

FINAL REPORT OF THE 2013 BRITISH COLUMBIA JUDICIAL JUSTICES

COMPENSATION COMMISSION

**as clarified following requests for clarification from Chief Judge Crabtree
by letter dated September 11, 2013 and the Province of British Columbia by
letter dated September 18, 2013**

I. INTRODUCTION

A. The Commission's Task

1. Judicial Justices ("JJs")¹ are officers of the provincial judiciary who derive their authority from the *Provincial Court Act*, RSBC 1996 Ch. 379. They are appointed pursuant to section 30.2 and 30.3 of that *Act*. The jurisdiction of the Judicial Justices is defined by section 31 of the *Act* and is designated by the Chief Judge under section 11(1) of the *Act*. The primary functions of the Judicial Justices are: i) sitting in court to hear Violation Tickets disputes issued under the *Motor Vehicle Act* and *Offence Act* and offences under municipal bylaws; ii) acting as 'justices' under the *Criminal Code* hearing applications for judicial interim release (bail) primarily via teleconference or videoconference, search warrants and production orders province wide; and iii) making payment orders under the *Small Claims Act*, RSBC 1996 Ch 430.

¹ In many instances throughout the report Judicial Justices will be referred to by the abbreviation "JJ". We note also that the following acronyms will be used throughout the report: OCJ (Office of the Chief Judge), JJA (Judicial Justice Association of British Columbia), and PCJ (Provincial Court Judge).

2. The work of JJs could otherwise only be done by Provincial Court Judges; as such the JJs provide a great service to the efficient, and effective functioning of the Provincial Court. The current qualification standards for applicants for appointment as JJs are, in practice, the same as those for Provincial Court Judges. Canadians rightly assume that the work of the JJs is carried out impartially by judges who are truly independent of the government and the parties. It bears noting that for many Canadians, probably by a significant majority, the only direct experience or contact with the Judicial system is with Judicial Justices or Provincial Court Judges.
3. The Supreme Court of Canada has recognized the nature and function of the JJs and held that the principles of judicial independence apply to the JJs by reason of the fact that they have the authority and jurisdiction to exercise judicial functions.² One of the core tenets of judicial independence is financial security and the Supreme Court of Canada has recognized the necessity of having an independent Commission review remuneration and make recommendations as to the fair and reasonable remuneration of JJs.
4. The Commission was appointed pursuant to the *Judicial Compensation Act*, SBC 2003 Ch 59 with Ms. Erin D. Dance as Commission Counsel. That statute provides under section 3(1) that, on or before March 1, 2013 and on or before March 1 in every third year after that, five individuals must be appointed to form the Judicial Justices Compensation Commission. As a Commission, and in accordance with section 5(1), the mandate is to provide a report on all matters respecting the remuneration, allowances and benefits of JJs as well as making recommendations with respect to those matters for each of the next three fiscal years. This

² See: *Reference Re Remuneration of Judges of the Provincial Court to Prince Edward Island*, [1997] 3 SCR 3 (the "PEI Reference") and *Provincial Court Judges Association of New Brunswick v. New Brunswick (Minister of Justice) et al.*, [2005] 2 S.C.R. 286 (the "Bodner decision").

Commission's recommendations will cover the period between April 1, 2014 and March 31, 2017.

B. The Process

5. The 2013 Commission is the fifth Commission to report on reasonable compensation of the JJs in British Columbia; the first was established in 2002 under the *Provincial Court Act*, the second, third and fourth Commissions under the present statute made recommendations in 2004, 2007 and 2010, respectively.³

2002 Commission

6. The 2002 Compensation Commission ("Hughes Commission") was the first independent Commission to review compensation of Judicial Justices of the Peace (JJPs). It was created after amendments enacted to the *Provincial Court Act* established the office of the JJP. The Commission made 13 recommendations, including an increase to salary that would have seen a 2.5% increase in each of the years between 2001 and 2003 and a 9.0% increase in 2004. The Legislature accepted nine of the recommendations, including the recommendation for a salary increase in the first year. It rejected the recommendations for the final two years and substituted 0% for each of those years, as part of the 'zero increase' public sector compensation policy then in effect. The base salary at the end of the 2002 Commission mandate was \$73, 872.

2004 Commission

³ The statistics pertaining to the 2002, 2004, 2007 and 2010 Commissions are found in the Government's written submissions at pages 9 – 14.

