

SUBMISSION TO THE 2019 BRITISH COLUMBIA JUDICIAL COMPENSATION COMMITTEE

**Respectfully submitted by Tim Holmes, a part time (per diem) Judicial
Justice assigned to the Justice Centre**

Introduction

1. I am asking the Commission to recommend that part time JJs be paid a base per diem rate considerably greater than the current rate. In this regard, I have had the advantage of reading the submission of my colleague JJ Brent Adair, Q.C. and I adopt his reasoning. Most part time JJs are lawyers and members of the Law Society of British Columbia. New appointees must be members of the Law Society.
2. I also am asking the Commission to recommend that JJs who are assigned to the Justice Centre ('JC'), be paid a shift differential whenever scheduled to work an evening, weekend or holiday shift, ('after hours shifts').

Discussion

3. After hours shifts are crucial to the work of this division of the Court. They guarantee round the clock, continuous delivery of front line justice in British Columbia. Government, law enforcement agencies and the people of British Columbia should be proud that the Provincial Court provides this service. In my respectful submission, any JJ who provides service outside of regular daytime weekday hours should be given recognition in the form of enhanced fees or a shift differential or premium.
4. As noted in Brent Adair's submission, Judges who fill in for JJs on weekends and holidays are provided with incentives to do so which extend and enhance their regular compensation scheme. As I understand it, a PCJ is rewarded with two extra vacation days for every shift worked at the JC.
5. After hours shifts are onerous and are more intense in terms of volume of work compared to weekday daytime shifts. They impact on aspects of health, and family and social life. Not all JJs are available or willing to work these shifts. The pool of part time JJs willing to work those shifts is limited. I say an incentive is needed.

6. Currently, and for the past several years, evening shifts on weekdays are filled by seven part time JJs and one full time JJ. Daytime and evening shifts on weekends are filled by twelve part time JJs, (five of whom are very occasional), and two full time JJs. Only part time JJs are scheduled to work on statutory holidays. Excluding weekday daytime shifts, that's about 1100 shifts a year that are being filled by a small number of JJs, mostly part timers. Frankly, it's a heavy burden. (My numbers are based on loose calculation, personal observations and a brief review of my assignment records.)
7. For the past five years or more, fewer and fewer local part time JJs have made themselves available for weekend and holiday shifts. The slack has been taken up by the expensive option of bringing in PCJs, or by bringing in part time JJs from the Kootenays, the Okanagan or the Island. A part time JJ brought in from the hinterland submits an invoice not just for daily fees but also for travel, meal and hotel expenses, which significantly increases the cost. It would be less expensive to appoint more local JJs and to provide a shift differential to make after hours shifts more attractive.
8. For the first several years following my appointment, I cannot recall a PCJ being assigned to fill a JC shift except very rarely. About four years ago I noticed PCJs being scheduled to fill in the occasional holiday shift and the numbers have steadily increased since then. From January 2018 to April 2019 inclusive, PCJs have worked a total of 92 shifts at the JC. Of those, 85 were on weekends or statutory holidays. In the same time period 9 shifts were not filled when a JJ became ill without time to find a replacement, and 28 shifts went unfilled because no PCJ or other part time JJ was available or willing to fill in.
9. I pause to point out that illness and other unexpected claims on a part time JJ's availability cause serious scheduling difficulties because we lack sufficient bodies to fill the breach. The problem could be solved if the compensation offered to part time JJs was more in keeping with the expectations of qualified individuals. It is unreasonably optimistic to expect much interest from lawyers who are prepared to work weekends, evenings and holidays for the same amount paid for a weekday shift.
10. I looked at the JC schedule for July, August and September this year. As I write, there are 54 vacant shifts in those 3 months alone. Of those, 46 are weekend and holiday shifts and 5 are Friday nights. The number of vacant shifts may be even greater, as one part time JJ who is currently scheduled to work a number of weekends and a holiday shift or two during those months, is unavailable at the present time and may still be unavailable in the near future due to an illness in the family.
11. Clearly the system is under stress. Three years ago, I doubt that more than half a dozen shifts would be vacant over the same period.

