SUPREME COURT OF YUKON

Citation: *Cameron v. Yukon*, 2011 YKSC 35

Date: 20110419
S.C. No. 09-A0143
Registry: Whitehorse

Between:

**DEAN RICHARD CAMERON,
SENIOR PRESIDING JUSTICE OF THE PEACE**

Petitioner

And:

YUKON (COMMISSIONER IN EXECUTIVE COUNCIL)

Respondent

Before: Madam Justice V.A. Schuler

Appearances:

Kimberly M. Eldred	Counsel for the Petitioner
Henry C. Wood, Q.C.	Counsel for the Respondent
Joseph J. Arvay, Q.C.	Counsel for the Territorial Court Judges

REASONS FOR JUDGMENT

Introduction

[1] The issue on this application is whether the process utilized by Yukon in 2007 for determining the remuneration of Territorial Court Judges and the Senior Presiding Justice of the Peace (the Petitioner) complies with the requirements set out by the Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3 (the *"PEI Reference"*) and other decisions. The Petitioner argues that it did not comply while the Yukon Government and the Territorial Court Judges (collectively, "the Respondents") say that it did. The Petitioner also

argues that to the extent the governing Yukon legislation permits the process used in 2007, that legislation is unconstitutional.

[2] This decision is concerned with process. It is not for this Court to decide what remuneration the Territorial Court Judges or the Petitioner should receive or to assess the arguments in favour of various levels of remuneration.

Overview and relief sought

[3] The Petitioner and the Territorial Court Judges ("the Judges") are all members of the Territorial Court of Yukon pursuant to s. 2 of the *Territorial Court Act*, R.S.Y. 2002, c. 217. The *Act* provides that a judicial compensation commission will make recommendations to the Yukon Government (the "Government") with respect to the remuneration that should be paid to the Judges and to salaried justices of the peace. The Petitioner is a salaried justice of the peace.

[4] In 2007, the Judges and the Government presented a joint submission on an appropriate increase in the Judges' salary and other issues to the judicial compensation commission ("the 2007 JCC"). The 2007 JCC accepted the joint submission and incorporated it in its recommendation to the Government. The salary increase that had been recommended for the Territorial Court Judges was subsequently implemented by Order-in-Council 2008/170.

[5] The Petitioner and the Government did not present a joint submission on the Petitioner's salary. After hearing submissions from both parties, the 2007 JCC made a recommendation which was less than what the Petitioner sought and more than what the Government sought. The Yukon Government did not accept the recommendation. By Order-in-Council 2008/170, the same increase that had been proposed by the Government to the JCC was implemented. After the Petitioner commenced this action, that Order-in-Council was revoked in so far as it dealt with the Petitioner's salary by a

new Order-in-Council 2010/154, which implemented the salary increase that had been recommended by the 2007 JCC.

[6] The Petitioner submits that there were three specific flaws in the 2007 JCC process: (i) the 2007 JCC permitted and endorsed negotiations between the Territorial Court Judges and the Yukon Government; (ii) the 2007 JCC was comprised of a single commissioner; and (iii) the 2007 JCC erred in holding that s. 17 of the *Territorial Court Act* limits the amount of salary increase the JCC can recommend.

[7] Based on these flaws, or any one of them, the Petitioner seeks relief which may be summarized as follows:

1. A declaration that the 2007 JCC did not function in a way that was independent, effective and objective as required by the Supreme Court of Canada and therefore was not a constitutional basis upon which the Yukon Government could alter judicial remuneration;

2. An order quashing or declaring invalid Orders-in-Council 2008/170 and 2010/154 to the extent that they set the Petitioner's remuneration;

3. To the extent that any of the alleged flaws are required or permitted by the *Territorial Court Act*, a declaration that those provisions in the said legislation are invalid as contrary to the principle of judicial independence as enshrined in the preamble to the *Constitution Act* and sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. The impugned sections are 21(a), 24(2), 25(4)(a), and 25(4)(b).

4. An order of mandamus compelling the Yukon Government to reconvene the 2007 JCC in accordance with this Court's direction to deal with remuneration of the Petitioner only.

[8] In the alternative, the Petitioner seeks:

> 5. If none of the three flaws are established, a declaration that the aforementioned Orders-in-Council are *ultra vires* the Yukon Government because of the manner in which they came about, or
>
> 6. A declaration that the Government's actions offend the principle of judicial independence in regard to the obligations of a government when it departs from the recommendation of a judicial compensation commission.

[9] The Petitioner has also challenged the process undertaken in relation to the 2010 Judicial Compensation Commission. That challenge is the subject of action S.C.No. 10-A0057, for which a separate decision will be issued.

[10] The Yukon Government takes the position that much of the relief sought by the Petitioner is moot because the Government did in the end implement the recommendation of the 2007 JCC, by Order-in-Council 2010/154. The Government also says that the process followed by the 2007 JCC is constitutional. It concedes that the 2007 JCC did err in its interpretation of s. 17 of the *Territorial Court Act* but says that is an error that should be challenged by an application for review of the JCC's recommendation, which has not been advanced by the Petitioner, and in any event is not an issue of judicial independence, which is the sole ground of the Petitioner's challenge.

[11] The Territorial Court Judges take the same position as the Government. They also submit that the Petitioner has no standing to challenge the 2007 JCC process as it relates to the Territorial Court Judges because he pursued a separate process. The Territorial Court Judges take the position that the substance of the Petitioner's complaint is that he did not receive the same level of salary increase that the Judges received, which is not an issue of judicial independence.

Historical and Legislative Framework

(i) The Principle of Judicial Independence

[12] Judicial independence is protected by the common law and by the Canadian Constitution in the *Charter of Rights and Freedoms*, s. 11(d). Independence is necessary because the judiciary's role is to protect the Constitution and the values embodied in it. Judicial independence has an individual dimension relating to the independence of a particular judge and an institutional dimension relating to the independence of the court the judge sits on. Public confidence depends on the judiciary both being and being seen to be independent: *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] S.C.J. No. 27, 2005 SCC 44 (*"New Brunswick"*).

[13] The components of judicial independence include financial security. The *PEI Reference* states that financial security entails three requirements: (i) judicial salaries can be maintained or changed only by recourse to an independent commission; (ii) no negotiations are permitted between the judiciary and the government; (iii) judicial salaries may not fall below a minimum level. Prior to the *PEI Reference*, in some provinces salary negotiations took place between provincial court judges or their associations and the government, sometimes resulting in public rhetoric and 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: *New Brunswick*.

[14] The *PEI Reference* declared that compensation commissions were to be the forum for discussion, review and recommendations to the government on judicial compensation issues. It was hoped and expected that this would avoid confrontations between the judiciary and the government and depoliticize the relationship between the

two by creating a new way and a new forum for setting judicial remuneration: *New Brunswick*.

[15] The judicial compensation commissions are required to be independent, objective and effective. Their work must have a meaningful effect on the process of determining judicial remuneration, although their recommendations need not be binding on governments.

(ii) Judicial compensation commissions in the Yukon

[16] In 1997, the Honourable E.N. (Ted) Hughes was asked by Yukon's Minister of Justice to conduct an inquiry into the administration and operation of the Territorial Court. Among the issues he was asked to consider were the remuneration of judges and justices of the peace, how communications between the Court and the government, which had been characterized by tension in the past, should take place, and what steps should be taken to ensure compliance with the *PEI Reference*. The inquiry included consultations with the Territorial Court, the Government and the public.

