

*Tabled by Minister of Justice
2007. 05. 15.
W.M. [Signature]*

**NEWFOUNDLAND AND LABRADOR PROVINCIAL COURT JUDGES
SALARIES AND BENEFITS TRIBUNAL
(2004-2009)**

**TRIBUNAL REPORT
APRIL 2007**

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**GEOFFREY L. STEELE, Q.C.
Chairperson**

DAVID C. DAY, Q.C.

Member

**DAVID G. NORRIS
Member**

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Chapter 1

Introduction

(1) The mandate of this Tribunal is established under Section 28 of the *Provincial Court Act, 1991*, SNL 1991, Chapter 15, as amended (the “*Act*”) and also by two letters, firstly, from John R. Cummings, Q.C., Deputy Minister of Justice and Deputy Attorney General, dated October 26, 2005¹ and secondly, from the Minister of Justice and Attorney General, Thomas W. Marshall, Q.C., dated January 24, 2006.² The letter from the Deputy Minister read in conjunction with Section 28.2(1) of the *Act*, instructs the Tribunal to review and report, with recommendations, on salaries and benefits of Judges for the four year period 2004/2005 to and including 2007/2008. The letter from the Honourable Thomas W. Marshall, Q.C., is a direction to also “*include the fiscal year 2008-09 in your report*”. Consequently, the mandate for this Tribunal is for a five year period: 2004/2005 to 2008/2009.³ Bearing in mind that these are fiscal years, the Tribunal’s mandate runs from 01 April 2004 to 31 March 2009.

(2) The first Report of the Tribunal, which considered and recommended on all matters submitted by the Newfoundland and Labrador Association of Provincial Courts Judges (Association), the Judges’ professional organization, and the Province of Newfoundland and Labrador (Province), other than a judicial indemnity policy, was submitted to the Minister of Justice on 26 May 2006.

(3) This second Tribunal Report considers the matter of a judicial indemnity policy for Judges of the Provincial Court.

(4) Geoffrey L. Steele, Q.C.: was called to the Bar of Newfoundland in 1958, and practiced law in partnership with Messrs. Halley, Hickman & Hunt, March 1959 to July 1975. He was appointed Judge of the District Court, St. John's in July, 1975 and appointed Chief Judge of the District Court of Newfoundland in August, 1977. In 1982 he was appointed a Justice of the Trial Division, Supreme Court and in 1989 was appointed Justice of the Newfoundland Court of Appeal. He retired in September, 2002.

(5) David C. Day, Q.C.: has been a member of the Newfoundland and Labrador Bar since 1968, practicing extensively in the Province's courts, including Provincial Court (often as a Crown Attorney or defence counsel), and in Courts of British Columbia, Alberta, Manitoba and Ontario and in the Supreme Court of Canada.

(6) David G. Norris: is currently a financial and management consultant, as well as a corporate director in St. John's, NL. From 1984 to 2001 he was chief financial officer of Fishery Products International Limited. Prior to that, in the period from 1969 to 1984, he was employed in the provincial public service of Newfoundland and Labrador, and over the years served in a number of public service positions, including Deputy Minister of Finance and Secretary of Treasury Board.

Chapter 2

Background

(7) This second Report of the Tribunal, to the Minister of Justice, considers judicial indemnity for the Provincial Court Judges.

(8) The Tribunal's first Report, dated 26 May 2006 and unanimous except for salary increase recommendations, recognized that it had jurisdiction to consider and recommend provision, by the Province, of judicial indemnity for Provincial Court Judges (majority report, paragraphs 198 to 203; minority statement, paragraph 1).

(9) However, the Tribunal refrained from making recommendations to establish a judicial indemnity policy or regards the terms and conditions of a policy because, as the first Report stated (majority report, paragraphs 223 to 227 (in part); minority statement, paragraph 1):

(223) A Judicial Indemnity Policy, in the Tribunal's view, is a benefit involving many aspects, which require articulation in considerable detail. Although addressed in principle, the multiple aspects of the Policy proposed by the Association were not considered in sufficient detail, [in submissions to the Tribunal] by either the Association or the Province, to enable the Tribunal to now recommend on this issue.

(224) In fact, Government lamented, in its Brief, that it found itself, "due to the lack of prior notice of the Association's intention to request blanket indemnity for legal costs and the short time to respond, not in a position to respond as fully as it would like, to the Association's request or its

assertions" in some respects; namely, concerning "legislative deficiencies regarding judicial immunities from civil action."

(225) Government continued: "Time restrictions did not permit the consultations (internal and external), study or analysis required to develop either [an] alternative comprehensive indemnity policy or, if warranted, proposals for legislative amendment regarding the scope of costs within the Judicial Council's power to award [,] or enhanced civil claim immunity."

(226) There is no doubt time restrictions impaired Government's ability to respond fully to the Association's proposal for a judicial indemnity policy. Indeed, both Government and the Association probably laboured under confining deadlines, generally, for filing their respective briefs and otherwise preparing for Tribunal hearings. This was a function of the limited time, in turn, afforded the Tribunal to perform its work.

(227) In any event, the Tribunal is patently unable to consider and make its recommendations on this issue without further information from each of the parties.

(10) "[A]s a more expeditious resolution" then convening a further hearing – the Tribunal having conducted a hearing of the Association and Province before its first Report – the Tribunal, therefore, recommended (majority report, para. 227; minority statement, paragraph 1):

... that the parties consult with one another, and jointly submit to the Tribunal, within 30 days after the date of this Report, a statement of (i) the respects in which they are agreed, on the terms and conditions of a judicial indemnity policy, and (ii) the respects in which they are not agreed. Within 14 days after the date of the joint submission, each party has leave to file a further written submission to the Tribunal on the aspects of a judicial indemnity policy about which they are not agreed. The Tribunal will then decide whether a further hearing, limited to the points in dispute, is necessary and, if so, set a further hearing date. If, on the other hand, the Tribunal is satisfied it can then report on this issue without a further hearing, it will do so with dispatch.

