

REPLY SUBMISSION OF
THE SOCIETY OF THE JUSTICES OF THE
PEACE IN ALBERTA

to the

2017 ALBERTA JUSTICES OF THE PEACE
COMPENSATION COMMISSION

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Reply Submission of
The Society of Justices of the Peace in Alberta
to the
2017 Justices of the Peace Compensation Commission
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INTRODUCTION

1. The Society sets out below its Reply to the Submission filed on behalf of the Government of Alberta (“GOA”) dated January 17, 2020.

2. At the conclusion of this Reply, the Society adds one additional proposal to the recommendations it seeks from this 2017 JPCC: a recommendation that interest should be paid on any retroactive recommendations in respect of salary, per diems or shift differentials. We fully expect and welcome that the GOA will wish an opportunity to respond to this proposal in writing, given that this proposal is raised only now.

GOA’S SUBMISSION

3. The GOA proposes a four-year freeze in all aspects of the compensation payable to Justices of the Peace. As detailed below, this position is not supported by a fair consideration of the criteria identified in the Commission Regulation. Rather, it is driven by the political judgment of the current Government, that reducing expenditures by, *inter alia*, restricting the amounts paid to persons paid by the public purse, is its preferred approach to addressing its fiscal challenges. By contrast, the Society proposes fair and reasonable increases in JP compensation, that are rooted in and supported by the objective criteria, as opposed to the politics of the day.

4. The GOA’s Submission focusses on the economic and fiscal situation and “government policy” to “better control both the costs and the size of the public sector primarily through the tools of wage freezes, rollbacks and through layoffs”. The GOA relies on the conclusions from the MacKinnon Report in advancing its position. As discussed below, not only was the MacKinnon Report highly political, but its conclusions about compensation paid to public sector employees generally, are not relevant to the compensation paid to Justices of the Peace. That changes in public sector compensation have been driven in part from the conclusions from the MacKinnon Report underscores why the level of increases paid to others from the public purse ought to have little, if any,

weight among the factors to be considered in determining appropriate compensation for Justices of the Peace for the fiscal years 2017/18 - 2020/21.

History of the JPCCs in Alberta

5. The Society rejects the GOA's assertion, at paragraph 8, that the history of JPCC processes "demonstrates the commitment of the Government of Alberta.., to the independent process and the effectiveness of that process". Chronic delay permeated the past Commission processes, and has continued into this 2017 JPCC process, compromising the effectiveness of the processes. Indeed, the last two Commissions made their recommendations almost entirely retroactively, meaning that Justices of the Peace worked with an effective compensation freeze throughout that period.

- (a) The 2009 JPCC, which made recommendations for April 1, 2008 to March 31, 2013, reported on November 29, 2013. The recommendations were implemented on March 27, 2014.
- (b) The 2013 JPCC, which made recommendations for April 1, 2013 to March 31, 2017, reported on July 20, 2017. The recommendations, save for one aspect thereof, were accepted on November 15, 2017. The Regulation was filed on May 9, 2018 and payments were made to full-time JPs in June 2018, but final implementation did occur for part-time and ad hoc JPs until October 19, 2018.

6. In its Submission, the Society raised significant concerns about delay in the past Commission processes. The 2013 JPCC acknowledged these concerns and expressed optimism that such delays would be avoided in the future:

We agree that it is not in the interests of any of the participants in this process to be tasked with having to retroactively address outstanding compensation issue, which is the central focus of this Commission. One of the important functions of a Commission, if it is to be "meaningful and effective", is to depoliticize and thus add credibility to the process of setting judicial compensation. This should occur in fact and in appearance. Some of that is lost when unexplained delays, beyond the control of the JP's, occur in setting up a Commission over a time when delay may seem prejudicial to those whose salaries remain frozen until the process

concludes. We understand that the 2017 Alberta Judicial Compensation Commission is expected to be appointed shortly. This may in turn speed up the process of appointment for the next JP's compensation commission.

2013 JPCC Report, Hearing Exhibit Binder, **Tab 3**, page 16

7. As noted in the Society's Submission, that expectation did not come to fruition and the 2017 JCC was significantly delayed. As a result, this Commission is now in essentially the same situation as its predecessor: it must make recommendations for a period which, largely, has already passed. The relevance and impact of the delay on the JPCC's considerations are addressed below both in the reply submissions generally and in the Society's request for a recommendation that interest should be paid on retroactive pay adjustments.

CRITERIA TO BE CONSIDERED BY THE COMMISSION

8. At paragraphs 14-24, the GOA outlines its perspective on the criterion identified in section 13(a) of the Regulation, namely "the constitutional law of Canada". As discussed at some length in the Society's Submission, the purpose of the Commission process is to preserve judicial independence and depoliticize the setting of judicial compensation.

9. At paragraph 18, the GOA discusses the constitutional concept that judicial compensation must not fall below the bare minimum required to protect judicial independence. The GOA contends that the level of JP's salaries as compared with the average weekly earnings of Albertans, is conclusive of the fact that salaries have not reached this minimum. While the Society does not accept this argument, it will not respond further since there is no suggestion here that salaries have fallen below the bare minimum such that financial security has been compromised. Moreover, the JPCC's role is not to identify the bare minimum sufficient to ensure judicial independence but, rather, to recommend appropriate compensation based on all the relevant factors.

Bodner, supra, Hearing Exhibit Binder, **Tab 11**, para 67

10. As the GOA emphasizes, Lamer CJC stated in *PEI Reference* that judges are not immune from across the board measures that apply to all persons paid from the public

purse. However, as discussed below, there is no across the board measure in place for the years at issue for this JPCC. Rather, the collective bargaining process has taken place and/or is underway. In some cases, that process concluded with the decisions of interest arbitrators on whether adjustments should be provided to employees in the third year of the three-year contracts (i.e., 2019/20). This is discussed further below.

