



Government of British Columbia

Reply Submission to the

2019 Judicial Compensation Commission

June 14, 2019

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INTRODUCTION

1. The British Columbia Government welcomes the opportunity to make its reply submission to the 2019 Judicial Compensation Commission. The Government has reviewed all of the submissions made to the Commission, and thanks the other parties for their thoughtful briefs and proposals.
2. The Government reaffirms its recognition of the vital role played by the judiciary in British Columbia's justice system, and the dedication and commitment Judges and Judicial Justices bring to their work on the Provincial Court.
3. This submission sets out Government's general responses to the submissions received by the Commission as well as responses to specific compensation items proposed.

THE GOVERNMENT'S RESPONSE TO THE PROVINCIAL COURT JUDGES' ASSOCIATION SUBMISSION

4. The following is the Government's response to selected matters raised in the Association's submission.

Uncertainty Created by Judicial Review Proceedings

5. In paragraphs 54, the Association notes that the ongoing judicial review proceedings arising from the Legislature's response to the 2016 JCC recommendations should have no impact on the work of the current Commission's analysis of the factors set out in the legislation. The government agrees with this submission, and agrees that the current Commission should make its own assessment of the appropriate compensation for the years within its mandate.

Maintaining a strong court

6. In paragraphs 161-176 the Association raises concerns about "legal diversity", i.e. the backgrounds and experience of lawyers who are applying and being appointed to the Provincial Court bench. In particular, the Association notes a concern that applications from Crown Counsel are over-represented as a proportion of their membership amongst practicing lawyers in the province generally, such as in 2017, when one-third of applicants to the Provincial Court bench were Crown Counsel.
7. Given the high volume of criminal cases that are brought to Provincial Court, it is neither surprising nor concerning that Crown Counsel who are interested in a judicial appointment would apply to Provincial Court. Also, the proportion of applications from the Crown have been stable over the past four years.¹

¹ Judges Association submission, para 168 (table).

8. Government submits that the most significant measure of healthy applications to the court is not the proportion of applications from any one area of the bar, but rather the actual number of applications and approvals. And the data indicates that these were up significantly in 2017, including applications by members of the private bar (31), the highest number since 2013. In terms of actual appointments to the Court, the submission from the Judicial Council indicates that approximately one-third were from the “public sector and other areas”.² This ratio seems appropriate given that over half of the cases in Provincial Court are adult and youth criminal.³
9. Further, the Government believes that the binary division of applicants as coming from “public” or “private” areas of law may understate the degree of legal diversity on the bench, since an individual lawyer may have practiced in a number of areas during their career. For example, the biographies accompanying the announcements on the Provincial Court website of the 12 judges appointed over the past year indicate that five judges had a mix of public and private law experience, including the following:
- Judge Silverman practiced for 27 years as a criminal defence lawyer and was a sole practitioner from 1993-2017. Most recently he has been Crown Counsel in Chilliwack. He has appeared at all levels of court and has appeared as a visiting practitioner in Alberta and Saskatchewan. He was also an instructor at the Pacific Regional Training Centre for the RCMP.
 - Judge Docolas started her career with Altman Kahn Zack focusing on federal work. She later became a Crown prosecutor in both the Provincial and Supreme Courts. She went on to open her own defence practice and has since been working regularly on major crime files.

² Judicial Council submission, para 43.

³ See Government main submission, p. 11.

- o Judge Albert started his career specializing in Aboriginal law working extensively with the Squamish Nation where he focused on criminal law, family law and civil litigation. From there he worked in Surrey as a federal prosecutor. He established his own law firm doing legal aid, duty counsel, drug related and impaired driving defence work.

These examples serve to illustrate the diversity of legal backgrounds and experience brought by appointees to the Court, which undoubtedly serves the Court well.