7. The 2004 Commission ("Lovett Commission"), the first to report to the Legislature under the *Judicial Compensation Act*, recommended increases to remuneration, but on a more modest basis than the previous Commission. The Commission recommended that the salary for JJs be set at \$75,600 effective Jan 1, 2005 with increases of 0%, 2% and 2% in the three subsequent fiscal years. The Legislature rejected the recommendations for 2004 and 2005 in accordance with the continued 'zero increase' in the public sector compensation policy. The Legislature did, however, implement increases to remuneration in 2006/2007 that resulted in an increase of approximately 6.5% over the three years. The base salary at the end of the 2004 Commission mandate was \$78, 654. The Commission also recommended, and the Legislature accepted, a vacation entitlement of 30 days per annum and a \$500 per annum Professional Development Allowance ("PDA") for the JJs.

2007 Commission

8. Shortly before the appointment of the 2007 Commission ("Taylor Commission"), the Office of the Chief Judge created the office of part time JJ. They were to be remunerated on a per diem basis. The Commission was therefore responsible for recommending remuneration for both full time JJs and the new part time (or per diem) JJs. The 2007 Commission was also the first (and, to date, only) Commission to consider JJ compensation at a time where the province's finances were in and predicted to continue in substantial surplus.
9. In the time of surplus, the Commission recommended, and the Legislative Assembly accepted, significant increases in remuneration that amounted to a cumulative increase of 26.5 % resulting in a base salary of \$99, 525 for the full time JJs, by 2010/2011. The Commission also recommended, and the Legislature accepted, an increase of the PDA from \$500 to \$1000.

10. The Commission devised a formula for compensating the new part time JJs on a per diem basis which simply divided the full time salary of the JJs by the number of working days in a year (calculated at 219 days and referred to as the "divisor"). The Commission also recommended that the part time JJs be paid an addition 20% in lieu of benefits, plus \$75 per diem for overhead expenses. The divisor did not take into account the 12 Chambers afforded to the full time JJs. The base rate for per diem JJs was at \$625 /day going into the 2010 Commission; this calculation resulted in a 13.6% increase from the original posted daily rate of \$550/day.

2010 Commission

11. The 2010 Commission ("Neilson Commission") was faced with the challenge of providing recommendations for remuneration at a time of economic uncertainty. As the Neilson Commission noted in its report: at the time of the Report the provincial economy had been significantly affected by the recent global economic recession and after five years of surplus budgets, the Province recorded a deficit in 2009/2010 and projected deficits for the following three fiscal years. The Province had instituted a "net zero" mandate in public sector compensation. In those circumstances the Commission recommended no increase in the first two years of their mandate and an 8% increase in the third year of the mandate. The Commission did not recommend a change to the per diem divisor that was previously set at 219 by the 2007 Taylor Commission.
12. The 2010 Commission recommended that the PDA allowance be increased to \$1500 and that the PDA be available to all JJs. Further, the Commission recommended that the full time JJs have access to Flexible

Benefits and that the Ad Hoc JJs be remunerated in the same manner as the Per Diem JJs.⁴

13. The Legislative Assembly rejected the Commission's recommendations with respect to the 8% salary increase in the third year; compensating the Ad Hoc and the Per Diem JJs in the same manner; and the increase of the PDA amount and expansion of the PDA to include the Per Diems. The Government accepted the recommendation to allow full time JJs to participate in the Flexible Benefits program but delayed implementation until April 2013.
14. The Legislative Assembly, on similar grounds, rejected the Judges Compensation Commission's Recommendations with respect to remuneration of Provincial Court Judges. The Government response was challenged by the Provincial Court Judges Association in a Petition filed in the Supreme Court of British Columbia. We were advised that due to the small membership in the Judicial Justices Association they were not in a position financially to seek a similar Judicial Review in the Supreme Court, notwithstanding that they shared the same complaints.⁵
15. In a judgment dated July 11, 2012, Justice Macaulay of the BC Supreme Court found, in Reasons reported at 2012 BCSC 1022, that the response from the Government, and the Legislative Assembly motion with respect to the 2010 Judges Compensation Commission recommendations did not meet the constitutional test set out by the Supreme Court of Canada. As a result the report was remitted to the Government to prepare a new response. In a subsequent ruling, reported at 2012 BCSC 1420, Justice Macaulay found that the Government's conduct during the process of

⁴ An Ad Hoc JJ is retired full time JJ who now serves in a part time capacity. Their remuneration was set by the government at 80 % of the per diem amount and was done so by using a divisor of 210 as opposed to the per diem divisor of 219.

⁵ JJA written submissions at p. 11.

setting the Judge's salary and during the subsequent Judicial review was such that it was deserving of rebuke, and he took the unusual step of ordering special costs against the government.