11. Just as it did in the 2013-2017 JPCC process, the GOA relies on the current economic and fiscal circumstances to justify its proposals dating back to April 1, 2017. It must be recognized that if the Commission had conducted its work in 2017, at the outset of the period of its mandate, the economic forecasts before the Commission would have been more optimistic. As JPs have no control over the timing of the JPCC's appointment, this impact of the GOA's delay ought to be considered when the JPCC makes its recommendations.

Unique Nature of the Role of JPs

12. At paragraph 28 and following, the GOA argues to the effect that the 2013 JPCC took into account the unique role and responsibilities of JPs and that, in the absence of demonstrated change in JP responsibilities, this factor does not support an increase in their compensation. Firstly, the Commission Regulation requires consideration of the uniqueness of the role, not simply any changes in it. Moreover, while the 2013 JPCC took into account the information before it about the role and responsibility of JPs, the Society relies on changes in the work performed by JPs that post-date the 2013 JPCC's Report. Necessarily, that was not considered by the earlier Commission. That is detailed in the Society's Submission and will not be repeated here.

The Need to Attract Qualified Applicants

13. At paragraph 34, the GOA argues that there is no evidence that the current compensation paid to Justices of the Peace has resulted in a failure to attract qualified candidates. However, it provides no explanation for its failure to fill any of the multiple full and part-time JP positions that were posted in December of 2018 or the vacancies which still exist today.

14. In its own Submission, the Society relies on the extraordinary workload that JPs have continued to endure over much of the period at issue for this JPCC, given the significant number of vacancies. Deputy Chief Judge McLellan set out in her Submission to this 2017 JPCC that there are currently three full-time and four part-time vacancies, and that two Ad Hoc Justices of the Peace will be retiring in March and April 2020, respectively. She noted that the existing vacancies have meant “additional stress on the remaining Justices of the Peace...”. (paras 13 and 16).

15. Albeit in another context, the impact of vacancies on existing staff was one of the reasons that Arbitrator Smith recently saw fit to award increased compensation to GOA employees in her recent arbitration award. Referring to the wage adjustment, Smith reasoned in part:

It also provides some recognition that bargaining unit employees have been asked to do more with less, as part of the deficit cutting measures have resulted in larger workloads due to the policy of not filling vacancies which is one part of the public spending restraint program.

Alberta Union of Public Employees v. The Crown in Right of Alberta (unreported), Arbitrator Phyllis Smith, January 31, 2020, (“GOA Award”), Society’s Documents, **Tab 18**, page 18

16. It is unknown whether the failure to fill JP vacancies relates to that public spending restraint program. Nonetheless, the impact on JPs has been significant and it should be recognized accordingly for the fact that they have “gracefully and diligently worked with many challenges”.

Submission of DCJ McLellan to this 2017 JPCC, para 17

17. At paragraph 36, the GOA refers to the fact that a number of JPs have been appointed to the Provincial Court of Alberta and suggests that, as such, the GOA has attracted candidates who “may be viewed as overqualified”. The Society maintains that this contributes to a retention concern and relies on the comments of former DCJ Lefever to the 2009 JPCC that the Court wants to attract candidates who will stay in the JP position. This is not surprising given the difficulties and delays associated with the

appointment process and the impact on the schedules of those who remain in the position in the meantime.

18. The GOA also claims that JPs are “over-qualified” since only 5 years at the bar is technically required for the position despite that all JPs have significantly more experience prior to their appointment. The GOA seeks to use what is clearly an outdated or base qualification in order to support its arguments to limit compensation. DCJ McLellan’s Submission underscores the importance of being able to attract and retain excellent candidates to this important judicial office.

19. At paragraph 40, the GOA relies on the transition of some part-time JPs to ad hoc status to suggest there is no retention concern. The Society rejects this argument in the strongest terms. All JPs, including those who are ad hoc appointments, have served Albertans since April 1, 2017 on the legitimate understanding and expectation that their compensation will be fairly and appropriately determined through this process. That they have demonstrated significant professionalism in continuing to serve in this capacity, despite the delays in this process, and the extraordinary workload and other pressures arising from the unfilled JP vacancies, does not at all support that they satisfied with their compensation. Quite to the contrary, the Society’s Submission presents compelling arguments for significant adjustments to JP compensation, including for ad hoc JPs.

The Compensation that other Justices of the Peace in Canada Receive

20. The GOA correctly identifies that the compensation paid to Alberta JPs is currently above that paid in most other jurisdictions. For the reasons detailed in the Society’s Submission, this is entirely appropriate and justified, given the differences between the work performed, and the working conditions, of Alberta JPs as compared with their counterparts in other jurisdictions. This is not a situation in which the JPCC can look to comparator JPs in other jurisdictions, who perform the same work under similar conditions, such as may well be the case in an interest arbitration process for government employees or health care professionals. The situation for JPs across the country is evolving but none of the jurisdictions is yet comparable to Alberta in this way.

21. The fact that the GOA's proposal would have Alberta JPs' salaries fall behind those of their Ontario counterparts over the course of this JPCC's mandate, reinforces that the GOA's proposed freeze is not justified in light of the factors identified in the Commission Regulation.

The GOA's Proposed Comparison Based on After-Tax Income is Highly Flawed

22. At paragraph 52, the GOA argues that "any comparison to neighbouring jurisdictions has to take into account that Alberta's tax advantages including lower personal income taxes and no sales tax, and other benefits allow Alberta justices of the peace to keep more of their salary than those in comparator jurisdictions".

23. Albertans have enjoyed relatively low rates of taxation for many years. Dr. McMillan pointed out in his 2019 McMillan Report that Alberta could raise taxes to entirely eliminate the deficit and still have a tax advantage as compared with other jurisdictions. The tax advantage is simply another way to illustrate the exceptional fiscal capacity of Alberta.

2019 McMillan Report, Society's Documents, **Tab 9**, page 66

24. None of the previous JPCCs in Alberta have made their inter-jurisdictional comparisons based on "after tax" rather than gross income. Despite that an 'Alberta advantage' has existed for many years, successive Alberta JPCCs determined that Alberta's JPs should be paid a salary that was at the top (2013, 2009, 2006 and 2000 JPCCs) of the salaries paid to justices of the peace across the country. These recommendations were supported by consideration of all the relevant criteria, including the differences in the role of JPs in Alberta as compared with the role and functions of JPs in these other jurisdictions.

