

IN THE MATTER OF THE COURTS OF JUSTICE ACT
AND
IN THE MATTER OF AN INQUIRY BY THE 9th & 10th PROVINCIAL JUDGES
REMUNERATION COMMISSIONS (2014-2018, 2018-2022)
BETWEEN:
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO
(“the Government”)
And
THE ONTARIO CONFERENCE OF JUDGES
(“the Judges”)

Before: William Kaplan, Chair
Roy Filion, Nominee for the Government
Chris Paliare, Nominee for the Judges

Appearances

For the Government: Sunil Kapur
Kate McNeill-Keller
McCarthy's
Barristers & Solicitors

For the Judges Steven Barrett
Goldblatt Partners
Barristers & Solicitors

Colleen Bauman
Goldblatt Partners
Barristers & Solicitors

A hearing in this matter was held in Toronto on November 8, 2017 and April 5, 2018.

Introduction

This is the report of the 9th and 10th Provincial Judges Remuneration Commissions. It is being filed with the Chair of Management Board of Cabinet in accordance with section 51.13 of the *Courts of Justice Act*, R.S.O. 1990, c. 43 as amended and section 16 of *Appendix A of Framework Agreement* (“the Framework Agreement”) set out as the schedule to that Act. This report contains the recommendations of the Commission contemplated by section 15 of the Framework Agreement for the Ontario Court of Justice for the period April 1, 2014 to March 31, 2018 and April 1, 2018 to March 31, 2022.

The purpose of the Framework Agreement is set out in section 2:

The purpose of this agreement is to establish a framework for the regulation of certain aspects of the relationship between the executive branch of government and the Judges, including a binding process for the determination of Judges’ compensation. It is intended that both the process of decision-making and the decision made by the Commission shall contribute to securing and maintaining the independence of Provincial Judges. Further, the agreement is intended to promote co-operation between the executive branch of government and the judiciary and the efforts of both to develop a justice system which is both efficient and effective, while ensuring the dispensation of independent and impartial justice.

The Framework Agreement continues the Provincial Judges Remuneration Commission on a quadrennial basis. The mandate of, and criteria to be used by, the Commission in recommending appropriate salary levels, benefits, allowances, and pension are set out in sections 13 and 25 of the Framework Agreement (and are set out below). Further to sections 27 and 30 of the Framework Agreement, the Commission’s recommendations with respect to salary, benefits, and allowances are binding on the Government.

Recommendations with respect to pension are non-binding.

Governing criteria are as follows:

- a) the laws of Ontario;

- b) the need to provide fair and reasonable compensation for judges in light of the prevailing economic conditions in the province and the overall state of the provincial economy;
- c) the growth or decline in real per capita income;
- d) the parameters set by any joint working committees established by the parties;
- e) that the Government may not reduce the salaries, pensions or benefits of judges individually or collectively, without infringing the principle of judicial independence; and
- f) any other factor which it considers relevant to the matters in issue.

Without doubt, the Commission has a critical constitutional role in safeguarding the independence of the judiciary. Maintaining judicial independence is *the* overriding factor in the consideration of judicial compensation. That is why an independent, effective, and objective judicial compensation commission is interposed between the Judges and the Government. The Commission plays an important public policy role as a guardian of the independence of the judiciary. Needless to say, the public interest in an independent judiciary is paramount.

It should be noted that no Judges participated in the discussions with the Government save for their participation in the technical work of the Joint Pension Working Group. Stated somewhat differently, while substantive discussions on a number of complex issues did take place, notably pensions – for example, there was a Joint Pension Working Group on which representatives of the government and representatives of the Judges, and their counsel sat – we are fully satisfied that nothing occurred that would, in any way, compromise judicial independence.

Under section 18 of the Framework Agreement, “the parties agree that the representatives of the Judges and the Lieutenant Governor in Council may confer prior to, during or following the conduct of an inquiry and may file such agreements with the Commission as they may be advised.” As already noted, the representatives of the Government and the Judges did confer. They have agreed on certain recommendations to be made by the Commission provided that the Commission is in agreement with them. Those recommendations proceeded to a hearing held in Toronto on November 8, 2017 and April 5, 2018. It should be noted that pursuant to the Framework Agreement, neither party is precluded, before future Commissions, from pursuing different positions or indeed pursuing any matter within the jurisdiction of the Commission.

