



**Reply Submission of the
Judicial Justices Association of British Columbia
Compensation Commission 2019**

June 14, 2019

Introduction

1. The Judicial Justices Association of British Columbia (the “Association”) makes the following submissions in reply to the submissions of the Government of British Columbia dated May 29, 2019.
2. The Association respectfully submits that the Government’s submission does not support the recommendation that it is making to this Commission. Nor does the Government’s submission have sufficient regard to the principles applicable to the determination of judicial compensation enunciated in the relevant case authorities or the legislative criteria under the *Judicial Compensation Act*.
3. The Government has taken the position that modest increases to compensation are reasonable. The Association submits that the Government has failed to provide valid reasons in support of that contention, has relied too heavily on considerations that are not appropriate or relevant to the determination of judicial compensation, and has inappropriately discounted relevant criteria.

Government Submissions

4. The Association submits that the Government recommendation is not based on the factors set out in the *Judicial Compensation Act* and would in fact maintain Judicial Justice compensation at an unreasonable level.

The Need to Maintain a Strong Court

5. The Government argues at paragraph 126 of its submission that “the best indicator as to whether compensation is sufficient to attract qualified applicants is whether the Court is experiencing any unmet need in the number of applicants approved and recommended by the Judicial Council, and whether the judicial complement demonstrates stability overall”. The Government states that it can find no evidence that “the roster of approved candidates for appointment as Judicial Justice is insufficient to meet the needs of the Court as required”¹ and that the Judicial Justice complement is “stable”.
6. The Association, the Chief Judge and the Judicial Council disagree. As noted in the submissions of each of these parties, there is an ongoing, pressing gap in Judicial Justice shift coverage. The Association, the Chief Judge, and the Judicial Council have all noted that in 2018, 4% of all Judicial Justice shifts at the Justice Centre needed to be covered by Provincial Court Judges, and approximately 10% of all weekend Judicial Justice shifts were filled by Provincial Court Judges. The Chief Judge stated that the reason Provincial Court Judges are regularly called in

¹ Government Submission, para. 148

to assist with coverage at the Justice Centre is because it is “under resourced” and that new Judicial Justice appointments are “urgently needed”.²

7. The Government makes no mention of this chronic shortage and further submits that the Judicial Council also has “not felt it necessary to initiate significant outreach or conduct interviews consistently” and that this “in itself suggests that the Council believes there is a sufficient number of Judicial Justices to serve the Court’s needs.”³ This is patently inaccurate.
8. The Judicial Council issued a Notice to the Profession Calling for Judicial Justice Applications (the “Notice”) in June 2018 which it circulated widely to all Provincial Court Judges and Judicial Justices, the Trial Lawyers Association of BC, The Advocate, The Canadian Bar Association (BC Branch), The Law Society of BC, and the Courthouse Libraries BC. In addition, a link to the Notice was placed permanently on the Judicial Council webpage and it was also added to the Provincial Court website and RSS feed.
9. However, despite that recruitment push, in 2018, the Judicial Council only received 9 applications, interviewed only 2 applicants, and did not make any appointments. To-date in 2019, the Judicial Council has not received any applications as a result of the Notice and has made only two incidental appointments.
10. The Association submits this is clear and cogent evidence of the desperate need to recruit more qualified Judicial Justice candidates, and that current compensation is clearly inadequate to do so.
11. The Government has rejected each of the last three Commission’s recommendations on Judicial Justice compensation and maintained that only modest increases to Judicial Justice compensation were reasonable. In this instance, the Government is asserting that modest increases are appropriate because there is stability in the Judicial Justice complement. However, the Chief Judge clarifies that that is not the case, noting that “while there is a very real, current need to attract qualified candidates, the Court’s attempts to do so...have had limited success.”⁴
12. The Association submits that this is especially worrying given that nine Judicial Justices will reach the age of 75 in the next five years, and a total of 19 Judicial justices will reach age 75 in the next 10 years.
13. The Government also points to the request from the Court in 2017 to extend the term of part-time Judicial Justices from 10 years to 12 years as evidence of the stability in the complement.⁵ This was addressed in the Association’s submissions at paragraphs 46-48. In fact, the term extensions were orchestrated as part of a