25. Similarly, no JCC in Alberta has accepted this argument that inter-jurisdictional comparisons should take into account "after tax" as opposed to gross income. Indeed, to the Society's knowledge, not a single JPCC or JCC across the country has compared judicial officers' salaries on an after-tax basis.

26. The Society is also unaware of this approach being taken by interest arbitrators tasked with making inter-provincial comparisons in order to determine appropriate wages for government employees generally. While economic circumstances and the financial position of government are a focus in those types of proceedings, and while interest arbitrators regularly consider differences in the cost of living as part of their analysis, the Society is not aware of any instance where after tax income has been compared in the absence of a much broader multi-dimensional analysis.

27. Were the JPCC to remove the “Alberta advantage” for judges by recommending a lower salary for Alberta Justices of the Peace as compared with their counterparts in other jurisdictions in light of the comparatively lower taxes they pay, Alberta JPs would be disadvantaged vis-à-vis other Albertans who would continue to enjoy the “advantage”. Singling out JPs, or indeed any other group, and applying that approach would penalize them as compared with other citizens.

28. Alberta wage data does not support that Alberta wages generally are lower than elsewhere on account of the “Alberta tax advantage” resulting in more take-home pay for employees. Quite the contrary, and despite the recent recession, Alberta wages generally remain the highest in Canada.

29. Just like all Albertans who enjoy the “Alberta advantage”, JPs also pay the higher costs associated with living in Alberta as compared with certain other jurisdictions. If one is going to consider the tax differences among the jurisdictions, one needs to also consider other differences. Conducting a comparison at such a detailed level is not only unduly complicated and unworkable, but it is ultimately unnecessary. This is because the goal is to take a “made in Alberta” approach in light of the criteria in the Commission Regulation. The task of this 2017 JPCC is not to recommend a salary that gives JPs in Alberta the same or some proportion of the “take home pay” of JPs in other jurisdictions.

30. Another consideration against taking such an approach is that it effectively ties the salary level to the provincial tax structure or vice versa. If JPs are to be paid relatively less for 2017 because their taxes are lower than they would be elsewhere (despite that

taxes have been lower in Alberta than in other jurisdictions for many year – and perhaps even lower still than they are now), to the extent that Government has increased or were to increase taxes in the future, JPs would need to be compensated for the tax increase through a higher salary, or the applicability of the tax increase to JPs would need to be reviewed by a JPCC. The notion of tying salary to taxes is ridiculous, of course, and illustrates one of the many problems with the approach suggested by the GOA.

The Growth or Decline or Both in Real Per Capita Primary Household Income In Alberta

31. At paragraph 54, the GOA refers to recent growth in nominal primary household income per capita in Alberta, and the comparative data for both Ontario and British Columbia. Yet, at paragraph 58, it makes the inconsistent assertion that “the factor to be considered is income in Alberta and not elsewhere”. Clearly the other jurisdictions are relevant when it comes to applying this factor among all the criteria identified in the Commission Regulation.

32. At paragraph 55, the GOA adopts what becomes a recurrent theme in its approach to the economic data, whereby it compares the current data to peak years. Depending on the indicator, the years in question are 2013, 2014 or 2015.

33. On primary household income, it provides a graph comparing real JP salaries compared to changes in real primary household income per capita over the period 2013 to 2020. As 2013-2015 were peak years, Dr. McMillan’s Rebuttal Report (Society’s Documents, **Tab 11**), provides a more useful long-term perspective on this comparison. His graph shows that in the period between 1999 and 2016, the growth in per capita Primary Household Income has generally exceeded the growth in JPs’ salaries. He notes in footnote 4 that if 1998 is the starting point, JPs’ salaries keep pace, rather than lag behind primary household income. As the jurisdiction and work of JPs has changed substantially over this period, it would be reasonable to expect increases in JPs’ salaries to have significantly exceeded gains in primarily household income seen by Albertans generally. This supports the adjustments in compensation sought by the Society.

34. At paragraph 56, the GOA focuses on how real per capita household incomes, throughout the period of this JPCC's mandate, are expected to relate to the figure for 2015, the peak level of the past two decades. The Society's Submission, at page 62, provides a graph showing Real Primary Household Incomes per Capita: Alberta and Selected Provinces 2000 to 2018, which shows the fluctuations over the past decades.

The Need to provide fair and reasonable compensation for Justices in light of Prevailing Economic Conditions in Alberta and the Overall State of the Economy, including the Financial Position of the Government

35. The GOA's theme of comparing to peak years resurfaces in this section of the GOA's Submission, where the focus is on how Alberta's GDP as at the end of 2018 compares with 2014, the highest level in recent years. In his Rebuttal Report (Society's Documents, **Tab 11**), McMillan noted the frequency of comparisons to 2013, 2014 and/or 2015 and advised:

Caution is advised in using those years as a standard or reference point as those were abnormally strong (i.e., boom) years by one measure or another. (page 2)

36. McMillan went on to explain to provide relevant and necessary context for the current GDP figures:

Figure 1, Real Gross Domestic Product Per Capita, illustrates. Alberta's real (2012\$) GDP per capita in 2013 and 2014 was \$83,031 and \$85,716 respectively. Those were the highest values over the 13 years 2006 to 2018. The levels in 2017 and 2018 were \$80,364 and \$80,563. Those were essentially equal to the values in the next highest years (2006, 2012 and 2015) – that is, those years exceeding \$80,000. The real GDP per capita average over the 13 years is \$79,340. So, real GDP per capita in 2017 and 2018 was essentially equal to or better than the levels in 11 of the 13 years 2006 to 2018. Comparisons to 2013-2015, while reflecting actual events (and shocks), imply a boom economy and so unduly high and probably somewhat unreasonable expectations.