(11) A Motion of the Justice Minister, approved of by the House of Assembly on 29 November 2006,⁴ accepted the Tribunal's first Report, including its recommendations (which had been tabled in the House of Assembly on 27 November 2006⁵). The Motion included a recital anticipating that the Tribunal would make a further report to the Minister containing "*its recommendations respecting indemnity for Provincial Court judges ...*"

(12) Since its first Report, dated 26 May 2006, the Tribunal has received written submissions on the subject of indemnity for Provincial Court Judges, both separately, in September and October 2006,⁶ and on 20 November 2006, jointly,⁷ from legal counsel for each of the Newfoundland and Labrador Association of Provincial Court Judges, an organization comprised of the current 23 Judges, and from the Province. Those submissions have been considered by the Tribunal, together with indemnity-related written submissions included in briefs received from, and oral arguments made at hearings of the Tribunal by, counsel for the Association and the Province,⁸ prior to the Tribunal's first Report.

(13) The result is this Tribunal's second Report; which addresses judicial indemnity for the Judges.

(14) The Tribunal's task of making this further Report was not without considerable challenges; for two fundamental reasons.

(15) First, judicial indemnity is not presently provided for Provincial Court Judges in any other provincial or territorial jurisdiction in Canada, although is afforded federally-appointed judges as unwritten policy of the Government of Canada. Therefore, the Tribunal did not have available, for consideration, comparison or guidance, any precedents providing provincial court judges' judicial indemnity coverage.

(16) And, secondly, the Association and the Province were at odds as to the terms and conditions which judicial indemnity should include. In fact, agreement between the Association and the Province was wanting on the overall concept of an indemnity "policy", as counsel for both termed the judicial benefit in their 20 November 2006 Joint Submission. From the Association's perspective,⁹ the Province should

provide a broadly based indemnity [described by the Association as a "blanket" indemnity policy] for legal and other costs of judges who are faced with defending against complaints or lawsuits or having involvement before Inquiries, so long as the matter relates to or affects the judicial function or capacity of a judge broadly understood. This policy ... [should be] designed to ensure that judges receive the best possible defence in the interests of the judge, the judiciary as an institution, and the administration of justice generally.

(17) The Province's position, on the other hand,¹⁰ is that

Provincial Court Judges' Indemnification Policy ... [should be] based on a modification of the existing Provincial Employee Liability Plan ... [which] provides coverage for causes of action, claims, complaints and inquiries related to matters arising post appointment. The Policy proposed by the Province ... [would extend] the protection currently provided by statute and at Common Law but does not provide an unwarranted extension of the principle of judicial independence by providing a blanket indemnity.

(18) Briefly stated, the Association and the Province agree - subject to the Tribunal's overriding discretion in performance of its mandate - to the Tribunal recommending, to the Province, the establishment by the Province of a judicial indemnity policy. They disagree, however, on the contents - the terms and conditions - of a judicial indemnity policy.

(19) The Tribunal now turns to address, in detail, the resulting issues which require this second Report.

Chapter 3

Principal Issues

(20) The issues the Tribunal considers in its second Report are (1) whether to recommend that the Province establish a judicial indemnity policy for Judges of the Provincial Court and, if so, (2) what to recommend to the Province as the terms and conditions of a judicial indemnity policy.

(21) Essentially, a judicial indemnity policy, in the context of this Tribunal, defines the concept and specifies the terms and conditions for providing, and provides, coverage, by means of payments by the Province of moneysums. The payments may cover damages, judgment interest, HST and costs which a Provincial Court Judge becomes legally obligated to pay, usually as a result of a judgment in a civil court proceeding after trial of a commenced proceeding, or settlement of a potential or commenced proceeding, because of the conduct of the Judge. The payment may also cover legal fees, as well as travel and other expenses, of legal counsel representing a Judge in a potential or commenced civil proceeding, a criminal or provincial summary penal offence proceeding, a proceeding before the Judicial Council (the Judges' professional disciplinary body), or a public, judicial or other inquiry. The payment may also cover remuneration of retired Newfoundland and Labrador Supreme Court Justices who perform dispute resolution under a policy.

(22) As will become apparent in this second Tribunal Report, however, a policy should not, in the Tribunal's view, necessarily respond to every potential or commenced proceeding or to every inquiry or to every other matter affecting a Provincial Court Judge. Whether a policy should respond would depend on interpretation and application of a policy concept, and its terms and conditions.

Chapter 4

Establishment Of Judicial Indemnity Policy

(23) The first issue is whether the Tribunal should recommend that the Province establish a judicial indemnity policy for Judges of the Provincial Court.

(24) The Association and the Province agree in their Joint Submission that the Tribunal recommend establishment by the Province of a judicial indemnity policy for the Judges of the Provincial Court.

(25) Based on separate submissions, in writing and orally, by the Association and the Province on all issues, including a judicial indemnity policy, received before the Tribunal's first report,¹¹ and based on their separate¹² and joint¹³ written submissions, confined to the subject of a policy, received since the first Report, the Tribunal is convinced that a policy is warranted.

(26) *The Tribunal therefore recommends that establishment by the Province of a judicial indemnity policy for the Judges of the Provincial Court is, in principle, warranted.*

(27) Another question entirely, however, is whether submissions to this Tribunal enables it to recommend the concept – i.e., the terms – (Chapter 5 of this

Report) or conditions necessary for establishment, as a reality, of the indemnity policy.

To these matters, the Tribunal next turns its attention.

Chapter 5

Concept Of Policy

(28) The Association and the Province, after the Tribunal's first Report (26 May 2006), originally filed separate submissions respecting judicial indemnity, in September and October 2006.¹⁴ Tribunal members experienced difficulty in comparing each topic or issue when reading the two separate submissions. As a consequence, the Tribunal requested their counsel to prepare and file a Joint Submission whereby each subject was presented side by side, making possible a comparison. The Joint Submission in this form, dated November 20, 2006,¹⁵ made it much easier to understand and to digest the opposing views. As a result, the Joint Submission was more easily absorbed and the disparities were more apparent.

