

**Government Response to the Report of
the 2010 Judicial Justices Compensation Commission**

May 2011

This document supplements the corresponding motion by presenting the reasons of the government of British Columbia ("the government") for the rejection of, and substitution of, recommendations contained in the *2010 British Columbia Judicial Justices of the Peace Compensation Commission Report and Recommendations* ("the Commission Report") and is prepared pursuant to the requirements of section 6(2) of the *British Columbia Judicial Compensation Act* (the "Act").

The Judicial Justices Compensation Commission ("the Commission") is an independent commission mandated by the Act to make recommendations respecting the remuneration, allowances and benefits of Judicial Justices of the Peace ("JJP"s). The Commission Report covers the period from April 1, 2011 to March 31, 2014.

The process for setting JJP compensation is contained in the Act. Pursuant to section 6(2) of the Act, the Legislative Assembly may

- (a) reject one or more of the recommendations made in the report as being unfair or unreasonable, and
- (b) set the remuneration, allowances or benefits that are to be substituted for the remuneration, allowances or benefits proposed by the rejected recommendations.

Recommendations of a Commission Report that are not specifically rejected by the Legislative Assembly within the time limits set out in the Act take effect beginning on the date recommended by the Commission. Recommendations by government take effect on the date stipulated in these reasons. The Commission Report was tabled in the Legislative Assembly on May 3, 2011.

Government must consider the Commission Report in the context of judicial independence and its responsibility to deal with matters of the public interest broadly understood. This includes responsible fiscal management for all of government, taking account of all public sector compensation, including compensation for JJPs. It is government's task to balance the competing interests and demands for public funds and to set policy and priorities having regard to government's financial commitments as a whole.

The Commission Report makes 10 recommendations respecting remuneration, benefits and allowances. As set out in the motion accompanying this response:

- five recommendations are rejected and substitutions made;
- one recommendation is rejected, but with a response by government that is similar but with implementation deferred; and
- the four remaining recommendations are accepted.

In accordance with section 6 (2), where the recommendations of the Commission Report are rejected, the rejection is on the basis that the recommendations are unfair or unreasonable, with more detailed reasons provided below.

A. Legal and Historical Context

Before considering the Commission Report, it is important to set out the legal and historical context for setting judicial compensation.

Independence of the Judiciary

It is a fundamental principle of the Canadian constitution that the courts must be independent of government and private actors. The government re-emphasizes its respect for and its commitment to the principle of judicial independence, both in its substance and its spirit.

The importance to our society of this basic principle has been noted many times, but perhaps the best statement is from a 1994 Federal Court of Canada decision:

[The] independence of the judiciary is an essential part of the fabric of our free and democratic society. It is recognized and protected by the law and the conventions of the Constitution as well as by statute and common law. Its essential purpose is to enable judges to render decisions in accordance with their view of the law and the facts without concern for the consequences to themselves. This is necessary to assure the public, both in appearance and reality, that their cases will be decided, their laws will be interpreted, and their Constitution will be applied without fear or favour.¹

The Supreme Court of Canada has recognized three essential conditions for judicial independence: security of tenure, financial security and administrative independence. Each of these components has been the subject of careful analysis by that court.

¹ *Gratton v. Canadian Judicial Council* [1994] 2 F.C. 769

The Supreme Court of Canada has affirmed, as a constitutional requirement for financial security, that judges' remuneration must not become the subject of negotiation between the judiciary and government. Instead, it must be established through a process that incorporates an independent, objective and effective judicial compensation commission that reports and makes recommendations on judicial remuneration.²

The 2000 *Independence of the British Columbia Provincial Court Justices of the Peace*³ decision of the B.C. Supreme Court affirmed that JJPs exercise judicial functions that require a significant level of judicial independence, including security of tenure and financial independence. Accordingly, the *Judicial Compensation Act* provides for a compensation commission process for JJPs essentially the same as that for Provincial Court judges.