McMillan Rebuttal Report, Society's Documents, **Tab 11**, page 2

37. This puts into appropriate context the GOA's claim (at paragraph 69) that while Alberta forecasts a gradual increase in GDP for 2020 and 2021, it predicts "no recovery to previous levels in the foreseeable future". Indeed, no boom is forecast but modest growth is predicted.

38. The GOA turns next to the labour market and employs the same technique again: it compares recent employment numbers to peak figures from 2015. A more objective approach is set out in the 2019 McMillan Report. As for the focus on unemployment numbers, the McMillan Rebuttal Report points out that “[o]ther provinces have experienced extended periods of high unemployment as their economies adjusted to shocks”.

2019 McMillan Report, Society’s Documents, **Tab 9**, page 15-22

McMillan Rebuttal Report, Society’s Documents, **Tab 11**, page 2

GOA’s Financial Position

39. At paragraph 79-80, the GOA cites and relies on the MacKinnon Report. As set out in the mandate letter, this “Blue Ribbon Panel” was tasked with considering only the expenditures side of the budget, with no consideration of revenues. Further, the independence of the panel has been brought into serious question in recent press releases by the Alberta Federation of Labour reporting on information obtained through freedom of information requests.

40. The MacKinnon Panel’s task was obviously political in nature and was designed to offer ostensibly independent justification and support for the Government’s political choices. The GOA is obviously free to employ such tactics to justify its position in collective bargaining with public sector employees or, indeed, in attempting to influence public opinion generally. However, as the task of this JPCC to depoliticize the setting of judicial remuneration, the Commission must approach the GOA’s reliance on the conclusions set out in the MacKinnon Report with significant caution and a recognition of the highly political nature of the exercise.

Mandate Letter to MacKinnon Panel, May 7, 2019, Society’s Documents, **Tab 19**

Alberta Federation of Labour, News Release: “AFL Questions Janice MacKinnon’s Independence from Government”, January 29, 2020, Society’s Documents, **Tab 20**

CBC Edmonton, “Documents show Alberta government drafted op-ed for chair of MacKinnon Panel”, January 30, 2020, Society’s Documents, **Tab 21**

41. At paragraph 81, the GOA refers to the MacKinnon Panel's recommendations about reduced expenditures, without referencing the limited mandate of the Panel. The GOA goes on to outline its own plans, as articulated in the Alberta's Budget 2019.

GOA Award, Society's Documents, **Tab 18**

Alberta Health Services, Lamont Health Centre and Allen Gray Continuing Care Centre v. Alberta Union of Public Employees, (unreported), Arbitrator Phyllis Smith, January 31, 2020, ("ANC Arbitration Award") Society's Documents, **Tab 22**

Alberta Health Services v. Alberta Union of Public Employees (unreported), Arbitrator Phyllis Smith, January 31, 2020, ("GSS Award") Society's Documents, **Tab 23**

42. The GOA concludes: "Given the measures that have been implemented and will be implemented to rein in spending, this is not the time to provide raises to any group being paid out of the public purse". While wage freezes for 2019 were imposed on teachers and nurses in the recent awards by Arbitrator Jones, dated January 10, 2020, Arbitrator Smith saw fit to order a 1% adjustment for 2019/20 for certain other employees paid by the public purse in two of three Awards issued on January 31, 2020. Even in the interest arbitration context, where the goal is very different than it is in this Commission process, the arbitrator saw fit to provide raises to a group paid out of the public purse. These Awards are discussed further below.

43. The GOA's summary of the economic and fiscal considerations, at paragraph 89 and following, serves to highlight the different approaches of the two parties. From an economic perspective, the GOA supports its proposed freezes by pointing out that Alberta has not returned to the boom time of 2013-2014 and that it has chosen to focus on reducing expenditures and corporate taxes in dealing with its current fiscal situation.

44. By contrast, the Society presents a broader perspective. It relies on the 2019 McMillan Report, which does not downplay the present difficulties but puts them into a broader context than that offered by Dr. Dahlby's Report and the GOA in its Submission. Dr. McMillan points out that the recession reduced, but did not eliminate, the economic advantages that have characterized Alberta for some time. Further, while Alberta's fiscal position "suffered substantially" during the recession, in that significant debt has accumulated in recent years, "the projected peak level is well below that in eight other

provinces and is quite manageable”. He goes on to explain that Alberta’s fiscal capacity remains high, and that this translates into a large tax advantage for Albertans. In emphasizing the policy flexibility that comes with a high fiscal capacity, McMillan concludes that “[t]he provincial governments have been in a position to address [the GOA’s] fiscal challenges with a combination of cuts and additional revenues and still maintain a fiscal advantage over all other provinces.”

2019 McMillan Report, Society’s Documents, **Tab 9**, pages 71-73

The Alberta Cost of Living Index and the Position of Justices Relative to its Increases or Decreases or both

45. At paragraph 96 and following, the GOA compares the increase in the cost of living between 2002 and 2016 with the increase in JPs’ salaries over the same period. Not surprisingly, JPs’ salaries have increased by substantially more than the rate of inflation.

46. The salaries recommended by past Commissions were determined to be appropriate for the periods for which they were made and, among other factors, those Commissions considered changes in the cost of living. That JPs’ salaries increased beyond the rate of inflation in the past is not a basis upon which to object to wage increases going forward or to suggest that this Commission ought not to be concerned about future erosion due to cost of living. This approach would amount to revisiting the recommendations of past JPCCs.

47. Leaving that aside, JPs are by no means the only group of persons within Alberta whose pay increases have exceeded inflation. Indeed, Figure 2 at page 4 in the McMillan Rebuttal Report compares the growth of JP salaries with the growth of Average Weekly Earnings over the period 1999 to 2016. JPs’ salaries have tracked very closely to the increases in Average Weekly Earnings and, since 2009, have only exceeded the increases in Average Weekly Earnings in 2016. As earnings are forecasted to increase throughout this JPCC’s mandate, the GOA’s proposal would mean that the increases for JPs would, for the first time, fall behind the increases in AWE over the four-year period.