(29) The concept for a judicial indemnity policy advocated by each of the Association and the Province – i.e., the terms of a policy – could hardly be more dissimilar – disparate. An accommodation or reconciliation of the two concepts drafted by the two parties is indeed, remote.

(30) The Tribunal is obligated to thoroughly analyze and assess the merits and deficiencies of the respective positions of the parties and, if feasible, to recommend a concept for a judicial indemnity policy that is appropriate and fair to both of them. It is essential that a judicial indemnity policy be entirely consistent with principles ensuring

an independent judiciary. It is necessary at this stage for the Tribunal to review the concept of a judicial indemnity policy devised, firstly by the Association and subsequently in response by the Province, in their separate and joint submissions.

(31) The separate Submission by the Association dated January 27, 2006¹⁶ to the Tribunal before its first Report, at Part III, Item 6 - is entitled "Judicial Indemnity" and commences with requests by the Association, respecting a judicial indemnity policy, that include the following (at p. 88):

That judges be guaranteed full indemnity for all legal fees reasonably incurred concerning a request to appear, or an appearance as a witness before an inquiry, whether in relation to their work as a judge or their work as a lawyer prior to appointment as a judge. (Emphasis added.)

(32) In its separate Submission of September 19, 2006,¹⁷ after the Tribunal's first Report, the Association (at p. 5) expanded its concept of a judicial indemnity policy by stating:

12. The Province seeks to exclude claims which arise from work prior to appointment as a judge. The Association seeks coverage for all claims, regardless of from when they originate, so long as the matter relates to or affects the judicial function or capacity, broadly understood. The deciding factor ought not to be the timing of the incident which leads to the complaint, but rather its relation to or affect on the judicial function or capacity as a judge.

(33) The Reply to the Province's Submission, by the Association, dated October 19, 2006, p. 6, at par. 18,¹⁸ after the Tribunal's first Report, makes reference to the reasons why the Association chose the broad terms that it did:

... The reason that the Association has chosen the language it did in setting out its threshold test is that the indemnity ought not be denied on the basis of a technicality of language. The application of the policy ought to be determined by the fact that the issue may impact the individual involved in their capacity as a judge. The Association chose broad terms in order that the impact on the person as a judge becomes the key criterion. (Emphasis added.)

(34) Paragraph 23, at p. 8, of the Association's Reply dated October 19, 2006¹⁹ is also relevant in explaining the Association's position on a judicial indemnity policy:

23. ... it is the Association's position that coverage under the policy should not depend on the time when the matter arose, but rather its relationship to or affect on the judicial function or capacity, broadly understood. Given the importance of raising a good defence at the outset because of both the potential impact on the judge or on the administration of justice, it should not matter that the incident arose when the judge was Crown or defence counsel, as it is the impact on him or her as a judge which is now at issue.

(35) The Association also expressed the nature and form – its concept – of a judicial indemnity policy in the Joint Submission dated November 20, 2006. The following are two statements reflecting the perspective of the Association:²⁰

"... a broadly based indemnity for legal and other costs of judges ... so long as the matter relates to or affects the judicial function or capacity of a judge broadly understood ..." (see p. 4).

"The Association's proposed policy is a broad-based or "blanket" indemnity policy. The policy may result on occasion, in the Province paying the legal fees of judges who are eventually found to have engaged in wrongdoing." (see p. 5).

(36) Under the heading of "OVERALL CONCEPT OF THE POLICY" the Province contributed the following background information at pp. 4 and 5 of the Joint Submission.²¹

The proposed Provincial Court Judges' Indemnification Policy [of the Province] is based on a modification of the existing Provincial Employee Liability Plan and provides coverage for causes of action, claims, complaints and inquiries related to matters arising post appointment. The Policy proposed by the Province extends the protection currently provided by statute and at Common Law but does not provide an unwarranted extension of the principle of judicial independence by producing a blanket indemnity.

(37) At p. 24 of the Joint Submission the position of the Province concerning judicial indemnity was stated as follows:²²

Provided that Provincial Court Judges, (Judges) were acting in good faith and within the scope of their duties as a judge, the Province will defend, negotiate or settle the following actions arising out of acts performed by Judges in the course of their duties:

- *Civil claims and suits;*
- *Criminal prosecution;*
- *Proceedings of the Judicial Council;*
- *Investigations and Inquiries.*

(38) A judicial indemnity policy advocated by the Association appears at p. 24 of the Joint Submission in this form:²³

The Association seeks a comprehensive indemnity for process costs which would apply in the broadest possible circumstances.

Judges ought to be indemnified for legal and other costs associated with the following types of proceedings, no matter the claim nor the allegation at stake:

1. *Complaints to the Judicial Council.*
2. *Involvement before inquiries such as the Lamer Inquiry into wrongful convictions; and*
3. *Civil actions;*

so long as the matter relates to or affects the judicial function or capacity of a judge broadly understood.

(39) Risking redundancy, the following is an abridgment of the Association's proposal of the concept for a judicial indemnity policy as extracted or deduced from statements by the Association in its submission of September 19, 2006,²⁴ its Reply Submission of October 19, 2006,²⁵ and in the Joint Submission of November 20, 2006.²⁶

To provide a broadly based indemnity policy, a comprehensive coverage for all matters, in all circumstances, including matters prior to his/her appointment to the Bench, so long as the problem or occurrence relates to or affects the judicial function or capacity of a judge, broadly understood.

(40) The broadly based indemnity policy – blanket indemnity – providing coverage for all matters, in all circumstances, including matters pre-appointment, is subject to a proviso: that the matter must relate to or affect the judicial function or capacity as a judge. The expression "*broadly understood*" is not particularly helpful, and likely was introduced to permit a more generous or extensive interpretation of the phrase "*the judicial function or capacity of a judge*". The point here is that the proviso is intrinsically a question that will have to be answered in the affirmative to achieve fulfillment and thereby warrant indemnity in a particular case. Secondly, determining whether "*the matter relates to or affects the judicial function or capacity of a judge*" is largely a subjective point at issue. *Webster's New World Dictionary*, 3rd College Ed., refers in part to "*subjective*" as meaning affected by or produced by the mind or a

particular state of mind; not objective. *The Synonym Finder* by J. I. Rodale used the terms non-objective, mental, internal, in the mind's eye, personal. We mention these factors merely to indicate the nature of the scrutiny that will have to precede a decision with respect to determining eligibility. As already explained, whether the matter relates to or affects (i) the judicial function or (ii) the capacity of the Judge is, in the main, a subjective question, as it concerns the judge's state of mind – his or her particular state of mind. There are, however, other concerns.