² Chief Judge Submission, para. 192

³ Government Submission, para. 149

⁴ Chief Judge Submission, para. 194

⁵ Government Submission, para. 150

larger suite of changes that were required to ensure that there was continuity of service at the Court. The Association submits that if the terms of the Judicial Justices had not been extended, there simply would not have been enough Judicial Justices to perform their core functions. We are now at a similar inflection point as the terms of seven of those Judicial Justices will expire in 2020.

14. The Association submits the Government's position of recommending modest compensation increases demonstrates a willful blindness to the current and coming Judicial Justice crisis. We highlight the Chief's Judge's submissions on urgency of the matter:

[196] the remuneration of judicial justices must, it is submitted, be increased to a level that will encourage existing judicial justices to continue in their public service and urgently attract outside applicants with significant professional and adjudicative experience. I have read the 2019 Submission to the Judicial Compensation Commission of the Judicial Justices Association of British Columbia (JJABC) and support their submission regarding remuneration and professional development allowance as being consistent with this need to attract and retain judicial justices.

Compensation in Respect of Similar Judicial Positions in Canada

15. The Government is in agreement with the Association's submission that for the purposes of determining reasonable compensation, it is appropriate to compare the compensation and role of Judicial Justices in BC with Judicial Justices/Justices of the Peace in other Canadian Jurisdictions. Having done its own comparison, the Government concedes that BC's Judicial Justices compensation is one of the lowest in the country. However, the Government claims that despite this divergence, BC's Judicial justices are not "significantly out of step with their counterparts elsewhere". The Association strongly disputes this.
16. The Association submits that the Government places too much emphasis on minor differences between the roles of Judicial Justices/Justices of the Peace in equivalent jurisdictions and ignores the more substantiated similarities. In paragraph 174 of the Government's submissions, it lists the duties performed by Judicial Justices/Justices of the Peace from other jurisdictions that it claims are distinguishable from the work of BC's Judicial Justices. In fact, many of those duties have an equivalent counterpart in BC's Judicial Justices' duties including:
 - Issuing an order to apprehend a child in need of protection under the *Missing Persons Act*;
 - issuing orders to apprehend an individual for a mental health examination under the s.28 *Mental Health Act*;
 - conducting trials for summary convictions in Traffic and By-Law Hearing Courts; and

- presiding at appearances and ordering the remanding of an accused into custody under s.515 of the *Criminal Code*.

17. The Association submits that this is an attempt to downplay the importance and complexity of the types of matters that Judicial Justices hear. The Government notes, for instance, that Judicial Justices do not have the jurisdiction to hear matters where *Charter* arguments are raised, but this ignores the reality that Judicial Justices are constantly weighing *Charter* rights when making decisions on judicial interim release. The Chief Judge offers the following ground-level perspective on the importance of the work of Judicial Justices:

[161] I will commence with a review of the division's work in the area of judicial interim release. We live in a society that values individual liberty and freedom and a criminal justice system based on the presumption of innocence. When that liberty is imperiled by virtue of a police investigation resulting in an individual being taken into police custody, it is important that the individual be brought before a judicial justice as soon as is practical and, in any event, not later than 24 hours from the time of arrest, for a determination of whether the continued detention, pending the adjudication of the matter, is justified. It is accepted that outstanding criminal charges and any accompanying deprivation of liberty can have enormous consequences upon the lives of individuals, impacting their personal lives, their family and their employment, often in a very public way.

...

[165] Judicial justices also hear a great number of search warrant and production order applications. While police agencies require investigative tools in the course of their work, many of these tools have the potential to infringe on the privacy rights of individuals who may not ultimately be charged with any offense or, if charged, may be determined not guilty. It is for this reason and the nature of the intrusion involved that many of these investigative measures require prior judicial authorization to ensure the existence of a proper legal foundation for their approval and to assure that any such approvals be accompanied by any appropriately limiting terms and conditions.