16. The Government's second response included a substitution of a 1.5% salary increase for the Judges in the 2013/2014 fiscal year, with the 1.5% representing the estimated change in Consumer Price Index for that year.⁶
17. Counsel for the JJA and the Government were able to reach an agreement that the JJA would not have to proceed with Judicial Review of the Legislative Assembly's response to the recommendations of the Neilson Commission, in order to receive a similar ruling as the PCJs. The Government made a commitment to the JJA that it would ask the 2013 Judicial Justice Compensation Commission to consider the Legislative Assembly's response to Mr. Justice Macaulay's decision.⁷ This is reflected in the Government's position before us that a 1.5% increase is in order for the first year of our mandate.

Commission Process

18. Sections 5(1) (a) and (b) of the *Judicial Compensation Act* set out the statutory timelines governing the Commission's work. The Commission must make a preliminary report, by September 1st of the year of appointment. The report must deal with all matters respecting JJ remuneration, allowances and benefits with recommendations for the following three fiscal years. Under section 5(2), within 14 days of receiving the report the minister or Chief Judge may apply to the Commission to provide clarification. Such clarification, if sought, must under section 5(3) be provided by September 30th. By section 6(1) the Attorney General is to lay the Commission's final report before the Legislative Assembly within

⁶ Summarized from the Government submissions at pp. 13 – 14.

⁷ JJA Submissions at pp. 11-12.

seven days of receiving the report, if sitting, or within seven days of the opening of the next legislative session. The Legislative Assembly may, under section 6(2), reject one or more of the recommendations as being unfair or unreasonable and set the remuneration, allowances or benefits that are to be substituted for the proposed rejected recommendations. Unless the report is rejected, in part or in full, by resolution within 16 days of being laid before the Legislative Assembly, the recommendations of the Commission will have effect from April 1st of the following year. Should the government reject the recommendations of the Commission, they must articulate a legitimate reason why they have done so. We note that any decision of the Legislature to reject the Commission's recommendation is subject to judicial review on the standard of reasonableness.

19. We note with concern that successive governments have rejected recommendations made by previous Commissions, despite the clear language set out by the Supreme Court of Canada in a number of judgments. We hope that this government will reflect on its constitutional obligations, and the rebuke issued recently by the Supreme Court of British Columbia, and will give appropriate consideration to the recommendations of this Commission.⁸
20. Under section 5(5), in preparing the report the Commission must consider:
 - a) the current financial position of the government;
 - b) the need to provide reasonable compensation to the Judicial Justices;
 - c) the need to maintain a strong court by attracting qualified applicants;
 - d) the laws of British Columbia; and
 - e) any other matter the Commission considers relevant.

⁸ See *PEI Reference* at paragraph 183.

21. The statute provides that the Commission may hold hearings in any manner it sees fit including receiving written and oral submissions. In accordance with this section, the Commission issued a Notice of Hearing and Information Circular dated, May 31, 2013, posted on the Ministry of the Attorney General's website and sent by mail or email to interested parties. The Information Circular included the relevant statutory requirements as well as the procedure the Commission would follow in terms of receiving submissions, holding hearings and viewing the work of JJs.
22. Following the precedent set by earlier Commissions, the Commissioners attended at Robson Square Provincial Court and the Justice Centre in Burnaby to view the work of JJs, prior to the Commission hearings.
23. The Commission received written submissions from the Canadian Bar Association, British Columbia Branch. Their submissions did not offer specific recommendations for remuneration, but rather made a number of general recommendations with respect to considerations for the Commission:
- applicable constitutional principles; the judicial nature of the work environment of the JJs;
 - the current financial position of the government as one that allows for fair and reasonable remuneration; widening disparity in the levels of compensation between the JJs and PCJs;
 - the need for competitive compensation to attract qualified applications to the JJ bench;
 - that the applicable laws of British Columbia be applied to ensure the protection of judicial independence; and
 - that the government pay all reasonable costs incurred by the JJABC in preparing and making submissions to the commission.

24. The written submissions from the Canadian Bar Association, British Columbia Branch, also included a useful summary of the applicable case law that should guide the Commissioners through the process.⁹

25. The Commission also received a formal submission from the Judicial Council. The Judicial Council is the body that receives and considers applications for appointment to the Provincial Court judiciary (PCJs and JJs).

26. The Judicial Council is:

...An independent body whose clear responsibility is to assess candidates solely on the basis of merit thereby ensuring that appointments cannot be based on political favour or other inappropriate considerations, nor that there can even be a reasonable perception of that having occurred.