(41) According to the statements by the parties concerning the determination of whether the indemnity policy applies, it appears that the Association and the Province agree that the question as to whether or not a policy applies will first be determined by the Minister of Justice and in the event of a disagreement, the dispute shall be resolved by a retired Supreme Court Justice. Under the heading of "Threshold Issues For Determining Eligibility",²⁷ the Association and the Province affirmed their stated positions: the Association saying that all matters are covered so long as the matter relates to or affects the judicial function or capacity of a judge, and the Province reiterating that as long as the Judge was acting in good faith and within the scope of his or her duties as a judge, the Province will support the Judge in the manner it outlined. If the Association's position prevails, that is, a blanket or broadly based indemnity policy that incorporates the question whether the matter relates to or affects the judicial function or capacity of a judge, broadly understood, it is inevitable that the Minister of Justice at some stage will become involved and be obliged to consider if the matter relates to or affects the judicial

function or capacity of a judge, broadly understood. This situation begs the question whether it is appropriate or fit to have the Minister of Justice thrust into such a paradox?

(42) In the event the Minister of Justice is called upon to act pursuant to a judicial indemnity policy of the Province, s(he) must, the Province proposes, consider if the Judge was acting in good faith and within the scope of his or her duties as a judge. However, if the Minister of Justice is obligated to act on the provisions of a judicial indemnity policy recommended by the Association, s(he) must decide whether the matter relates to or affects the judicial function or capacity of a judge broadly understood. The difference between these two standards is that the question of acting in good faith and within the scope of his or her duties as a judge, recommended by the Province, are essentially issues of conduct/behaviour, with the likelihood of confronting subjects such as ethics, integrity and honesty. On the other hand, if the Minister of Justice is to address the question of whether the matter relates to or affects the judicial functions or capacity of a judge, proposed by the Association, the pertinent factors to be pursued are, for example, his or her personality, temperament, state of mind, mood, and likesuch, all for the purpose of determining if the matter is affecting or interfering with the performance of his or her duties as a judge. We take the liberty of repeating in part a portion of the quote above, namely "*The Association chose broad terms in order that the impact on the person as a judge becomes the key criterion*".²⁸ Is it the role of the Minister of Justice to form opinions and decide on a performance rating of a Judge in order to grant or withhold judicial indemnity? We do not think so.

(43) There are at least two shortcomings with a policy advocated by the Association: firstly, there are no limitations, restrictions or stipulations of any kind that might contain, regulate or control matters pre-appointment; secondly, there are no provisions or conditions limiting or constraining matters pre-appointment that are of a particular or specific age, say for example, a dispute that is ten years old.

(44) Unquestionably it was the Association's intent that all matters be covered, and as explained above, the only obstacle, in the Association's view, would be the proviso that the matter relate to or affect the judicial function or capacity of a judge, broadly understood. It is well to remember, that a pre-appointment matter has nothing to do with judges or the judiciary. The Judge may or may not have been a lawyer at the time, but s(he) was not a sitting Judge. In these circumstances, the question posed is whether legal costs from matters pre-appointment are justified or defensible.

(45) At p. 8 of the Joint Submission the Province made the following statement:²⁹

It is unreasonable to suggest that a Provincial Court Judge's independence would be influenced because he or she were held financially responsible for defending conduct unrelated to judicial duties, (for example, conduct prior to appointment that he or she would have been required to defend at personal cost, but for judicial appointment).

(46) At p. 9 of the Joint Submission the Province also commented as follows:³⁰

The Association's proposal will result in the Province paying legal fees to defend wrongdoing, or, conduct outside the scope of judicial duties for

both pre and post appointment conduct while at the same time completely immunizing judges from these same actions.

(47) (We note, however, the Province acknowledges, at pp. 25 and 26 of the Joint Submission, in agreeing to a point with the Association, that pre-appointment conduct – e.g., remarks – of a Judge, cited in support of allegations that the Judge displayed bias in his or her decision(s) as a Judge, is a consideration pertinent to coverage under a judicial indemnity policy.)³¹

(48) The Tribunal is satisfied that a judicial indemnity policy advocated by the Association is flawed and does not present a workable scheme. First, in the Tribunal's view it is not reasonable or practical to expect the Province to underwrite the payment of legal costs for all matters that originated prior to the appointment of the Judge. It was never convincingly demonstrated by the Association that a non-payment of legal costs for matters pre-appointment constituted a disregard or a breach of any tenet touching judicial independence. Secondly, the Tribunal concludes, the proviso that the matter must relate to or affect the judicial function or capacity of a judge is not a useful criteria or standard for activating a judicial indemnity policy. And, thirdly, a policy for judicial indemnity that constitutes blanket coverage, that is, that covers all matters, in all circumstances, is not a realistic concept.

(49) Having considered the submissions, oral and written, by the Association and the Province, the Tribunal is of the opinion that the concept – “OVERALL CONCEPT OF THE POLICY” (for judicial indemnity) – advanced by the Association and appearing

in the Joint Submission under sections or headings 2 – 7 (inclusive) at pp. 4 – 42,³² is flawed and shall be disaffirmed.

(50) To this point we have discussed primarily the position and proposed indemnity policy of the Association with only a brief reference to the indemnity policy recommended by the Province. A separate Submission by the Province includes a draft of a proposed "*Provincial Court Judges' Indemnity Policy*". We have cited above a portion of the Province's policy statement. However, for the sake of expediency, the following is the full policy statement by the Province as it appears in Tab 4 of the Submission of the Government of Newfoundland and Labrador dated September 22, 2006:³³

***Provincial Court Judges' Indemnification Policy
Policy Statement***

Provided that Provincial Court Judges, (Judges), were acting in good faith and within the scope of their duties as a Judge the Province will defend, negotiate or settle the following actions arising out of acts performed by Judges in the course of their duties:

- a. civil claims and suits;*
- b. criminal prosecution;*
- c. proceedings of the Judicial council, investigations and inquiries;*

The Province will also provide representation for Judges required to appear before inquiries, in respect of their duties as a judge, if they have been granted standing by the Inquiry and provided the Minister of Justice is satisfied that they were acting in good faith and within the scope of their duties as a Judge.