Relationship to other judicial positions

10. In paragraph 151, the Association states that its salary proposal would “restore the base salary for BC judges to an appropriate relationship with federal salaries and thereby reduce the financial disincentive for potential applicants to the Provincial Court”.
11. The comparative salary history of B.C. judges and superior court judges is set out in the following table.⁴ As the table indicates, B.C. judges’ salaries as a percentage of superior court judges’ salaries have varied over the years, but for the past decade have averaged in the low 80s.
12. The Association’s salary proposal would result in a salary relationship of approximately 92% in 2020/21, depending upon the actual adjustments made to superior judges’ salaries in that year. The effect of the proposal would be to increase B.C. judges’ salaries to a level *vis a vis* the superior courts that is significantly higher than at any time in the past 15 years.

⁴ Candidates and appointments data from Judicial Council and Provincial Court annual reports, and Judicial Council submission to 2019 JCC. Salary data from information in Chart of Judicial Salaries Across Canada (2005 to present), Tab 15, Judges Joint Book of Documents.

| Year | B.C. Salary as % of Federal Salary | Approved candidates for Prov Court* | Prov Judges appt'd to BC Supreme Court* |
|-----------|------------------------------------|-------------------------------------|---|
| 2004/2005 | 69 | 10 | 0 |
| 2005/2006 | 68 | 16 | 1 |
| 2006/2007 | 81 | 7 | 1 |
| 2007/2008 | 80 | 11 | 0 |
| 2008/2009 | 85 | 13 | 0 |
| 2009/2010 | 85 | 7 | 2 |
| 2010/2011 | 85 | 17 | 2 |
| 2011/2012 | 82 | 14 | 2 |
| 2012/2013 | 80 | 12 | 2 |
| 2013/2014 | 79 | 11 | 1 |
| 2014/2015 | 81 | 19 | 0 |
| 2015/2016 | 81 | 17 | 0 |
| 2016/2017 | 80 | 11 | 1 |
| 2017/2018 | 83 | 14 | 1 |
| 2018/2019 | 83 | unknown | 1 |
| 2019/2020 | 82 | unknown | 0 |
| | *calendar year | | |

13. Just as importantly, the table also shows that there is no apparent correlation between the two salary levels and either the number of approved candidates to the Provincial Court bench or the number of Provincial Court judges who leave the Court for appointment to the B.C. Supreme Court.

14. In Government's view, these figures, taken together, do not support an argument that B.C. judges' salaries should increase significantly because of their relationship to superior judges' salaries.

15. In paragraph 189, the Association notes that its focus for comparisons with other provincial court judges across the country is limited to Alberta, Saskatchewan and Ontario. These comparisons, along with a comparison to superior court judges, underpin the Association's salary proposal, which would represent a 14.8% increase in the first year above the current

salaries approved by the Legislature and 19.5% over the three years covered by this Commission's recommendations.

16. Respectfully, limiting the focus to these three provinces does not fully engage with the factor set out in the *Judicial Compensation Act*, which refers to “compensation paid to similar judicial positions in Canada”. The subsequent phrase “having regard to the differences between those jurisdictions and British Columbia” is a qualifier, not an exclusion: it does not remove the requirement for the Commission to consider all other similar judicial positions in Canada. The Government's main submission situates British Columbia's judges in the full inter-provincial context.
17. Also in para 189 of the Association's submission, a stated rationale for comparing to those selected provinces is that they are in favourable economic positions. Yet data indicates that Quebec is outperforming Ontario on a range of measures. For example, in 2018 Quebec's real GDP growth was 2.5% compared to 2.2% for Ontario, and Quebec's is forecast to be equal to Ontario's for the next two years.⁵ Quebec's unemployment rate in 2018 was lower than Ontario's (5.4% vs. 5.6%), as was its inflation rate (1.65% vs. 2.35%).⁶ Quebec's merchandise export growth has been stronger than Ontario's over the past three years as well.⁷
18. Overall, if one is to make inter-provincial comparisons based on current economic performance generally, Quebec is a better comparator to British Columbia than Ontario: Quebec has a balanced budget and similar economic growth, as well as low unemployment but general wage rates that are in the middle of the provinces.

⁵ Statistics Canada: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3610040201>

⁶ Statistics Canada: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410028701>

⁷ Statistics Canada: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1210011901>

19. Similarly, the actuarial report commissioned by the Association focusses only on the selected provinces and does not present a complete picture of judicial pension arrangements across the country.

