial independence.

[125] Rather than dealing meaningfully with the conclusions and recommendations in the Report concerning recommendation 3, the Response repeated previously rejected submissions to justify its reasons for rejecting recommendation 3.

[126] The first constitutional requirement for financial security is that changes to judicial remuneration require prior recourse to an independent, effective and objective judicial remuneration tribunal. This is noted in paragraphs 131-133 of *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (“*P.E.I. Reference*”)

[127] The Response, by “maintaining” Government’s position concerning section 27 of the *Act*, is not responsive to recommendation 3 in the Report and it does not engage with the reasoning in the Report. As such, this reason in the Response lacks legitimacy and it is not in keeping with Government’s obligation in the first step in the *Bodner* analysis.

[128] This reason in the Response for rejecting recommendation 3 of the Report does not meet Government’s constitutional obligations as set out in *Bodner*.

Recommendations 3 – Reweighing of Factors

[129] The Response states that the Report should have adopted the Maritime Average without recommending CPI-based increases. The Response does not address the weight that the Report places on the cost of living factor and it ignores other factors in the Report for making recommendation 3.

[130] The Report speaks about ensuring that increases in judicial remuneration keep Judges' salaries competitive with the salaries of their federally appointed counterparts.

[131] As well, paragraph 111 of the Report explains the concerns about salary erosion due to inflation as follows:

The Tribunal's recommendation for salaries in the period from 1 April 2023 to 31 March 2027 reflects its concern that *de facto* reductions do not occur through erosion by inflation. The effect may be to reduce the competitiveness of a Provincial Court Judges' salary when compared to the federal (s.96) courts or a lawyer's earnings in private practice.

[132] The Report also speaks to the recruitment and retention of Judges by ensuring that remuneration is competitive with federally appointed judges.

[133] The Response gives less weight than the Report did to the cost of living, recruitment, retention and the comparative salaries of other groups. As such, the Response failed to engage with the reasoning in the Report without providing sufficient justification for doing so.

[134] The Response disagrees with the application of CPI-based increases to Judges' salaries and states that the CPI should be a factor to determine whether judicial compensation has eroded below the minimum acceptable level for judicial independence. The role of the May Tribunal, however, was to assess fair and appropriate compensation, not just determine whether remuneration had eroded below the minimum acceptable level.

[135] The Response states that increases in other Maritime provinces will presumably be the result of an independent tribunal process that will likely consider factors such as the CPI. This reasoning ignores the Report's conclusion that the May

Tribunal was constitutionally obliged to conduct its own assessment of judicial compensation based upon the relevant objective factors.

[136] It was not appropriate for the Response to fail to engage with the Report's analysis and to simply conclude that the Maritime Average was adequate. These reasons in the Response for rejecting recommendation 3 lack legitimacy and do not meet Government's constitutional obligation in the first step of the *Bodner* analysis.

[137] Government further submits that, to accept recommendation 3 of the Report would be to effectively immunize judicial salaries against inflation, which is contrary to the law as outlined in *P.E.I. Reference*.

[138] Recommendation 4, which the Response did not meaningfully address, speaks to the scenario where the CPI increase results in judges receiving increases that materially exceed salary/wage growth compared to other workers in the province. This effectively addresses the concern raised by Government that recommendation 3 could result in judicial salaries being immunized against inflation.

[139] As per Recommendation 4, which is addressed subsequently, Government can refer recommendation 3 back to the judicial remuneration tribunal for review in accordance with the *Act* if it believes that any CPI adjustment is inappropriate.

[140] Given the foregoing, this reason in the Response is not responsive to recommendation 3 or 4 and it does not meet Government's obligation for justification in the first step of the *Bodner* analysis.

[141] Overall, and with respect to all of the reasons provided for rejecting recommendation 3 of the Report, the Response does not meet Government's constitutional obligation under the first step of the *Bodner* analysis.

Recommendation 4

[142] Recommendation 4 speaks to the process for having any CPI adjustments to salary reconsidered by the judicial remuneration tribunal for the period April 1, 2023, to March 31, 2027.