The Minister of Justice will determine if this policy is engaged. In the event of a dispute respecting the applicability of the Indemnity policy that dispute shall be referred to a retired Supreme Court Justice.

(51) A cursory evaluation of the Joint Submission by the Association and the Province quickly manifests the very wide divide and schism existing between the parties over a policy of judicial indemnity. We have already considered and commented, generally, on the concept for a judicial indemnity policy by the Association and to a much lesser extent the concept put forth by the Province. It is imperative that we be aware of the numerous specific objections and complaints that each counsel has of the other's draft policy for judicial indemnity. The following is a list of areas of disagreement and is a clear indication of the serious rift that exists between the Province and the Association:

- (1) The parties disagree on a fundamental - an overall - concept of a policy for judicial indemnity;
- (2) The Association alleges that the Province has reserved for itself the right to determine judicial duties or professional standards for judges;
- (3) The Province proposes that the Minister of Justice make a pre-trial and pre-discovery adjudication which, the Association submits, forces the Judge into untimely disclosure of his or her defence;
- (4) The parties disagree on screening by the Minister during preliminary assessment of the matter;
- (5) The parties disagree on the threshold test for coverage;

- (6) The Province's principle objection to the scope of the Association's policy is that it exceeds any reasonable requirement of judicial independence;
- (7) The parties disagree on "Breadth of Coverage";
- (8) The Association insists on a comprehensive indemnity policy that applies in the broadest possible circumstances, whereas the Province supports a test of acting in good faith and within the scope of duties as a judge;
- (9) The Province's policy would exclude matters relating to pre-appointment conduct (except where pre-appointment bias is alleged to impact post-appointment decisions), whereas the Association says coverage should apply regardless of when the matter arose;
- (10) With respect to indemnity for legal costs, first, arising from a complaint to the Judicial Council, secondly, before an inquiry, and thirdly, in civil (and criminal) proceedings, the Association says that there will be indemnity if the matter relates to or affects the judicial function or capacity as a judge, whereas the Province says it will pay if the Judge is acting in good faith and was within the scope of his or her duties;

(11) As to choice of legal counsel, the Association rejects involvement of the Minister in every case as inappropriate because of potential interference with judicial independence, and the Province insists that as a necessary step, requests for legal counsel must be funneled through the Minister.

(52) The list of items or headings that are still in dispute are many, and the topics on which the parties have reached agreement are very few.

(53) The Reply of the Government to Submissions of the Association dated February 15, 2006, at par. 229,³⁴ before the Tribunal's first Report, states that the Province opposes the Association's requests on the following grounds:

they are overly broad and do not include appropriate qualifications as to scope of coverage or inappropriate limits on amounts to be reimbursed;

blanket indemnity does not respect or accord with settled law regarding the award of legal costs to judges, as acknowledged by the Association in the review of relevant case law at paragraphs 278 to 286 of its Submission. That review clearly shows there are circumstances where the award of any costs to judges, let alone solicitor and client costs, is not appropriate, in fact, not in the public interest. This is further supported by Newfoundland and Labrador Court of Appeal case law, discussed in detail below. Accordingly, the exercise of discretion is an acceptable component of any indemnity policy, limited to circumstances where circumstances warrant; and

it appears that the scope of protection requested is not known in other jurisdictions canvassed by the Association. While this does not affect the Tribunal's ability to consider the issue, it suggests that caution and critical analysis is required in this area, given there is no model or experience from other jurisdictions presented for consideration.

(54) Paragraph 230 of the Province's Reply³⁵ is also significant. It appears that the Province required additional time to prepare its submission.

Unfortunately the Province finds itself, due to the lack of prior notice of the Association's intention to request blanket indemnity for legal costs and the short time to respond, not in a position to respond as fully as it would like, to the Association's request or its assertions regarding legislative deficiencies regarding judicial immunities from civil action. Time restrictions did not permit the consultations (internal and external), study or analysis required to develop either alternative comprehensive indemnity policy or, if warranted, proposals for legislative amendment regarding the scope of costs within the Judicial Council's power to award or enhanced civil immunity policy.

(55) We have little doubt that bringing this matter before the Tribunal was premature.

(56) The Tribunal's request to counsel to prepare a Joint Submission was for reasons already explained and, in short, to enable the Tribunal members to more easily grasp the subjects in dispute. However, it was also our expectation that a Joint Submission would be a submission that reflected a coming to terms - an accommodation - and essentially a resolution of all, or at the very least, most of the major terms and conditions. It is obvious that such harmony is far from achievement.

(57) Accomplishing a satisfactory agreement will not happen quickly, notwithstanding the parties' assurance that a judicial indemnity policy would be desirable - welcomed. The contenders are a formidable and influential government, fully aware of all its authority, duties and responsibilities, and a judiciary, conscious of its vulnerability, but also very protective of its status under the constitutional umbrella usually

characterized as the independence of the judiciary. Both parties have demonstrated a very firm stance.

(58) Achievement of a judicial indemnity policy can only happen if and when the Association and the Province, acting through their legal counsel, are able to reach a consensus.

(59) There must be negotiations, a dialogue between the Province and the Association, that includes debate, understanding and a coming to terms. The *Provincial Court Act, 1991*, SNL 1991, Chapter 15, as amended, sections 28, 28.1 and 28.2, states in part that the Tribunal shall review and report on salaries and (or) benefits of judges. The Act makes no reference to arbitration or the drafting of proposed agreements or legislation. The duty placed on the Tribunal by the Act is to report to the Minister of Justice. Should the Province and the Association reach a provisional agreement on a judicial indemnity plan, it would be obligatory to bring it before the Tribunal to be scrutinized for errors and omissions and generally for it to be determined if in the opinion of the Tribunal it is in satisfactory form to be recommended to the Minister of Justice for implementation.