...

This is demanding work and it requires a swift balancing and consideration of an individual's security against unreasonable search or seizure, weighed against the legitimate interest of the state, to investigate crime.

18. The Government also submits that when comparing compensation variances between the jurisdictions, it is important to know that differing jurisdictions use differing compensation processes. The Government identifies that in Saskatchewan, Ontario, and Manitoba, Judicial Justice compensation is set as a percentage of the relevant Judges' salaries. Saskatchewan's salaries are set at 49% of the Judges' salaries; Ontario is set at 47% for 2019/20 increasing to 50% by 2022, and Manitoba's is set by legislation at 43%.
19. The Association submits that the differences in processes used to determine compensation rates is irrelevant and in any event not sufficient to account for the comparatively low rate of compensation BC's Judicial Justices receive. Further,

even when viewed as a percentage of the Provincial Court Judges' salaries, Judicial Justice's in BC are still at the lowest end of the spectrum: BC's Judicial Justices currently receive 41% of Provincial Court Judges' total compensation (salary, benefits, etc.).

Changes in the Compensation of Others Paid By Provincial Public Funds

20. The Government's salary recommendations for Judicial Justices are aligned with the Government's public sector bargaining mandate. The Association submits that the Government has placed undue weight on this single factor in support of its recommendation for only modest increases to Judicial Justice compensation. At paragraph 180 in its submissions, the Government states that this is "one of the most reliable markers of reasonableness in determining judicial compensation".
21. Though the Government notes that Judicial Justices are not employees and require adequate compensation in order to maintain judicial independence, it nevertheless uses the Supreme Court's reasoning in the *PEI Reference* to claim that in "some circumstances 'identical treatment' between judges and those paid by public funds is 'preferable' as a matter of judicial independence."⁶ However, the Government fails to outline exactly which circumstances would warrant identical treatment. The Association submits that those discussed in the *PEI Reference* are distinguishable from those before the Commission today. It is also worth noting that the *PEI Reference* decision predates the *Judicial Compensation Act*, which sets out the factors that the Commission must consider when determining reasonable compensation for judicial officers.
22. In the *PEI Reference*, the central issue was about reductions in the salaries of provincial court judges and within that context, the Supreme Court found that a salary cut of **all** persons paid by the public purse helps to "sustain the perception of judicial independence precisely because judges are not being singled out for differential treatment."⁷ It was determined that Judicial salaries can be altered as part of an overall economic measure that affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class.
23. The Association submits that the Government's continuing insistence on applying its public sector mandate to judicial compensation determinations raises the concern that the Government views the Commission process as an analogue of the process used for the public sector employees.
24. The Government also states that "compensation outcomes for judges that consistently differ from those of others [paid by public funds] are more apt to raise potential questions than if judges are treated more similarly."⁸ It then provides data on the average annual salary increase for public servants to highlight the similarity

⁶ Government Submission, para. 184

⁷ *PEI Reference*, para. 156

⁸ Government Submission, para. 189

and consistency it has maintained in salaries among those paid from public funds. It does not, however, provide a rationale for how these aggregated averages are helpful comparators for judicial officers in particular, or for demonstrating how those comparators address reasonable compensation for the judiciary. For instance, the Government notes that unionized public employees received average annual wage increases of 1.35%⁸ between 2009-2018 but offers no explanation for why Crown Counsel, which the Association submits is a more helpful comparator than a unionized public employee, received average annual increases of 3.25% during that same period. Nor does it explain the rationale for why Judicial Justices only received an average annual increase of 2.4% for the same period.