48. That JPs' salaries have tracked so closely to increases in average weekly earnings over the past decades is surprising, given the significant evolution in the work performed by JPs over that same period. If these changes had been fairly accounted for, JPs' salaries ought to have increased at a faster rate. As detailed in the Society's Submission, JPs seek a significant adjustment that will account, at least partially, for the work they now perform within Alberta's justice system.

49. Over the period of this JPCC's mandate, the cumulative effect of the GOA's proposed freeze would mean significant erosion of the 2016 JP salary against the cumulative increases in the cost of living over the period of 2016 to 2019:

Year	2016	2017	2018	2019	2020
GOA Proposal	n/a	0%	0%	0%	0%
% increases in CPI ¹	1.12%	1.6%	2.4%	1.7%	
Real JP Salary	\$151,813	\$150,112	\$147,710	\$144,165	\$141,714

50. This is not to mention the erosive impact of increases in the cost of living on other aspects of JP compensation, including shift differentials.

The Nature of the Jurisdiction of the Justices

51. The Society rejects the GOA's contention that there "has been no significant change in the jurisdiction of justices of the peace or the manner in which they operate since the 2009 and 2013 Commission Reports were issued". The Society's position on the evolution of the JP role is detailed in its Submission.

52. Deputy Chief Judge Lillian McLellan referred in her Submission to the evolution of the work, since the 2013 JPCC conducted its hearing in 2017. She wrote:

In my time as judicial supervisor there has been a complete overhaul of first appearance bail with the involvement of Crown and Duty Counsel. Clerks and Hearing Office Coordinators have been added to an efficient virtual court system. Justices of the Peace have learned to become familiar with electronic documents.

¹ These CPI figures are from Budget 2019, as outlined in the Society's Submission at page 72.

including electronic bail lists and multiple screens. I have been impressed with the dedication and necessary flexibility of the Justices of the Peace to lean different skills. Since the last compensation commission Duty Counsel has been added to the Crown Bail Project. This is an important addition and necessary for impartial justice. Additional stakeholders mean additional complexity for Justices of the Peace. (para 6)

The Levels of Increases or Decreases, or Both, Provided to Other Programs and Persons Funded by Government

53. The GOA asserts that this is a “mandatory factor” for the Commission to consider, failing to note, as it does in respect of other factors, that the Commission “certainly has the discretion to assign whatever weight it deems to be appropriate to that criterion” (see, for example, the GOA Submission, para 42).

54. At paragraph 102, the Government asserts that, since this process “was established to ensure that the public is assured that the setting of salaries for judicial officers is not subject to government influence”, the increases paid to other persons and programs are relevant, “as if everyone is treated the same financially, then no such perception could ever be formed”.

55. Firstly, the purposes of the process are to preserve judicial independence and depoliticize the setting of judicial compensation, and thus are broader than the GOA makes them out to be. Secondly, as discussed below, it is not the case that all persons other than JPs are being treated the “same financially”. Thirdly, even if that were the case, the analysis in *PEI Reference* is very clear that a JCC process is still required. In the facts before the Court in *PEI Reference*, Alberta and Manitoba had imposed, by legislation, “across the board measures” which applied to public sector employees and to judges. Lamer CJC was clear that if such a proposal were to be applied to judges, it needed to be first proposed to a JCC. The role of the independent JCC is to consider the government’s proposal in light of objective factors, with the goal of depoliticizing the process.

56. In Alberta, the Government has chosen a particular approach to dealing with its fiscal situation: reducing expenditures and corporate taxes. As the 2019 McMillan Report makes very clear, there are other options and Alberta enjoys significant flexibility in that regard. In the circumstances, if JPs (or judges) were simply to be “treated the same financially” as others paid by the public purse, the JPCC (or JCC) process would be rendered meaningless. This Commission must make its recommendations based on objective factors, not the political decisions of the government of the day.

57. The GOA asserts at paragraph 104 that the increases granted to provincial employees “over the term of this agreement”. are set out in Tab 24 of the Hearing Exhibit Binder, presumably referring to the period of this JPCC’s mandate. Tab 24 sets out only the general wage increases that were applied across the board to the salary scales that apply to the relevant employees. Individual unionized employees had other opportunities to increase their pay beyond these general wage increases, through step or merit adjustments within their salary scale or through a change in classification. Accordingly, it should be understood that individuals may well have received increases beyond simply the general wage increases shown.

58. At page 18, the GOA provides a graph which compares the increases received by various groups paid by the public purse over the years 2002 to 2020. The choice of 2002 is puzzling and there is no stated rationale for choosing that starting point. This is not the outset of any JPCC’s mandate; indeed, it is the last year of the 2000 JPCC’s mandate of April 1, 1998 to March 31, 2003). As the McMillan Rebuttal Report illustrates, the choice of starting point changes the look of the graph significantly. While on the GOA’s graph, JPs’ salaries tracked consistently *above* the increases in Average Weekly Earnings, McMillan’s graph of the years 1999 to 2016 show almost an identical trajectory over many of the years. Notably, Dr. McMillan addresses in Footnote 4 that if one chooses 1998 as the starting point, i.e., the outset of the 2000 JPCC’s mandate, the results are the same as for 1999. As noted above, given the substantial changes in the role of Alberta JPs over that period, one would expect to see gains well beyond the rate of increase of Average Weekly Earnings.

59. At paragraphs 108-109, the GOA argues that salaries for non-unionized and unionized employees are set based on the very same considerations as appear in the Commission Regulation; indeed, the GOA argues the factors to be considered in an interest arbitration are "almost identical". The Crown argues otherwise in other contexts. Arbitrator Smith rejected a comparison to the 2017 JCC's recommendations in her recent GOA, GSS and AHS Awards, stating "...the Board agrees with the Crown that this is not an appropriate comparator given the different criteria to be utilized by the Commission".

GOA Award, Society's Documents, **Tab 18**, page 16

60. It is well-established that the focus in an interest arbitration is on replication of the result that would have been achieved in bargaining. Because it was recognized by Chief Justice Lamer to be highly inappropriate for members of the judiciary to be engaged in the highly political "horse trading" that is part and parcel of collective bargaining, the JPCC process is differently focused on what is appropriate compensation in light of all of the objective factors, with the goal of depoliticizing the setting of judicial compensation.