[143] Government submits that recommendation 4 in the Report was premised upon recommendation 3 being accepted, which it was not. The Response, because it had not accepted recommendation 3 of the Report, did not meaningfully address recommendation 4.

[144] Government has expressed a preference for the regular convening of judicial remuneration tribunals, rather than doing so for individual issues, but this does not meaningfully address recommendation 4.

[145] It has been determined that the reasons in the Response for rejecting recommendation 3 were not appropriate. Given this, and once recommendation 3 is properly considered by Government, recommendation 4 of the Report must be considered as well in accordance with *Bodner*.

Recommendations 5 and 6

[146] Recommendations 5 and 6 relate to the salary differentials to be paid to the Chief Judge and the Associate Chief Judge positions:

[Recommendation] 5. The Chief Judge receive an 8% differential above that paid to *puisne* judges of the Provincial Court with interest calculated and paid on any retroactive increase to reflect the rate of inflation from the end date of each pay period to which the retroactive increase is applied to the date of its actual payment.

[Recommendation] 6. The Associate Chief Judge receive a 4% differential above that paid to *puisne* judges of the Provincial Court with interest calculated and paid on any retroactive increase to reflect the rate of inflation from the end date of each pay period to which the retroactive increase is applied to the date of its actual payment.

[147] The Response, at page 8, rejected these recommendations and substituted the provisions of the *Act*:

... Recommendations 5 and 6 would apply an 8% salary differential and a 4% salary differential to the Chief Judge and the Associate Chief Judge positions, respectively, above the salary paid to *puisne* judges of the Provincial Court. Under s. 27.1(2) of the Act, effective every July 1 the annual salary of the Chief Judge is adjusted to an amount equal to the average annual salary of chief judges in the Maritime provinces as determined on April 1 of that year. Under subsection 27.1(3), the annual salary of the Associate Chief Judge is adjusted by a percentage equal to the percentage by which the annual salary of the Chief Judge is adjusted under subsection (2), with retroactive effect where applicable.

As noted above, the application of the average annual salary of Maritime judges is an appropriate comparator and does not erode judicial independence. Applying the statutory formula as per s. 27.1(2) and (3) ensures that the Chief Judge and Associate Chief Judge continue to receive salary differentials that reflect their administrative roles and is consistent with the salary differentials of counterparts in the Maritime Provinces...

[148] The above reasoning restates the previous submissions of Government to the May Tribunal, which had already been rejected. Furthermore, this reasoning is not responsive to the reasoning in the Report and, as such, it lacks legitimacy.

[149] The Report's reasoning with respect to the Chief Judge salary differential is noted in paragraphs 116-117 as follows:

The Andrews Tribunal's recommendation for an 8% differential to be paid to the Chief Judge was based on increased workload in assigning duties to Judges, coordinating the work of Judges, and overseeing the transfer of Judges throughout

the Province. It noted the Chief Judge also has representational functions... It also noted that two of the three Maritime Provinces currently pay their Chief Judge an 8% differential.

The Tribunal did not receive any new evidence to suggest that the recommendation made by the Andrews Tribunal should be disregarded. There is no evidence that the work of the Chief Judge has changed or requires any less time than had been the case when the recommendation of the Andrews Tribunal was made. The Tribunal recommends that the Chief Judge continue to receive the 8% differential for the entire period that is subject to its mandate.

[150] This was the basis for the recommendation in the Report that the Chief Judge position continue to receive the 8% differential. The reasons in the Response do not engage with the reasoning of the Report.

[151] The Report also recommended adopting the 4% differential for the Associate Chief Judge position. This recommendation in the Report at paragraph 126 was based upon the same reasons for recommending that the differential for the Chief Judge position be maintained:

... There is no new evidence to suggest why the recommendation made by the Andrews Tribunal should be disregarded. There is no evidence that the work of the Associate Chief Judge has changed or requires any less time than had been the case when the recommendation of the Andrews Tribunal was made. The Tribunal therefore recommends that the Associate Chief Judge continue to receive no more than the 4% differential...