(60) In preparation for the hearings conducted by the Tribunal in March 2006, and the Tribunal's resulting first Report, counsel filed submissions (that included replies) and very complete indexes of attachments. However, what was filed after the Tribunal's First Report, with respect to the subject of a judicial indemnity policy, consisted simply

of a debate over the merits of parties' respective policies. The Tribunal, in its first Report, recommended that "*the parties consult with one another, and jointly submit to the Tribunal ... a statement*".³⁶ During the summer of 2006, after the Tribunal's first Report, counsel prepared and filed separate submissions (including replies) that were a repetition of their earlier arguments made before the first Report. Later, the Tribunal requested that counsel prepare and file a Joint Submission. A document entitled "Joint Submission of the Newfoundland and Labrador Association of Provincial Court Judges And the Province of Newfoundland and Labrador on Judicial Indemnity" was filed, dated November 20, 2006, and it was helpful as explained above, as each subject was presented side by side, making possible a comparison. Nevertheless, even the Joint Submission was presented in such a manner that once again each party argued only its view of what a policy should contain. The point is, that at no stage did the parties seriously negotiate or attempt to 'hammer out' an indemnity policy that was in any way a consensus.

(61) It is apparent, the Association's concept having been found lacking, that the Association will have to develop or accept a new policy concept.

(62) It may reasonably be said that the Association's concept for a judicial indemnity policy, having been disaffirmed, we ought to have promptly accepted or endorsed the Province's proposal for a judicial indemnity policy. In our view such a spontaneous reaction would be ill-advised. The Association presented its case with firmness and confidence and no doubt will require considerable time to re-valuate and assess its position and options. This matter is not about winning or losing; it is about

accomplishing a fair and proper judicial indemnity policy that is acceptable to – approved by – the two parties. Imposition of the Province’s concept of a judicial indemnity policy at this disconcerting period for the Association would not be helpful. It would be unduly hasty at this stage to make mandatory, or at least recommend to the Minister, a judicial indemnity policy, proposed by the Province, that to this date the Association has roundly criticized and repudiated. The Association is entitled to an opportunity to consider and review its options and to prepare a considered response.

(63) The parties agree that there should be a judicial indemnity policy, but we suspect that such an understanding is on the premise that both parties agree to the terms – the concept – and conditions and other matters. We are in no position to gauge the Association’s response to the conclusions in this Report. It is well to note the words of caution expressed by the Province in the Reply of the Government to Submissions of the Association dated February 15, 2006 at para. 229³⁷ and quoted above in part:

... it appears that the scope of protection requested is not known in other jurisdictions canvassed by the Association. While this does not affect the Tribunal's ability to consider the issue, it suggests that caution and critical analysis is required in this area, given there is no model or experience from other jurisdictions presented for consideration.

(64) To summarize: In our estimation the matter will have to be returned to the parties, Province and the Association, for further consideration. The situation at this point is that the concept for a policy of judicial indemnity proposed by the Association has been repudiated, and a policy for judicial indemnity promoted by the Province, while

"alive and well", is for the moment, at rest. It is up to the parties to determine the next phase.

(65) It would seem evident that the continuation of the search for a judicial indemnity policy, satisfactory to the Association and the Province, should begin with a clear and well-defined description or definition of an overall concept of a judicial indemnity policy.

(66) We can only reiterate that it is up to the Province and the Association to negotiate a judicial indemnity policy. The parties must settle the various sensitive issues, relating principally to a policy concept, through discussion, as arbitrary conclusions by the Tribunal, even if that were permissible, would have a high risk of rejection. Clearly, both parties feel very strongly about the entire subject of a judicial indemnity policy and unless they, together, further a resolution as to the concept of a policy, no satisfactory answer or conclusion on the subject is possible.

(67) For reasons explained above in this Chapter, it is not possible for this Tribunal to recommend, to the Minister of Justice, establishment of a judicial indemnity policy for the Provincial Court of Newfoundland and Labrador: there can be no judicial indemnity policy in the absence of a plausible, comprehensive concept that is free from uncertainty.

(68) *The Tribunal therefore recommends that the Province and the Association, working through their legal counsel, promptly undertake discussions with a view to formulating the terms and conditions of a judicial indemnity policy acceptable to both parties, and that the first subject matter for consideration be the defining of an overall concept of the policy.*

(69) An Addendum to this second Report of the Tribunal, authored by Tribunal member David C. Day, Q.C., offers suggestions for guidelines intended to assist the Association and the Province in negotiations, recommended by this Report, of the terms – the concept – and the conditions of a judicial indemnity policy. The Tribunal, however, cautions the parties that they not regard those suggested guidelines as binding them in their negotiations, or as affording any indication of the position a Tribunal will take should the issue of a policy again be submitted to this Tribunal, or be submitted afresh to a future Tribunal, for review and recommendations under the *Provincial Court Act, 1991*, SNL 1991, c.15, as amended.

Chapter 6

Summary of Recommendations


Chapter 4 – Establishment Of Judicial Indemnity Policy

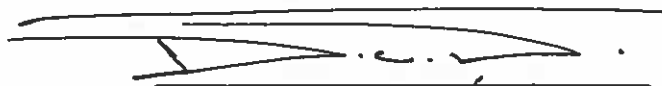
1. Establishment of a judicial indemnity policy for the Judges of the Provincial Court is, in principle, warranted.

Chapter 5 – Concept of Policy

2. The Province and the Association, working through their legal counsel, promptly undertake discussions with a view to formulating the terms and conditions of a judicial indemnity policy acceptable to both parties, and that the first subject matter for consideration be the defining of an overall concept of the policy.

Respectfully submitted,


Geoffrey L. Steele, Q.C., Chair


David C. Day, Q.C. Member


David G. Norris, Member

30 April 2007,
St. John's, NL.

References

¹ Appendices A, B.

² Appendices A, C.