PEI Reference, supra, Hearing Exhibit Binder, **Tab 12**, para 134

61. In awarding a 1% pay adjustment for certain employees paid by the public purse, Arbitrator Smith rejected the Government's proposed rollback of wages, but at the same time ordered less than the increases which were sought by the AUPE. In addition to those referenced above, certain aspects of the analysis from her GOA Award (Society's Documents, **Tab 18**) are useful here, despite that the differing circumstances and criteria under consideration in this process should render a different result.

- The first two years of a wage freeze for GOA employees were agreed to in the course of a complex collective bargaining process that involved many other considerations, including a no layoff clause but also a wage reopener in the third year (2019/20) with the right to access interest arbitration if the amount could not be agreed upon. (page 14)

- Had the arbitration been conducted without the delays that occurred as a result of Bill 9, “the data relied on for 2019 would have been more positive and potentially created a different result. The application of the replication principles considers what would have been achieved in negotiations relying upon the data available at the time those negotiations would reasonably have occurred.” (page 14) Similarly, the 2017-2021 JPCC process should properly have been conducted in 2017, at which time, the economic data and forecasts were much more positive. This is not dissimilar to what happened in the 2013-2017 JPCC process, whereby the JPCC considered that had the Commission conducted its hearings in 2013, the outcome would likely have been different.
- The Board was “cognizant of comparisons” between Alberta and other jurisdictions: “Alberta’s debt as a percentage of GDP and debt per capita even in the somewhat difficult economic circumstances today remains the lowest in Canada and is forecast to remain so”. (page 17) The 2019 McMillan Report makes the same point.
- “The Crown is entitled to make policy decisions as to how to manage the public purse but those policy decisions are not criteria which govern interest arbitrations”. (page 17) This last observation has even more force in the context of this independent and objective process, which is designed to depoliticize the setting of judicial remuneration.

GOA’S PROPOSAL

62. The GOA proposes a four-year compensation freeze for JPs. In the Society’s respectful submission, this cannot be justified by a fair consideration of the criteria identified in the Commission Regulation.

63. At paragraph 111, the GOA confirms that it has fully disclosed the basis for its position in its Submission. To summarize, the GOA relies on:

- (a) the fact that the economic and fiscal circumstances in Alberta have not returned to the peak boom years of 2013-2015, comparison years about

with which Dr. McMillan urges caution as being “unduly high and probably somewhat unreasonable expectations”²;

- (b) the fact that JPs received increases in the 2013-2017 JPCC process, despite that those increases were recommended as appropriate by an independent Commission and were accepted by the GOA;
- (c) assertions that there have been “no significant changes in the roles and jurisdiction of justices of the peace”, contrary to the detailed analysis set out in the Society’s Submission and confirmed in the Submission of Deputy Chief Judge McLellan;
- (d) the fact that compensation paid to Alberta JPs is currently higher than that paid to JPs in other jurisdictions, ignoring the fact that this is entirely appropriate and justified based on the differences with the role and jurisdiction of JPs in the other jurisdictions and that, yet, Alberta JPs would fall behind their Ontario counterparts under the GOA’s proposal;
- (e) the fact that JP compensation (like that of Alberta employees generally) has increased, over past years, at a rate that exceeds the rate of inflation, in order to justify four years of erosion, despite that past JP salaries were recommended as appropriate by past JPCCs and accepted by Government; and
- (f) an argument that, by its proposal to freeze compensation, JPs are being sheltered from rollbacks in compensation, despite that no persons paid from the public purse have been subject to rollbacks, and that arguments for rollbacks have been rejected now in five separate interest arbitration awards.

64. As to the GOA’s paragraph 113, given the highly political attacks on public sector compensation that have been launched by the Kenney Government, it is all the more

² McMillan Rebuttal Report, Society’s Documents, **Tab 11**, page 2

important for this JPCC to carefully weigh the objective criteria identified in the Commission Regulation, instead of adopting what is clearly a Government policy choice.

65. In summary, fair consideration of the objective criteria identified in the Commission Regulation does not justify a four-year wage freeze for Justices of the Peace. Rather, the criteria support the Society's requests for fair and reasonable increases in each of the four years. The Society has provided detailed submissions in respect of each factor and relies on the analysis in its Submission as to how each criterion supports its proposed increases in compensation.

INTEREST ON RETROACTIVE SALARY, PER DIEMS & SHIFT DIFFERENTIALS

66. As set out in the introduction, the Society seeks one additional recommendation from this 2017 JPCC:

Society's Request:

- That interest shall be paid, from April 1, 2017 to the date of retroactive payment of salary increase(s) including the differentials for the administrative JPs, per diem rates for part-time and ad hoc JPs, and shift differentials, in accordance with the prejudgment and post-judgment interest rates set out in sections 4 and 6 of the *Judgment Interest Act*, and the regulation thereunder.
- That prejudgment interest shall be payable from April 1, 2017 to the date it is resolved or determined that the recommendations shall be implemented, and post-judgment interest should be payable from that date to the date that JPs are paid the resulting retroactive adjustments.

The Purpose of an Interest Award

67. The Supreme Court of Canada considered the purpose of judgment interest in *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601 (Society's Documents, **Tab 24**), in which the Court considered whether a trial judge had jurisdiction to award

compound interest.³ The Court described the concept of the time-value of money which underlies an interest award. On behalf of the Court, Justice Major wrote at paragraphs 21 to 23:

The value of money decreases with the passage of time. A dollar today is worth more than the same dollar tomorrow. Three factors account for the depreciation of the value of money: (i) opportunity cost (ii) risk, and (iii) inflation.

The first factor, opportunity cost, reflects the uses of the dollar which are foregone while waiting for it. The value of the dollar is reduced because the opportunity to use it is absent. The second factor, risk, reflects the uncertainty in delaying possession. Possession of a dollar today is certain but the expectation of the same dollar in the future involves uncertainty. Perhaps the future dollar will never be paid. The third factor, inflation, reflects the fluctuation in price levels. With inflation, a dollar will not buy as much goods or services tomorrow as it does today. (G.H. Sorter, M.J. Ingberman and H.M. Maximon, *Financial Accounting: An Events and Cash Flow Approach* (1990), at p. 14). The time-value of money is common knowledge and is one of the cornerstones of all banking and financial systems.