12. On my appointment, I entered into a Memorandum of Understanding with the OCJ in which I indicated that I would make myself available to the Court pretty much anytime and anywhere the Court wished to deploy me. I understood that was the expectation. However, in my cover letter accepting the appointment, I advised then Chief Judge Stansfield that I did not wish to convey a willingness to work "every Friday night for the rest of my life." I wanted to signal that I expected a reasonable mix of assignments and until recently I have been generally satisfied with the mix but for the issue of compensation. As one of the part time JJs who offers to work evenings, weekends and holidays, as well as weekday shifts, I am very aware that the after hours shifts are more taxing and stressful. In my view, unless those shifts attract a premium, it is likely that the pool of JJs willing to work them will continue to dwindle.
13. I do not know how many applications Judicial Council has received for JJ appointment in recent years or how many applicants have been interviewed. My recollection of notices sent out to JJs asking for comments about prospective interviewees indicates that the numbers are minimal to practically non-existent. Since November 2014 only two part time JJs, assigned to the JC, have been appointed. I believe that inadequate remuneration and anti-social hours are barriers and disincentives to applications for appointment.
14. When the first round of part time JJ appointments was made in 2007, the Compensation Commission hearing of the day was only weeks away. I do not believe that any of the newly appointed JJs or the other participants at that hearing really had an opportunity to be fully informed how the part time appointment would evolve. Nor do I believe that any of the new appointees had a clear idea of the realities and implications of working the unpopular shifts.
15. At the 2013 hearing of the Compensation Commission I filed a submission seeking a recommendation for a 'shift differential'. As part of my submission I noted that the part time JJ conducting a bail hearing was the lowest paid lawyer in the room and I believe this still to be the case. As a recognition of value through compensation, the role of the decision maker is undervalued. The Commission declined on the ground that a shift differential would interfere with existing arrangements between the Office of the Chief Judge and part time JJs pursuant to the various Memoranda of Understanding between them. With respect, I disagree.
16. A recommendation to do or not do something does not in my view amount to interference. In this case, a recommendation from the Commission would merely open the door to renegotiation. After all, circumstances change and an MOU is not written in stone. Unlike a contract which contains legally binding terms, an MOU sets out terms which the parties expect will apply, but are not necessarily enforceable.

17. The 2016 Compensation Commission also declined to recommend a 'shift premium'. The Commission concluded that a shift premium, was inconsistent with the fact that part time JJs are not employees but persons who hold office. Again, I respectfully disagree with the reasoning.
18. The Commission's reasoning appears to be that a shift premium looks like a form of employment benefit. The same can be said about lieu days, sick days, moving days or compassionate leave. Full time JJs and PCJs, who of course also hold appointments, have compensation packages which include those type of benefits. Such benefits do not impute employee status on those appointees.
19. The BC Government provides benefits such as shift premiums and time off in lieu to OIC appointees under its existing Terms and Conditions policy. Government recognizes that persons who are not employees in a traditional sense, but who hold office, can be eligible to receive compensation for working after hours or on holidays. (Attachment 1 - policy extract.)
20. I acknowledge that appointees listed in Appendix 1, Schedule A of Attachment 1 are government servants, whereas part time JJs are independent judicial officers. My point is that holding office by appointment does not by itself preclude an appointee, in some circumstances, from receiving a benefit which might more commonly be available to an employee. It seems there can be grey areas and policies can be crafted to suit circumstance.
21. The part time JJ is a bit of a hybrid creature who enjoys a simple relationship with the Office of the Chief Judge. Obviously the role was created to meet a need. It is somewhat unique. Although I am an appointee I may also practice law, or indeed take on any other remunerative work which is not in conflict with the role of JJ. I am not aware of any other independent judicial officer who can say the same. I submit that it would take a great deal more than a shift premium to bring a part time JJ anywhere close to looking like an employee.
22. By way of further illustration, the MOUs which part time JJs have with the OCJ include a mutual agreement that a part time JJ will be available for a minimum 40 shifts per annum, and the OCJ will ensure that a part time JJ is offered the same, subject to extraordinary circumstances such as conduct or competency issues. In my respectful view, this type of arrangement makes it very clear that the parties have no intention to create an employment relationship.