More recently, the Supreme Court of Canada has provided further guidance on the tests a government must meet if it wishes to reject recommendations from a judicial compensation commission:

[A commission's] recommendations must be given weight, but the government retains the power to depart from the recommendations as long as it justifies its decision with rational reasons in its response to the recommendations. Reasons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality. The reasons must also rely upon a reasonable factual foundation. If different weights are given to relevant factors, this difference must be justified. The use of a particular comparator must also be explained. If it is called upon to justify its decision in a court of law, the government may not advance reasons other than those mentioned in its response, though it may provide more detailed information with regard to the factual foundation it has relied upon.

The government's response is subject to a limited form of judicial review by the superior courts. The reviewing court is not asked to determine the adequacy of judicial remuneration but must focus on the government's response and on whether the purpose of the commission process has been achieved.⁴

Provincial Court Judicial Justices of the Peace

² *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] S.C.R. 319 (hereinafter "the PEI Reference Case")

³ *Re Independence of the Provincial Court of B.C. Justices of the Peace*, 2000 BCSC 1470.

⁴ *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); et al*, [2005] 2 S.C.R. 286, (commonly referred to as the "Bodner" decision).

Provincial Court JJPs are appointed under the *Provincial Court Act*. They exercise two broad functions: sitting in Provincial Court and adjudicating traffic cases, bylaw cases and small claims payment hearings. They also consider requests for search warrants and interim release applications.

Relevant Provisions of the *Judicial Compensation Act*

In accordance with section 3 of the *Act*, the members of the Commission were appointed on or before March 1, 2010. The members were William Neilson (Chairperson), Geoffrey Cowper QC, John Dustan, Terence La Liberté QC, and Dr. Brian Burtch.

The Commission's responsibility pursuant to section 5(1) of the *Act* was to report on and make recommendations respecting the remuneration, allowances and benefits of JJPs for the fiscal years 2011/12, 2012/13, and 2013/14. The *Act* requires the Commission to consider several factors before making its recommendations. Section 5(5) of the *Act* says:

5. (5) In preparing a report, a commission must consider all of the following:
 - (a) the current financial position of the government;
 - (b) the need to provide reasonable compensation to the judges or judicial justices;
 - (c) the need to maintain a strong court by attracting qualified applicants;
 - (d) the laws of British Columbia;
 - (e) any other matter the commission considers relevant.

Section 6(2) provides that the Legislative Assembly may, by resolution passed within 28 days after the date on which the report is laid before it:

- (a) reject one or more of the recommendations made in the report as being unfair or unreasonable, and
- (b) set the remuneration, allowances and benefits that are to be substituted for the remuneration, allowances or benefits proposed by the rejected recommendations.

The *Act* further specifies that if a recommendation is not rejected by the Legislative Assembly within the time limit, the JJPs are entitled to receive the remuneration, allowances and benefits proposed by that recommendation.

B. Commission Report and Response

Commission Salary and Per Diem Recommendations

The Commission made the following recommendations respecting the salaries of JJPs:

1. No salary increase in fiscal years 2011/12 and 2012/13. (para. 104)
2. Salary increase in fiscal year 2013/14 of 8%. (para. 104)
3. The per diem compensation formula to be full-time JJP salary/219 @ 24.5% benefits + \$80 overhead. (para.106)
4. Ad hoc JJPs' per diems to be the same as for per diem JJPs.(para.108)

Response to Commission Salary Recommendations

Recommendations 2, 3, and 4 are rejected as unfair and unreasonable. The remaining recommendation is accepted.

Substitution for Recommendation and Reasons

There will be no salary increase for JJPs in fiscal year 2013/14.

The reason for the rejection is that the stated rationale for the Commission's recommendation is "to compensate for the effects of inflation over the period of our mandate and to recognize the continuing expansion in scope and complexity of the duties and responsibilities being assumed by the JJs".