³ Appendix D.

⁴ House of Assembly, Province of Newfoundland and Labrador, 3rd Sess., 45th Gen. Assem., Orders of The Day, No. 31/2006, 29 November 2006, Motions, no. 1.

⁵ Ibid.

⁶ "Judicial Indemnity Submission of The Newfoundland & Labrador Provincial Court Judges' Association to the 2006 Salary and Benefits Tribunal", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB), 19 September 2006;

"Submission Of The Government Of Newfoundland And Labrador On Judicial Indemnity To The 2006 Provincial Court Judges' Salary And Benefits Tribunal", Pritchard, Rolf (Dept. of Justice, NL, St. John's, NL), 22 September 2006;

"Reply Submission of The Newfoundland & Labrador Provincial Court Judges' Association to the 2006 Salary and Benefits Tribunal (concerning Judicial Indemnity)", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB), 19 October 2006.

⁷ "Joint Submission Of The Newfoundland And Labrador Association Of Provincial Court Judges And The Province Of Newfoundland And Labrador On Judicial Indemnity", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB). legal counsel for the Association, and Pritchard, Rolf (Dept. of Justice, NL, St. John's, NL), legal counsel for the Province, 20 November 2006.

⁸ "Submission of The Newfoundland & Labrador Provincial Court Judges' Association to the 2006 Salary and Benefits Tribunal", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB), 27 January 2006;

"Reply Of The Government Of Newfoundland And Labrador To Submissions Of The Newfoundland And Labrador Provincial Court Judges' Association To The 2006 Provincial Court Judges' Salary And Benefits Tribunal", Pritchard, Rolf (Dept. of Justice, NL, St. John's, NL), 15 February 2006 and 01 March 2006;

"Reply Submission Of The Newfoundland & Labrador Provincial Court Judges' Association To the 2006 Salary And Benefits Tribunal", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB), 01 March 2006.

⁹ "Joint Submission Of The Newfoundland And Labrador Association Of Provincial Court Judges And The Province Of Newfoundland And Labrador On Judicial Indemnity", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB). legal counsel for the Association, and Pritchard, Rolf (Dept. of Justice, NL, St. John's, NL), legal counsel for the Province, 20 November 2006, pp. 4-5.

¹⁰ "Joint Submission Of The Newfoundland And Labrador Association Of Provincial Court Judges And The Province Of Newfoundland And Labrador On Judicial Indemnity", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB). legal counsel for the Association, and Pritchard, Rolf (Dept. of Justice, NL, St. John's, NL), legal counsel for the Province, 20 November 2006, pp. 4-5.

¹¹ "Submission of The Newfoundland & Labrador Provincial Court Judges' Association to the 2006 Salary and Benefits Tribunal", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB), 27 January 2006;

"Reply Of The Government Of Newfoundland And Labrador To Submissions Of The Newfoundland And Labrador Provincial Court Judges' Association To The 2006 Provincial Court Judges' Salary And Benefits Tribunal", Pritchard, Rolf (Dept. of Justice, NL, St. John's, NL), 15 February 2006 and 01 March 2006;

"Reply Submission Of The Newfoundland & Labrador Provincial Court Judges' Association To the 2006 Salary And Benefits Tribunal", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB), 01 March 2006.

¹² "Judicial Indemnity Submission of The Newfoundland & Labrador Provincial Court Judges' Association to the 2006 Salary and Benefits Tribunal", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB), 19 September 2006;

"Submission Of The Government Of Newfoundland And Labrador On Judicial Indemnity To The 2006 Provincial Court Judges' Salary And Benefits Tribunal", Pritchard, Rolf (Dept. of Justice, NL, St. John's, NL), 22 September 2006;

"Reply Submission of The Newfoundland & Labrador Provincial Court Judges' Association to the 2006 Salary and Benefits Tribunal (concerning Judicial Indemnity)", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB), 19 October 2006.

¹³ "Joint Submission Of The Newfoundland And Labrador Association Of Provincial Court Judges And The Province Of Newfoundland And Labrador On Judicial Indemnity", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB). legal counsel for the Association, and Pritchard, Rolf (Dept. of Justice, NL, St. John's, NL), legal counsel for the Province, 20 November 2006.

¹⁴ "Judicial Indemnity Submission of The Newfoundland & Labrador Provincial Court Judges' Association to the 2006 Salary and Benefits Tribunal", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB), 19 September 2006;

"Submission Of The Government Of Newfoundland And Labrador On Judicial Indemnity To The 2006 Provincial Court Judges' Salary And Benefits Tribunal", Pritchard, Rolf (Dept. of Justice, NL, St. John's, NL), 22 September 2006;

"Reply Submission of The Newfoundland & Labrador Provincial Court Judges' Association to the 2006 Salary and Benefits Tribunal (concerning Judicial Indemnity)", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB), 19 October 2006.

¹⁵ "Joint Submission Of The Newfoundland And Labrador Association Of Provincial Court Judges And The Province Of Newfoundland And Labrador On Judicial Indemnity", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB). legal counsel for the Association, and Pritchard, Rolf (Dept. of Justice, NL, St. John's, NL), legal counsel for the Province, 20 November 2006.

¹⁶ "Submission of The Newfoundland & Labrador Provincial Court Judges' Association to the 2006 Salary and Benefits Tribunal", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB), 27 January 2006.

¹⁷ "Judicial Indemnity Submission of The Newfoundland & Labrador Provincial Court Judges' Association to the 2006 Salary and Benefits Tribunal", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB), 19 September 2006.

¹⁸ "Reply Submission of The Newfoundland & Labrador Provincial Court Judges' Association to the 2006 Salary and Benefits Tribunal (concerning Judicial Indemnity)", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB), 19 October 2006.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ "Judicial Indemnity Submission of The Newfoundland & Labrador Provincial Court Judges' Association to the 2006 Salary and Benefits Tribunal", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB), 19 September 2006.

²⁵ "Reply Submission of The Newfoundland & Labrador Provincial Court Judges' Association to the 2006 Salary and Benefits Tribunal (concerning Judicial Indemnity)", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB), 19 October 2006.