[152] The Response again failed to address this reasoning in the Report and it does not acknowledge that applying the statutory formula under the *Act* will result in a reduction of the currently applicable 4% differential to the Associate Chief Judge position. Paragraphs 122-123 of the Report note the currently applicable differential.

[153] The issue here, despite the reasons in the Response, is not whether application of the statutory formula under the *Act* will “erode judicial independence”. The issue is what constitutes fair and appropriate compensation based upon objective criteria.

[154] The assertion in the Response that the Chief Judge and the Associate Chief Judge will “continue to receive salary differentials that reflect their administrative roles” ignores the reasoning in the Report that the statutory formula will result in a reduction to those salary differentials.

[155] The salary differentials for the Chief Judge and the Associate Chief Judge positions were recommended by a prior judicial remuneration tribunal based upon the evidence at that time. No similar evidence concerning the salary differentials for these positions was presented to the May Tribunal.

[156] The statement in the Response that the salary differentials are consistent with the salary differentials in the Maritime provinces is not accurate. Paragraph 115 of the Report references that two of the three Maritime provinces have an 8% salary differential for the Chief Judge position, with Prince Edward Island having a 6% salary differential for the Chief Judge position. Paragraph 121 of the Report notes that no comparable position to the Associate Chief Judge position exists in Prince Edward Island.

[157] The reasons in the Response for rejecting recommendations 5 and 6 of the Report and substituting the provisions of the *Act* lack legitimacy and are not based upon a reasonable factual foundation. As such, these reasons do not meet the constitutional obligations of Government under the first and second steps of the *Bodner* analysis.

[158] Even though the Response does not accept recommendations 5 and 6 of the Report, it does state that interest will be calculated for retroactive payments as per section 27 of the *Act*. The issue of the appropriate retroactive interest rate and its calculation has already been addressed.

Recommendation 7

[159] Recommendation 7 concerns the judicial professional allowance:

[Recommendation] 7. Retroactive to April 1, 2021, the annual allowance for judges of the Provincial Court be increased to \$5,000.00 with \$1,000.00 pooled and allocated to judicial legal education to be spent in the year it is allocated and for the *per diem* judges to \$1,400.00 with \$500.00 pooled and allocated to judicial legal education to be spent in the year it is allocated.

[160] The Response states that it accepts the above recommendation respecting professional allowances.

[161] The recommendations in the Report do not speak to the annual amounts assigned to and reserved in the pool to fund judicial education prior to April 1, 2021. Those amounts were pooled further to the first Wicks Tribunal's recommendation.

[162] Recommendation 7 is expressly retroactive to April 1, 2021. As such, and effective April 1, 2021, the annual sum of \$1,000.00 for each full time judge and \$500.00 for each *per diem* judge pooled and allocated to fund judicial legal education must be spent in the year it is allocated and does not carry over.

[163] The Judicial Education Funds pooled in the years prior to April 1, 2021, accumulated and arguably vested pursuant to the first Wicks Tribunal's recommendation. These pooled funds were not addressed in the Report.

[164] The reclamation of the Judicial Education Funds, having occurred separate and apart from the judicial remuneration tribunal process, was not done appropriately. It was also done in a manner that was inconsistent with the previously accepted first Wicks Tribunal's recommendation that the funds "will be reserved in a pool".

[165] The reclamation of the Judicial Education Funds by Government was based upon recommendation 7 of the Report but recommendation 7 does not address pooled education funds for the period prior to April 1, 2021.

[166] Government has raised the *Financial Administration Act*, R.S.N.L. 1990, c. F-8 (“*Financial Administration Act*”) as a legal basis for reclaiming the Judicial Education Funds. This legal argument was not raised before the May Tribunal, in the Response or otherwise prior to it being raised in Government’s submissions in this judicial review.

[167] Government now submits, despite its practice of doing so in the past, that the *Financial Administration Act* precludes it from carrying the pooled Judicial Education Funds from one fiscal year to the next.