The Commission has now had the opportunity to consider the agreed-upon recommendations of the Government and the Judges. Our job, summarily stated, is to arrive at an objective and fair set of recommendations dictated by the overriding public interest in ensuring an independent judiciary. Having carefully considered the applicable criteria, and the joint recommendation in this principled fashion, the Commission fully and unequivocally endorses the proposed recommendations of the Government and the Judges and recommends the following:

Salary:

1. As per paragraph 27 of Appendix A of the Framework Agreement, which is a Schedule to the *Courts of Justice Act*, salary recommendations of the Commission come into effect on the first of April in the year in which the Commission began its inquiry;
2. For the period of April 1, 2014 to March 31, 2018, salaries of Provincial Judges, Regional Senior Justices, Associate Chief Justices and the Chief Justice of the Ontario Court of Justice (appointed before November 12, 2013) are increased annually in an amount equivalent to the IAI (Canada) indexing, as follows:

	<u>April 1, 2014</u> <u>(1.9%)</u>	<u>April 1, 2015</u> <u>(2.7%)</u>	<u>April 1, 2016</u> <u>(1.2%)</u>	<u>April 1, 2017</u> <u>(0.7%)</u>
Provincial Judge:	\$279,791	\$287,345	\$290,793	\$292,829
Regional Senior Justice:	\$300,800	\$308,600	\$314,100	\$315,300
Associate Chief Justice:	\$308,300	\$316,100	\$321,600	\$322,800
Chief Justice:	\$313,300	\$321,100	\$326,600	\$327,800

Note: The salary provisions for judges appointed to administrative positions prior to November 12, 2013, are determined as follows and as set out in O.I.C 225/2016:

- The rate for Regional Senior Justices is to be 9.65% above the rate for Provincial Judges, subject to not exceeding the salary rate for federally appointed puisne judges of the Superior Court of Justice on April 1 of that year.
- The rate for Associate Chief Justices is \$7,500 above the rate for Regional Senior Justices.
- The rate for the Chief Justice is \$12,500 above the rate for Regional Senior Justices.

3. For the period of April 1, 2014 to March 31, 2018, salaries of Provincial Judge, Regional Senior Justices, the Senior Advisory Family Judge, Associate Chief Justices and the Chief Justice of the Ontario Court of Justice (appointed on or after November 12, 2013) are increased annually in an amount equivalent to the IAI (Canada) indexing, as follows:

	<u>April 1, 2014</u> <u>(1.9%)</u>	<u>April 1, 2015</u> <u>(2.7%)</u>	<u>April 1, 2016</u> <u>(1.2%)</u>	<u>April 1, 2017</u> <u>(0.7%)</u>
Provincial Judge:	\$279,791	\$287,345	\$290,793	\$292,829
Regional Senior Justice/Senior Advisory Family Judge:	\$287,291	\$294,845	\$298,293	\$300,329
Associate Chief Justice:	\$294,791	\$302,345	\$305,793	\$307,829
Chief Justice:	\$299,791	\$307,345	\$310,793	\$312,829

Note: The salary provisions for judges appointed to administrative positions on or after November 12, 2013, are determined as follows and as set out in O.I.C 225/2016.:

- The rate for the Regional Senior Justices and the Senior Advisory Family Judge is to be \$7,500 above the rate for Provincial Judges, subject to not

exceeding the salary rate for puisne judges of the federal Superior Court of Justice on April 1 of that year.

- The rates for Associate Chief Justices are \$7,500 above the rate for Regional Senior Justices.
- The rate for the Chief Justice is \$12,500 above the rate for Regional Senior Justices.