Compensation paid to others from provincial public funds

20. In paragraph 197, the Association suggests that even with a general wage freeze in government, the salaries of most individual employees are not frozen because they can move up within their salary classification or seek promotion. However, the vast majority of unionized public servants experienced two years of no general wage increases in 2010/11 and 2011/12, and excluded management employees experienced five years of a salary freeze. The actual increases awarded over the past five and 10 years are shown in the Government's main submission on page 71.

21. Further, the Association's submission does not differentiate between salary increases and labour mobility. It is true that public servants, unlike judges, can move to different positions within government, but if they move to a position with a higher salary it is because that position carries greater responsibilities, or because they have competed for a different position that comes with a different salary. This mobility should not be conflated with salary increases (or freezes) for remaining in the same position.

22. In paragraph 198, the Association queries whether other non-compensation trade-offs may occur in public sector bargaining in exchange for lower general wage increases.

23. In British Columbia, provincial public sector bargaining is highly centralized and co-ordinated, and all negotiations are subject to a government mandate that details the financial and policy requirements for bargaining. The purpose of this bargaining approach is consistency, and it significantly limits opportunities for trading off general wage increases for other items. As of the date of this submission, the mandate general wage increases of 2% in each of three years

are well-established, and no agreement has been reached that has contained a general wage increase above or below this amount. There have been no agreements that have traded general wage increases in exchange for staffing guarantees to avoid layoffs.

24. Additionally in this round, Government provides up to 0.25% per year at each table to fund collective agreement changes that demonstrably will improve services for British Columbians. It is true that, in certain cases, union and employers may agree on collective agreement language changes that generate savings, and those savings may be used to generate additional targeted wage adjustments. For example, in the core public service, the 0.25% was used to provide targeted adjustments for social workers, sheriffs, and corrections officers to address demonstrated recruitment and retention challenges. As a trade-off, the employer gained the ability to manage employee flexible work schedules to ensure service delivery staffing levels could be maintained in certain occupations.
25. The Association raises a further point about transparency. Government and public sector employers are committed to a high level of transparency in collective bargaining. New collective agreements are generally public and posted on the internet, and employers, employer associations, and unions prepare summary reports describing the changes, costs, and trade-offs. These summary reports are generally publicly available.⁸
26. In paragraphs 200 to 205, the Association notes that salaries of certain public servants are linked to those of Provincial Court Judges, and that those linkages should not influence the setting of judicial salaries. Government agrees, and is making its submissions to this Commission solely to address what is fair and reasonable compensation for Judges.

⁸ As an example, updated health sector collective agreements outlining what has changed can be found at: <http://www.heabc.bc.ca/Page20.aspx#.XQKSP4hKiU>

THE GOVERNMENT'S RESPONSE TO THE JUDICIAL JUSTICES' ASSOCIATION SUBMISSION

Maintaining a Strong Court

27. Government takes note of the fact that relatively few applications have recently been submitted to the Judicial Council for appointment as Judicial Justice.
28. However, given the available information, Government is respectfully unable to conclude that inadequate compensation is the reason – or conversely, that an increase in compensation would necessarily result in a higher number of qualified applicants. As noted in Government's main submission, for some years the Court did not actively recruit Judicial Justices,⁹ and while efforts have been made starting last year, it is possible that sustained outreach will be necessary to inform prospective applicants about the position, regardless of the remuneration.
29. As noted by the Association, the retention rate of Judicial Justices is high. Government has responded to requests by the Court to extend the tenure of per diem JJs by amending the Provincial Court Act in 2017 to extend the previous 10-year terms to 12 years. Government is also taking steps to create the ability for JJs to be re-appointed to a further 10-year term, so that those who wish to remain in the position may do so, including full-time JJs who may retire and be re-appointed on a part-time basis; this latter arrangement would broadly mimic the Senior Judges Program that has existed for many years for Provincial Court Judges.
30. Given that the majority of the per diem Judicial Justices are lawyers with practices, the retention rate suggests that currently appointed Judicial Justices are satisfied overall with the position, including the compensation.

⁹ Government submission, para 149.