[17] Among the recommendations in Mr. Hughes' August 28, 1998 report were the following: that the *Territorial Court Act* be amended to establish a judicial compensation commission which would consist of either one or three commissioners, at least one of whom should be skilled in mediation or other consensus processes to resolve differences; and that in carrying out its work the commission should be efficient, economical, informal and should endeavour to resolve differences through mediation or other consensus processes.

[18] The *Territorial Court Act* was subsequently amended: R.S.Y. 2002, c. 217. The amended *Act* continues the Territorial Court of Yukon and continues the Justice of the Peace Court as part of the Territorial Court (s. 2).

[19] Judges of the Territorial Court are appointed by the Commissioner in Executive Council on the recommendation of the Minister of Justice. The Minister appoints justices of the peace, who are appointed to perform administrative or presiding duties or both: s. 53(1). A justice exercising presiding functions has jurisdiction to perform all the duties imposed on a Territorial Court Judge with certain restrictions as to the penalties that can be imposed in criminal matters (no custodial sentence in excess of 90 days and no conditional sentence in excess of 180 days) and the types of orders that can be made in child protection matters (permanent care and custody order and temporary care and custody order exceeding three months not to be made except on consent of the parties): s. 56.

[20] Part 3 of the *Act* provides for a judicial compensation commission process for Territorial Court Judges. Section 13 requires that a commission is to be established every three years which shall consist of either one commissioner or three commissioners. Section 14 states that the mandate of the commission is to inquire into and make recommendations respecting all matters relating to judicial remuneration of judges and respecting other related matters as the Minister of Justice and Chief Judge of the Territorial Court agree to submit to the commission.

[21] Section 21 of the *Act* provides for the selection and appointment of the commissioners. It requires that the Minister and the Chief Judge endeavour to recommend the appointment of a single commissioner, failing which a commission of three members shall be appointed. Section 23 provides that if practicable, at least one commissioner should be skilled in mediation or other consensus processes to resolve differences.

[22] The operating principles and procedures of the commission are as follows:

> 24(1) The commission shall operate efficiently and economically. The commission and the parties appearing before it shall ensure that the commission works in a manner that minimizes its time and costs.
>
> (2) The commission shall make every effort to use mediation and other consensus processes to resolve differences between the parties.
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> 25(1) Hearings before the commission shall be informal and the commission shall ensure that the public has an adequate opportunity to participate in them.
>
> (2) If the commission is composed of three members, the commission may designate one or more of its members to act on behalf of the commission and those commissioners shall act on behalf of the commission to the extent of their designated responsibilities.
>
> (3) Subject to subsection (4), the commission may determine its own rules of conduct including rules respecting public hearings.
>
> (4) The commission shall
>
> (a) ask the Minister and the court to identify unresolved issues between the government and the judiciary within 30 days of the commission being appointed;
>
> (b) employ those consensus processes that the commission considers advisable to assist the government and the judiciary in resolving their differences within 60 days of the commission having been appointed; and
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> (c) issue its final recommendations and provide these to the government through the Minister and to the court within 90 days of having been appointed.
>
> (6) When there are three commissioners, any recommendation concurred in by two commissioners shall be the recommendation of the commission.

[23] Section 17 of the *Act* is also important in this case:

> 17(1) Subject to subsection (2), recommendations made by the commission with respect to judicial remuneration in accordance with section 14 shall bind the government.

> 17(2) Recommendations made by the commission with respect to judicial remuneration shall not bind the government to the extent that these exceed the highest total value of judicial remuneration provided to territorial or provincial judges of British Columbia, Alberta, Saskatchewan, or the Northwest Territories.
>
> 17(3) If the recommendation of the commission exceeds the highest total value of the judicial remuneration set out in subsection (2), the Commissioner in Executive Council may substitute the highest total value of judicial remuneration for the commission's recommendation.

[24] The judicial compensation commission process applies also to salaried justices of the peace. Section 58 of the Act provides that judicial remuneration for salaried justices shall be set by the commission in accordance with Part 3 of the Act "modified to suit the case".

[25] Pursuant to the direction in s. 25(4)(b) that mediation and other consensus processes be used by the commission, the 2004 Judicial Compensation Commission issued a directive in its Report, establishing a mediation process called "Rules for the Informal Meetings". According to the Report, these Rules were established after consultation with the Yukon Government, the Yukon Justices of the Peace Association, the Petitioner and the Territorial Court Judges. The Rules provide for discussions mediated by the Commission with the goal of encouraging the parties to agree on a joint submission on all or some issues. The discussions are to be held on a without prejudice and confidential basis and are to form no part of the record before the Commission; the Commission will disregard the discussion when making its decision on issues. It appears that the intent was that the Rules would apply to consensus processes by future judicial compensation commissions.

[26] In January 2005, the Petitioner and representatives of the Yukon Government, the Territorial Court Judges and the justices of the peace signed a Letter of

Understanding (the "LOU"). The LOU states that as a result of previous experiences with the commissions and their related high costs, the parties agreed to explore an informal procedure that is consistent with the principles referred to in the *Territorial Court Act*. The purpose of the LOU was to establish an informal procedure that would apply to the establishment and conduct of a judicial compensation commission, while preserving the formal procedure contemplated by the *Act* if, in the case of a particular commission, the informal procedure proves unworkable.

[27] One of the principles set out in the LOU is that the commission procedure should be cost effective, involving minimal use of legal counsel and proceeding by consensus whenever possible. The parties are to attempt to agree on a single commissioner, preferably one with mediation experience. The LOU provides for a "Summary Process" which includes disclosure between the parties of issues, information and the positions they intend to advance to the commission. The representatives of the parties are to meet with a view to identifying common ground and exploring the possibility of joint submissions. The commission is to convene informally to address any outstanding issues between the parties and if agreement on those issues cannot be reached informally, a formal hearing will be conducted. Any party may terminate the LOU on notice to the others.

[28] It was indicated in argument that none of the parties have given notice of termination of the LOU. The Petitioner states in one of his affidavits that the focus of the LOU was on improving the negative aspects of the commission process and that it was an attempt to reduce costs and improve efficiency. The commissions that had operated prior to the LOU had each been comprised of three commissioners.

[29] The 2007 JCC process used by the Territorial Court Judges, which I describe below, was based on the informal process contemplated by the LOU.

The standard of review

[30] Since this proceeding was brought as an application for judicial review, the standard of review must be addressed. The standard of review is also important as it gives context to the submissions regarding the Petitioner's standing and whether his application is moot.

[31] The Supreme Court has said that the response of a government to a judicial compensation commission is subject to a limited form of judicial review in the superior courts. A three-stage analysis must be undertaken as follows:

(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?

Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice), [2005] S.C.J. No. 27, 2005 SCC 44.

[32] Although the Petitioner does challenge the Government's initial rejection of the 2007 JCC's recommendation as to his salary, the grounds for many of his submissions invoke the third stage of the analysis - whether the commission process has been respected. At paragraph 38 of *New Brunswick*, the Supreme Court provides further detail as to what the third stage of the analysis entails:

> At the third stage, the court must consider the [government's] 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.

[33] Counsel did not argue that any other standard of review is applicable and directed their submissions to the process followed by the 2007 JCC. So the standard of review that I will apply is whether, viewed globally, the commission process was respected and the purposes of the commission - preserving judicial independence and depoliticizing the setting of judicial remuneration - achieved.

Does the Petitioner have standing?