Beyond its role in the appointment process of PCJs and JJs, the Judicial Council has a statutory objective to “improve the quality of judicial service” and has a clear interest in attracting the best possible candidates to the bench.¹⁰

27. While not making any specific recommendations for remuneration the Judicial Council submitted that “the remuneration of judicial justices be maintained at a level that will encourage existing judicial justices to continue in their public services and continue to attract outside applicants with significant and professional adjudicative experiences.”¹¹

28. The Commission was provided with written submissions from five individual JJs as described in Schedule I to this Report; their submissions will be discussed later in this report.

⁹ CBA, BC Branch, written submissions at pages 7-14

¹⁰ Judicial Council Written Submissions at p. 1-2.

¹¹ Judicial Council Written Submissions at p. 12.

29. The *Judicial Compensation Act* refers to the JJA in the process for appointing Commissioners, but does not mandate membership in that association or authority on behalf of all JJs. The JJA has participated in the compensation process since the Act was enacted in 2003. The JJA currently has 11 members, of a total of 35 appointed JJs. The membership includes both full time and per diem JJs. While the Association does not represent all JJs, it does purport to advocate on behalf of the entire compliment. Some JJs made the point in submissions to us, respectfully, that the Association did not represent or speak for them. Some per diem JJs wished to advocate on their own behalf for what they perceive to be their different concerns on matters under review by this Commission. There are also some full time JJs who have chosen to advocate on their own behalf. This Commission has received and considered all of the submissions consistent with its duty to understand the full range of compensation issues that are of concern to all JJs.

30. The Commission held its public hearings on July 23, 24 and 30, 2013 at Robson Square Provincial Court. It received oral presentations from:

- The JJA, represented by Thomas Roper, Q.C.;
- Judicial Justice Anna-Maya Brown;
- Judicial Justice Zahid Makhdoom;
- The Government represented by Richard Meyer, Neil Reimer and Sabine Feulgen, ADM /Secretary to Treasury Board, who was called as a witness during the Government's presentation; and
- Chief Judge Thomas J. Crabtree who appeared in his capacity as the Chief Judge of the Provincial Court and also on behalf of the Judicial Council as the Presiding Member of the Judicial Council.

All of the parties who appeared at the hearings had previously filed written submissions dealing with the range of compensation issues to be

considered by the Commission. The JJA and JJ Brown also filed reply submissions. In addition to the parties who made oral submissions, the Commission was also provided with and considered written submission from JJ Hayes, JJ Holmes and JJ Beer and the CBA, BC Branch. Subsequent to the hearings, the Commission received additional submissions from the Chief Judge addressing questions arising from the Commission members during the course of the Hearings.

C. The Function of Judicial Justices¹²

History

31. The history of the JJs was well canvassed by the Neilson Commission in its Report, beginning at paragraph 19:

19. The history of the JJs dates back to September 15, 1975, when the *Provincial Court Act* amended the position of Justices of the Peace and redefined their jurisdiction. At this time, the first Traffic Hearing Room was established and the Sitting Justices of the Peace were established. From the very beginning the aim was to facilitate fair, efficient and expedited access to justice for summary proceedings. One result of the amendments was to free up the time and resources of Provincial Court Judges. The numbers of sitting justices of the peace gradually increased, as did their jurisdiction, and by 2000 there were 21 full-time and 5 part-time Sitting Justices of the Peace.

20. The 2000 BC Supreme Court decision by Sigurdson, J., in *Re Independence of the Provincial Court of B.C. Justice of the Peace*¹³ was a significant change in the legal position of Sitting Justices of the Peace. That decision held that the Sitting Justices of the Peace exercised a judicial function which in turn called for a guarantee of independence from government. This meant that their compensation should be determined with the assistance of separate compensation commissions.

¹³ *Re Independence of the Provincial Court of B.C. Justice of the Peace*, 2000 BCSC 1470.

Following this decision, the *Provincial Court Act* was amended in 2001 and the position of Judicial Justice of the Peace (JJP) was created.

21. In October 2006, after a review was completed of the work currently assigned to JJPs, and a concurrent general review was undertaken of the entire criminal court process, the make up of the JJPs underwent dramatic changes. A plan was implemented to replace the full-time JJPs with part-time justices recruited from the legal community. The Judicial Council passed a resolution changing the minimum standards required for recommendation for appointment as a JJP to include: a) a degree in law; and b) a minimum 5 years of active practice as a member of the Law Society of British Columbia. These changes were reflected in amendments to the *Provincial Court Act* in 2008, which now limits the appointment of JJP to those individuals qualified to practice law.

