

Fourth Session - Fortieth Legislature
of the
Legislative Assembly of Manitoba
Standing Committee
on
Legislative Affairs

Chairperson
Mr. Dave Gaudreau
Constituency of St. Norbert

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MANITOBA LEGISLATIVE ASSEMBLY
Fortieth Legislature

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**LEGISLATIVE ASSEMBLY OF MANITOBA
THE STANDING COMMITTEE ON LEGISLATIVE AFFAIRS**

Tuesday, June 9, 2015

TIME – 12 p.m.

LOCATION – Winnipeg, Manitoba

**CHAIRPERSON – Mr. Dave Gaudreau
(St. Norbert)**

**VICE-CHAIRPERSON – Mr. Stan Struthers
(Dauphin)**

ATTENDANCE – 11 QUORUM – 6

Members of the Committee present:

Hon. Messrs. Chomiak, Mackintosh, Hon. Ms. Marcelino

Messrs. Bjornson, Eichler, Friesen, Gaudreau, Goertzen, Pedersen, Struthers, Swan

PUBLIC PRESENTERS:

Ms. Susan Dawes, Provincial Judges Association of Manitoba

MATTERS UNDER CONSIDERATION:

Report and Recommendations of the Judicial Compensation Committee, dated November 20, 2014

* * *

Clerk Assistant (Ms. Monique Grenier): Good afternoon. Will the Standing Committee on Legislative Affairs please come to order.

Before the committee can proceed with the business before it, it must elect a new Chairperson. Are there any nominations for this position?

Mr. Andrew Swan (Minto): I nominate Mr. Gaudreau.

Clerk Assistant: Mr. Gaudreau has been nominated. Are there any other nominations?

Hearing no other nominations, Mr. Gaudreau, will you please take the Chair.

Mr. Chairperson: Our next order of business is the election of a Vice-Chairperson. Are there any nominations?

Mr. Swan: I nominate Mr. Struthers.

Mr. Chairperson: Mr. Struthers has been nominated. Are there any other nominations?

Mr. Kelvin Goertzen (Steinbach): I move that that nomination be unanimous.

Mr. Chairperson: Hearing no other nominations, I move that it's unanimous; Mr. Struthers is elected Vice-Chair.

This meeting has been called to consider the Report and Recommendations of the Judicial Compensation Committee, dated November 20th, 2014.

Before we get started, I would like to provide the committee with some background information on the process following—followed in the past when dealing with Judicial Compensation Committee reports. At previous meetings, representatives from the judges' association and other groups have appeared by leave before the committee, and the minister responsible has made an opening statement followed—following by a statement from the opposition. Prior to concluding consideration of the report, a motion will be required in order to adopt or reject some of the—all or some of the recommendations of the JCC report.

I would like to inform the committee that Ms. Susan Dawes of the Provincial Judges Association of Manitoba has asked permission to speak to the committee today.

Is there agreement from the committee to hear from Susan Dawes? *[Agreed]*

Are there any suggestions on how long we should sit this afternoon?

Mr. Goertzen: Until—no later than 1 o'clock.

Mr. Chairperson: Until no later than 1 o'clock. Is that agreed? *[Agreed]*

An Honourable Member: 1 p.m.

Mr. Chairperson: 1 p.m., to be exact.

I will now call on Ms. Dawes to make a presentation. I hope I'm saying your name right.

Ms. Susan Dawes (Provincial Judges Association of Manitoba): No.

Mr. Chairperson: How do I say it?

Ms. Dawes: Dawes.

Mr. Chairperson: Dawes.

Ms. Dawes: Yes.

* (12:10)

Mr. Chairperson: Do you have any written material for the committee?

Ms. Dawes: I provided a handout—

Mr. Chairperson: Oh, okay. The clerks are going to be handing it out right now and you can feel free to make your presentation when you're ready.

Ms. Dawes: So, good afternoon. I'm counsel for the Provincial Judges Association of Manitoba. You have before you for consideration the report and recommendations of the 9th Judicial Compensation Committee in Manitoba; the 2014 JCC, as we refer to it. The recommendations of this JCC are for the years 2014, 2015 and 2016, those fiscal years.