4. Commencing on April 1, 2018, the salaries of Provincial Judges will be increased over the four year term of the 10th Provincial Judges Remuneration Commission to align with a percentage of the salary rate of a puisne judges of the federal Superior Court of Justice (“Federally Appointed Judge”) on a phased-in approach to 95.27% of a Federally Appointed Judge’s salary by April 1, 2021, as follows:

<u>Year</u>	<u>Provincial Judge Salary Rate Percentage Link to Federally Appointed Judge’s Salary Rate</u>
April 1, 2018	Provincial Judge April 1, 2017 salary rate + Industrial Aggregate Index (IAI) (Canada) + the difference required to bring Provincial Judges salaries to 93.47% of the Federally Appointed Judge’s current year’s salary rate
April 1, 2019	Provincial Judge April 1, 2018 salary rate + Industrial Aggregate Index (IAI) (Canada) + the difference required to bring Provincial Judges salaries to 94.07% of the Federally Appointed Judge’s current year’s salary rate
April 1, 2020	Provincial Judge April 1, 2019 salary rate + Industrial Aggregate Index (IAI) (Canada) + the difference required to bring Provincial Judges salaries to 94.67% of the Federally Appointed Judge’s current year’s salary rate
April 1, 2021	Provincial Judge April 1, 2020 salary rate + Industrial Aggregate Index (IAI) (Canada) + the difference required to bring Provincial Judges salaries to 95.27% of the Federally Appointed Judge’s current year’s salary rate

5. For clarity, the term “Federally Appointed Judge’s current year’s salary rate” in paragraphs 6 and 9 includes the annual adjustment to a Federally Appointed Judge’s salary as of April 1 of the current year as per s. 25 of the *Judges Act*, R.S.C., 1985, c. J-1, after implementation of any IAI increase to the Federally appointed Judge’s salary, and implementation of any increases, including retroactive increases, to the 2020 and 2021 the salary rate that may be awarded as a result of the 6th Judicial Compensation Commission for federal judges.
6. The salaries of Regional Senior Justices, the Senior Advisory Family Judge, Associate Chief Justices and the Chief Justice of the Ontario Court of Justice would continue to be increased annually to preserve the differential with the salary of a Provincial Judge as described in paragraphs 4 and 5 of this submission and as set out in O.I.C 225/2016.
7. The parties agree that providing Provincial Judges with the above noted salaries ending with an amount that is 95.27% of the Federally Appointed Judge’s current year’s salary rate as of April 1, 2021 reflects an appropriate level of remuneration for the term of the ninth and tenth Commissions in light of the criteria the Commission is mandated to consider.

Benefits:

Insured Benefits

8. Effective April 1, 2018, insured benefits for all active and retired Provincial Judges and their eligible dependents and survivors will be changed as follows:
 - (a) Restructure benefits related to psychological/MSW services to \$40 per half hour of service with an annual cap of \$1,400
 - (b) Increase the paramedical entitlement to \$35 per visit per practitioner
 - (c) Provide a laser eye surgery entitlement of up to \$1,000 max per insured (Lifetime Max), in addition to the existing routine eye exam coverage and \$450 vision care max in any consecutive 24 month period;
9. The Government confirms that any clause in any insurance contract applicable to judges and or their dependents precluding group insurance coverage in the event of attempted suicide or physician assisted death does not apply.

Judicial Allowance:

10. Effective April 1, 2018, a Provincial Judge is not entitled to claim or be reimbursed under section 32 (1) Order in Council O.C. 225/2016, or its successor Order-in-Council, for more than \$3,750 for expenses in respect of the twelve-month period commencing on the 1st day of April in each year.
11. The Ontario Government and the Association of Judges agree to meet and discuss the judicial allowance for per diem Provincial Judges.

Housekeeping:

12. The Government will take steps to amend Schedule B of O.I.C. 225/2016 to reflect the \$3,000 coverage for Dentures and Orthodontic, which is already provided and currently set out in the Great West Life policy.
13. Confirmation of the application of dental assignment of benefits, which is a payment arrangement between an active or retired Provincial Judge or their eligible dependents or survivors and their dentist which allows the insured to authorize Great West Life to pay the dentist directly for the eligible claims expense. For clarity, the dentist must agree to the assignment of dental benefits in order for the insured to participate in this payment arrangement.