[34] The Territorial Court Judges argue that the Petitioner does not have standing to challenge the JCC process in so far as it involved them because that process did not involve or affect the Petitioner. Therefore, they say, the Petition should be dismissed outright.

[35] I would not give effect to this argument. Pursuant to s. 2 of the *Territorial Court Act*, the Petitioner as a justice of the peace is a member of the Territorial Court. Recommendations as to his salary are made by the same commission that makes recommendations as to the salary of the Judges, even if the same process is not used for both. If, as the Petitioner argues, the 2007 JCC was not effective, objective and independent as required by the Supreme Court of Canada, and if as a consequence the determination of judicial remuneration for some members of the Territorial Court was conducted in a way that was unconstitutional, arguably that taints the JCC in relation to

the Court as a whole. If the remuneration for some members of the Court was determined in a way that was unconstitutional, and contrary to the principle of judicial independence in its institutional dimension, the Petitioner as a member of the same Court is affected by that.

[36] Accordingly, I rule that the Petitioner does have standing to challenge the process as it relates to the Territorial Court Judges.

Is the relief sought by the Petitioner or any aspect of it moot?

[37] The Respondents submit that most of the relief sought by the Petitioner is moot because Order-in-Council 2008/170, which reflects the rejection by the Government of the 2007 JCC's recommendation as to the Petitioner's salary, was subsequently revoked by Order-in-Council 2010/154. By the latter instrument, the Government implemented the recommendation.

[38] However, the relief sought by the Petitioner is not implementation of the recommendation of the 2007 JCC. He seeks a new JCC and a new hearing into his level of remuneration for the time period in question. He seeks that on the grounds that in 2007 the commission process was not respected and the purposes of the commission as explained in the *PEI Reference* and *New Brunswick* were not achieved. Should the Court rule in his favour, future judicial compensation commission proceedings may be affected. Accordingly, in my view the relief sought is not moot.

The 2007 Judicial Compensation Commission

[39] What occurred between the Yukon Government and the Territorial Court Judges is at the heart of the Petitioner's complaint and therefore I will describe it in some detail.

[40] There are some contradictions and uncertainties in the affidavit evidence as to some of the events surrounding the 2007 JCC. None of the affiants were cross-examined and therefore I am not in a position to make findings of credibility where their

versions are different. Consequently, I have taken into account only the facts on which there is no dispute.

[41] In early 2007 after discussions between the interested parties, it was agreed between the Chief Judge of the Territorial Court and the Minister pursuant to s. 21(a) of the *Territorial Court Act* that the 2007 JCC would be comprised of a single commissioner. The identity of the commissioner had also been discussed and agreed on by the interested parties, or at least not objected to. The JCC was established by an Order-in-Council dated May 14, 2007.

[42] Prior to the 2007 JCC being established, Yukon's Deputy Minister of Justice asked the Territorial Court Judges and the Petitioner to identify issues for the 2007 JCC. In April 2007, each responded in writing. At this point none of the parties were represented by counsel; later in the process, both the Government and the Judges had counsel, while the Petitioner would represent himself throughout.

[43] The Judges' representative responded to the Deputy Minister in a "without prejudice" letter with the range of salary sought by the Judges and the rationale for that range. The rationale was mainly based on the salaries paid in the comparator jurisdictions set out in s. 17(2) of the *Territorial Court Act*. The Judges' representative expressed hope that a joint submission could be presented. The Deputy Minister responded, also on a without prejudice basis, with the Government's position, which was a 3 percent salary increase in each of the next three years, less than what the Judges were seeking. The rationale for the Government's position was also given. The Deputy Minister expressed the hope that the information would be of use to the Judges and allow them to proceed in an efficient fashion before the JCC, with a joint submission if possible.

[44] The Petitioner wrote separately to the Deputy Minister, setting out the issues he intended to raise before the JCC, including an increase in salary, and his position on those issues. Although his letter was not expressed to be without prejudice, the Deputy Minister's reply was. The Government's position on his salary was the same as its position on the Judges' salary and would result in a lesser increase in salary than what the Petitioner said he would propose to the JCC. There is no reference in either letter to the possibility of a joint submission.

[45] Subsequently, the Petitioner and the Judges' representative wrote separately to the 2007 JCC identifying the issues they wanted to raise. The Judges elected to proceed with an informal procedure pursuant to the LOU. The Petitioner elected to proceed with the formal procedure set out in the *Territorial Court Act*. Dates were set for each to appear before the JCC in October 2007.

[46] In September 2007 there were communications between counsel for the Yukon Government and counsel for the Judges during which the desirability of reaching a consensus as contemplated by the LOU was discussed and it was agreed that if they were able to, they would make a joint submission to the JCC for its review and potential approval. At that time the Judges' position was that they would agree to a salary increase of 5 percent in the first year, followed by a 3 percent increase in each of the next two years. The Government's position remained that the increase should be 3 percent in each of the three years.

[47] Approximately a month prior to the JCC hearing, the Judges' counsel again communicated with the Government's counsel (letter of September 24, 2007), saying that they should try to formulate a joint submission and reach a consensus in the spirit of the principles agreed to in the LOU. Where they differed was on the salary increase in the first of the three years. Counsel for the Judges referred to increases that had

been recommended for judges in British Columbia and Alberta by their respective judicial compensation committees; he asked the Government's counsel to consider the higher range of the average of those jurisdictions, giving reasons why that would be appropriate.

[48] In his reply (letter of October 5, 2007), counsel for the Government set out the Government's position on what would be an acceptable joint submission to the 2007 JCC. He gave reasons for disputing whether the British Columbia increase was settled and also how counsel for the Judges had calculated the average. The Government also took issue with some assumptions and numbers that had been relied on by counsel for the Judges. The Government's calculations resulted in a 4.55 percent increase in the first of the three years.

[49] Whether there were further verbal discussions between counsel about a joint submission is not completely clear from the evidence, but if there were they did not result in a joint submission.

[50] Prior to the hearing date, the parties filed their written submissions with the 2007 JCC. The Judges' submissions described the Northwest Territories as the most appropriate comparator. It proposed that the Judges receive the existing Northwest Territories salary plus 5 percent in the first year, stating that would achieve near parity with the Northwest Territories.

[51] The Yukon Government's submissions advanced the position that an increase to the salary level in the Northwest Territories was inappropriate because of the higher cost of living in the Northwest Territories. It proposed what the Government had originally stated: a 3 percent increase in the first year.

[52] The Judges' reply submissions took the position that the Government had presented no evidence to support some of its submissions, including the cost of living in

the Northwest Territories. It also pointed out that the report of the 2001 JCC had stated that the parties should work toward parity with the territorial court judges in the Northwest Territories.

[53] There is no transcript of the JCC hearing that took place on October 22, 2007. From the affidavit evidence, it appears that the hearing commenced with oral submissions on some preliminary matters. Counsel for the Government told the JCC that he was taken by surprise by the Judges' submission for parity with the Northwest Territories; in his affidavit he refers to that submission as a "newly introduced proposition" that he was not prepared to deal with and needed additional time to respond to. Although it is not clear why the parity issue was a surprise since it had been referred to before the date of the hearing, counsel for the Judges seems to have agreed that further information was needed. With the approval of the Commissioner, counsel then agreed to go into an informal session without a court reporter but in the presence of the Commissioner and the Judges' representative.

[54] Counsel made their submissions based on their written materials. The Judges' representative, who was then the Chief Judge, voluntarily left the room when the Government's position on his stipend was being addressed. After the Government's counsel finished his submissions, he indicated that the parties had moved closer and although the Government would not agree to parity, it might be persuaded to move some more. The Commissioner, stating that he did not want to be tainted by hearing the details of any offers that might be discussed between the parties, left the room but encouraged counsel to discuss their respective positions.