[168] Even if one presumes that the *Financial Administration Act* should be now be considered outside of the judicial remuneration tribunal process, section 23(1) of the *Financial Administration Act* makes it clear that this limitation only applies to “goods and services coming in the course of payment during the fiscal year to which the estimates relate...”.

[169] The pooled Judicial Education Funds did not and do not relate to goods and services coming in the course of payment in a given fiscal year. They are for goods and services coming in the course of payment in the future.

[170] Furthermore, and as submitted by the Association, the funds could have been transferred to the Provincial Court of Newfoundland and Labrador in order for those funds to be expended within the fiscal year, such that section 23(1) of the *Financial Administration Act* would not apply.

[171] This belated submission by Government, even if it could and should be considered and accepted at this stage of the process, is not a legitimate basis for Government to unilaterally reclaim the pooled Judicial Education Funds outside of the judicial remuneration tribunal process.

[172] Point number two of the summary provided in paragraph 287 of *P.E.I. Reference* makes it clear that issues of judicial remuneration, which include salary and benefits, must be determined through the judicial remuneration tribunal process:

Provinces are under a constitutional obligation to establish bodies which are independent, effective, and objective, according to the criteria that I have laid down in these reasons. Any changes to or freezes in judicial remuneration require prior recourse to the independent body, which will review the proposed reduction or increase to, or freeze in, judicial remuneration. Any changes to or freezes in judicial remuneration made without prior recourse to the independent body are unconstitutional.

[173] Given this, and the preceding analysis, there was no legal or constitutional basis for Government to reclaim the Judicial Education Funds pooled prior to April 1, 2021. These funds were not capable of being reclaimed outside of the judicial remuneration tribunal process.

The Response Overall

[174] Government has submitted that judicial review is not relitigation and that the Association's submissions rehashing the May Tribunal process is contrary to *Bodner*.

[175] Judicial review is certainly not a hearing *de novo*, whether a *Bodner* review is involved or not. But the final stage of the *Bodner* analysis involves an overall view of Government's participation in the May Tribunal process ("process") and its Response. The focus shifts to the totality of the process and the Response.

[176] The Response accepted recommendations 7-10 of the Report. Other than the subsequent reclamation of Judicial Education Funds, which has already been addressed, the Association takes no issue with the conduct of Government and the Response concerning recommendations 7-10.

[177] All of the issues raised by the Association, other than the reclamation of Judicial Education Funds, have to do with recommendations 1-6 in the Report.

[178] It is instructive to provide a generalized summary of the position of Government during the process and in the Response for the salary issues raised in recommendations 1-6 of the Report:

Recommendations 1 and 2 – July 1 or April 1 date

Government position during the process: Section 27 of the *Act*

Government position in the Response: Section 27 of the *Act*

Recommendations 1 and 2 – Retroactive Interest Rate

Government position during the process: No interest payable

Government position in the Response: *Judgment Interest Act*

Recommendations 3 and 4 – Judges Salary and CPI

Government position during the process: Section 27 of the *Act*

Government position in the Response: Section 27 of the *Act*

Recommendations 5 and 6 – Salary Differentials

Government position during the process: Section 27 of the *Act**

Government position in the Response: Section 27 of the *Act*

** during the process the position of Government concerning the Associate Chief Judge salary differential was more favourable than section 27 of the Act, as referenced in paragraph 121 of the Report*

[179] Given the foregoing, and the analysis of the reasoning in the Response for recommendations 1-6, it is not possible to conclude that Government engaged in a meaningful way with the process concerning salary issues.

[180] Other than agreeing to apply interest for retroactive salary payments, although not at the rate recommended in the Report, Government did not change its stated position whatsoever during the process concerning the salary issues in recommendations 1-6.

[181] In advance of the changes to the *Act*, Government was of the view that adopting the Maritime Average would mean that “salary matters are no longer determined by the Tribunal”.

[182] Following the changes to the *Act*, and subject to an “adequacy” assessment, Government continued to maintain during the process that salary matters no longer had to be determined by the May Tribunal.