22. The first per diem JJs were appointed in July 2007. Compensation packages to the full-time JJs were offered and approximately half the complement of justices elected to end their service. It was anticipated that more JJPs would take up the offer of retirement compensation, with the unusual result that these judicial resources are now being filled by two groups of justices with a different history, background and employment expectation.

23. There are obvious differences between these two groups (full-time JJs and per diem JJs); what is relevant to this Commission is that under both the *Judicial Compensation Act* and the *Provincial Court Act*, all JJs are entitled to security of tenure and financial security.”

Jurisdiction/Function of Judicial Justices

32. The Office of Judicial Justice presently has a complement of 35 working JJs. The JJ complement is comprised of 14 full-time (two whom are on long term disability), 16 per diem and 5 ad-hoc JJs. An Associate Chief Judge oversees the Office of the Judicial Justices and two of the full-time JJs act as Administrative JJs for the province. They are responsible for the day-to-day administration of the JJ system. It is important to note that all JJs work

collaboratively, side-by-side performing the same judicial functions at both the Justice Centre and in Provincial Court; their jurisdiction is identical as is their constitutional protection of judicial independence and financial security.

Justice Centre, Burnaby, BC

33. JJs are available 24 hours a day, 7 days a week, 365 days a year to deal with bail, search warrants and production orders. Much of this work is done through the Justice Centre, which is operational 16 hours per day. From midnight to 8:00 A.M., the Justice Centre operates remotely from the home of a JJ who has been assigned to that shift.

34. Judicial Justices hear applications for judicial interim release at the Justice Center by teleconference or by videoconference. They frequently deal with unrepresented accused and inexperienced police officers with no legal training, both of whom are in attendance by tele or video conference from police detachments. The hearings are conducted without a Court Clerk. The responsibility of the JJs is substantial: they must determine whether accused persons are to be remanded in custody pending their trial, which will be months or even years away, or whether they can be released into the community, and if so, on what terms. This requires a judicious application of the *Criminal Code* provisions respecting bail, and ss. 9 and 11 (e) of the *Canadian Charter of Rights and Freedoms*, which provide a constitutional guarantee to not be denied reasonable bail without just cause.

35. Judicial Justices also hear the majority of the search warrant and production order applications made in the Province by the Police and other law enforcement agencies. These applications are dealt with by telephone, fax and in person. The applications can be straightforward and dealt with in an hour or less or quite complex, requiring a day or more to

decide whether to grant or refuse the application. Almost by definition, search warrants are only sought in the more serious cases. The applications may be very urgent, because of a need to preserve evidence of a recently committed crime, or to obtain evidence in a long term, large and significant criminal investigation. The JJs must carefully consider whether the evidence presented satisfies the tests set out in the *Criminal Code*. An improperly rejected application may result in the collapse of a police investigation and a consequential failure to bring an offender to justice. An application improperly granted may result in the violation of an individual's privacy rights which are protected by s. 8 of the *Charter*, which, in turn, may result in the exclusion of evidence and collapse of a prosecution case. There is an expectation of written reasons, albeit brief, when refusing these applications.¹⁴

Provincial Court

36. As noted in the 2007 Taylor Commission Report:

When presiding in court JJPs are attired and conduct themselves as judges in the ordinary sense, and are seen as such by thousands of people who appear before them each year. To such person there is no more important judge than the one before whom they appear. Judicial Justices are expected to demonstrate the care and patience, courteous consideration and impartial judicial deportment that is required of judges.¹⁵

37. When sitting in Provincial Court, the JJs primarily hear traffic cases but also adjudicate prosecutions of alleged violations of municipal by laws, conduct Small Claims Court payment hearings and hear a variety of claims and charges under numerous other provincial statutes. We were

¹⁴ Samples provided at the hearing and entered as Exhibit 1.

¹⁵ 2007 Judicial Justices of the Peace Compensation Commission Report, p. 7.

advised by the JJA that typical court lists involve between 50 – 60 cases per day. Many litigants who appear before them are unrepresented, do not speak English as a first language and have little or no understanding of our legal system.¹⁶

38. Members of the Commission attended at various hearings conducted by the JJs, including at the Justice Center, to view the JJs at work. Without exception the members of the Commission were impressed by the work done by the JJ's and we have no doubt that the residents of British Columbia are very well served by those that hold the office of Judicial Justice.