Compensation paid to others from provincial public funds

31. The Association addresses this factor in paragraphs 70-78 of its submission focussing almost exclusively on actual salaries and per diems paid to others in the public sector. However, this factor as set out in the *Judicial Compensation Act* is in regard to changes in the compensation of others paid by provincial public funds.
32. In other words, the statutory direction is not to compare Judicial Justices to the levels of remuneration of other positions in the public sector, but to focus on how those other positions' remuneration is changing.
33. The outlier in this regard, as noted by the Association, is legal aid lawyers. Significant work is being done by Government to address this long-standing issue, which includes negotiating a new tariff model and the immediate infusion of funding to avert job action. It is noteworthy that until these actions were taken, no increases in the legal aid tariff had occurred since 2006, and the last increase before that occurred in 1991. Judicial Justices' compensation, by comparison, is reviewed and addressed every three years through the compensation commission process.
34. Government notes that the salary increases proposed by the Association would, over the three years covered by this Commission, represent a cumulative increase of 18.4% above the current salary approved by the Legislature.

Correction

35. The Government's main submission, at paragraphs 63 and 244, mis-states the current per diem for part-time Judicial Justices: the correct amount is \$782, not \$787. Government regrets the error, which arose in respect of the amount provided for lawyers' overhead, which is \$75, not \$80.

36. The correct formula is:

Full-time Judicial Justice salary / 207 (days of work) + 20% (in lieu of benefits) + \$75 (overhead).

THE GOVERNMENT'S FURTHER SUBMISSIONS TO THE COMMISSION

Provincial Court Judges

Professional Development Allowance

37. Government supports the proposal submitted by the Provincial Court Judges' Association that the Professional Development Allowance (PDA) be increased from \$4,000 to \$4,500, in part to reflect inflation since the last time the PDA was adjusted, and in particular to help offset increased costs for attending judicial education events and conferences.

38. Government is not opposed to the proposal that the portion of the PDA that may be used for health and wellness expenditures be increased from \$500 to \$750, noting that it is a modest increase.

Interest on Retroactive Salary Adjustments

39. The Association requests that interest be paid from April 1, 2020 to the date of retroactive payment of salary increases with prejudgment interest being calculated from April 1, 2020 to the date "it is resolved or determined that the recommendations shall be implemented" and post judgment interest from "that date to the date that judges are paid the resulting retroactive adjustments".

40. There are two reasons why Government respectfully disagrees with this proposition. First, the wording of the request seems to assume or imply that the recommendations of this Commission are mandatory and must be implemented. Government assumes that is not the intent of the submission since that would not be legally accurate. One legally consistent construction of the request is that the date for determining pre- and post-judgment interest is the date that the Legislature determines what the compensation should be after considering the recommendations.

41. However, on either construction there is a second, more fundamental issue that under the B.C. process there is no certainty of a “resulting” retroactive adjustment.
42. The submissions on this point are based on the recommendations of the Manitoba JCC and subsequent judicial review proceedings which were all significantly influenced by a structural delay created by the Manitoba legislation between the time the remuneration adjustments are to be made and the decision as to what those adjustments should be.
43. The structural delay under the Manitoba *Provincial Court Act* C.C.S.M. c. C275 is caused by the fact that the JCC makes recommendations for the period which begins on the date by which the JCC is to be appointed.¹⁰ As a result there is necessarily a period of retroactive adjustment which must be made after the recommendations have been made and government determines how to proceed after considering the recommendations.
44. The legislative scheme in British Columbia is one in which no retroactive payment is necessarily required. The mandate of this Commission is to make recommendations for a prospective period of time (i.e. April 1, 2020 and two years following). The timelines contained in the B.C. legislation are such that it is unlikely there will be a delay between the effective date of the adjustment and the date the Legislature considers the recommendations and decides how to proceed (see section 6 of the *Judicial Compensation Act*).
45. The fact that a retroactive adjustment is certain under the Manitoba legislation was the basis upon which the Manitoba JCC made its interest payment recommendation. It was also a significant factor for the court on judicial review. The chambers judge noted that the JCC recommendation that interest be paid from April 1, 2008 until the date of the retroactive salary adjustment was because the process created by the legislative scheme in Manitoba creates a delay in the adjustment of salary which necessarily requires a retroactive payment.