As many of you will be aware, this JCC process is required by the Constitution in order to ensure the independence of the judiciary. The jurisprudence has determined that the setting of compensation for judges must be depoliticized. It's been recognized that whenever the expenditure of public funds is involved, the decision is inherently political and so to remove the politics to the greatest extent possible, the Supreme Court of Canada has determined that a province must put in place a sieve, an institutional sieve, a filter that will depoliticize the setting of compensation for judges.

So the government must make its proposals to an independent, objective and effective tribunal, a JCC, which must then make recommendations about what constitutes, in its view, appropriate compensation for judges. This standing committee and the Legislature then considers the report and recommendations and may choose to implement or vary them. If the decision is to vary the recommendations, the Legislature must provide legitimate reasons for doing so, which are based on a reasonable, factual foundation.

The Provincial Court Act sets out the process in Manitoba and requires the appointment of a three-person panel, the nominee of each of the association, the—and the province who then agree on a chairperson. The 2014 JCC was chaired by Mr. Michael Werier; this is the fourth JCC that he has chaired. He also chaired the 2002, 2005 and

2011 JCCs. Without a doubt, he was chosen because he has a proven track record of making fair and reasonable recommendations. I should note that the Legislature adopted in full his recommendations of—in 20–2002 and 2005 and most of the recommendations of the 2011 JCC.

The other two members of the panel were also experienced. This was the sixth JCC for the Province's nominee, Mr. Schroeder, and the third for Mr. Shrom.

The committee held hearings in the summer of 2014, almost a year ago now, and the report was provided in November. Prior to the hearings, the association and the Province both provided extensive written submissions to the JCC and the committee then heard oral argument from the Province and the association.

At the hearing, the association called expert evidence from an economist, Professor Fletcher Baragar from the University of Manitoba. He testified about the economic conditions in Manitoba and the province's fiscal circumstances. He was cross-examined by the Province's legal counsel and the Province provided its own economic report from Dr. Narendra Budhia, the director of economic and fiscal analysis.

If you've had a chance to read the report, it'll be apparent that the Province's representatives, both its counsel and the civil servants who were tasked with preparing the Province's submissions, worked very hard to advance the Province's position as to what compensation was appropriate for judges during the years in question, and it's also apparent from the report that the committee took into account all of the various submissions and very carefully set out its reasoning and recommendations in its report.

I want to discuss certain of the recommendations this morning. The first is salary. The JCC considered the extensive evidence and arguments provided by both parties regarding the appropriate salary for provincial court judges, the recommendation effective April 1st, 2014, is for a salary of \$239,000. The JCC also recommended that there be increases on April 1st of each of 2015 and 2016 based on the percentage change in the average weekly earnings for Manitoba over the preceding calendar year. In so doing, it took the same approach that the 2011 JCC had taken, and those salary recommendations were, of course, implemented by the Legislature.

One significant consideration in the setting of judicial remuneration in Manitoba is what we call the three-province or the designated average. The Provincial Court Act provides that if a salary figure is recommended for 2014, in this case, that is less than or equal to the designated average, it's binding, and the designated average is the average of salaries paid to judges in Nova Scotia, New Brunswick and Saskatchewan.

We have some new information to share with you that was not available to the JCC itself. The information affects the three-province average and therefore is critical for you to consider in your deliberations. I have provided you with two tables in the handout that was just circulated. The first page contains updated information about judicial salaries in each of the three provinces, and the second and third pages are an updated chart showing judicial salaries in each of the jurisdictions across Canada together with, on the third page, an explanation of where each jurisdiction is at in terms of its process.

