

**The Government of British Columbia’s Submissions
to the 2022 Judicial Compensation Commission
respecting participation costs**

Submitted March 4, 2023

1. In its January 12, 2023 and February 3, 2023 submissions,¹ the Government of British Columbia (the “Government”) briefly addressed the outstanding constitutional challenge to the statutory costs formula in s. 7.1 of the *Judicial Compensation Act* (the “Act”). The Government did not take a position on the recommendations proposed by the Provincial Court Judges’ Association (“Provincial Court Judges”) and the Judicial Justices’ Association (“Judicial Justices”) that the Government should fully indemnify their reasonable participation costs in this Commission’s process.² The Supreme Court of British Columbia did not release its reserved judgment regarding the response to the recommendations of the 2019 Commission by the end of February 2023. Accordingly, the Government now provides its submissions on participation costs.
2. The Provincial Court Judges’ arguments, both before the Supreme Court and before this Commission, are premised in part on two ideas: (a) the Provincial Court Judges’ participation in this process (and their expert evidence) is necessary, useful and of assistance; and (b) the Government has greater resources.³ While they are not involved in the Supreme Court proceedings, the Judicial Justices also reference their relative financial capacity, an increase in pre-hearing work by all parties, and the impact of inflation.⁴
3. The Government does not support the requested recommendations on participation costs. The Government maintains the positions it advanced before the Supreme Court of British Columbia in the judicial review arising from the 2019 Commission process. There is no

¹ Submission of the Government of British Columbia [Government Original Submission], January 12, 2023, at paras. 69-71; Reply Submission of the Government of British Columbia, February 3, 2023, at paras. 55-57.

² The Provincial Court Judges propose a recommendation that the Government pay 100% of their reasonable legal fees and disbursements including 100% of the cost of any expert evidence: Submission of the Provincial Court Judges’ Association of British Columbia, January 12, 2023 [PCJA Submission], at paras. 355-399. The Judicial Justices seek full indemnity for their reasonable costs, or a significant increase to the ceiling of reimbursed costs by way of a regulation made pursuant to the *Act* or an amendment to the *Act* itself: Submission of the Judicial Justices Association of British Columbia, January 12, 2023 [JJABC Submission], at paras. 23(d), 182-189.

³ See, for example, PCJA Submission, at paras. 384-388.

⁴ JJABC Submission, at paras. 184-188.

reason for this Commission to depart from the legislated norm as represented by the costs formula in section 7.1 of the *Act*.

Chief Justice Hinkson’s Decision is Dispositive in the Circumstances

4. In reviewing the Government’s response to the 2016 Commission’s report, Chief Justice Hinkson expressly considered the rationales provided by the 2016 Commission in issuing its costs recommendation: that the Government had access to greater resources than judicial officers, and that the participation of judicial officers was “helpful and appropriate, and most importantly, necessary for an effective and objective process”.⁵ On that basis, the 2016 Commission recommended that the Government pay 100% of all reasonable costs, including legal fees and expert evidence, for both sets of judicial officers.⁶
5. In response to those arguments, Chief Justice Hinkson first referenced the Government’s Proposed Response to the report of the 2016 Commission, which noted that, with the creation of the statutory costs formula in 2015, the *Act* did not contemplate a “norm” of 100% reimbursement. Instead the “statutory norm” was for less than 100% reimbursement, subject to the Lieutenant Governor in Council’s discretion to prescribe a higher amount of reimbursement through regulation.⁷ The Chief Justice concluded at para. 99 that the Legislative Assembly’s rejection of the costs recommendation met the standard of rationality. More specifically, he concluded:

[99] ...While the statutory formula can be overridden by the government through regulation, that represents an exception to the norm created by the legislation. To depart from the legislated norm is a step which, in my view, is a matter for the legislative branch of government to consider, and not a matter into which the judicial branch of government should intrude. [emphasis added]

6. The importance of judicial officer participation at Commission hearings and the disparity in resources are factors that will always be present. The arguments addressed by Chief Justice

⁵ *Provincial Court Judges’ Association v. British Columbia (Attorney General)*, 2020 BCSC 1264 [*PCJA 2020*] at para. 96, citing the Report of the 2016 Judicial Compensation Commission, pp. 68-70: Joint Book of Documents of the Parties [JBD], Vol. 1, Tab 21.

⁶ Report of the 2016 Judicial Compensation Commission, pp. 69-70: JBD, Vol. 1, Tab 21.

⁷ *PCJA 2020* at para. 97; Government’s Proposed Response to the Judicial Compensation Commission 2016 Final Report in Respect of Provincial Court Judges, pp. 15-16: JBD, Vol. 1, Tab 22.