[183] Following the Report, and despite the very clear reasoning and recommendations of the Report, Government continued to maintain in its Response that salary matters no longer had to be determined by the May Tribunal other than through an “adequacy” assessment.

[184] At the hearing of this Application Government continued to maintain that salary matters no longer had to be determined by the May Tribunal, subject to an “adequacy” assessment.

[185] As stated in paragraphs 85-86 of *B.C. Provincial Court Judges*:

... it is never enough for the government to simply repeat the submissions it made to the commission: *Bodner*, at para 23. That does not justify a departure from the commission's recommendations. Similarly, a government that consistently rejects a commission's recommendations will put in question whether it is respecting the commission process and, as a result, whether the process is achieving its objectives...

A government response that does not *meaningfully* engage with the commission process and its recommendations risks failing the *Bodner* test. As *Bodner*, at para. 31, makes clear, the reviewing court must ultimately be satisfied that the objectives of the commission process — namely, depoliticizing decisions about judicial remuneration and preserving judicial independence — have been met. ...

[186] Overall, and with respect to issues of salary, it is evident that Government engaged in a form of “surface” participation in the process. Government consistently took the position that the changes to the *Act* determined salary issues, short of an adequacy assessment by the May Tribunal under the *Act*, and Government did not deviate from that position whatsoever.

[187] The changes to the *Act* and the adoption of the Maritime Average, while certainly laudable, are not and cannot be the beginning and end of the judicial remuneration tribunal process concerning salary, subject only to an “adequacy” assessment.

[188] To accept the submissions of Government on this issue would be contrary to existing legislation concerning the judicial remuneration tribunal process and contrary to constitutional principles for determining judicial remuneration.

[189] Government's participation in the process and the Response, viewed in its entirety, are impermissibly flawed even after considering the appropriate degree of deference owed to Government.

[190] With respect to the level of deference owed to Government and its actions the comments of the Manitoba Court of Appeal in paragraphs 65-67 of *Judges of the Provincial Court (Man.) v. Manitoba et al.*, 2013 MBCA 74 are apt:

It is correct that deference is always to be shown to the Government and the application judge clearly stated that deference is appropriate. He repeats several times that the standard is one of deference to the Government (for example, see para. 50).

However, it is also correct that the application judge stated that the degree of deference to be shown by the court depends upon, and is proportional to, the degree to which the Government has participated in the process. In so doing, he was simply following the Supreme Court's admonition in *Bodner* when it stated, in referring to the third part of the test and the need for a holistic analysis, "[t]hus, the Government has participated actively in the process and it must be shown greater deference than if it had ignored the process" (at para. 83).

I see no error here...

[191] While Government participated in the process, its words and actions demonstrate that it approached the issue of salary determination with a closed mind. Government consistently stated its exact same position on salary determination before, during and after the process.

[192] Following the Report and in its Response Government chose to ignore salary recommendations 1-6, other than agreeing to partial retroactive interest. Furthermore, Government continued to "maintain" its position concerning the changes to the *Act*.

[193] Government's conduct and the reasoning in the Response do not support a high level of deference in this matter. Government's participation in the judicial remuneration tribunal process must involve more than simply going through the motions.

[194] Even if a high level of deference is owed to Government the totality of the process and of the Response do not demonstrate that the objectives of the process have been met.

[195] Viewed holistically, Government did not meaningfully engage with the process and the recommendations in the Report.

[196] Government has failed to meet its overall constitutional obligations as set out in the third and final step of the *Bodner* analysis.

REMEDY

Remedy - Reclamation of Judicial Education Funds

[197] There is no basis for the Court to remit the issue of the reclamation of Judicial Education Funds to the May Tribunal or to Government to be further considered.

[198] The issue of reclamation of Judicial Education Funds for the period prior to April 1, 2021, was not raised before the May Tribunal, nor was it mentioned in the Report.

[199] The reclamation of Judicial Education Funds for the period prior to April 1, 2021, occurred outside of the judicial remuneration tribunal process. The May Tribunal was not involved in the reclamation of these funds.