Looking to the first page, I would point out that the New Brunswick Judicial Remuneration Commission released its report on Friday, June 5th, so just last week. I have included the salary recommendations of that JRC in these two charts. The government of New Brunswick has not responded to those recommendations yet, but this is the latest information on what those salaries are likely to be. You'll see there that the salary recommended by that JRC in New Brunswick is higher than what the Manitoba JCC was expecting it to be at the time we made the submissions. The association had presented a conservative estimate of what we expected the recommendations to be from that committee. They've turned out to be higher than that. And, in fact, as a result, for all three of the years at issue here—2014, 2015 and 2016—the salaries recommended by the 2014 Manitoba JCC are likely to be lower than the three-province average. And you'll see that on that first page there.

Manitoba judges would be paid more than judges in Nova Scotia and in New Brunswick but substantially less than judges in Saskatchewan. And this makes eminent sense when you consider how the provinces compare economically. And in the report it's noted that Dr. Baragar testified that Manitoba's economy lies distinctly between the economies of Nova Scotia and New Brunswick on the one hand and that of Saskatchewan on the other. So the recommendations certainly are consistent with that evidence.

The JCC, obviously, very carefully considered the economic evidence submitted by the parties and concluded that Manitoba sits in the mid-range across Canada, although it does face certain risks. The JCC recognized the government's dealing with a deficit and was mindful of the province's balanced budget legislation, and you will see, when you look across the broader salary chart I've provided, Manitoba judges' salaries would fall somewhere in the mid-range, fifth or sixth place across the country, consistent with how the province is doing economically.

So I trust that puts the salary recommendations into context. I'll turn briefly to some of the other recommendations. I don't intend to address them all. I do want to talk about pension contributions. I want to be very clear about this point. The pension contributions for judges have been increased, and judges are already paying the contribution rates that are set out in the regulation under The Civil Service Superannuation Act. The issue was not about whether there should be an increase in pension contributions, but merely it was a process issue in the nature of a housekeeping matter. The issue was raised before the 2011 JCC. In the end, that JCC didn't deal with it in its report. And, as a matter of constitutional principle, any change to judicial compensation must be the subject of a JCC recommendation.

And for that reason, to ensure that the proper process is followed, we asked this 2014 JCC to recommend what is, in effect, already in place. So the JCC has also made it clear that any future change would need also to go before the JCC. That's entirely consistent with the constitutional principles and the principles that govern this process. So it's essential that this recommendation be adopted by the Legislature.

*(12:20)

I also want to address senior judges. You'll see in the report that the 2014 JCC has recommended that, effective April 1st, 2014, senior judges should be paid a per diem rate equal to one over 218 of the salary of a full-time judge. It has also recommended that senior judges should be afforded educational allowances and professional allowances and that those should be provided through a fund that would be distributed by the chief judge based on the needs of the judges in question.

The senior judge program was implemented in September of 2011 after many years of hard work by

members of the association and by government representatives. The program has been a tremendous success and has proven invaluable to the court, to the government and, ultimately, to the citizens of Manitoba in that senior judges have provided the court with the flexibility it needs to deliver services, and whether it's because a full-time judge is tied up with a lengthy inquest, or because there's an illness that turns out to be lengthy, senior judges have been an essential tool for the court in recent years, so much so, that the government extended the funding to the senior judge program by 25 per cent for the fiscal year of 2014-15 in order to give added flexibility.

The parties made submissions to the 2011 JCC about appropriate compensation for senior judges, and that JCC made recommendations about a per diem and allowances, and, in fact, it made the very same recommendations that you will have seen in this report. Those recommendations were rejected by the Legislature when it considered them in 2012. In seeking the same recommendations from this 2014 JCC, the association addressed each of the reasons that were offered by the Legislature at that time for rejecting the recommendations. The 2014 JCC has now considered all of the arguments, the reasons that were given for rejecting the recommendations. It has confirmed the same recommendations.

There is one piece of updated information that I want to share with you about the issue of the per diem rate that's relevant to your deliberations. The New Brunswick judicial remuneration committee that I mentioned released its report last Friday also recommended an increase in the per diem rate there from the current rate of one over 251 of a full-time judge's salary to a rate of one over 220.