Hinkson in relation to the 2016 Commission process are the same arguments that continue to be advanced before this Commission. In addition, when those same arguments were considered by the 2019 Commission, and when the 2019 Commission made its costs recommendation for reasons virtually identical to those cited by the 2016 Commission, it did not have the benefit of Chief Justice Hinkson's decision. The 2019 Commission's rationale⁸ must be viewed with that context in mind.

7. The statutory costs formula has not been found unconstitutional. As such, it defines the maximum amount payable by the Government for participation costs unless and until a regulation changing the formula is approved by the Lieutenant Governor in Council.
8. Where – as here – the same primary arguments are advanced as were advanced before the 2016 Commission, the Government says the Chief Justice's decision is dispositive.
9. It is no answer to observe that the Chief Justice did not say that the Commission, as opposed to the court, cannot intrude into legislative matters. The Chief Justice upheld the validity of the Legislative Assembly's rejection of the 2016 Commission's costs recommendation. The Chief Justice was not purporting to *bar* the Commission from making recommendations; but rather has held that a Commission recommendation to depart from a statutory norm is validly rejected by the Legislative Assembly. Making further such recommendations, absent exceptional circumstances (discussed in the next section), is not consistent with the Chief Justice's decision. The Chief Justice was not faced with any exceptional circumstances. The same is true here.
10. The Provincial Court Judges did not appeal Chief Justice Hinkson's decision on costs.⁹ As such, it was not the subject of comment by the Court of Appeal and remains good law.

⁸ The Provincial Court Judges rely on the rationale offered by the 2019 Commission: see PCJA Submission, at paras. 365-366, 378, 380.

⁹ PCJA Submission, at para. 364.

There are no Exceptional Circumstances that Justify a Recommendation by this Commission

11. The statutory costs formula in s. 7.1 of the *Act* was enacted to provide greater certainty to the Government, the Provincial Court Judges and the Judicial Justices.¹⁰ The Government has no control over the amounts that the Provincial Court Judges and Judicial Justices spend on the Commission process. Accordingly, the statutory formula assists the Government in determining in advance what it will be required to pay, and provides a measure of predictability of reimbursement for the two sets of judicial officers.
12. The Legislature must be taken to have understood the importance of judicial participation in the Commission process, and understood the disparity in resources, at the time the costs formula was enacted. It likewise must be taken to have understood the concept and potential impact of inflation as another factor that will always be present. Accordingly, these factors alone cannot be used to justify a departure from the statutory norm.
13. The Government agrees that the participation of the Provincial Court Judges and the Judicial Justices is important to the Commission process, and accepts it has greater resources. This will always be true. As indicated, Chief Justice Hinkson specifically considered these factors when upholding the Legislative Assembly's rejection of the 2016 Commission's costs recommendation. Further, the notion that these factors militate in favour of 100% reimbursement cannot be reconciled with the information the Provincial Court Judges have provided to this Commission. That information indicates that 100% reimbursement of all legal fees and expenses is not the default in several other jurisdictions across Canada.¹¹
14. To be clear, prior to the enactment of the statutory costs formula in 2015, the Government's proposals respecting costs were not typically for 100% reimbursement. In fact, the Government's historical costs position was more nuanced than is suggested by those portions of previous Commission reports to which this Commission has been directed.¹² Of note:

¹⁰ *PCJA 2020* at para. 97, citing Government's Proposed Response to the Judicial Compensation Commission 2016 Final Report in Respect of Provincial Court Judges, p. 15: JBD, Vol. 1, Tab 22. See also Government's Proposed Response to the Judicial Compensation Commission 2019 Final Report in Respect of Provincial Court Judges, p. 15-16: JBD, Vol. 1, Tab 19.

¹¹ PCJA Submission, at paras. 392-398.

¹² PCJA Submission, at paras. 357, 361.

- (a) at the 2007 Commission, the Government took the position that it should bear two-thirds of the Provincial Court Judges' reasonable expenses and that the Provincial Court Judges should bear the remaining third;¹³
 - (b) at the 2010 Commission, the Government agreed to reimburse the Provincial Court Judges for reasonable costs, but this was in the context of an agreement that both sides would "prepare and present their respective submissions to this commission without the use of outside counsel" in order to "reduce the overall cost of the process" and "make the process less adversarial";¹⁴
 - (c) at the 2013 Commission, the Government's position in chief was that it would reimburse the Provincial Court Judges for reasonable costs up to a maximum of \$25,000¹⁵ and, on reply, the Government raised various reasons why it did not agree with 100% reimbursement beyond \$25,000, including that levels of reimbursement differ across the provinces;¹⁶ and
 - (d) by the time the 2016 Commission convened, the *Act* had been amended to include the current cost reimbursement formula in s. 7.1.
15. Further, before Justice Sharma, in the litigation concerning the 2019 Commission process, the Government took the position that participation costs do not implicate the "remuneration, allowances and benefits of judges and judicial justices" within the meaning of s. 5(1)(a) of the *Act*. Remuneration, allowances and benefits are "inputs" received by judges and judicial justices in consideration of the work they perform, whereas participation costs are reimbursement for an "output" or expenditure. On a plain language interpretation of s. 7.1, costs do not form part of either "reasonable compensation" or "remuneration, allowances or benefits".