While the Commission's salary recommendations purport to agree with the application of the public sector "net-zero" compensation mandate for at least two years, it nevertheless would ensure that JJPs' salaries are protected against inflation during the whole of the Commission's mandate. The effect of the recommendation is to provide salary increases in those years but defer their implementation to 2013/14.

Based on current forecasts⁵, however, government estimates the CPI increase to be approximately 2% for 2011 and 2012, increasing to 2.1% in 2013: 6.1% cumulatively over the three years in question. An 8% increase as proposed by the commission would be greater than current estimates for changes in the B.C. Consumer Price Index during this period.

The government observes that the Commission's recommendation for 2013/14, to take into account accumulated inflation, contradicts its rationale for recommending no salary increases in 2011/12 and 2012/13. The practical effect of the Commission's recommendation is to provide compensation increases for those years, but defer implementation until 2013/14.

The second part of the Commission's rationale for the recommended increase is the "continuing expansion in scope and complexity" of JJPs' duties and responsibilities. However, the Commission does not state any evidence before it or provide a rationale for this finding in the analysis or conclusions contained in its report. Government does not accept that there has been any significant expansion in the scope or complexity of JJPs' work and is unable to view this statement by the Commission as offering a sufficient reason to increase their compensation.

Government has determined that it must limit compensation increases paid by public funds. A compensation arrangement for JJPs that provides protection against inflation is not consistent with this determination. Protection against inflation has not been offered to employees in the public sector. In pursuing its approach to deficit reduction, the government has established a 'net-zero' public sector compensation mandate. This mandate is an across-the-board measure affecting every person who is paid from the public purse. A similar approach is fair and reasonable for JJPs. The Supreme Court of Canada recognized, in the *PEI Reference Case*, that the guarantee of a minimum acceptable level of judicial remuneration is not a device to shield the courts from the effects of deficit reduction. The Court recognized that "nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times."⁶

JJPs received large salary increases of 26.5% cumulatively from the 2007 commission process, increases which were significantly higher than those for others in the public sector. At this time, government is not in a position to offer salary increases to any public sector group, including JJPs.

⁵ British Columbia, Budget and Fiscal plan. — 2011/12 – 2013/14, May 3, 2011, available at http://www.bcbudget.gov.bc.ca/2011/bfp/2011_Budget_Fiscal_Plan.pdf, at page 61.

⁶ *PEI Reference Case*, para. 196.

In light of the present uncertain fiscal situation for government a recommendation of no increase in the salary of JJPs for the 2013/14 year, as well as the prior two years, is fair and reasonable. A further consideration is the uncertainty regarding the financial impacts government may face as a result of the Harmonized Sales Tax (HST) referendum being conducted in June of this year.⁷

Maintaining JJPs' salaries at \$99,525 (with corresponding per diems for other JJPs) through fiscal year 2013/14 will not result in a salary or per diem rate that falls below a level necessary to attract high-quality candidates to the position or that would otherwise harm judicial independence.

Recommendation 3 is rejected for the reasons outlined above. This recommendation would increase the per diem paid to "lawyer JJPs" by increasing the overhead compensation from \$75 to \$80 and through the application of the formula as set out in the Commission's report: the total per diem would rise from the current \$625 to \$645.

Recommendation 4, which would create parity between the per diems paid to ad hoc JJPs and lawyer per diem JJPs, is rejected for the same reasons outlined above.

Commission Benefits Recommendations

The Commission made the following recommendations respecting benefits for JJPs:

5. Increase in the professional development allowance (PDA) from \$1,000 to \$1,500. (para. 110)
6. All JJPs (not only full-time JJPs) to be eligible for the PDA. (para. 110)
7. Allocation and use of the PDA to be administered by the Chief Judge in accordance with the policy guidelines in the Provincial Court Judges Benefits Manual. (para.110)
8. No wellness benefit. (para. 112)
9. Full-time JJPs to be enrolled in the flexible benefits program. (para. 114)
10. Vacation days to remain unchanged. (para.116)

⁷ British Columbia Independent Panel, Report, " HST or PST/GST It's Your Decision" (May 4, 2011). http://www.deltachamber.ca/wp-content/uploads/2011/05/Its-Your-Decision-HST-GST.PST_.pdf

Response to Commission Benefits Recommendations

Recommendations 7, 8, and 10 are accepted.