Conclusion

23. At present there is a small pool of JJs available to fill after hours shifts and without incentive, I believe interest will continue to fade. It appears that there is difficulty attracting qualified new appointees.
24. I submit that the remedy is to provide shift differentials as follows:

- 20% of base for all weekday evening shifts.
- 35% of base for all weekend shifts, day and evening, other than weekend days which precede or are linked to a public or statutory holiday.
- 50% of base for weekend days preceding or linked to, and for the following public or statutory holidays: Family Day, Victoria Day, B.C. Day, Remembrance Day.
- 75% of base for weekend days preceding or linked to, and for the following public or statutory holidays: New Year's Day, Good Friday, Easter Sunday, Easter Monday, Canada Day, Labour Day, Thanksgiving Day, Christmas Day, Boxing Day.

25. I have identified weekend days preceding or linked to a public or statutory holiday for particular attention as those days are essentially part of the 'holiday weekend', and are as much a part of the holiday as the day itself. If only the holiday day attracts a shift differential, it is likely that JJs will sign up for the holiday shift but decline to sign up for the weekend shifts linked to the holiday. Holiday weekend day shifts are particularly busy and often very demanding and pressured.

26. In my respectful submission, adding shift differentials to JJs compensation will fulfil the need to maintain a strong court by **attracting** and **retaining** highly qualified individuals. I predict that Judicial Council is likely to receive more applications for appointment if the current rate of pay is significantly increased and the concept of the shift differential is endorsed. In this regard I refer to the remarks set out in the Report of the 2016 Judicial Compensation Commission at pages 45 and 46. (Attachment 2 – my underlining.)

Signed:



Date:

26 May 2019

Attachment 1.


Terms & Conditions for Excluded Employees & Appointees Part 01 - Introduction

Last updated February 22, 2017

1. Objective

The objective of this policy is to define and facilitate consistent application of the terms and conditions of employment for covered groups.

2. Application and scope

 This policy applies to all employees excluded from a bargaining unit agreement and to all appointments made by the Lieutenant Governor in Council that are designated for coverage under this policy.

3. Definitions

 appointee means an Order in Council appointee.

basic pay means the rate of pay established for a position classification, including an add-to-pay resulting from salary protection.

common-law spouse includes same sex and opposite sex individuals where the employee/appointee has signed a declaration or affidavit that they have been living in a common-law relationship or have been cohabiting for at least 12 months. The period of cohabitation may be less than 12 months where the employee/appointee has claimed the common-law spouse's child/children for taxation purposes.

continuous service means uninterrupted regular employment in the Public Service of British Columbia or any period of regular employment with an employer listed in Schedule 9 provided no break in service has occurred between employment with that employer and the appointment to the Public Service. Continuous service for a regular part-time employee shall be pro-rated on the basis of one year's service for every 1,827 hours worked.

Crown counsel refers to employees designated as such pursuant to the *Crown Counsel Act*.

hourly rate is the rate calculated by taking the annual salary and dividing it by 1827 or by taking the bi-weekly rate and dividing it by 70.

legal counsel are Crown Counsel and other legal counsel admitted to the Law Society of British Columbia and included in the Legal Counsel Classification Series.

NOT included in the legal counsel series are:


- Assistant Deputy Attorney General, Criminal Justice
- Director, Operations
- Regional Crown Counsel
- Director, Policy and Legal Services
- Director, Criminal Appeals and Special Prosecutions
- Director, Special Programs, Environmental Law and Aboriginal Justice
- Director, Programs and Initiatives for Vulnerable Persons
- Deputy Regional Crown Counsel

and any other position excluded from the series by the Head of the BC Public Service Agency.

management employee means an employee whose duties and responsibilities are evaluated under the Management Compensation and Classification Framework.

monthly salary is equal to the bi-weekly rate multiplied by 26.0893 and divided by 12.

no break in service occurs when an employee/appointee moves from his/her position or organization to a new position or organization on the next available working day, taking into account shift changes, weekends, scheduled vacation, statutory holidays, scheduled earned time off or any other approved paid scheduled time off.