[200] The pooled Judicial Education Funds for the period prior to April 1, 2021, occurred based upon a previous judicial remuneration tribunal's accepted recommendation that these funds "will be reserved in a pool".

[201] The pooled Judicial Education Funds in the amount of \$130,583.24 were existing and in place prior to the start of the May Tribunal process.

[202] Even if the May Tribunal had sought to address the issue of these pooled Judicial Education Funds, these funds had arguably already vested pursuant to the accepted outcome of a previous judicial remuneration tribunal process.

[203] The only appropriate remedy in these circumstances is to order that the reclaimed Judicial Education Funds in the amount of \$130,583.24 be immediately reinstated by Government.

[204] There is nothing that the May Tribunal did consider, should have considered or recommended in the Report with respect to the previously pooled Judicial Education Funds.

Remedy - Recommendations 1-6

[205] The Association has asked that the recommendations in question in the Report should be declared to be in full force and effect as of January 27, 2023, and that the Judges be entitled to these recommendations effective April 1, 2021.

[206] Imposing recommendations is possible in certain situations but it is not appropriate in these circumstances. Generally speaking, and as indicated in paragraphs 42-44 of *Bodner*, the normal remedy in these types of circumstances is to remit the matter to Government for reconsideration.

[207] The *Act* itself does not make the recommendations in the Report binding upon Government, nor does the *Act* give the Court the explicit authority to make the recommendations binding. This supports the conclusion that remitting this matter to Government is the appropriate remedy.

[208] Government should be given the opportunity to consider recommendations 1-6 of the Report based upon the preceding analysis and then provide an appropriate further response, if necessary.

[209] If a further response from Government does not meet Government's legal and constitutional obligations then the Court can subsequently decide any appropriate further possible remedy forthwith. Any further possible remedy from the Court could include a declaration that some or all of recommendations 1-6 are in full force and effect.

[210] Delay has been a significant issue in terms of the history between the parties and the current process. This history of delay is outlined in the Affidavit of the Honourable Judge David Orr dated April 25, 2023, and in the previous cases involving the parties. Given this, and the need for a timely outcome, a strict deadline for a further response from Government is being set.

[211] The Court is referring recommendations 1-6 of the Report back to Government to be reconsidered based upon all of the foregoing and the contents of the Report.

[212] Government shall approve, vary or reject recommendations 1-6 of the Report within sixty days of the date of this Judgment.

[213] If Government varies or rejects any of recommendations 1-6 again then it shall provide written reasons to the May Tribunal and to the president of the Association for doing so.

[214] If Government does not vary or reject recommendations 1-6 of the Report within sixty days of the date of this Judgment, regardless of the reason, then recommendations 1-6 of the Report are deemed and declared to be in full force and effect.

[215] Following any further written response from Government this matter will be brought back before the Court, as needed, forthwith to address any outstanding issues.

COSTS

[216] The Association and Government agreed that the issue of costs will be addressed, as needed, following a decision on the merits.

[217] The parties may address the issue of costs at a later date.

DISPOSITION

[218] The Application for judicial review is allowed, in part. Government has not met its legal and constitutional obligations and it is hereby ordered that:

1. Recommendations 1-6 of the Report are remitted to Government for reconsideration. Government shall approve, vary or reject recommendations 1-6 of the Report within 60 days of July 10, 2025.
2. If Government varies or rejects any of recommendations 1-6 then it shall provide written reasons to the May Tribunal and the president of the Association for doing so.
3. If Government does not approve, vary or reject recommendations 1-6 of the Report within 60 days of July 10, 2025, regardless of the reason, then recommendations 1-6 of the Report are hereby deemed and declared to be of full force and effect.

4. Government shall reallocate the Judicial Education Funds in the amount of \$130,583.24 to the Provincial Court of Newfoundland and Labrador immediately, for use in accordance with the recommendation of the first Wicks Tribunal.

5. The issue of costs can be subsequently addressed by the parties.

[219] Judgment accordingly.

DAVID G. CONWAY
Justice