¹⁰ See section 11.1(2) and section 11.1(4)).

This structural delay was identified by both the Manitoba JCC and the chambers judge as an “inherent unfairness in the system”.¹¹

46. The fact that there would necessarily be retroactive adjustments was also an important factor for the Manitoba Court of Appeal’s analysis of the reasonableness of the JCC’s interpretation that it had an implied statutory power to award interest.¹²

47. The rationale for both implying a statutory power to recommend interest based on the principles of statutory interpretation and, assuming a jurisdiction to do so, that it would be appropriate to recommend interest, does not exist within the context of the BC legislation. There is no inherent unfairness as this Commission is making a prospective recommendation rather than one which is necessarily partly retroactive.

¹¹ *Manitoba Provincial Judges’ Assn. v. Manitoba* [2012] MJ 105. Judges’ Association documents, Tab 16 paragraph 129.

¹² *Manitoba Provincial Judges’ Assn. v. Manitoba* [2013] MJ 279. Judges’ Association documents, Tab 17 paragraphs 139-43.

Judicial Justices

Pension

48. With respect, Government does not support the Judicial Justices' Association's proposal for enhanced pension benefits.
49. The Association requested similar enhancements before the 2004 and 2016 compensation commissions. Neither commission recommended the proposed enhancements.
50. The enhanced pension benefits for Provincial Court Judges were the product of two years of analysis and work in the early 2000s, and were subsequently written into the *Judicial Compensation Act*. Those benefits were meant to address the fact that, on an ongoing basis, qualified applicants to the bench were likely to be appointed relatively late in their careers, and accelerated benefits would assist with recruitment.
51. By contrast, the Court has moved to a model of appointing part-time per diem Judicial Justices, who are not members of the pension plan but are provided an amount within their per diem in lieu of benefits, including pension benefits. The enhancements proposed by the Association therefore would affect only the individuals already appointed as full-time Judicial Justices.
52. Government has reviewed the report submitted by Mr. Cheng, the actuary retained by the Association, and requested that an actuary at the Pension Corporation review the report as well. The response of the Pension Corporation is appended to this reply submission.
53. In short, Government is advised that Pension Corporation is unable to reproduce the analysis because it does not possess the specific actuarial data that underlies it, including salary history and length of service. Even with that data, Government is advised that it would be

extremely challenging to provide a proper response in the timeframe set out for reply submissions.

54. However, it is possible to address a few matters:

- The report notes that the issue of using a small group size for this analysis means that “the actual costs may be quite different from the estimates if the actual future experience of the group significantly differs from the assumptions”;¹³
- The report suggests at p. 7 that the formula for per diem Judicial Justices also should be adjusted to reflect the enhanced pension benefit, which would add further costs to the proposal that have not been accounted for in this report;
- Pension Corporation notes possible further effects, not captured in the report, due to the benefit cap and early retirement reduction rules that apply to judges.

Administrative Judicial Justice Salary Differentials

55. The Association proposes salary differentials of 6% for two administrative Judicial Justices: one for Traffic Court and one for the Justice Centre. The proposal is supported by the Chief Judge, and the extra duties undertaken by these Judicial Justices are outlined in the Chief Judge’s submission at para 205.

56. Given the extra duties as described, Government supports the creation of the proposed salary differential of 6% for these two positions.

¹³ *Actuarial Costings of the Proposed Pension Enhancements for Judicial Justices of B.C.*, p. 8

Professional Development Allowance

57. The Association proposes an increase in the PDA of \$750, from the current \$2,500 to \$3,250 per year, primarily for the purpose of offsetting expenses for educational conferences and seminars. Government supports this proposal.

Judicial Justice Shift Premiums

58. The Judicial Justices' Association has proposed shift premiums for all shifts that are not weekday shifts. With respect, Government does not support the proposal as presented.