¹³ Government of British Columbia Submission to the Judges Compensation Commission, June 14, 2007, at pp. 28-29. See the attached Appendices to these cost submissions [Costs Appendices], Tab 1 (pp. 10-11 of this submission).

¹⁴ Government of British Columbia Submission to the 2010 Judges Compensation Commission, June 8, 2010, at p. 24: Costs Appendices, Tab 2 (p. 13 of this submission).

¹⁵ Government of British Columbia Submission to the 2013 Judges Compensation Commission, June 27, 2013, at p. 43: Costs Appendices, Tab 3 (p. 15 of this submission).

¹⁶ Government of British Columbia Reply Submission to the 2013 Judges Compensation Commission, July 8, 2013, at p. 21: Costs Appendices, Tab 4 (p. 17 of this submission).

16. Before Justice Sharma, the Government noted that the specific source of a Commission's authority to make costs recommendations is not well documented, either in Commission reports themselves or in the jurisprudence. While the Provincial Court Judges reference the 2013 Commission's statement that costs fall with the "broad jurisdiction" of a Commission to address "remuneration, allowances and benefits,"¹⁷ there is no analysis in any of the case law supporting this position, and the Commission itself did not explain why it reached that conclusion.¹⁸
17. However, the Government did not then, and does not now, take the position that a Commission can *never* make a recommendation with respect to costs.¹⁹
18. The Government submitted to Justice Sharma that it was unnecessary to resolve the specific question of the source of a Commission's authority because the Government accepted, based on the language in *R. v. Campbell*, [1999] 2 S.C.R. 956 at para. 5 and *R. v. Newfoundland Association of Provincial Court Judges*, 2000 NFCA 46 at para. 299, that it may be open to a Commission to make a recommendation in respect of costs where it is necessary to ensure the approach to costs is "fair, equitable and reasonable."
19. However, in a context where the Legislature has created a statutory formula to govern participation costs, and so long as that formula is not unconstitutional, the norm established by the legislation must indeed be treated as a norm, as confirmed by the Chief Justice. A recommendation to alter a legislated norm cannot be justified on the basis of matters the Legislature must have understood at the time the norm was established. Instead, a Commission's recommendation to alter such a norm can only be justified on the basis of exceptional circumstances or a significant evolution in the Commission process.²⁰ By way

¹⁷ PCJA Submission, at para. 357.

¹⁸ Report of the 2013 Judges Compensation Commission, p. 53: JBD, Vol. 1, Tab 24.

¹⁹ The Provincial Court Judges are mistaken in their belief that the opposite can be implied from the Government Original Submission. The Government did not take a position in either of its previous submissions as to what meaning this Commission should ascribe to Chief Justice Hinkson's decision. Paragraphs 69 and 70 of the Government Original Submission merely summarize the Provincial Court Judges' arguments before the Supreme Court of British Columbia and quote Chief Justice Hinkson's conclusion without argument. Contrary to the assertion at paras. 62 and 64 of the February 3, 2023 Reply Submission of the Provincial Court Judges, there is no inconsistency in the positions the Government took before the Supreme Court of British Columbia, and the positions it now takes before this Commission.

²⁰ The Provincial Court Judges have incorrectly characterized the Government's argument before the Supreme Court of British Columbia: see PCJA Submission, at paras. 373, 376-377. The Government did not argue that exceptional

of example, if the Commission process underwent structural change (e.g. becoming much lengthier) leading to significantly higher costs, this may represent a circumstance not contemplated when the formula was enacted which could justify a recommendation that the Lieutenant Governor in Council revisit the formula by way of regulation. A further example may be a Commission process, which for reasons unforeseen, involved an exceptional amount of expert evidence and resulting cost.

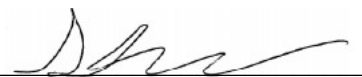
20. It is true that the Lieutenant Governor in Council, in its law-making role, may enact a regulation to set higher reimbursement amounts by regulation; it may do so even when such a change is not necessary to ensure the statutory formula is fair, equitable and reasonable. By contrast, there is no basis for the Commission to make a recommendation other than in a case where respecting the statutory norm imposed by the Legislature would be unfair or unreasonable. As indicated, this requires exceptional circumstances. Any other approach would be inconsistent with Chief Justice Hinkson's decision.
21. In the present case, there are no such exceptional circumstances which justify a recommendation to exceed the statutory norm.
22. If Justice Sharma issues her decision before this Commission issues its report and recommendations, supplemental submissions on costs may be warranted.