[55] After the Commissioner left the room, counsel discussed their differences and very quickly reached a tentative agreement to "split the difference" between the Government's proposal of a 5.94 percent increase and the Judges' request for a 9.9

percent increase in the first year. Splitting the difference meant a salary increase of 7.925 percent in the first year. Counsel then went before the Commissioner and asked that the hearing be adjourned so they could obtain instructions and put together a joint submission.

[56] The 9.9 percent increase sought by the Judges is equivalent to what territorial court judges in the Northwest Territories were then being paid plus 5 percent. However, since the Government's submissions proposed only a 3 percent increase, it is not clear, nor can I find any explanation, where the 5.94 percent figure comes from. The notes of the Government's counsel, which are attached to his affidavit, describe 5.94 as "our last offer", from which I infer that at some point along the way, the Government had conveyed to the Judges, presumably through discussions between counsel, that it was prepared to go that high, notwithstanding the 3 percent referred to in its submissions to the JCC.

[57] The uncontradicted evidence of the counsel who represented the Government is that throughout the events I have just described, the discussions were cordial and counsel were mindful of the need to avoid a confrontational labour relations style of negotiations. His evidence is that they tried to restrict their communications to informational exchanges and representations related to the adequacy of remuneration. Had they not been able to agree on a joint submission, each party was free to rely on the written and oral submissions made to the JCC.

[58] The joint submission was approved by the Chief Judge on behalf of the Territorial Court Judges. Counsel for the Government put the joint submission before Yukon's Management Board for approval and explained the difference in the cost implications between approving the joint submission and having a full hearing before the JCC. In his covering memorandum to the Board, counsel added, "There is also the intangible

benefit of good will gained from reaching a consensus with the Territorial Court Judges about their compensation package".

[59] In a letter advising the JCC where matters stood, counsel for the Government stated that the proposed joint submission would be put before the JCC "in order that you may complete your report and conclude this matter in its entirety".

[60] The Management Board gave its approval to the joint submission in January 2008. Part of the joint submission relating to pension calculation had potential to affect the Petitioner's pension. The Petitioner was consulted and provided his written agreement to that aspect of the joint submission.

[61] In the cover letter to the JCC enclosing the joint submission, counsel stated "... the parties have now reached an agreement on placing all issues between them before you by way of a Joint Submission, so that a further hearing will not be required". The joint submission itself included the following statement: "As is not uncommon in JCC proceedings in Canada, the parties are in a position where they have agreed upon a Joint Submission, which follows, to be placed before the Commission for approval, if considered appropriate".

[62] The JCC accepted the joint submission and issued a report recommending the jointly submitted salary and benefits adjustments for the Territorial Court Judges. The recommendations were subsequently accepted by the Government and put into effect by Order-in-Council 2008/170.

[63] As I have indicated, the Petitioner's hearing before the JCC was conducted separately, before the same Commissioner but by way of a formal hearing, which took place on October 23, 2007. The Petitioner and the Government filed their respective submissions and also made oral submissions. There was no discussion about a joint submission.

[64] The Government's position was the same for the Petitioner as it had originally been for the Territorial Court Judges - a 3 percent increase in each of the three years. The Petitioner sought to have his salary set as a percentage of the Territorial Court Judges' salary with increases tied to theirs.

[65] The JCC recommended a salary increase (5.606 percent in the first year and 3 percent in each of the following years) that was more than what the Government had proposed, but less than what the Petitioner sought; it rejected the Petitioner's position that his salary should be a percentage of the Judges' salary. The JCC also decided that section 17 of the *Territorial Court Act* limits the compensation that can be recommended for the Petitioner to the maximum total value of remuneration (salary and value of benefits) provided to justices of the peace in the comparator jurisdictions.

[66] The Government did not accept the JCC's recommendation with respect to the salary increase for the Petitioner and instead implemented an increase of 3 percent in each year, in other words what it had originally proposed to the JCC. This was done by Order-in-Council 2008/170. After the Petitioner commenced this litigation and without explanation, Order-in-Council 2010/154 revoked that increase and instead enacted the salary increase that had been recommended by the JCC.

[67] The Petitioner characterizes the discussions that took place between the Chief Judge and the Deputy Minister and between counsel for the Judges and counsel for the Government as negotiations. He questions why the Government started out with the same position (3 percent increase in each of the three years) for both the Judges and him but changed its position for the Judges. Although he concedes that he cannot point to any evidence that the Judges received an increase at his expense, the Petitioner says that is a conclusion that one might draw. He also submits that an observer might conclude that the Government was rewarding the Judges or punishing him.

Did the 2007 JCC allow or endorse negotiations of the sort prohibited by the *PEI Reference*?

[68] The *PEI Reference* requires that an independent, effective and objective judicial compensation commission stand between the judiciary and the government so that there will not be negotiations between the two on the subject of judicial remuneration. Salary negotiations between the judiciary and government are constitutionally inappropriate because negotiations for remuneration from the public purse are political and would undermine public confidence in the impartiality and independence of the judiciary. Since the Crown is a litigant before the courts, negotiating with the Crown would put judges in a conflict of interest.

[69] Chief Justice Lamer, writing for the majority in the *PEI Reference*, explained what is meant by negotiations:

> When I refer to negotiations, I use that term as it is understood in the labour relations context. Negotiation over remuneration and benefits involves a certain degree of "horse-trading" between the parties. Indeed, to negotiate is "to bargain with another respecting a transaction" (Black's Law Dictionary (6th ed. 1990), at p. 1036). That kind of activity, however, must be contrasted with expressions of concern and representations by chief justices and chief judges of courts, or by representative organizations such as the Canadian Judicial Council, the Canadian Judges Conference, and the Canadian Association of Provincial Court Judges, on the adequacy of current levels of remuneration. Those representations merely provide information and cannot, as a result, be said to pose a danger to judicial independence. (paragraph 188)

[70] Chief Justice Lamer went on to say that the mandatory involvement of an independent commission serves as a substitute for negotiations because it provides a forum in which the judiciary can raise concerns about the level of their remuneration that might otherwise have been advanced at the bargaining table. The commission acts as

"an institutional sieve" which protects the courts from political interference through economic manipulation (paragraph 189).

[71] The Supreme Court also addressed the nature of prohibited negotiations in *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick,* [2002] 1 S.C.R. 405, 2002 SCC 13, where it talked about negotiation "in the sense of trade-offs" (paragraph 58). It also said that the *PEI Reference* requires that any change made to the remuneration conditions of judges at any given time must necessarily pass through the institutional filter of an independent, effective and objective body so that the relationship between the judiciary and the government remain depoliticized as far as possible (at paragraph 69).

[72] In the *New Brunswick Reference*, the Supreme Court said that the goal reflected by the *PEI Reference* was that of avoiding the confrontations that had historically occurred in the "often spirited wage negotiations and the resulting public rhetoric" (paragraph 9). It clarified that the commission process as an institutional sieve means that it is a structural separation between the government and the judiciary (paragraph 14).

[73] The Petitioner says that what took place between the Yukon Government and the Territorial Court Judges both before and during the JCC process and whether through counsel or not, amounts to negotiations and contravenes the requirements of the *PEI Reference* and s. 11(d) Charter guarantee of judicial independence. Because the JCC permitted and endorsed at least some of what transpired, for example by allowing or encouraging counsel to discuss the possibility of agreement during the hearing on October 22, 2007, the JCC cannot be said to have been independent, effective and objective. The Petitioner says that the 2007 JCC was therefore tainted and that taint extends to the process as it applied to him.