25. There is clear precedent for the Government agreeing to compensation terms that are outside of its public sector bargaining mandate. For instance, the Government recently negotiated a three-year agreement with the physicians of BC on less rigid terms. Though the Government stated in its press release that they had agreed on a general wage increase of 2% each year for physicians,⁹ when taking into account increases including a one-time payment per physician of \$7,500 and business cost premiums,¹⁰ the increase to the compensation base is actually closer to 3% per year.¹¹
26. The Supreme Court of British Columbia determined in the *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)* case, that the Government's public sector bargaining mandate is "only a negotiating position for bargaining with public sector unions" and that reliance on that mandate—in that instance, a net-zero mandate—"cannot be permitted to trump the constitutional obligations applicable to setting judicial remuneration."¹²
27. The Association maintains that Judicial Justices are not public employees and that reflexively indexing Judicial Justice compensation to the Government's public sector mandate fails to take into account the other required statutory criteria and is not reasonable.

Current and Expected Economic Conditions in BC

28. The Government opens its submissions on this factor by stating that the province has "recently seen a moderation in economic growth, following a period of robust

⁸ Government Submission, para. 192

⁹ BC Gov News (May 8, 2019). Resident doctors ratify agreement under provincial mandate. Retrieved from <http://news.gov.bc.ca/19669>

¹⁰ Fayerman, P. (May 16, 2019). Doctors approve new fee agreement with BC government. *Vancouver Sun*. Retrieved from <https://vancouversun.com/news/local-news/doctors-approve-new-fee-agreement-with-b-c-government>

¹¹ Doctors of BC. 2019 Physician Master Agreement Negotiations Tentative Settlement. Retrieved from <https://www.doctorsofbc.ca/sites/default/files/2019pma-highlightsheetlinkedtothepma.pdf>

¹² JBOD: *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022 (CanLII), para. 78

expansion.”¹³ This sentiment – that BC’s economic situation used to be strong but now has weakened – becomes the Government’s primary refrain for the remainder of its economic conditions submission.

29. It points to the softening of the housing market, the slower than anticipated economic growth in the first part of 2019, the decline in oil prices, and trade policy uncertainty as indicators that BC’s economy is just not what it used to be. It even submits that the slated massive LNG Canada project is a “downside risk” to BC’s current economic outlook.¹⁴
30. The Government advances the notion that restraint and caution must inform the Commission’s view of BC’s financial capacity while also claiming that the Government is expecting surpluses over the next three years, albeit more moderate surpluses than the large surpluses of 2014 through 2017 period. The Association notes that in its 2016 submissions, following a period of large surpluses and higher-than-expected growth, the Government also urged that financial restraint and caution were required.
31. The Association queries what are the precise economic and financial circumstances that would allow the Government to acknowledge that anything other than caution is warranted? If one follows the logic of the Government submission, Judicial Justices will only benefit from a strong economy if the Commission year happens to fall during a boom time. In the meantime, the Government’s fiscal position benefits from every year of a strong economy.
32. The Association further submits that the Government overly downplays its financial and economic outlook. Though the Government submits that it is “under tremendous pressure to deliver core operations as well as proceed with justice reform,”¹⁵ it fails to acknowledge that Judicial Justices are essential members of the core operations of the justice system and are in dire need of an increase in compensation in order to attract qualified candidates and head off the coming crisis in the Judicial Justice roster.

The Government’s Submission on Recommended Compensation

33. The Government’s recommendation regarding salary for Judicial Justices over the three year mandate does not address the fact that the salaries today are inadequate to attract qualified candidates and do not meet the test for reasonableness. As submitted previously the Government’s call for restraint in public sector compensation is an impermissible rationale upon which to base its recommendation and its position that the complement of Judicial Justices is extremely stable is directly contradicted by the submissions of the Association, the Judicial Council and the Chief Judge.

¹³ Government Submission, para. 208

¹⁴ Government Submission, para. 210

¹⁵ Government Submission, para. 225

Final Comments

34. The Association submits that the Government is arbitrarily imposing its predetermined public sector mandate without regard to the Compensation process. We request this Commission in its Report and Recommendations make it clear the compensation hearing process is a legislated process, not merely a formality. Given the tenor of the Government's submissions, this process runs the risk that the Government will simply apply the considerations and reasons it set out in its submission as it has in the past, when it comes to consider this Commission report and recommendations.
35. The Association submits that its proposals should be adopted by this Commission.

All of which is respectfully submitted this 14th day of June, 2019.



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