Simple interest and compound interest each measure the time value of the initial sum of money, the principal. The difference is that compound interest reflects the time-value component to interest payments while simple interest does not. ...

68. At paragraph 36, Justice Major described the theory underlying judgment interest:

In *The Law of Interest in Canada* (1992), at pp 127-28, M.A. Waldron explained that the initial theory underpinning an award of judgment interest was that the defendant's conduct was such that he or she deserved additional punishment. The modern theory is that judgment interest is more appropriately used to compensate rather than punish. At pp. 127-28, she wrote:

Compensation is one of the chief aims of the law of damages, but a plaintiff who is successful in his action and is awarded a sum for damages assessed perhaps years before but now payable in less valuable dollars finds it quite obvious that he has been shortchanged. Equally obviously, payment of

³ It is acknowledged that an award of compound interest is generally reserved for cases of breach of contract where the parties agreed, knew or ought to have known that compound interest would apply – see paragraph 55 of the decision.

interest on his damage award from some relevant date is one way of redressing this problem.

The overwhelming opinion today of Law Reform Commissions and the academic community is that interest on a claim prior to judgment is properly part of the compensatory process. [Citations omitted.]

69. Interest is not punitive against the payor of interest. Rather, an award of interest recognizes the decline in the value of money where payment is delayed, and is recognized as being a proper part of compensation.

The JPCC has Jurisdiction to Recommend Interest

70. Section 42(1) of the *Judicature Act*, states:

42(1) One or more commissions must be established in accordance with the regulations under subsection (3) to review the remuneration and benefits to be paid to judges, justices of the peace and masters as defined in Part 6 and to make recommendations with respect to any changes in remuneration and benefits.

71. Section 4 of the *Commission Regulation* provides in part

4(1) The Commission shall conduct an inquiry respecting the appropriate level of compensation for justices with a view to preparing the report.

(2) The Commission shall, in the report, make recommendations respecting the compensation of the justices for the period April 1, 2017 to March 31, 2021, the effective date of the recommendations, unless otherwise stated, being April 1, 2017.

72. This 2017 JPCC's jurisdiction in s. 4(2) to make recommendations "respecting compensation", including "remuneration and benefits" for JPs, necessarily includes the jurisdiction to make a recommendation with respect to interest.

73. As the *Bank of America Canada* decision makes clear, an interest award is compensatory and accounts for the decline in the value of money when there is a delay

in making a payment. It is therefore fair and reasonable that JPs receive interest on any salary adjustments paid by Government where payment is delayed, whatever the reason, because the value of the compensation declines with the delay. In the interim, the Government has had the use of the money that will ultimately be payable to JPs as part of their compensation package.

A JCC's Jurisdiction to Recommend Interest Was Confirmed by Manitoba's Court of Appeal

74. Interest on retroactive salary adjustments has been recommended by four successive JCCs in Manitoba. On the first occasion, when the payment of interest was recommended by the 2008 Manitoba JCC, the Government rejected the recommendation on the basis that the 2008 Manitoba JCC lacked jurisdiction to make such a recommendation. The Government's reasons for rejecting, *inter alia*, the interest recommendation, were considered by the Court of Queen's Bench for Manitoba and then by Manitoba's Court of Appeal.

Manitoba Provincial Judges' Assn., v. Manitoba, [2012] M.J. No. 105 (Q.B.), Judges' Association Documents, **Tab 25**, paras 127 to 133

Manitoba Provincial Judges' Assn. v. Manitoba, [2013] M.J. No. 279 (C.A.) ("Decision of Steel J.A."), Judges' Association Documents, **Tab 26**

75. Both Courts agreed that the 2008 JCC had jurisdiction to make the recommendation under s.11.1(3)(b) of *The Provincial Court Act* (Manitoba). That section reads:

11.1(3) A compensation committee shall investigate, report and make recommendations with respect to the following:

- (a) the salaries to be paid to
 - (i) the Chief Judge,
 - (ii) an Associate Chief Judge, and
 - (iii) a judge of the court, other than the Chief Judge or an Associate Chief Judge; and
- (b) the benefits to be paid, including pensions, vacations, sick leave, disability benefits, travel expenses and allowances, to

the Chief Judge, an Associate Chief Judge and a judge of the court.

The Provincial Court Act (Manitoba), C.C.S.M. c. C275

76. Notably, the legislation which empowers this 2019 JPCC is similarly broad:

42(1) One or more commissions must be established in accordance with the regulations under subsection (3) to review the remuneration and benefits to be paid to judges, justices of the peace and masters as defined in Part 6 and to make recommendations with respect to any changes in remuneration and benefits.

77. Steel J.A., who wrote for the Court of Appeal, concluded that the Act necessarily implied that the JCC had jurisdiction to recommend interest.

Decision of Steel J.A., Judges' Association Documents, **Tab 26**, para 136

78. Despite that the decision of the Manitoba Court of Appeal was still outstanding at the time Manitoba's 2011 JCC's report was released, the 2011 JCC also recommended that interest should be paid on the retroactive salary adjustments. It wrote:

While we are not bound to follow recommendations of past JCCs, we accept that it is open to interpret the Act in such a way as to allow the awarding of interest on retroactive salary adjustment.

Further, there is no denying that the judges have suffered from the loss of the use of the money and the Province has had the use of that money.

In light of the above, and to maintain consistency, we are prepared to recommend the payment of interest in the manner requested by the Association.

2011 Manitoba JCC Report, Judges' Association Documents, **Tab 27** (excerpt), page 87

79. The Government of Manitoba initially rejected the interest recommendation of the 2011 Manitoba JCC, although it did indicate it would be "guided" by the Court of Appeal's decision on jurisdiction. The Government of Manitoba implemented the recommendation after the Court's decision was released.