[74] It is true that some of the correspondence and documentation that passed between the Government and the Judges uses terms like offer and accept and is stated to be without prejudice, which can be a sign that negotiations are taking place. However, there is nothing in the evidence that supports characterization of any of the exchanges between the Government and the Judges as horse-trading or bargaining. Nowhere is there any suggestion that the Government will or will not do anything depending on whether the Judges accept the remuneration the Government proposes. Nowhere is there any suggestion that if the Judges do anything or refrain from doing anything the Government will react in a certain way in relation to their remuneration. Nor is there any suggestion that the Judges will act a certain way depending on what the Government does.

[75] It is helpful to compare what happened here to what had happened in Manitoba as described in the *PEI Reference*. The Manitoba government initiated negotiations with the Manitoba Provincial Judges Association, offering a salary increase on condition that judicial compensation commission hearings not proceed. That offer was accepted by the Judges. The Supreme Court of Canada found that it was clear that both parties intended a negotiated salary increase to be an alternative to proceeding through the commission and expected that the commission would either rubber-stamp the negotiated increase or not convene at all. The government then learned that the Association was considering a constitutional challenge to earlier legislation by which the government had reduced salaries and bypassed Manitoba's judicial compensation commission. The government refused to proceed with the joint submission unless the Association agreed to forego the litigation. The Association refused to do that and the joint submission did not proceed.

[76] The Supreme Court described the overall picture as the Manitoba government having initiated negotiations with the Association for the purpose of setting salaries without recourse to the commission and then threatening to abandon the joint submission when the judges would not back away from the constitutional challenge. The government had, in the view of the Supreme Court, relied on pressure tactics of the sort which are characteristic of salary negotiations, creating an atmosphere of acrimony and discord. The tactics were intended to induce a concession from the judiciary. The Court referred to such "expectations of give and take, and of threat and counter-threat" as fundamentally at odds with judicial independence (paragraph 246, *PEI Reference)*.

[77] Nothing of that sort happened in this case. Initially there were exchanges of correspondence to discover the respective positions of the parties and examine the information each party had in support of its position. Each party made representations as to what it was seeking. The parties hoped they could agree on what would be appropriate. There was never any expectation that the 2007 JCC would be bypassed. The expectation on both sides was simply that if the Government and the Judges were of the same mind, they would present a joint submission to the JCC.

[78] There is no evidence of any acrimony or pressure from either side; the pressure tactics referred to by the Supreme Court in the *PEI Reference* as one of the characteristics of the labour relations type of negotiating that is not to take place are completely absent in this case. There is no evidence of anything that could be described as give and take or threat and counter-threat.

[79] In my view what occurred is consistent with the directions in the *PEI Reference.* The Chief Judge made representations as to the level of remuneration the Judges felt was appropriate and the reasons why they were taking that position. The Petitioner does not take issue with the appropriateness of the Chief Judge making such

representations. The Government responded with the level of remuneration it felt was appropriate and the reasons for its position. Their respective positions changed as further information was obtained about salaries in other jurisdictions. There was probing and questioning of the reasoning behind each other's positions, but nothing that is suggestive of pressure or any trade-offs. Clearly efforts were made to determine whether each other's position was firm or flexible. All of this was in accordance with what the parties had agreed in the LOU, paragraph 7.7 of which requires their representatives to "meet with a view to identifying common ground and exploring the possibility of joint submissions on agreed upon issues".

[80] Exploring the possibility of a joint submission may or may not involve negotiating. If pressure, concessions or trade-offs take place in order to reach a joint submission, the requirements of the *PEI Reference* have not been observed. But if what takes place is simply a probing of the parties' respective positions and an effort to determine whether there is or can be common ground, that should not be characterized as the type of negotiations prohibited by the *PEI Reference*.

[81] All of the communications at issue took place in preparation for or while before the JCC in accordance with the processes that had been legislated in Yukon and agreed to in the LOU. Throughout, it is clear that the Government and the Judges intended that the JCC would ultimately consider and make recommendations on remuneration, a point I will address in more detail. The fact that it was open to either party to submit their position to the JCC without any communications with the opposing party beyond disclosing their position on the issues contradicts any notion of pressure. Nor is there any evidence here of any pressure being applied. It is noteworthy that the February 21, 2005 Report of the 2004 JCC states that that JCC accepted and considered the results of mediation and a joint submission made by the parties "as the

free and voluntary action of the participants" (paragraph 3.1 of the Report). In my view, the joint submission reached by the parties and presented to the 2007 JCC should be characterized in the same way.

[82] I turn now to the "off the record" aspect of the proceedings. The 2007 JCC hearing in relation to the Judges' remuneration commenced as a public hearing. Counsel went off the record with the Commissioner and subsequently met in his absence, at his suggestion, as I have described above.

[83] The evidence before me is that no members of the public were present at the hearing, thus I need not consider the role of s. 25(1) of the *Territorial Court Act*, which requires the commission to ensure that the public has an adequate opportunity to participate in the hearing.

[84] The informal procedure and the attempt to reach consensus that were used are in line with what is contemplated by s. 24(2) of the *Act*, the LOU and the Rules for Informal Meetings developed by the 2004 JCC. From the evidence before me, it is clear that the main issue was parity with the Northwest Territories and the extent to which the parties could reach common ground on that issue.

[85] The *PEI Reference* says that the mandatory involvement of an independent commission serves as a substitute for negotiations because it provides a forum in which members of the judiciary can raise concerns about the level of their remuneration that might otherwise have been advanced at the bargaining table; the commission also serves as an institutional sieve which protects the courts from political interference through economic manipulation.

[86] In this case, the 2007 JCC was involved and was the forum, broadly speaking, in which the judiciary's concerns were raised. It was under the umbrella of the JCC process, that the parties discussed whether they could reach an agreement. Their

agreement necessarily had to be reviewed and approved by the JCC, which had the ability to accept or reject it or ask that it be explained or justified. The JCC was not bypassed. In my view, the *PEI Reference* aimed at prohibiting labour relations-style bargaining between the government and the judiciary without an institutional sieve as protection. It did not intend to ban attempts to reach a common position to submit to a judicial compensation commission. Whether discussions for this purpose take place in private or before the commission is not important. What is important is that if the result of the discussions is an agreement, the agreement be examined by the commission and, if accepted by it, be disclosed in its report and recommendations.

[87] The Supreme Court chose to describe the judicial compensation commission as a sieve, or a filter, which suggests that the question of appropriate judicial remuneration is to pass through the commission before it is decided by the government instead of being hammered out at the bargaining table. The Court did not describe the commission as some sort of wall, which might be a more apt term if the intention was to keep the judiciary and the government from having any discussions at all about remuneration.

[88] Accordingly, I find that the communications that took place between the Government and the Judges in relation to the 2007 JCC were not negotiations in the sense prohibited by the *PEI Reference*.

Was the 2007 JCC flawed because it accepted the joint submission made by the Territorial Court Judges and the Yukon Government?

[89] The Petitioner takes the position that a joint submission as to remuneration agreed to by the government and the judiciary is contrary to the principles set out in the *PEI Reference* because it can only result from negotiations of the kind that the Supreme Court said must not take place. The Petitioner says that in this case the parties

expected that the JCC would simply rubber-stamp the joint submission and the JCC did just that and made no independent inquiry as to whether it was appropriate. As evidence of this, the Petitioner points to a lack of analysis and reasons in the JCC's report. Because of this, the Petitioner says that the JCC was not independent, effective and objective.