II. SUMMARY OF COMPENSATION ISSUES SUBMITTED TO THE COMMISSION

A. Remuneration of Full-Time Judicial Justices

39. The JJs currently earn \$99,525, which has not been increased since 2010. The JJA proposes that the remuneration for JJs be set at 65% of the PCJ's which presently stands at \$234,605 per annum. This would result in an increase of 53% to \$152,493. At present the JJs remuneration is 42% of the PCJs. The 65% level did exist in 1978, although the Commission suspects that that was in great part because the PCJs were then underpaid. The ratio has not reached 60% since 1992 and has been under 50% since 1999. The JJA submissions appreciate that an immediate jump to 65% of the PCJ salary would be a "sharp increase" and conceded "Rome was not built in a day". As such, the JAA leaves it to the Commission to determine a fair salary increase over the three-year mandate would be in order to address what they describe as

¹⁶ JJA Written Submission, p. 4.

the “significant wage disparity” with the PCJs. It almost goes without saying that a 53% increase is not appropriate in today’s economic climate.

40. In support of the submission to link JJ remuneration to that of the PCJs the JJA notes that a number of quasi judicial officers and senior civil servants including Commissioners, Chairpersons of Boards and Statutory Officers of the Legislatures have their salaries set at 100% of the remuneration of a PCJ. Further, Provincial Crown Counsel have a collective agreement with the Province that will set the salary of a senior crown at approximately 85% of the PCJs by 2019. They submit that given the overlap in jurisdiction, the near common criteria for appointment and the close working relationship more strongly justifies a linkage of salary to the PCJs than any other group.
41. The Chief Judge recommended that the compensation of all judicial justices “afford reasonable recognition of the important and valuable work performed by the judicial justices”; be “comparable to those with similar independent adjudicative responsibilities in other fields”; and be maintained at a level to continue to attract and retain judicial justices.¹⁷
42. The Government opposed creating a fixed linkage between compensation of the PCJs and JJs. It based its submissions on the Government’s current fiscal plan in which no new funding is being made available for public sector compensation increases. They proposed that the salary be increased by 1.5% to recognize the ultimate outcome of the 2010 PCJ Commission Process in the first year of the Commission’s mandate; that there be no increase in the second year; and that in the third year the increase be “equal to the percentage by which the province exceeds the current real Gross Domestic Product (GDP) forecast for the previous year.” The Government conceded that, but for an arrangement in Quebec

¹⁷ Written Submissions of the Chief Judge, p. 12

that was not with respect to judicial officers, it knows of no other arrangement in which salary increases are connected to changes in GDP and we reject that proposal as unfair. The Government notes that the present salary of JJs is only .7% below what it would be if the 2009 salary were adjusted for changes in the Consumer Price Index over the same period.

43. JJ Brown sought a “meaningfully higher rate of remuneration than publically paid lawyers [crown and legal aid] who appear before me, and comparatively fair rate in relation to Provincial Court Judges.”¹⁸
44. JJ Makhdoom agreed with the JJA submission to link the JJ salary to that of the PCJ’s and do so at 65%.
45. The Judicial Council made no specific submissions in terms of a quantum of remuneration but submitted remuneration be maintained at a level that would retain the existing JJ and attract new and qualified applicants to the JJ bench.¹⁹

B. Remuneration of Per Diem Judicial Justices

46. A number of the per diem JJs made written and oral submissions concerning the appropriate per diem rate. The submission ranged from an increase of \$725 per day to \$900 per day with small annual increases thereafter. In support of these increases it was submitted that the JJs per diem rate is significantly less than the per diem rate of criminal duty counsel and crown counsel.

¹⁸ Written Submission of JJ Brown at p. 17.

¹⁹ Written Submissions of the Judicial Council, p. 12.

47. JJ Beer submitted that the per diem amount should be increased to \$825/day in the first year of the Commission mandate and increased by 1.5% in each of the next two years of the mandate.

48. JJ Holmes submitted that the per diem rate should be no less than \$900 per day noting that JJs are paid significantly less than criminal duty counsel and crown counsel.

49. JJ Brown submitted that the per diem rate should be between \$725 and \$850/day with annual increases.

50. JJ Makhdoom agreed with JJ Brown's submissions.

51. The JJA supported the submissions of JJ's Holmes, Beer and Brown.

52. The Government opposed any changes to the current per diem compensation formula and thinks any increase in compensation should flow directly from an increase to the full time salary.

C. Professional Development Allowance (PDA)

53. The JJA submitted that the PDA be increased from \$1000 to \$2500 and further that the \$2500 be extended to the per diem JJs. In their submission the JJA notes that the PCJ's PDA is currently \$4000.