All of which is respectfully submitted this 4th day of March 2023.



Karrie Wolfe

Counsel for the Government of British Columbia



Steven Davis

Counsel for the Government of British Columbia

circumstances or a significant evolution in the Commission process are preconditions to the exercise of the Lieutenant Governor in Council's regulation-making authority under s. 7.1(3) of the *Act*.

Appendices to the Government's Costs Submissions

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GOVERNMENT OF BRITISH COLUMBIA

Submission to the Judges Compensation Commission

June 14, 2007

George K. Macintosh, Q.C.
Judith A. Macfarlane
Farris, Vaughan, Wills & Murphy LLP
25th Floor, 700 W Georgia St
Vancouver, BC V7Y 1B3

Telephone: 604 684 9151
Fax: 604 661 9349

There is no reason to visit such expenditures on the public, particularly in light of the range of items already covered by the existing list.

PART IX THE GOVERNMENT'S SUBMISSION REGARDING COSTS

87. The Government proposes that it bear all of the costs of the Commission proceeding, as well as two thirds of the Association's reasonable expenses, with the Association bearing the remaining third of its own reasonable expenses.

PART X CONCLUSION

88. In the Government's submission, the PCJ are reasonably compensated, particularly when their *total* compensation is considered. The public interest supports maintaining the *status quo*, which in turn fully maintains the fiscal aspect of judicial independence.

89. PCJ compensation ranks favourably with that of their counterparts across Canada. It ranks third, in keeping with the economic position in Canada of this province.

90. Their compensation also ranks favourably with the most senior public servants in British Columbia.

91. The evidence does not disclose a recruitment problem. Many baby boom lawyers will be ready to retire from litigation and seek to become judges. The evidence does not show that the two trial courts compete for candidates. Even if they do, the evidence does not show a shortage of qualified applicants.

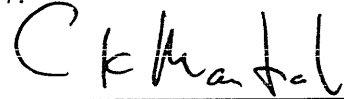
92. The last Commission raised the PCJ salary by 25.4%. An adjustment for inflation for the next three years would keep the PCJ reasonably compensated.

93. The Government asks that Pension Plan and benefit plan system-wide changes flow through to the Judges automatically.

94. The Government asks that it bear all costs of this process, except one-third of the Association's reasonable costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Vancouver, British Columbia this 14th day of June, 2007.



GEORGE K. MACINTOSH, Q.C.
Counsel for the Government



JUDITH A. MACFARLANE
Counsel for the Government



Government of British Columbia
Submission to the 2010
Judges Compensation Commission

June 8, 2010

Costs Incurred by the Association

In contrast to previous compensation commissions, the Association and the Province agreed to prepare and present their respective submissions to this commission without the use of outside counsel. This step was intended to reduce the overall cost of the process and to make the process less adversarial.

The Province agrees to reimburse the Association for its reasonable costs, pending the provision of a reasonably detailed description of those costs.



Government of British Columbia
Submission to the 2013
Judges Compensation Commission

June 27, 2013

Costs Incurred by the Association

The Province agrees to reimburse the Association for its reasonable costs up to a maximum amount of \$25,000 pending the provision of a reasonably detailed description of those costs.



Government of British Columbia
Reply Submission
to 2013 Judges Compensation Commission

July 8, 2013

savings to government, it appears that there are differences of opinion respecting the potential impact such a change would have on the complement of the court.

Absent an agreed-upon analysis of the likely impacts of such a proposal, the Province believes that the commission should refrain from making a recommendation to extend the program. The Province would be pleased to consider a similar proposal at a subsequent commission.

Costs

The Province has made its submission respecting costs. In response to the submissions of the Association on this matter, we note the following:

- While some jurisdictions reimburse full costs to their judiciary, others do not. Alberta has reimburses two-thirds of costs up to a capped limit. The most recent commission in Quebec recommended that government pay 12% of the judiciary's costs, or \$60,000 out of a total of \$485,000.
- Provincial Court Judges have resources to contribute. If the approximately 150 judges of the court (including senior judges) were each to contribute \$10 per bi-weekly paycheck (\$260 per year), the accumulated amount every three years would be \$117,000.
- While government does have staff available to assist in preparing its submissions, there is principally one person who co-ordinates the Province's submissions to this commission and to the Judicial Justices commission. As well, there are higher expectations for government to provide detailed information to the commission on a range of matters, for example the financial position of government and the administration of benefit plans.
- The Province has seen no estimates from the Association respecting its potential costs.