[90] Many of the observations I have made in the preceding section on negotiations are applicable to the question whether a joint submission is prohibited by the *PEI Reference*. The *Territorial Court Act* [s. 24(2)] and the LOU encourage consensus processes and joint submissions. The Petitioner seems to say, however, that the only permissible consensus or joint submission is one that occurs solely by coincidence. I cannot agree with that proposition. In my view the *PEI Reference* does not prohibit agreement so long as it is not arrived at by negotiations of the give and take sort. If the parties come to a consensus because the information they have exchanged results in a voluntary change of position for one or both such that they are able to agree, that is a matter of each party exercising a choice.

[91] The Petitioner also submits that there is something improper and contrary to principle in the joint submission having been arrived at by the Government and the Judges splitting the difference between the amounts they had proposed in order to reach a joint submission. Again, I disagree. Splitting the difference in the context of what occurred simply means that the parties were able to agree on a figure that both were prepared to submit to the JCC as an appropriate salary increase. The setting of judicial remuneration is not an exact science. The 7.925 percent increase agreed in the joint submission brought the Judges closer to parity with the Northwest Territories, which was the main issue between the Government and the Judges.

[92] The Petitioner also says that the correspondence from counsel to the JCC and to the Management Board clearly suggests that the parties expected that the JCC would accept the joint submission without questions and without the necessity of a further hearing. While one might infer that from some of the correspondence, the joint submission itself clearly states that it is for the JCC's approval, if considered appropriate. Thus, the parties acknowledged that the JCC would make the decision as to whether the amount agreed on would be recommended. If the JCC disagreed or wanted explanations, there was nothing to prevent it from calling the parties back before it for submissions or evidence. Indeed, it is clear that is exactly what the Judges' representative understood. In his affidavit, Judge Faulkner says he agreed that the hearing should be adjourned on the basis that if a joint submission was not reached, the matter would return for hearing before the JCC. He also understood that any joint submission would go to the JCC to be independently evaluated and accepted or rejected.

[93] The Petitioner also points to that part of the Memorandum to the Management Board, in which the Government's counsel sought approval of the proposed joint submission in part on the basis of the "intangible benefit of good will gained from reaching a consensus with the Judges about their compensation package". The Petitioner refers to this as exceedingly political and lacking any connection to the judicial compensation process.

[94] The impugned statement was made in the context of counsel for the Government explaining to the Management Board why it should approve the joint submission. The rationale provided was mainly that the joint submission would reduce the cost of the 2007 JCC by saving the expense of a full hearing. Minimizing cost is a legitimate consideration in the operation of a judicial compensation commission, pursuant to s.

24(1) of the *Territorial Court Act*. Maintaining good will between parties who have an ongoing relationship is likely to promote efficiency, which is another consideration in s. 24(1). It was therefore a legitimate consideration and there is no evidence to support any other, improper motive behind the statement.

[95] I turn now to how the JCC dealt with the joint submission. The Petitioner submits that the entire process has the appearance of counsel for the Government and the Judges reaching a "back room deal" which the JCC accepted and recommended without any analysis or explanation.

[96] The joint submission itself does not provide an explanation for how the salary figures were arrived at. It simply says, with respect to salary, "The parties are in agreement that the Commission should recommend the following salaries for a Territorial Court Judge, effective the following dates: ..." and then it lists the agreed upon salary figures for the next three years.

[97] The 2007 JCC report refers to the fact that submissions had been made to the JCC. It also states, in section VII, Analysis and Recommendations, that consideration was given to the factors set out in s. 19 of the *Territorial Court Act* "as was submitted" in the evidence and submissions from counsel. I take this to be a reference to the review and analysis of those factors in the Government's and the Judges' written and oral submissions. Clearly, therefore, the JCC had considered the submissions that had been made to it.

[98] While the JCC report does not contain any analysis of its own, it would have been obvious that the figures proposed in the joint submission fell between the two positions advanced in the written submissions and would result in the Territorial Court Judges moving closer to parity with the Northwest Territories, which was the main point in the Judges' submissions.

[99] The Petitioner submits, however, that the JCC should have adjudicated on what would be an appropriate salary increase and not simply accepted the increase proposed in the joint submission. The Petitioner argues that adoption of a joint submission may be appropriate in an adversarial process where the tribunal has to resolve an issue between parties, but not in an inquisitorial process where the tribunal is mandated to look into a matter and make a determination.

[100] In *New Brunswick,* the Supreme Court referred to the judicial compensation commission process as neither adjudicative interest arbitration nor judicial decision making. Instead, its focus is to be on identifying the appropriate remuneration for the judicial office in question (paragraph 14). Section 14 of the *Territorial Court Act* provides that the mandate of the JCC is to "inquire into and make recommendations respecting all matters relating to judicial remuneration of judges". Agreement by the parties as to what is appropriate is clearly relevant and if the JCC also considers it appropriate based on the evidence and information provided, there is no reason why a joint submission should not be adopted by the JCC if it is not unreasonable, illogical or otherwise questionable. The JCC clearly is not obliged to adopt a joint submission, but considering, as I have said, that what the JCC is dealing with is not an exact science, there is no reason why it should not do so.

[101] Against the background of the submissions that had been made to it, and in light of the agreement of both parties as to what an appropriate salary increase would be, it is clear that the 2007 JCC also considered that increase to be appropriate. As the Judges' written submissions pointed out, the 2007 JCC was comprised of the same commissioner who, as a member of the 2001 JCC, had commented favourably on working toward parity with the Territorial Court Judges of the Northwest Territories. The salary increase proposed in the joint submission moves toward that goal.

[102] In the *PEI Reference*, the Supreme Court declined to set in stone the form that a judicial compensation commission can take. I will refer to this in more detail in considering the Petitioner's submissions about the 2007 JCC being a single commissioner. In discussing that issue, the Supreme Court considered the Schedule to Ontario's *Courts of Justice Act*, which embodies an agreement between the government and the provincial court judges to establish, among other things, a binding process for determination of the judges' compensation. The Court said that agreements of this sort promote, rather than diminish, judicial independence. Although it did not comment specifically on it, the agreement includes clause 18, which states, "The parties agree that representatives of the Judges and the Lieutenant Governor in Council may confer prior to, during or following the conduct of an inquiry and may file such agreements with the Commission as they may be advised". That the Supreme Court did not comment adversely on this clause suggests that it did not view the making of agreements by the parties to be contrary to the judicial compensation commission process.

[103] The Petitioner also challenges the JCC's report because it does not explain its "disparate treatment" of the Petitioner. This challenge assumes that the Petitioner and the Territorial Court Judges should have received the same salary increase, even though their circumstances were and are different. They have different appointments. The main issue for the Judges was parity with the Northwest Territories. For the Petitioner it was whether his salary should be a percentage of the Judges' salary and his increases tied to theirs, an argument that had been rejected by past JCC's and was rejected by the 2007 JCC. Although the Government's starting position was the same for both the Judges and the Petitioner, that position changed as I describe elsewhere. In my view, there is no basis for an assumption that the Petitioner and the Judges should have received the same increase.

