

**Government Response to the Report of
the 2010 Judges Compensation Commission**

May 2011

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

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

The process for setting judicial 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 the 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 Provincial Court judges. 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 15 recommendations respecting judges' remuneration, benefits and allowances. As set out in the motion accompanying this response:

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

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

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

an independent, objective and effective judicial compensation commission that reports and makes recommendations on judicial remuneration.²

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.³

Provincial Court Judges

Provincial Court judges are appointed under the *Provincial Court Act*. The Provincial Court of British Columbia has broad jurisdiction – while its work is primarily in criminal law, the judges also hear family law, child protection and civil matters.

The Judicial Compensation Act

In accordance with section 2 of the Act, the members of the Commission were appointed on or before March 1, 2010. The members were George Morfitt (Chairperson), Geoffrey Cowper QC, Brian Kenning, Robin McFee QC, and John Dustan.

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

³ *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).

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 judges for the fiscal years 2011/12, 2012/13, and 2013/14. The Act requires the commission to consider several factors before making its recommendations:

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 judges are entitled to receive the remuneration, allowances and benefits proposed by that recommendation.

B. Commission Recommendations and Government's Responses

Salary Recommendations

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

1. No salary increase in fiscal year 2011/12 (page 33).
2. No salary increase in fiscal year 2012/13 (page 33).
3. Salary increase in fiscal year 2013/14 equal to the accumulated increase in the B.C. Consumer Price Index over the preceding three fiscal years, compounded annually (page 33).
4. Chief Judge's salary to remain at puisne judge salary plus 12% (page 33).
5. Associate Chief Judge's salary to remain at puisne judge salary plus 6% (p. 33).

Responses to Commission Salary Recommendations

Salary recommendations 1, 2, 4 and 5 are accepted. Recommendation 3, the recommended salary increase for fiscal year 2013/14, is rejected as unfair and unreasonable. There will be no salary increase for Provincial Court Judges in fiscal year 2013/14.

The amount of the increase recommended by the Commission depends upon future changes in the Consumer Price Index (CPI) and thus cannot be definitively determined now. Based on current forecasts⁴, 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.

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.

Government has determined that it must limit compensation increases paid by public funds. A compensation arrangement for judges that provides protection against inflation is not consistent with this determination. Protection against inflation has not been offered to employees in the public service. 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 Provincial Court judges. 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."⁵

Judicial compensation has increased significantly in recent years. In 2004 judges' salaries were \$161,250 a year. They are now \$231,138 annually. This is a cumulative increase of 43.3% since 2004. This substantial increase flows from 2004 and 2007 judicial compensation commission recommendations. In light of the present uncertain fiscal situation for government, a recommendation of no increase in the salary of judges for the 2013/14 year, as well as the prior

⁴ 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.

⁵ *PEI Reference Case*, para. 196.

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.⁶

Maintaining judges' salaries at \$231,138 through fiscal year 2013/14 will not result in a salary that falls below a level necessary to attract high-quality candidates to the provincial bench or that would otherwise harm judicial independence.

Commission Benefits Recommendations

The Commission made the following recommendations respecting benefits for judges:

6. Increase in the pension accrual rate from 3.0% to 3.5%, effective April 1, 2013 (page 34).
7. No change to the statutory pension plan contribution rate ratios of 24% for judges and 76% for government (page 34).
8. Increase in the pension contribution period from age 71 to age 75, effective April 1, 2011 (page 35).
9. No change to annual leave (page 35).
10. Extension of Long-term Disability (LTD) coverage to age 75, effective April 1, 2011 (page 35).
11. Separate funding of LTD benefits by government outside of the budget of the Office of the Chief Judge (page 35).
12. Extension of life insurance coverage to age 75, with adjustments in benefit levels to the age 65-69 cohort so that the overall change is cost-neutral to government (page 36).
13. No medical screening program (page 36).
14. Enrolment of judges in the flexible benefits program, effective April 1, 2011 (page 36).
15. Increase in possible number of sitting days for senior part-time judges at the discretion of the Chief Judge, with a three-year "sunset clause" (page 37).

Responses to Benefits Recommendations

⁶ 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

Recommendations 7, 9, 12, and 13 are accepted.

Recommendations 10 and 14 are rejected for immediate implementation but, in substitution, government recommends the same provisions as are described in the recommendation, but commencing April 1, 2013.

Recommendation 15 is rejected but replaced with a recommendation that is consistent in part with Recommendation 15.

Recommendations 6, 8 and 11 are rejected.

The reasons for these responses are found below.

Substitution for Recommendations 10 and 14

Recommendations 10 and 14 are rejected for immediate implementation. These recommendations are 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 recommendations are rejected, but the substituted recommendation is to the same effect as Recommendations 10 and 14, 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 restrict all public sector compensation increases – the two-year “net-zero” compensation mandate. It would be unfair and unreasonable to depart from this restriction and to provide these benefits to judges during this period. In regard to LTD benefits in particular, the Chief Judge retains the same authority to provide benefits from the budget allocated to the Office of the Chief Judge for judges over age 70 as he has exercised to date in providing these benefits to judges between the ages of 65 and 70.

Recommendation 15, respecting an expansion of the senior judges part-time program, is rejected but in substitution government proposes the following. Government accepts that amendments to the Act should be introduced that would permit part-time judges to exceed the existing remuneration caps and will take necessary action to present these to the Legislative Assembly. These caps limit a senior part-time judge’s salary to no more than 40% of the salary of a full-time sitting judge and the combination of salary and pension benefits to no more than 100% of the salary of a full-time sitting judge.