So the New Brunswick JRC used the same method that the Manitoba JCC did in coming to that figure, although there is a difference in the number of statutory holidays in that jurisdiction and that's why it's 220 there and not 218 as our JCC has recommended. If the New Brunswick recommendation is implemented, the per diem rate that has been recommended for Manitoba would be consistent with the rates in all of the three comparative provinces, but also with many other jurisdictions across the country.

So we urge you to respect the recommendations on this occasion. The parties have twice advanced

their positions to the JCC. They have twice made their arguments. The recommendations of this independent panel should be respected, and I would submit that to do otherwise in the circumstances would amount to a failure to respect the JCC process.

I want to mention insurance very briefly. There was an issue about life insurance before the committee as well. It's long been the position of this association that all judges should be treated the same way at the time of appointment, regardless of whether they come from the private bar or were employed by government prior to their appointment. That principle was endorsed by this JCC, and the recommendation of the JCC on life insurance was to remedy a situation that currently exists whereby judges who previously worked for government may be disadvantaged as compared with their colleagues who came from private practice.

The point is simply that all judges should be enrolled for five times their annual salary worth of life insurance at the time of their appointment, subject to their electing lower coverage. The JCC's recommendation would contemplate a one-time election for all existing judges and for future appointees. As I understand it there's only two judges who would be affected. This ought to be viewed as a housekeeping matter and an issue of fairness, so we encourage you to adopt that recommendation as well.

In closing, I'd like to make some general comments about the importance of the judicial compensation process. As I said at the outset, both parties made extensive submissions to the committee. It's very critical that these recommendations be respected or all that work is essentially for naught. I want to reiterate, also, something that I said in 2012, and I may have also said it in 2009 for those of you who politely listened at that time as well.

At the end of the day we're talking about 41 judges, and if you implement something other than what was recommended, it's not going to impact the Province's bottom line in any meaningful way. As such, there's a certain amount of symbolism here. There's symbolism in two respects. The first is the independence of the judiciary and the significance of this constitutionally mandated process. The other is the desire of government to send a message to groups with whom the Province is engaged in collective bargaining. The very *raison d'être* of this process,

as I said, is to depoliticize the setting of judicial compensation.

Now is not the time to look at this issue politically. That was done before the JCC itself, and the government, in advancing its arguments to the JCC, took a political position, as it was entitled to do, and it argued that in light of all of the unique considerations that go into setting judicial compensation, judges should get the same increase that it was proposing for employees in the public sector because those unique factors also supported the judges should get those increases.

The Province's position was considered. All of its arguments were taken into account and the JCC's recommendations, and we urge you to implement the recommendations of this highly experienced independent panel in full, and as members of the Legislature, you can ensure that this process is effective by doing just that and implementing the recommendations in full.

If you have any questions, I am most pleased to try to answer them, and, otherwise, on behalf of the association, I want to thank the committee for the opportunity to speak on this very important matter.

Mr. Chairperson: Thank you for your presentation.

Is there any questions from the committee?

Mr. Goertzen: Just in terms of, you know, the factors to be considered, and thank you very much for your presentation. It was well-thought-out and well presented, and you've represented your clients and your interests well.

Under the factors to be considered, it talks about the nature of a judge's role and the independence of the judiciary. So, looking at those two separately, when it talks about the nature of the judge's role, is that the kind of work that they do or the volume of work that they do or what—is there jurisprudence on what that specifically means? *[interjection]*

Mr. Chairperson: Ms. Dawes. Sorry, I just have to recognize you. I know it's a weird process, but go ahead.

Ms. Dawes: Thank you.

That factor has been considered by past JCCs in this province. It's also one that is noted in a number of other jurisdictions. So there's a lot of

jurisprudence on what is taken into account thereunder.

Generally speaking, JCCs will look at what is the work of a judge, what is the role of a judge within society, what role do they play in the justice system, also, what's the nature of the work in the sense of actually—what does it involve on a daily basis? And in the submissions to the JCC, the association has put in information about the circuit work conducted by Provincial Court judges, how difficult that can be, how taxing it can be on their personal time, how that compares, perhaps, with the work that's done by judges in other jurisdictions. Also, the breadth of the court's jurisdiction, are they engaged as they are here in deciding family matters on occasion as well as criminal law matters where, you know, all aspects of it, certainly.