 **Order in Council** appointees are individuals appointed by the Lieutenant Governor in Council as specified below:

1. **Category A:** Order in Council appointments to positions referenced in Appendix 1.
Typically, they are:
 1. Senior Executives (e.g., Deputy Ministers); or
 2. Management and professional appointees, including those who support Executive Council, the judiciary or Ministries (e.g., Administrative Coordinator to Executive, Supreme Court Registrar, Chief Negotiator); or,
 3. Chairs and members of some agencies, boards, commissions and administrative tribunals (e.g., Chief Coroner, Fire Commissioner)
2. **Category B:** Order in Council appointments to positions referenced in Appendix 2.
Typically, they are: Administrative support staff to Executive Council, all of whom have bargaining unit classifications.

42. Designated statutory holiday entitlement

42.1 Designated statutory holiday entitlements: Auxiliary employees and statutory term

1. A statutory term or auxiliary employee shall be entitled to the designated statutory holiday off at straight time compensation where:
 1. The employee works the day before and the day after the designated statutory holiday, or
 2. The employee works 15 of the 30 days preceding the designated statutory holiday, or
 3. The employee works at least 105 hours at the straight time rate in the previous 30 days.
 4. This section does not apply to employees who have been terminated.
2. An auxiliary employee who is qualified under subsection (1) to receive compensation for the paid holiday but does not work on the paid holiday shall receive compensation for the day based on the following formula: straight time hours paid in the previous 30 calendar days divided by the straight time hours of work of a full-time employee for the same 30 calendar day period multiplied by the hourly rate multiplied by 7.
3. An employee who qualifies under subsection (1) and who works on a designated statutory holiday shall be entitled to the compensation specified in section 42.2(2) and (3). The day off in lieu provided under section 42.2 (2) and (3) will be compensated on the basis of the formula in 42.1(2).
4. An employee who works on the designated holiday but does not meet the conditions of subsection (1) above shall receive straight time for hours worked on the holiday.

42.2 Designated statutory holiday entitlements: Regular Schedule A, OIC Category B

1. An employee/appointee is entitled to the designated statutory holiday off at straight time compensation.
2. An employee/appointee who works on a designated holiday which is a scheduled work day shall be compensated at the rate of double time for hours worked plus a day off in lieu of the holiday, except for Christmas and New Year's, when the compensation shall be at the rate of double time and one-half for hours worked, plus a day off in lieu of the holiday. Compensation will be in cash only.
3. Where the lieu day is built into the annual work schedule, no additional lieu day is required.

42.3 Designated statutory holiday entitlements: Regular management, OIC categories A and C

An employee/appointee is entitled to the designated statutory holiday off at straight time compensation. Where an employee/appointee works on a designated statutory holiday, they will be entitled to another paid day off in lieu.





42.4 Designated statutory holiday entitlements: Regular management, OIC Categories A and C working less than full time

An employee/appointee working less than full time is entitled to receive statutory holiday pay as follows:

1. An employee/appointee working a set schedule of less than full time, who works or earns wages for at least 15 of the previous 30 days prior to the statutory holiday, will receive the same amount of pay as if the employee/appointee had worked regular hours on the day off. The calculation of pay will not be pro-rated based on hours worked.
2. An employee/appointee working a set schedule of less than full time, who works or earns wages on fewer than 15 of the previous 30 days prior to the statutory holiday, will receive pro-rated statutory holiday compensation based on hours worked.
3. An employee/appointee working a fluctuating schedule will receive pro-rated statutory holiday pay based on hours worked regardless of which day the statutory holiday falls.
4. The entitlement as set out in subsections (1), (2) and (3) above applies when a temporary assignment start date and end date encompass a statutory holiday.

As an alternative to receiving statutory holiday pay, an employee/appointee may be provided with time off in lieu.



Terms & Conditions for Excluded Employees & Appointees

Appendix 1: Order in Council Appointees - Category A

Last updated April 12, 2016

Executive Council Operations

- Administrative Coordinators
- Administrative Officer
- Audio Visual Coordinator
- B.C. House, Ottawa, Executive Director, Director of Information
- Chair and Chief Executive Officer, British Columbia Trade Development Corporation
- President and Chief Operating Officer, British Columbia Trade Development Corporation
- Cabinet Officer
- Deputy Minister to Premier
- Director of Federal, Provincial/International Relations
- Director, Policy and Legislation
- Executive Secretary
- Intergovernmental Relations Officer
- Manager Administration
- Policy Advisor
- Policy Analyst
- Policy and Planning Director, Cabinet Planning Secretariat
- Representative, B.C. House Ottawa
- Secretary to Cabinet
- Secretary to Ministers
- Secretary to Premier
- Senior Executive Secretary
- Senior Letter Writer/Research Coordinator
- Senior Policy Advisor
- Senior Policy Analyst, Cabinet Planning Secretariat
- Senior Representative, B.C. House, Ottawa