54. The JJA observed that the PDA allowance is available for full time JJs to cover reasonable expenses incurred for attendance at courses, seminars or conferences (including travel and expenses); law texts, periodicals and subscriptions; costs associated with a home office; and health and wellness expenditures up to \$300/year. The JJA pointed out that at present the PDA is not sufficient to cover attendance at one course at an out of town location.

55. The Government supported an increase in the PDA amount to \$1500 for the full time JJs and a smaller PDA limited to use for attendance at education opportunities for the per diem JJs.
56. JJ Holmes submitted that the per diem amount should be calculated to include the PDA.
57. JJ Brown agreed with the written submissions of JJ Holmes submitting that the PDA amount should be factored into the per diem amount, as she believed that provided the clearest compensatory scheme. She further submitted that the per diem JJs should receive the same PDA amount as the full time JJs. Ms. Brown supported the Government's submission that the PDA for Per Diems be used for educational purposes.
58. JJ Makhdoom submitted that the PDA must be increased though did not provide a dollar amount. JJ Makhdoom did not agree with JJ Holmes submission that the PDA should be included in the per diem rate as the use of the benefit should be both transparent and conscientious.

D. Education Leave

59. The JJA submitted that the JJs should be given five days of educational leave, in addition to the two mandatory courses per year that are sponsored by the Office of the Chief Judge. The PCJs, on the other hand, are permitted to apply for education leave of up to five days in a calendar year. The JJA submits the courses made available to the PCJs cover material that is equally relevant to the JJs and the five-day education leave should be extended to cover the JJs.
60. The Government made no specific submission on this point.
61. JJ Makhdoom agreed with the JJA recommendation, noting that equalizing the education benefit would be an advantage to the public by

“ensuring adjudication of their matters by a highly qualified learned bench.”²⁰

E. Shift Differentials

62. The JJA submitted that the JJs assigned to the weekend and holiday shift should be paid an additional \$50.00/shift. They asserted that a differential would recognize the sacrifice and inconvenience of working on a weekend or statutory holiday. It was noted that the full time JJs currently receive two days “in lieu” when working on a statutory holiday.
63. The Government opposed the creation of shift differentials, noting that working different shifts (including weekends and statutory holidays) is a fundamental aspect of the JJ role.
64. JJ Beer submitted that there should be an additional allowance for JJs working evenings, weekends and holidays. He submitted that his additional amount should not apply to the full time JJs.
65. JJ Holmes submitted that part time JJs should be paid in the same manner as full time JJs when working on a statutory holiday (i.e. provided days “in lieu) and that there should be allowances for working evenings and weekends.
66. JJ Brown submitted that there should be an additional per diem of 5% for all weekend and statutory holidays shift except for Christmas Day which should attract time and a half compensation.
67. The Chief Judge explained, in oral submissions, that per diem JJs sign a Memorandum of Agreement (MOA) with the OCJ when appointed. The MOA sets out, among other things, the assurance that the JJ is entitled to a minimum of 40 working shifts per year, their remuneration, and the shifts

²⁰ Written Submission of JJ Makhdoom at p. 5.

and assignments that fall on evenings, weekends and statutory holidays the and the willingness of the particular JJ to accept these shifts, as set out in Schedule I to each MOA.

68. Schedule I is a document provided to the Judicial Council by the applicant when they apply for the JJ position. It contains an indication of when the JJ is prepared to work. This document varies from JJ to JJ; some indicate a willingness to work weekends, while others might indicate only Monday – Friday availability. The Judicial Council considers this document in determining what appointments are made.

69. The Chief Judge noted in his submissions that “shift differentials” are not contemplated in the MOA nor did he believe they had ever been part of the full time JJ compensation scheme.

F. Senior JJ Program

70. The JJA submitted that a Senior Judicial Justice Program be implemented in 2014 for the current full time Judicial Justices. In 2003, following recommendations from the 2002 Judges Compensation Commission, the *Provincial Court Act* was amended to create a Senior Judge Program. This program was to act as a transition to full retirement. It permits Senior Judges to work half time at 40% salary. Both parties benefit by cost saving, as the senior judges do not pay pension contributions.

71. The JJA submits that the Senior Judicial Justice Program could, with slight modification, apply to the JJs. Their rough calculations suggest that for each Senior JJ the government would realize approximately \$59, 715 in savings in addition to the savings in pension contributions. It was also submitted that a Senior JJ program would increase the flexibility of the part time pool without the necessity of new appointments.