[104] The report of the 2007 JCC was not perfect; it could have been more detailed with more analysis. It is preferable that reasonably detailed reasons be given for a commission's recommendation, even when it has accepted a joint submission, in part because the reasons may be of assistance to the work of future commissions. However, I am satisfied that the reasons of the 2007 JCC can be inferred from the written and oral submissions that were made to it.

[105] The Petitioner also criticizes the joint submission as having resulted in a process that was not efficient, contrary to what the *Territorial Court Act* and the LOU require. After the hearing on October 22, 2007 was adjourned, it was not until mid-February 2008 that the joint submission was provided to the JCC. The JCC released its report on March 31, 2008. While one can only speculate as to how long the process would have taken had there been a hearing without a joint submission, I agree with the Respondents that the delay in this particular case is not cause to find that a joint submission is not acceptable.

[106] For the above reasons, I find that the 2007 JCC was not flawed because of the joint submission or the way the JCC dealt with it.

[107] I will also address the issue of perception that was raised by the Petitioner in relation to the communications before and during the 2007 JCC and the joint submission. While the analysis must ultimately be as set out in *New Brunswick* because this is an application for judicial review, the question of perception arises because the reason the judiciary and governments are not to negotiate is based on preservation of judicial independence, which is not only a matter of fact but also of perception. In the *PEI Reference,* the Supreme Court adopted as correct the following test articulated by Howland C.J.O. in *R. v. Valente (No. 2)* (1983), 2 C.C.C. (3d) 417 (Ont. C.A.):

> The question that now has to be determined is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically would conclude [that the tribunal or court was independent].

[108] In my view a reasonable person informed of the legislation, the historical background and the traditions, including Yukon's choices as to the processes, and apprised of what took place, and with the knowledge that the Judges and the Government both wanted to find common ground if possible, after viewing the matter realistically and practically would conclude that the judiciary acted of its own free will and that no pressure or bargaining was involved. That reasonable person would conclude that the Territorial Court was independent. In my view this perception would be reinforced by the knowledge that the Petitioner participated in the joint submission to the extent of the pension issue that might affect him. The Petitioner gives no evidence that he felt pressured to do this or compromised by it. A reasonable person would conclude that he acted voluntarily and that neither his nor the Territorial Court's independence was compromised.

Was the 2007 JCC flawed because it was comprised of a single commissioner?

[109] The Petitioner submits that the 2007 JCC was flawed because it was composed of a single commissioner. He argues that a single commissioner was not contemplated by the Supreme Court in the *PEI Reference* and that a single commissioner is less likely to be truly independent than a panel of three commissioners.

[110] The Supreme Court spoke of a three member judicial compensation commission and how it should be selected, however it explicitly declined to set in stone the form

such commissions should take. Chief Justice Lamer stated at paragraph 167, *PEI Reference*:

> I do not wish to dictate the shape and powers of the independent commission here. These questions of detailed institutional design are better left to the executive and the legislature, although it would be helpful if they consulted the provincial judiciary prior to creating these bodies. Moreover, different provinces should be free to choose procedures and arrangements which are suitable to their needs and particular circumstances. Within the parameters of s. 11(d), there must be scope for local choice, because jurisdiction over provincial courts has been assigned to the provinces by the *Constitution Act, 1867*. This is one reason why we held in *Valente, supra,* at p. 694 [*Valente v. The Queen*, [1985] 2 S.C.R. 673] that [t]he standard of judicial independence for purposes of s. 11(d) cannot be a standard of uniform provisions".

[111] In paragraph 185 of the *PEI Reference*, the Court again confirmed that it did not intend to lay down a particular institutional framework in constitutional stone and that commissions are merely a means to the end, the end being an institutional sieve between the judiciary and the other branches of government. It foresaw that governments might create new institutional arrangements which would comply with s. 11(d) so long as they meet the requirements of independence, effectiveness and objectivity.

[112] Based on the recommendations of the Hughes Inquiry which included input from the territorial judiciary, Yukon has done exactly what the Supreme Court said it could. It has provided for a judicial compensation commission that consists of either one commissioner, or, if the Minister and the Chief Judge are unable to agree and recommend the appointment of a single commissioner, three commissioners (*Territorial Court Act*, ss. 13 and 21). The LOU signed by the Petitioner, the Judges' representative and the Government confirms that efforts should be made to select a single

commissioner rather than three. Clearly Yukon has decided that a single commissioner is the preferable choice, so long as the Chief Judge and the Minister agree. Whether consisting of one commissioner or three commissioners (or some other number), the commission's function remains the same.

[113] The petitioner says that in a small jurisdiction like Yukon the preservation of judicial independence requires greater institutional safeguards and this is more likely to be served by a commission of three people than a single commissioner. The Respondents say, on the contrary, in a small jurisdiction with a small bench a commission comprised of one person may be more or just as efficient and effective. In my view, the different considerations that may come into play are precisely why the Supreme Court left it open to the provinces and territories to choose what shape their commissions would take.

[114] There is no basis for the conclusion that a single commissioner is likely to be less independent than three commissioners sitting together. When the *PEI Reference* speaks of the requirement that judicial compensation commissions be independent, it does so in the sense that they must not be under the control of the executive or the legislature. This means that they must have security of tenure in that the members of the commission serve for a fixed term and that the appointments not be entirely controlled by any one of the branches of government (paragraphs 170 to 172). Those requirements are observed in the *Territorial Court Act*, which provides that the commission's terms expires on the filing of its report and that the Chief Judge and the Minister agree on a single commissioner, failing which a nominee of each of them and a third person selected by those two nominees shall constitute a three-commissioner commission.

[115] Nor is there any basis upon which to find that a single commissioner does not fulfill the criteria of being objective and effective. The *PEI Reference* says that objectivity can be promoted by ensuring that the commission is fully informed and that the enabling legislation includes a list of factors to guide the commission's deliberations (paragraph 173). A list of factors to be considered is provided for in the *Territorial Court Act,* s.19. The hearing process and the filing of submissions ensures that the commission is fully informed.

[116] The effectiveness of a commission is not determined by whether it consists of one or three commissioners. Effectiveness derives from the fact that the JCC's recommendations on judicial remuneration are binding on the Government except as set out in s. 17(2) of the *Act.*

[117] For the foregoing reasons, I find that the 2007 JCC was not flawed because it was comprised of only one commissioner.

What is the effect of the 2007 JCC's error as to the meaning of s. 17 of the *Territorial Court Act* in relation to the Petitioner?

[118] Section 17 of the *Territorial Court Act* provides that recommendations made by the JCC bind the government except to the extent that they exceed the highest total value of judicial remuneration provided to territorial or provincial judges of the comparator jurisdictions. If the JCC's recommendations do exceed that value, the Commissioner in Executive Council may substitute that value for the JCC's recommendation.

[119] The 2007 JCC interpreted section 17 as limiting the compensation that can be recommended by the JCC for the senior presiding justice of the peace to the maximum total value of remuneration (salary and value of benefits, in dollars) provided to a justice

of the peace in the comparator jurisdictions. All parties agree that this interpretation is an error. The issue is the effect of that error.

[120] The Petitioner submits that because the Government had made the argument to the JCC that s. 17 puts a "salary cap" on what can be recommended, the JCC simply followed the Government's lead and therefore was not independent.

[121] The Government's written submissions to the JCC on this issue give the mistaken impression that the Government is also bound by the salary cap. The submissions state in part that the salary increase proposed by the Petitioner "would obviously contravene the limits imposed under the Act", and "it must be borne in mind that SPJP Cameron is extremely close to the maximum salary which is permitted by the legislation".