²⁶ "Joint Submission Of The Newfoundland And Labrador Association Of Provincial Court Judges And The Province Of Newfoundland And Labrador On Judicial Indemnity", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB). legal counsel for the Association, and Pritchard, Rolf (Dept. of Justice, NL, St. John's, NL), legal counsel for the Province, 20 November 2006.

²⁷ "Joint Submission Of The Newfoundland And Labrador Association Of Provincial Court Judges And The Province Of Newfoundland And Labrador On Judicial Indemnity", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB). legal counsel for the Association, and Pritchard, Rolf (Dept. of Justice, NL, St. John's, NL), legal counsel for the Province, 20 November 2006, p. 13.

²⁸ "Reply Submission of The Newfoundland & Labrador Provincial Court Judges' Association to the 2006 Salary and Benefits Tribunal (concerning Judicial Indemnity)", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB), 19 October 2006, p. 6 at par. 18.

²⁹ "Joint Submission Of The Newfoundland And Labrador Association Of Provincial Court Judges And The Province Of Newfoundland And Labrador On Judicial Indemnity", Dawes, Susan (Myers Weinberg LLP, Winnipeg, MB). legal counsel for the Association, and Pritchard, Rolf (Dept. of Justice, NL, St. John's, NL), legal counsel for the Province, 20 November 2006.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ "Submission Of The Government Of Newfoundland And Labrador On Judicial Indemnity To The 2006 Provincial Court Judges' Salary And Benefits Tribunal", Pritchard, Rolf (Dept. of Justice, NL, St. John's, NL), 22 September 2006.

³⁴ "Reply Of The Government Of Newfoundland And Labrador To Submissions Of The Newfoundland And Labrador Provincial Court Judges' Association To The 2006 Provincial Court Judges' Salary And Benefits Tribunal", Pritchard, Rolf (Dept. of Justice, NL, St. John's, NL), 15 February 2006.

³⁵ Ibid.

³⁶ Newfoundland and Labrador Provincial Court Judges Salaries and Benefits Tribunal [:] Tribunal Report [-] May, 2006, pp. 45-49, esp. p. 49.

³⁷ "Reply Of The Government Of Newfoundland And Labrador To Submissions Of The Newfoundland And Labrador Provincial Court Judges' Association To The 2006 Provincial Court Judges' Salary And Benefits Tribunal", Pritchard, Rolf (Dept. of Justice, NL, St. John's, NL), 15 February 2006.

Appendix A

Order-in-Council dated 17 October 2005 Appointing Tribunal Members

Executive
Council



Newfoundland
and Labrador

*Certified to be a true copy of a Minute of a Meeting
of the Committee of the Executive Council of Newfoundland and
Labrador approved by His Honour the Lieutenant-Governor on*

2005/10/17

OC2005-553

MC2005-0413. JUS2005-017. TBM2005-264. Under the authority of section 28 of the Provincial Court Act, 1991, the Lieutenant Governor in Council is pleased to appoint the following persons to the Provincial Court Judges' Salary and Benefits Tribunal for a four-year period:

- i) Mr. Justice Geoffrey Steele (retired), Chairperson;
- ii) Mr. David C. Day, QC, Member; and
- iii) Mr. David Norris, Member.

JUS/DM
TB/Secretary
D. Gale
AG
Deputy Clerk
File

A handwritten signature in cursive script, reading "Robert C. Thompson".

Clerk of the Executive Council

Appendix B

**Letter from John R. Cummings Q.C.,
Deputy Minister of Justice
dated 26 October 2005**



GOVERNMENT OF
NEWFOUNDLAND AND LABRADOR

Department of Justice

Office of the Deputy Minister
and Deputy Attorney General

October 26, 2005

Mr. Justice Geoffrey Steele,
3 Winter Place,
St. John's, NL
A1B 1J5.

Dear Justice Steele:


**Re: Provincial Court Judges salary and
Benefits Tribunal 2005.**

I am pleased to advise that pursuant to section 28 of the *Provincial Court Judges Act* (the "Act") the Lieutenant-Governor in Council has appointed you Chair of the Provincial Court Judges Salary and Benefits Tribunal for the four year period 2004/2005 - 2007-2008. Order in Council 2005-553 refers. The other members of the Tribunal are: Mr. David Day, Q.C. and Mr. David Norris.

Section 28.1 of the Act requires the Tribunal to report within 6 months following referral or within such shorter time as the Minister may direct. Government's intention is to amend section 28 of the Act during the Fall sitting of the House of Assembly to defer the statutory reporting date for the 2005 Tribunal to April 1, 2006. Meeting this timeframe will require that the Tribunal be expeditious in its work.

I want to take this opportunity to congratulate you on your appointment. If I can be of further assistance in this matter, please do not hesitate to contact me at your convenience.

Sincerely,


John R. Cummings, Q.C.,
Deputy Minister and
Deputy Attorney General.

JRC/cp

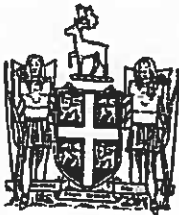
C. Mr. David Norris
Mr. David Day, Q.C.

Appendix C

**Letter from Honourable Thomas W. Marshall, Q.C.
Minister of Justice and Attorney General
dated 24 January 2006**

Appendix D

**Order-in-Council authorizing inclusion in Report
of Fiscal Year 2008/2009**



CABINET DIRECTIVE

*The following is a Copy of a Directive
passed by Cabinet at a Meeting held on
2006/01/20*

MC2006-0007

JUS/DM ✓
TB/Secretary
T. Paddon
D. Gale
AG
Deputy Clerk
File

JUS2006-001. TBM2006-011.

The submission of the Minister of Justice respecting the Provincial Court Judges' Salary and Benefits Tribunal was considered.

Approval was given to replace Item 5 of MC2005-0413 with the following direction:

The Minister of Justice is directed to request the Tribunal to make recommendations for a five year period – fiscal years 2004/2005 to 2008/2009.

Clerk of the Executive Council

Appendix E

Public Notice of Tribunal Hearings