Recommendation 9 is rejected for immediate implementation but, in substitution, government recommends the same provisions as are described in the recommendation, but commencing April 1, 2013.

Recommendations 5 and 6 are rejected.

Substitution for Recommendations and Reasons

Recommendation 9 is rejected for immediate implementation. This recommendation is acceptable to government in principle, but it is fair and reasonable that implementation of the substance of these recommendations be deferred to April 1, 2013. Accordingly, the recommendation is rejected, but the substituted recommendation is to the same effect as recommendation 9, with a later implementation date of April 1, 2013 only.

The reason for the later implementation is that these benefit increases, as recommended, would fall within the period when government has decided to not provide increases in public sector compensation for fiscal reasons. It would be unfair and unreasonable to depart from this and provide these benefits to JJPs during this period.

Recommendation 5 respecting an increase in the PDA is rejected as unfair and unreasonable. The PDA will remain at \$1,000. The reason for the rejection is that the current amount is reasonable and provides sufficient funds for JJPs to receive professional development, consistent with their areas of responsibility, in the form of books, periodicals, conferences, and other professional development opportunities.

With the introduction of mandatory professional development by the Law Society of British Columbia, the number and quality of professional development programs has increased significantly. In addition to the programs themselves, written material is available for self study, as well as archived webcasts and other means of maintaining currency. All JJPs have their own semi-annual conferences for five days in total of mandatory judicial education. JJPs also have monthly education nights for two hours each with guest speakers.

For these reasons, a recommendation which would increase the financial burden on government without taking fully into consideration the many alternatives available is unfair and unreasonable.

Recommendation 6 respecting the extension of the PDA to all JJPs, including per diem lawyer JJPs and ad hoc JJPs, is rejected. The PDA will continue to be available to full-time JJPs only. The reason for the rejection is that per diem lawyer JJPs are required to be active members of the legal profession, and with that membership comes a mandatory requirement for continuing legal education. Similarly, the rate for ad hoc JJPs has been developed to take into consideration the cost of professional development. A separate provision to address this is both unfair and inappropriate in the case of ad hoc JJPs.

NOTICE OF MOTION

I give notice that on May 31 I shall move the following Motion:

That pursuant to section 6(2) of the *Judicial Compensation Act* the Legislative Assembly reject six out of the ten recommendations of the *Report and Recommendations* of the 2010 British Columbia Judicial Justices Compensation Commission as laid before this Assembly on May 3, 2011, as unfair and unreasonable for the reasons outlined in *Government Response to the Report of the 2010 Judicial Justices Compensation Commission* filed in this House today:

1. The recommended salary increase for full-time JJPs for April 1, 2013 to March 31, 2014 of 8% is rejected as unreasonable and unfair. The salary increase for April 1, 2013 to March 31, 2014 is set at zero.
2. The recommendation amending the compensation formula for per diem JJPs is rejected. The compensation formula for per diem JJPs will remain unchanged.
3. The recommendation that the compensation formula for per diem JJPs should be applied equally to ad hoc JJPs is rejected. The compensation formula for ad hoc JJPs will remain unchanged.
4. The recommended increase in the professional development allowance from \$1,000 to \$1,500 effective April 1, 2011 is rejected. The allowance will remain at \$1,000.
5. The recommended extension of the professional development allowance to per diem and ad hoc JJPs is rejected as unfair and unreasonable. The allowance will continue to be available to full-time JJPs only.
6. The recommendation to enrol full time JJPs in the flexible benefits program, effective April 1, 2011 is rejected but in substitution full time JJPs will be enrolled in the flexible benefits program commencing April 1, 2013.

That the Legislative Assembly accepts the remaining recommendations contained in the report.

Hon. Barry Penner, QC