Mr. Goertzen: And just to follow that, and I appreciate that. It was—I've talked about this sort of issue in the past, and I know it's not specific to your work, but I was looking for the annual reports for the Provincial Court. And I know that they're published online or put online, and when I was looking today, and I know that it's mandated under The Provincial Court Act that there needs to be an annual report and it's supposed to be provided three months after March 31st. The latest one that I could find online—so it's either my—it's my either technological failings or it's just not been posted—is 2011 and 2012. So—and it does in those reports. I've always found them very helpful. It does talk about the circuit courts, the different work that's happening within the court, and yet I was—it looks like online that they're two years behind in those reports. Do you—*[interjection]*

* (12:30)

Mr. Chairperson: Yes, go ahead, Ms. Dawes.

Ms. Dawes: Thank you. I have no involvement in the preparation of the annual reports. The association is not tasked with that. I believe it's a task of the chief judge under The Provincial Court Act; I'm not aware or up-to-date on the status of that.

Mr. Goertzen: And it's, that's a fair point, it is the Chief Justice who, I think, is responsible for providing the annual reports three months after March 31st. So, if we're two or three years behind, though, if it's not just a technical error and they exist somewhere other than on the website, but I think they have to be tabled before the Legislature, I'm pretty certain the last one was 2011-2012, and one of the factors is the nature of the judges' role. If we

don't have access to those reports because they haven't been produced or tabled yet, how do we consider that when we—when those reports are three years behind?

Ms. Dawes: Certainly, this was a factor, which, as I've said, was considered in much detail with much evidence and argument by the Judicial Compensation Committee itself. And I think that the role of this Legislature and this standing committee in reviewing the recommendations is not so much to conduct its own assessment of what it thinks is appropriate compensation according to the relevant factors, but rather to review the report, review the reasoning set out therein and, as I said, not to conduct its own analysis in that regard.

So I would caution the—I would caution you in that regard in terms of the approach to this. But I think that the past reports and certainly the information that's publicly available does provide a lot of background on the court, certainly there's a lot available as it is on the website, but, certainly, as I said, I'm not aware of the status of those. They may be available, and I'm not aware of whether they've been produced and are simply not on the website. So can't really comment.

Mr. Goertzen: Maybe just as a final comment, I'd say, and I don't mean to put you in a difficult position because I know that that's not your responsibility to produce those reports, but assuming that they haven't been made available and tabled before the Legislature and assuming that they are at least two years behind, maybe a message could be delivered that it would be much easier for us to consider this if those reports were brought up to date, not only because the law says they should be there, although that's a good enough reason for me, but it would be helpful to consider the nature of the judges' role if we could actually have those reports brought up to the legally required time that they are at.

So I'll just leave that as more if you could transmit that to whomever needs that to be transmitted to.

Thank you for your report.

Mr. Chairperson: Did you wish to respond, or no?

Floor Comment: No thank you.

Mr. Chairperson: Thank you very much for your presentation.

Floor Comment: Thanks very much for listening.

Mr. Chairperson: Does the honourable minister wish to make opening remarks today?

Hon. Gord Mackintosh (Minister of Justice and Attorney General): Well, clearly, this is a process that requires robust consideration by the members of the Legislature. It is subject to and compels both public and legal scrutiny. So my understanding is the respective caucuses will now look at the recommendations and will reconvene on a timely basis to make some decisions here and then report back to the Legislature.

Mr. Chairperson: We thank the minister.

Does the official opposition critic wish to make an opening remark?

Mr. Goertzen: I think I'll defer into the next sitting of this meeting.

Mr. Chairperson: Is it the will of the committee that we adjourn and meet again at the call of the House leaders? *[Agreed]*

Committee rise—the hour being 12:34, committee rise.

COMMITTEE ROSE AT: 12:34 p.m.

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