Joint Benefits Committee:

14. Establish a joint committee consisting of Ontario Government and Provincial Judge Representatives to discuss a number of benefit related concerns. The items to be addressed may include the following:
 - (a) Setting out of benefits in OIC rather than only in GWL policies;

- (b) Addressing discrepancies and inconsistencies between GWL policies and OIC (i.e. paramedical services, drug coverage);
 - (c) Setting out in OIC cap on premiums for Catastrophic Drug Coverage as per 8th Commission (\$10.44 single/\$21.24 family);
 - (d) Judges' concerns about changes to GWL policies, no matter how minor, without Judges' knowledge or approval or without going through the Commission;
 - (e) The process for determining increases to premiums for Judges and retired Judges;
 - (f) Provision of up-to-date and historic copies of GWL policies to Association;
 - (g) Provision of accurate information for judges (i.e. Judges request for dedicated person at GWL to deal with judicial benefits, up-to-date and more detailed benefit guide);
 - (h) Inclusion of Benefit Coverage for Retirees in the judges' benefit plan;
 - (i) Dependent definition in s. 1 of Schedule B of O.I.C. 225/2016 to address Association's concerns re: maximum age and disabled dependent children; and
 - (j) Judges' concerns regarding Long Term Income Protection coverage and pension entitlement for judges who do not meet the basic service requirement at age 65.
15. The list of benefit issues to be discussed by the joint committee can be expanded upon mutual agreement of the parties;
16. The Committee will address any matters before it in a manner that is consistent with the role and jurisdiction of the Commission in relation to the determination of Judges' remuneration. The Commission may hear submissions on any items not resolved within the Committee, which are within the jurisdiction of the Commission. The parties agree that the establishment of this Committee neither expands nor narrows the jurisdiction of the Commission. Either party will have the ability to argue whether or not the above listed issues fall within the Commission's jurisdiction.

Pensions:

17. See Appendix A

Other:

18. Upon a referral by the Association and the Government during the term of the Commission under paragraph 14 of the Framework Agreement set out as a Schedule to the *Courts of Justice Act*, the Commission may conduct an inquiry and make recommendations regarding the pension benefits of Provincial Judges

arising out of any expansion of the Family Branch of the Superior Court of Justice (i.e., the Unified Family Court).

19. Upon a referral by the Association and the Government during the term of the Commission under paragraph 14 of the Framework Agreement set out as a Schedule to the *Courts of Justice Act*, the Commission may make recommendations regarding the issue of representation costs to be paid, if any, associated with the implementation of the Commission's recommendations, including matters related to the joint pension committee and joint benefits committee.
20. If the Association wishes to make a referral pursuant to paragraphs 20 or 21 above, the Government shall consent to make the referral jointly.
21. Representation Costs of the Association for the 9th and 10th Commission will be paid as follows [within 30 days of the issuance of the recommendations of the Commission]:
 - (i) Disbursements (including actuarial fees and disbursements, other expert advice, and lawyers disbursements plus HST on all the fees and disbursements);
 - (ii) Legal fees plus HST.

DATED at Toronto this 18th day of April 2018.

"William Kaplan"

William Kaplan, Chair

"Roy Filion"

Roy Filion, Nominee for the Government

"Chris Paliare"

Chris Paliare, Nominee for the Judges

APPENDIX A – JOINT SUBMISSION ON PENSIONS

Objective:

The pension benefits (both lifetime benefits and ancillary benefits) provided to provincial judges and their survivors/dependents and the associated contribution levels and other requirements will remain unchanged from what is currently provided by Ontario Regulation 290/13 to the *Courts of Justice Act*. The vehicles used to provide these benefits will change to the three instruments set out below. This will change the tax treatment of the contributions to and benefits received from the Provincial Judges Pension Plan.

1. Registered Pension Plan (RPP)
2. Retirement Compensation Arrangement (RCA)
3. Supplemental Pension Plan (SUP)

RPP:

- The RPP shall be registered under the *Income Tax Act (Canada) and Regulations (ITAR)* with the Canada Revenue Agency but shall not be registered under the *Ontario Pension Benefits Act (PBA)*.
- The RPP will provide a pension of 2% of final three-year average indexed salary multiplied by service up to the pension benefit maximums as determined under Regulation 8504 of ITAR. For 2017, the maximum pension under the ITA is reached at an average salary of \$147,222. Salary in excess of that will receive a pension from the RCA.
- Ancillary benefits currently provided by Ontario Regulation 290/13 will also be provided under the RPP up to the maximum permitted by ITAR.
- Provided they do not have a material negative impact on the Ontario Government's accounts and that the necessary data is available with reasonable effort, the Ontario Government will take what steps are permitted under ITAR to maximize the value of the benefits payable from the RPP
- Funding for the RPP will be through the use of a trust (established through a trust agreement and if necessary as approved or authorized by legislation).
- The Trustees will be one or more entities as agreed to by the Ontario Government and the Association of Ontario Judges, which could include the Provincial Judges Pension Board and/or the Ontario Pension Board.
- Contributions by the Provincial Judges and the Ontario Government will be made to the RPP trust to the extent permitted by ITAR.
- Ontario Government contributions will be based on an actuarial report that is not more than four (4) years old.
- Any surplus that may arise in the RPP trust is the property of the trust unless and until it can be transferred to the Ontario Government under the terms of the trust for the following purposes:
 - Payment of required Government contributions in accordance with the regulation that provides for judicial pensions and survivor allowances under the *Courts of Justice Act* (currently provided by Ontario Regulation 290/13);
 - Any surplus shall revert to the Ontario Government provided the obligations in respect of pension benefits as set out in the regulation that

provides for judicial pensions and survivor allowances under the *Courts of Justice Act* (currently provided by Ontario Regulation 290/13) are satisfied, in the unlikely event of plan wind-up.

- For clarity the Provincial Judges are not entitled to any surplus that may arise from the RPP trust.
- The Ontario Government will transfer assets to the RPP trust to fully fund the obligations under the RPP calculated as of the applicable valuation date using a discount rate equal to the OFA's 25-year borrowing rate (the current basis for setting the discount rate under the PJPP). The balance of the assets allocated to the PJPP in the CRF will remain in the CRF. Once the asset mix for the RPP is established, the discount rate to be used for actuarial valuations will be based on the expected return on assets with the appropriate margin. This is expected to create a funding excess in the RPP which, in the Government's sole discretion, may be maintained as a reserve to address asset volatility and/or to reallocate current service contributions to the RCA that would otherwise be made to the RPP.

RCA:

- The RCA will provide a pension of 2% of final three-year average indexed salary multiplied by service minus the amount paid from RPP.
- Ancillary benefits currently provided by Ontario Regulation 290/13 will also be provided under the RCA minus what is provided under the RPP.
- Funding for the RCA will be through the use of a trust (established through a trust agreement and if necessary as approved or authorized by legislation).
- The Trustees will be one or more entities as agreed to by the Ontario Government and the Association of Ontario Judges, which could include the Provincial Judges Pension Board and/or the Ontario Pension Board.
- The RCA will be partially funded to a level sufficient to pay three (3) to five (5) years' worth of benefit payments (lifetime benefits and ancillary benefits), in accordance with advice from the Plan's actuary. The funding will be established gradually through three types of contributions:
 - contributions by the Provincial Judges that are not permitted to go to the RPP due to ITAR contribution maximums will be made to the RCA; and
 - The Government of Ontario will match these contributions by the Provincial Judges to the RCA trust.
 - Additional annual contributions by the Ontario Government to the RCA trust based on the current service cost of the benefits provided by the RCA and, at least initially, on the current service cost of the benefits provided by the SUP, both to be calculated on a going concern basis until the partially funded target level is reached.
- Once the three (3) to five (5) years' worth of funding has been established in the RCA trust, the annual government contributions shall be expensed to a Special Purpose Account (SPA) in the Consolidated Revenue Fund (CRF) which is used to fund the Provincial Judges' RCA and SUP benefits. The government, however, will continue to match the contributions of judges into the RCA trust.
- Funding requirements for the RCA, including amounts payable to the SPA, shall be based on an actuarial report that is not more than four (4) years old.

- Any surplus shall revert to the Ontario Government provided the obligations in respect of pension benefits as set out in the regulation that provides for judicial pensions and survivor allowances under the *Courts of Justice Act* (currently provided by Ontario Regulation 290/13) are satisfied, in the unlikely event of plan wind-up.
- Funds that are remitted to and held by CRA in a refundable tax account are deemed to be property of the RCA trust.