80. The 2014 JCC concluded that there was “no reason to depart from the recommendation of interest made by the JCCs in 2008 and 2011.” The recommendation was accepted by the Government of Manitoba. The same recommendation was then made by the 2017 JCC and once again, was accepted by the Government of Manitoba.

2014 Manitoba JCC Report, Judges’ Association Documents, **Tab 28** (excerpt only)

2017 Manitoba JCC Report, Judges’ Association Documents, **Tab 29** (excerpt only)

The Payment of Interest was Recommended by 2019 BC JCC

81. The 2019 BC JCC, chaired by The Honourable Thomas Cromwell, C.C., issued its Report on October 24, 2019, providing recommendations for appropriate compensation for both Provincial Court Judges and Judicial Justices. The Government of British Columbia has yet to provide its response to the recommendations.

82. Like the successive JCCs in Manitoba, the BC JCC saw fit to recommend the payment of interest on retroactive JCC recommendations. The 2019 BC JCC explained the basis for its recommendation for interest as follows:

If a Commission recommendation for a salary increase that would take effect on or after April 1, 2020 gives rise to a retroactive payment, the amount of that retroactive payment should bear interest at the prejudgment interest rate from April 1, 2020 until the date on which the increased remuneration is established and at the postjudgment rate from that date until the date of the retroactive payment.

The PCJABC asks the Commission for interest on any retroactive salary adjustments arising from our recommendation for a salary increase that would take effect on or after April 1, 2020. The request is for interest from April 1, 2020 to the date of retroactive payment of salary increase(s), in particular, pre-judgment and post-judgment interest as per the *Court Order Interest Act*.⁴⁷ The PCJABC’s proposal is based on the decline over time of the value of money and the loss of the use of money, which underlie all interest awards. Interest awards are thus compensatory, not punitive.

The Government opposes any recommendation for the payment of interest that is premised on the assumption that Government must implement our recommendations. We agree that we should make no such assumption. However, we have formulated our recommendation for interest to apply simply in the event

that a retroactive payment arising from our Commission’s salary recommendations becomes due after April 1, 2020. We are of the view that this is within our mandate. We are required to make recommendations with respect to “all matters respecting the remuneration, allowances and benefits of judges and judicial justices.”⁴⁸ This language, in our view, is broad and includes the ability to recommend that interest be paid on retroactive salary payments.

Any delay in payment of judge or judicial justice salary gives the Government the use of the funds. Interest is the usual way of paying for this use of funds. Interest is also a method of compensating for the cost of not receiving money when it was due. We note that the Government has tied Crown Counsel salary adjustments to salary increases received by judges and in 2015 after the Court of Appeal ordered an adjustment to judges’ salaries for the years covered by the 2013 Judges Compensation Commission,⁴⁹ Crown Counsel received interest on their retroactive salary payments.

2019 BC JCC Report, Society’s Documents, **Tab 2**, page 34

83. In BC, the judges have waited the lengthy periods before receiving the adjustments which resulted from each of the 2010, 2013 and 2016 compensation commissions.

April 1, 2011 April 1, 2012 April 1, 2013	Finally determined when SCC denied leave to appeal on October 29, 2015	Adjustments received a few months thereafter	Delay of more than 3.5 years
April 1, 2014 April 1, 2015 April 1, 2016	Finally determined after second Resolution in Legislature on October 25, 2017	Adjustments received a few months thereafter	Delay of more than 3.5 years
April 1, 2017 April 1, 2018 April 1, 2019	Unknown – litigation is ongoing		Likely to be even longer than on past occasions, given that the judicial review awaits the appeal to the SCC

84. Alberta JPs have waited significantly longer than their BC colleagues to receive their pay adjustments, following the past two JPCC processes. As noted above, in the 2008-2013 Commission process, JPs waited more than 6 years to receive their adjustments. While the Society took some time to get established following the *Bodner* case and the expiry of the terms of the JPs involved therewith, the JPs nonetheless waited

a significant period thereafter, for the GOA to establish the 2009 JPCC. In the 2013-2017 Commission process, the wait for pay adjustments was about 5.5 years. Significantly, unlike in BC where the delays have been the result of litigation over the implementation of Commission recommendations, the delays in Alberta have been largely caused by:

- (a) the Government's own delay in appointing the Commission; and
- (b) delays in implementing the recommendations.

85. On the latter point, in the 2013 JPCC process, it was almost one year from the time the Government resolved to accept the recommendations (i.e. November 2017), before all JPs received the relevant adjustments (i.e. October 2018) for the period commencing April 1, 2013.

Chronic Delays in the JPCC Process in Alberta Justifies Interest

86. The Society seeks a recommendation that interest should be paid on any retroactive salary adjustments. The Society submits that a recommendation for interest is warranted, particularly when JPs have been required to wait while receiving an outdated salary (and hence a salary that has not been constitutionally determined) for longer than 5.5 years pending implementation of the JPCC recommendations.

87. This should be seen as a make whole remedy rather than something punitive. Knowing that interest is payable on any retroactive adjustment would be largely symbolic but would lessen the frustration and loss of morale created by delays in the process. Further, it is fair, since the GOA has the use of the JPs' money in the intervening period. It should be emphasized that the matter of delay in finalizing compensation decisions has been a significant problem for the morale of these judicial officers for many years. This is particularly the case since the concerns expressed by the 2013 JPCC, about the impact of delay, appear to have been ignored by Government.

88. In the past two JPCC processes in Alberta, JPs have consistently waited more than 5 years from the start of the JPCC's four-year mandate to receive the resulting salary

adjustments. There is a decline in the value of money over that period of time. In the interim, the Government has had use of funds that are ultimately to be paid to JPs. As four successive JCCs in Manitoba have recognized, and the most recent JCC in BC has accepted, it is simply not fair and appropriate that JPs should bear the cost of the delay.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th DAY OF FEBRUARY, 2020.

A handwritten signature in black ink, appearing to read "Susan Dawes", written in a cursive style.

SUSAN DAWES