However, government rejects as unreasonable the commission’s recommendation that there should be no limits on this, or guidance provided to the Chief Judge, in deciding to schedule

senior part-time judges to sit in excess of their pre-determined number of sitting weeks and thus exceed the compensation caps noted above.

The Commission's recommendation provides more discretion to the Chief Judge than is necessary to achieve the goal advanced by the Chief Judge, and indeed goes beyond what the Chief Judge actually requested in presenting this proposal to the Commission. Further, it does not take into account the potential added costs to government for extra facilities and court staff that may arise if extra sittings are authorized without limitation.

The Chief Judge proposed to the Commission that extra sitting days for senior part-time judges be authorized only when:

- there is an urgent and unforeseen need to provide coverage for a judge suffering from illness or injury;
- there is a need to provide coverage for judicial education leave; or
- there is any other judicial resource deficiency such that the normal operation of the Court is adversely affected.

In submissions to the Commission, the Chief Judge stated that extra sitting days would be authorized only if adequate budgetary resources exist, and that this mechanism would not be used as a vehicle to expand the overall number of court sitting days beyond normal historical levels, which would in turn create higher costs to government.

Government is of the view that the Chief Judge's proposal represents a prudent approach to using the senior part-time judge program to address unforeseen, short-term court needs, whereas the Compensation Commission recommendation, without the limitations proposed by the Chief Judge, would be unreasonable. The government has concluded that the Chief Judge should, under the Act, be authorized to exercise his or her discretion only in urgent and unforeseen circumstances⁷.

Government agrees this provision should be reviewed after 3 years.

Recommendation 6, respecting an increase in the pension accrual rate for judges to 3.5% annually, is rejected as unfair and unreasonable. The pension accrual rate will remain at 3%.

Judges are members of the Public Service Pension Plan. The current 3% accrual rate is already 50% higher than the 2% accrual rate that applies to most members of the Public Service

⁷ The government does not, however, agree that the Chief Judge should be authorized to exercise his or her discretion where there is a need to provide coverage for judicial education leave or there is any other judicial resource deficiency such that the normal operation of the Court is adversely affected.

Pension Plan. It can be inferred from its recommendation that the Commission appears to implicitly accept that the intent of the Public Service Pension Plan is to ensure that judges retire with the maximum pension benefit. This approach is unreasonable. The intent of a pension plan is not necessarily to guarantee that its members achieve the maximum benefit possible; rather, it is to ensure a reasonable retirement benefit for members given their length of service, and contribution, to the plan.

The submissions of the judges association indicate that the average age of a Provincial Court judge appointed in the last 3 years is 53 and the average age on the court is 58.⁸ It is reasonable to expect that judges will have prudently saved for retirement during their careers as lawyers, in the expectation that they will have to rely to a large degree on their own retirement savings. In the case of public service lawyers who are subsequently appointed to the bench, they will have contributed to the Public Sector Pension Plan during their service and will bring that accumulated service with them.

Given that the Commission recommended retaining the current statutory division of pension contributions of 24% from judges and 76% from government, the burden of added contributions necessary to fund a higher accrual rate would fall disproportionately, and unreasonably, on the public purse.

Finally, there is no evidence in the Commission's report that the Commission considered government's submissions on this issue, in particular government's proposal to examine the possibility of increasing the accrual rate if the contribution rates were re-balanced so that the effect was cost-neutral to government.

Recommendation 8, respecting an extension in the pension contribution period for judges from age 71 to age 75, is rejected as unfair and unreasonable. Judges will continue to cease contributing to the pension plan after reaching age 71.

Implementing this recommendation would require requesting an exception from the federal Minister of Customs and Revenue to the existing *Income Tax Act* (Canada) regulations prohibiting employees from contributing to a pension plan after age 71. Even if this request were granted, the form of the pension arrangement for judges age 71 to 75 would have to be on a non-registered basis. As a result, either judges' individual pension contributions would no longer be tax-deductible or government would be required to fund 100% of the necessary contributions for these judges. This latter outcome is both unfair and unreasonable.

⁸ Provincial Court Judges Association of British Columbia, Submission to the 2010 Judges Compensation Commission, page 16 para. 24

This information was not available to the Commission at the time of its hearings and deliberations. This pension change was instead presented as a simple matter, both legally and administratively. After consultation with representatives of the Public Service Pension Plan, government has determined that this is not the case, and implementing the recommendation either would make the change of nominal benefit to judges (if judges' contributions are not tax-deductible) or would create an unreasonable and unfair burden upon the public purse (if government were to be responsible for either a comparable or greater portion of the contributions). It is on the latter basis that government rejects the Commission's recommendations.

Recommendation 11, respecting the manner in which LTD benefits are accounted for, is rejected as unreasonable and because it is outside the jurisdiction of the Commission.

The Commission's mandate is set out in section 5(1) of the Act. It is limited to "all matters respecting the remuneration, allowances and benefits of judges or judicial justices". This recommendation does not address the salaries or benefits of judges because it would not affect the eligibility of judges to receive LTD benefits or the level of those benefits. Instead, the recommendation seeks to alter the administrative relationship between government and the Office of the Chief Judge. For that reason, it is both unreasonable and outside of the Commission's statutory mandate.