SUP:

- The SUP will provide a pension equal to what is currently provided by Ontario Regulation 290/13 minus the amounts paid from the RPP and RCA.
- Ancillary benefits currently provided by Ontario Regulation 290/13 will also be provided under the SUP minus what is provided under the RPP and RCA.
- Funding for the SUP will be through the use of a SPA under the *Financial Administration Act*. For clarity, no trust shall be established in respect of the SUP.
- Funding requirements for the SUP shall be based on an actuarial report that is not more than four (4) years old.
- Funds for the SUP shall be expensed to the SPA at least annually by the Ontario Government.
- The Ontario Government shall credit the amount recorded in the SPA with the market rate of return as set out below.

Investment Account:

For the purpose of determining the market rate of return used for the SPA as described above, the Ontario Government will establish a Proxy Investment Account (PIA). For clarity, the PIA does not form part of the Provincial Judges Pension Plan (consisting of the RPP, RCA, and the SUP).

The PIA would hold funds equal to the amount held in the SPA. Provincial Judges would have no entitlement to the funds held in the PIA.

The PIA would remain part of the CRF, available for the Ontario Government's use.

Funds in the PIA would be invested in the market in a manner appropriate for investments of a pension plan in order to determine what the market rate of return would be on the SPA funds if they were directly invested in the market. The rate of return would be calculated annually based on the performance of the PIA.

In order to maintain the appropriateness of the PIA as a proxy for the SPA, the PIA must maintain the same amount of funds as the SPA. The PIA will, therefore, need to be periodically rebalanced by having funds added or subtracted. The frequency of this rebalancing will be at the discretion of the Ontario Government but will be at least annually.

The PIA is expected to operate in the following manner:

- The PIA is under the control of the Minister of Finance, as CRF funds normally are.
- The PIA would be invested by the Minister of Finance through a service level agreement with investment professionals. This may be the Investment Management Corporation of Ontario or another third party investment manager.
- As the PIA is a proxy for a pension fund, Treasury Board Secretariat is responsible for determining the investment policy of the PIA.
- Returns on the PIA would remain in the PIA and not be transferred to other accounts in the CRF.

Other:

The Ontario Government and the Association of Ontario Judges make these submissions on a without prejudice basis with regard to the position of either party as to whether the revisions made to O. Reg. 290/13 to comply with the *Income Tax Act (Canada)* did or did not require prior review by the Provincial Judges Remuneration Commission.

The pension benefits (lifetime benefits and ancillary benefits) of provincial judges and their survivors/dependents shall not be subject to the PBA.

Funds held in the RPP and RCA shall be invested in a manner consistent with the fiduciary obligations to the plan members.

Preliminary List of Implementation Instruments

A number of implementation instruments would be required as set out below, including the following to be developed by the Ontario Government, with prior disclosure to the AOJ:

- Legislative amendment to the Financial Administration Act (FAA) to authorize the Ministry to invest the PJPP Supplemental Plan assets separately from the CRF in a proxy Investment Account in the kinds of investments that would be appropriate for a pension plan and to allow the interest earned on that investment to be put back to that Investment Account.
- An appropriation for the registered PJPP, RCA and proxy investment account to be set up by a cash transfer out of the CRF either via statutory amendment or by a voted appropriation obtained through the Government business planning cycle or as an in-year submission.
- A new order in council under Section 7(2) of the FAA that indicates the interest attributed to the SPA shall be the same as the rate of return of the proxy Investment Account.
- Amended service level agreements with OPB and PJPB for the running of the RCA and the registered PJPP.
- Amendments to the MOU with the PJPB.
- Funding protocols for government funding to the three vehicles.

The Ontario Government will engage in meaningful consultation with the AOJ in the development of the following preliminary list of potential instruments:

- Regulatory amendments to the PJPP to reflect the three separate components of the pension plan and the associated funding arrangements.
- The trust agreement and service level agreement with the third party trustee and/or investment manager.

- RPP and RCA documentation – custodial agreement and any other forms required by CRA.
- Communication materials for the judges to explain the changes.

The parties agree to return to the Commission which will remain seized, in order to address or resolve implementation issues if that should become necessary.