59. To the extent that the Association's shift premium proposal is made with a view to addressing recruitment issues, it is therefore linked with whatever recommendations the Commission may make respecting full-time Judicial Justices' salaries. In particular, Government does not support significant increases in salary (which flow through to the per diem amount for part-time Judicial Justices) plus of the full range of requested shift differentials.

60. This was the approach taken by the 2016 JCC: in declining to recommend shift premiums, the Commission noted that a sufficient salary for the position should reduce the need for such premiums.¹⁴

61. In Government's view, there is, however, a distinction to be drawn between the normal course of work under a model that is structured around shift work in order to provide 24/7 service versus working on a recognized holiday. The purpose of legally recognized holidays is to provide people with time away from work and to spend with friends and family, and it is common for those in the public sector who are required to work on statutory holidays to receive added compensation.

¹⁴ 2016 Judicial Compensation Commission Final Report, p. 66.

62. Given all of the above, Government supports the creation of a shift premium of \$245 for statutory holidays only, those being the legally recognized statutory holidays in the province: New Year's Day, Family Day, Good Friday, Victoria Day, Canada Day, B.C. Day, Labour Day, Thanksgiving Day, Remembrance Day, and Christmas Day. This amount is the highest of the holiday shift premiums proposed by the Judicial Justices Association, which Government submits would be appropriate to apply to all statutory holidays, not only the four days listed by the Association. Government's submission in this respect accords, at least in part, with the submissions of Judicial Justice Holmes on this matter, who views weekends and holidays as being more significantly in need of premiums over weekday evenings and graveyard shifts.

Other Compensation Proposals

Long Term Disability (Age 65-75)

63. The Chief Judge has requested that the Commission recommended a fully funded arrangement for her office's budget in respect of Long Term Disability (LTD) benefits for Judges and Judicial Justices over age 65.
64. Government is aware of the nature of the budgetary pressure currently being experienced by the Office of the Chief Judge. In Government's respectful submission, this is not a compensation issue respecting the provision or change of a benefit to the affected judicial officers. Rather, it is a budgetary matter that Government and the Office of the Chief Judge should seek to address together outside of the commission process. Government therefore requests that the Commission refrain from making a recommendation on this matter.

Per Diem Travel Allowances

65. Provincial Court Judges and Judicial Justices have long been in Group III and Group II respectively for travel per diems.
66. Group III is also the rate for provincial government Deputy Ministers and Assistant Deputy Ministers, while Group II is for other senior managers and legal counsel, all of whom travel extensively.
67. The worklife of MLAs is significantly different from others in the public service, and features near-constant travel to attend legislative sessions and caucus meetings throughout the year. Current MLA per diems were set by the Legislative Assembly in recognition of the sustained, long-term absences from home associated with their work both in the legislature and remote areas of their constituencies.

68. In Government's respectful view, there is no reason to depart from the existing travel per diems for Judges and Judicial Justices.

Costs

69. Costs for the Provincial Court Judges' Association and the Judicial Justices Association are provided for in the *Judicial Compensation Act*. Section 7.1 of the Act contains a formula for costs, under which Government pays:

- o 100% of costs up to \$30,000; and
- o Two-thirds of costs between \$30,000 and \$150,000.

This formula was developed and put into the Act in 2015. Its purpose is to provide for a fair distribution of costs and to create clarity in advance for all parties.

70. Government's position is that the Commission should make no recommendation respecting costs because they are already provided for in statute.

71. Continued argument over costs in front of compensation commissions undermines the goal of providing certainty over the costs formula in advance of the commission process. It is not unreasonable for the parties to bear a nominal amount of their costs for participating in the process, over which Government has no control.

72. The formula was developed with previous compensation commission experience in mind. Costs for the two Associations up to 2015 averaged around \$90,000 to \$120,000 for the Judges Association and \$25,000 to \$35,000 for the JJs' Association. For the 2016 JCC, the costs submitted were approximately \$93,000 for the Judges, of which \$65,500 or 70% was reimbursed; and \$37,000 for the JJs' Association, of which approximately \$35,000 or 95% was reimbursed. This distribution of costs does not reasonably prevent either party from fully participating in the process and is consistent with the outcomes in other jurisdictions.