Judiciary

- Court Referees
- Deputy Director of Judicial Administration, Office of the Chief Judge of the Provincial Court of B.C.
- Deputy Director, Judicial Administration, Superior Courts of British Columbia
- Deputy District Registrar/Manager, Trial Division, Supreme Court of British Columbia, Vancouver
- Director, Judicial Administration, Superior Courts of British Columbia



- District Registrar of the Supreme Court of British Columbia
- Executive Assistant to the Chief Justice of the Supreme Court of B.C.
- Executive Officer, Office of the Chief Judge of the Provincial Court of B.C.
- Law Officer, Office of the Chief Justice of the Supreme Court
- Legal Officer of the Chief Judge of the Provincial Court of B.C.
- Registrar of the Supreme Court of B.C.
- Supreme and County Court Registrars

Commission on Resources and Environment

- Commissioner

Forest Renewal BC

- Vice President, Policy and Planning
- Vice President, Communities, Workforce and Value Added
- Vice President, Finance and Corporate Secretary

Ministries/offices - General

- Administrative Assistant
- Assistant Deputy Minister
- Associate Deputy Minister
- Deputy Minister
- Executive Secretary
- Senior Executive Secretary

Ministries - Specific

- Aboriginal Affairs
- Agriculture, Fisheries and Food
 - Agricultural Land Commission, General Manager
 - Milk Board, Chairman
 - Attorney General
 - B.C. Coroner's Service, Chief Coroner, Coroners
 - Chief Electoral Officer
 - Commissioner of Corrections
 - Law Reform Commission, Chairman, Full-time Member
 - Liquor Control and Licensing Branch, General Manager
 - Liquor Distribution Branch, General Manager
- Education
 - Inspector of Independent Schools
- Employment and Investment

- Agent General, Japan
 - Agent General, London
 - KAON Project
- Energy, Mines and Petroleum Resources
 - B.C. Utilities Commission, Management Employees
- Environment, Lands and Parks and Responsible for Multiculturalism and Human Rights
 - Correspondence Secretary
- Finance and Corporate Relations
 - Comptroller General
 - Deputy Secretary to Treasury Board
 - Full Time Members of the British Columbia Securities Commission
 - Securities Commission, Chairman
 - Superannuation Commission, Commissioner
 - Superintendent of Brokers
- Forests
 - Forests Research Council, Executive Director
 - Special Advisor to the Deputy Minister of Forests
- Government Services and Responsible for Sports
 - Government House, Secretary to Lieutenant Governor, Operations Manager
 - Public Affairs Bureau, Executive Director, Public Affairs Counsels
 - Purchasing Commission, Chairman
- Health and Responsible for Seniors
 - Medical Services Commission, Chairman, Members
 - Forensic Psychiatric Services Commission, Chairman, Members
- Housing, Recreation and Consumer Services
- Municipal Affairs
 - Assessment Appeal Board, Chairman
 - Fire Commission, Commissioner, Chairman Fire Services Advisory Board
 - Inspector of Municipalities
 - Library Services, Director
- Skills, Training and Labour
 - Compensation Advisory Services, Employer's Advisor
 - Compensation Advisory Services, Workers' Advisor
 - Compensation Advisory Officers
- Small Business, Tourism and Culture
- Social Services
- Transportation and Highways
 - Motor Carrier Commission, Superintendent
- Women's Equality

REPORT OF THE 2016 JUDICIAL COMPENSATION COMMISSION — Attachment 2

In the Commission's view, based on the current data, it is unclear if there is a link between the number of applications and the salary of Provincial Court judges, but we echo the concern that the number of applications received dropped in 2015 to nearly half received in the previous year and the average for the previous ten years. To date, the Court has not had a problem attracting a sufficient number of qualified candidates to do its work, but the Commission is mindful that attracting the highly qualified applicants could become a problem if the compensation of the Court does not keep pace with the other options open to these candidates. In any event, it is necessary to maintain a reasonable salary that is sufficient to attract exceptional candidates who can meet the needs of the Court.