[122] Even accepting that the Government's erroneous argument led the JCC into error in its interpretation of s. 17, that cannot be characterized as an issue of independence, or lack thereof. It is nothing more than an error of interpretation. It does not call into question the independence of the JCC, just as a judge's acceptance of a flawed argument made by government counsel in the court room does not compromise that judge's independence.

[123] The Petitioner also submits that by accepting the salary cap, the JCC fettered its discretion and compromised its analysis of the remuneration issue. The Petitioner says that had the JCC not considered itself bound by the salary cap, it might have recommended an even greater increase in remuneration, perhaps even equivalent to the increase it recommended for the Territorial Court Judges.

[124] The Respondents say that notwithstanding the error, the total remuneration package did exceed the highest comparator and therefore the error had no practical effect. Even if it can be said that without the error, the JCC might have recommended a

greater increase than it did, the Respondents say this Court should take no action because the Petitioner has not sought judicial review of the JCC's recommendation, but has challenged it only on the basis that the JCC was not independent and therefore the manner in which it dealt with the Petitioner's remuneration was unconstitutional.

[125] In relation to the s. 17 error, I note that the Amended Petition seeks the following relief: (i) a declaration that Order-in-Council 2008/170 as amended by 2010/154 offends the principle of judicial independence to the extent that it changes the remuneration of the Petitioner without recourse to a judicial compensation commission that is independent, objective and effective in that the 2007 JCC erroneously considered that s. 17 placed an upper limit on the remuneration the JCC could recommend; (ii) an order quashing the said Order-in-Council as offending the principle of judicial independence in that the 2007 JCC erroneously considered that s. 17 placed an upper limit on the remuneration the JCC could recommend; (iii) a declaration that s. 17(1) offends the principle of judicial independence to the extent it requires the Government to give effect to the recommendations of a JCC that is not independent, objective and effective.

[126] The Petitioner's challenge to the Orders-in-Council so far as it relies on the s. 17 error is thus based solely on the argument that the 2007 JCC was not independent. However, the erroneous interpretation given to s. 17 by the JCC does not raise an issue of independence, as I have already found.

[127] In any event, it is clear from the actuarial opinions in the evidence that both the Government's original position and the JCC's recommendation resulted in remuneration that exceeds the highest total value in the comparator jurisdictions set out in s. 17(2) of the *Territorial Court Act*. By Order-in-Council 2010/154, the JCC's recommendation has been implemented.

[128] In argument, the Petitioner also challenged the interpretation of s. 17 as requiring that his remuneration be compared to the remuneration paid to justices of the peace in the comparator jurisdictions. He says that the comparison should instead be to provincial or territorial court judges. He points out that the 2007 JCC, as one may infer from its report, found it difficult to compare the Petitioner to justices of the peace in the comparator jurisdictions, because of differences in their duties, qualifications and benefits.

[129] Section 58 of the *Territorial Court Act* provides that judicial remuneration for salaried justices of the peace shall be set by the judicial compensation commission in accordance with Part 3 of the *Act* (which includes section 17) "modified to suit the case". The *Act* as a whole clearly distinguishes between territorial court judges and justices of the peace. Although the Petitioner performs many of the same functions performed by a territorial court judge, he is appointed as a justice of the peace and there are restrictions on what he can do as compared to a territorial court judge. The purpose of section 58 is clearly to provide the same process to deal with remuneration of salaried justices of the peace as is provided for territorial court judges, but modified to suit the case of salaried justices of the peace. In my view, in the context of the Act as a whole, that must mean that the comparator for remuneration is the salary paid to justices of the peace in the specified jurisdictions.

[130] In light of the extensive duties performed by the Petitioner, whether the comparator for a justice of the peace in his unique position should be the salary paid to judges rather than to justices of the peace is a matter for the legislature, not this Court.

[131] Notwithstanding the error as to s.17, the 2007 JCC recommended remuneration, now implemented, that exceeds the amount in s. 17(2). The increase in salary brought the Petitioner only $500.00 away from the salary paid to Alberta justices of the peace.

The JCC report points out that, unlike the Petitioner, justices of the peace in Alberta must be legally trained with at least 5 years experience at the Bar. It is speculation to say that, absent the s.17 error, the JCC would have recommended a greater increase. In all the circumstances, and considering that no issue of judicial independence arises, this Court should not intervene and I decline to do so.

Was the 2007 JCC process flawed by reason of the Government's initial rejection and subsequent adoption of the JCC's recommendation as to the Petitioner's salary?

[132] Counsel for the Yukon Government conceded that the Government did not provide a legitimate reason for rejecting the 2007 JCC's recommendation by way of Order-in-Council 2008/170. The sole reason given by the Government was that the recommendation exceeded the amount in s. 17(2) of the *Territorial Court Act*, yet so did the Government's proposed increase. However, the matter does not end there because by Order-in-Council 2010/154, on August 19, 2010, the JCC's recommendation was implemented. In my view the flaw arising from the Government's initial response has been remedied. In the end the recommendation of the 2007 JCC did have a meaningful effect on the Petitioner's remuneration, which is what the *PEI Reference* requires.

Conclusion

[133] In concluding my findings, I return to the standard of review as described in *New Brunswick*.

[134] On the first stage of the analysis, the Government, by its own admission, did not articulate a legitimate reason for departing from the recommendations of the 2007 JCC in relation to the Petitioner's salary; however, by Order-in-Council 2010/154, it has remedied the situation.

[135] For the same reason, i.e. since the Government has remedied the situation, I need not consider the second stage of the analysis.

[136] The third stage of the analysis is whether, viewed globally, the commission process has been respected and the purposes of the commission - preserving judicial independence and depoliticizing the setting of judicial remuneration - have been achieved.

[137] I have addressed the issues that were raised by the Petitioner regarding his hearing before the 2007 JCC. Overall, the commission process was respected, notwithstanding the Government's initial rejection of the JCC's recommendations. The purposes of the commission were achieved when the Government accepted the recommendation.

[138] I am also satisfied, for the reasons given, that the commission process was respected and its purposes achieved in relation to the Territorial Court Judges. Both the Government and the Judges engaged in a meaningful way with the commission process including the informal processes that are in place in Yukon. The commission process provided the parties with a framework within which to explore whether they could discover some common ground without the pressure and "give and take" inherent in labour relations type negotiations and subject always to the right of either side to cease discussions and direct their submissions to the JCC. The process adopted in Yukon, including its encouragement of consensus, is consistent with the constitutional principles set out in the *PEI Reference* and *New Brunswick.*

[139] As stated, I am satisfied that what occurred were not the kind of negotiations prohibited by the *PEI Reference*. Even so, in my view it is preferable that such communications not use terms like "offer" and "accept" so as to avoid any misinterpretation.

[140] Finally, there is no evidence from which to infer that the Judges' salary increase was obtained at the expense of the Petitioner or that the Judges were being rewarded

or the Petitioner punished. I am satisfied that an informed, reasonable observer would not make that inference. I also conclude that such an observer would be satisfied that both the 2007 JCC and the Territorial Court were and are independent.

[141] It follows from the reasons given that the impugned provisions of the *Territorial Court Act* are valid. There is no basis for a declaration that Order-in-Council 2010/154 is *ultra vires*. The same applies to Order-in-Council 2008/170 because in so far as it affects the Petitioner's salary it has been revoked and replaced.

[142] In the result, the application is dismissed. Counsel may seek a date to make submissions on costs or, if they agree, they may propose a schedule for written submissions.

SCHULER J.