The legal diversity of the judges on the bench indicates a potential over-representation of Crown counsel relative to the bar generally. That is not necessarily a problem in that former Crown counsel are experienced in criminal law, which is a main need of the Court. Nevertheless, a lack of diversity can exacerbate the needs in other areas, especially civil and family law.

Judicial justices

In the JJA's submission, the numbers of applicants to judicial justice positions indicates an "alarming lack of interest in the Judicial Justice role" (JJA Written Submissions at p. 7). There was only one interview of an applicant in 2015 and only one candidate under consideration for appointment in 2016. In 2016, one judicial justice retired and at the time of the hearings two more were in a position to retire. Potentially further exacerbating the situation is the fact that in 2018, when the 10-year terms of the *per diem* judicial justices expire, there will be 9 part-time judicial justices retiring. Given all of this, the JJA is very concerned about improving compensation for judicial justices to an amount sufficient to attract qualified candidates to this role.

The Chief Judge explained that judicial justices are working day-in and day-out with little thanks. His office has attempted to make it clear to the public that the Provincial Court is one court with judges and judicial justices working together, but the difference in remuneration between the positions undermines this message. In oral submissions, the Chief Judge said that there has been no active recruitment of judicial justices because there has appeared to be a sufficient complement.

The Judicial Council reported that as of June 24, 2016, there was only one candidate approved for appointment. During oral submissions, counsel for the JJA informed the Commission that an appointment was made on July 7, 2016, resulting in there being no one left in the applicant pool. According to the Judicial Council, the role of a judicial justice is demanding and challenging. There is a need to keep them motivated and better remuneration is a key way to do this as it is an important component of positive morale. Judicial justices reflect the face of the Court for many citizens; they deal with serious issues; and they work all hours and holidays, which is disruptive to their personal lives. As with judges, self-

represented litigants are common, and unlike judges, judicial justices have no support staff or sheriffs to assist them.

The Government said that the current compensation for judicial justices is sufficient to attract highly qualified applicants and that there is no evidence that the roster of approved candidates for appointment is insufficient to meet the needs of the Court.

In the Commission's view, while there was no evidence establishing that there is a link between the number of applicants and the salary of judicial justices, there is a real need to increase the applicant pool, particularly considering that in less than two years almost half of the current judicial justices will be retiring. Something must be done. Ensuring a reasonable salary that is sufficient to attract exceptional candidates who meet the needs of the Court is crucial.

Evidence regarding the pool of potential candidates for judicial positions

At the hearing, the Commission asked the CBABC to provide publicly available information on the salaries of the pool of potential candidates for judicial positions. On July 21, 2016, the CBABC made further submissions in this regard. The CBABC noted that the publicly available information on public and private sector lawyer salaries was meager and inconsistent across Canada and years.

With respect to Crown Counsel in British Columbia for April 1, 2007 to March 31, 2019, salaries for Senior Crown Counsel (Level 4, which requires at least 10 years of call and is reserved for counsel who have exceptionally distinguished themselves in the practice of law) ranged from \$124,134.19 to \$149,996.52 (see also JJA's Book of Documents, Tab 14). Annual increases are the same percentage increases provided to judges plus 1.27%. Potentially equivalent positions in Manitoba, Nova Scotia, New Brunswick, Alberta and Ontario earn salaries ranging from \$73,070 to \$265,657. (This information was for different years ranging from 2014 to 2018.)

With respect to private sector salaries, the CBABC found little publicly available information for the likely candidate pool (senior private practitioners). In-house counsel with 10 or more years' experience earn on average at least \$250,000 in Toronto and Vancouver; \$225,000 in Montreal; \$180,000 in Calgary; and \$140,000 in Edmonton. The lack of data regarding compensation of the applicant pool impedes the ability of this Commission to better determine the potential impact of compensation on attracting highly qualified applicants.

Changes to the jurisdiction

The Government, PCJA and JJA agreed that there were no changes to the jurisdiction of judges or judicial justices. The Commission thus finds this factor to be neutral during the term of its mandate. We note, however, that there was evidence of the increase in the complexity of the work within the jurisdiction and address this factor under sub-section 5(5.2) below.