72. JJ Makhdoom agreed with the JJA's position.

73. The Government took the position that the subject of a Senior Judicial Justice Program requires more information and consultation before it can be rationally recommended at this time.

74. The Chief Judge, in oral submissions, said that the suggestion required further study and evaluation before he could comment.

G. Elimination of Distinction between Ad Hoc and Per Diem JJs

75. The JJA submitted that all part time JJs (Ad Hoc and Per Diem) should be compensated at a single per diem rate. At present there are five Ad Hoc JJs who are compensated at 80% of the per diem, an amount that is submitted to be arbitrary. The JJA submits that all part time JJs should be compensated in the same manner as they are performing the same functions and duties.

76. The Government submitted that the best way to deal with this issue would be for the Commission to recommend a study to consider the issues surrounding the retired JJs who are now remunerated as Ad Hocs and receiving a pension. It appeared to be contemplated that this study would be part of a larger study into the desirability of a Senior Judge program.

H. Costs incurred

77. The government agreed to reimburse the JJA for its reasonable costs up to a maximum amount of \$25, 000, pending the provision of a reasonably detailed description of those costs.

78. The JJA accepted the Government's offer.

III. APPLICATION OF THE CRITERIA SET OUT AT S. 5(5) OF THE ACT

a) **The Current Financial Position of the Government (s. 5(5) (a))**²¹

79. Section 5(5) of the *Act* instructs the Commission to consider five factors in preparing its report. The first factor, “*the current financial condition of the government*”, forms the foundation of the government’s position that it is unable to recommend any increase to the remuneration of the JJs over the next 3 fiscal years beyond the 1.5% increase in the first year to reflect the Legislative assembly’s reconsideration of the 2010 Provincial Judge’s Commission Report following Judicial Review. The government submitted that while there have been “modest improvements” following the global economic recession and signs of recovery” the economic forecast both domestically and globally is “still precarious and vulnerable to significant downside risk.”

80. The *June Budget 2013 Update* from the Province indicates a “slight deterioration” in the fiscal plan since February 2013. Likewise, the Ministry of Finance’s nominal GDP forecast for BC was lowered in the June 2013 Budget Update from 3.5 % to 3.1%. In terms of real GDP growth the Province forecast is for 1.4% in 2013, 2.2% in 2014 and 2.5% in each of 2015 and 2016.

81. The Economic Forecast Council, in a May survey, had similarly lowered its outlook forecasting nominal GDP growth at 3.2 percent which was down from the 4.0% forecast in January.

82. In order to mitigate these risks to the 2013/2014 – 2015/16 fiscal plans, the Province has incorporated four level of prudence to these current forecasted estimates²²:

²¹ Written Submissions of the Government at pp 15-28.

²² Government Written Submissions at p. 16

- a. A lower outlook for BC's real GDP growth than the outlook from the Economic Forecast Council;
- b. A price forecast in the lowest 20th percentile of the private sector for natural gas revenue;
- c. A forecast allowance of \$150 million in 2013/14, \$200 million in 2014/2015 and \$300 million in 2015/2016 to guard against revenue volatility; and
- d. A Contingencies Vote allocation of \$225 million in each year of the fiscal plan to help manage unexpected pressures and to fund critical priorities.

83. The current Government fiscal plan states a commitment to “delivering balanced budgets starting in 2013/14, paying down debt and continuing expenditure growth management to help advance the goal of a debt free BC, while at the same time protecting core service for healthcare, education, skills training and social supports, funding government priorities, and providing vital infrastructure such as hospitals, schools, post-secondary facilities, transit and roads.” It is submitted that the fiscal plan requires “fiscal discipline, making tough decisions and trade offs based on over all priorities.”

84. The Government projects surpluses of \$153 million in 2013/14, \$154 million in 2014/15 and \$446 million in 2015/16, but stressed that the surpluses “did not represent a return to the Province’s pre-recession financial position”; in other words the surpluses projected are in no way akin to the financial position during the Taylor Commission in 2007. As an example, it is apparent that the surpluses for 2013 and 2014 will be

funded almost entirely through the sale of surplus government assets expected to generate \$600 million in revenue for the province.

85. The JJA submits, in reply to the Government's submission that the overview of the Government's financial position "does not suggest that there is any reason to weigh this criterion against the need to provide reasonable compensation to judicial justices." In support of that position they note the following:

- a. The Government is projecting surpluses in all years of the Commission's mandate
- b. The Provincial debt level is comparatively low in comparison to other Provinces;
- c. The Government forecasting is conceded to be conservative; and
- d. With respect to risks to the fiscal plan none of the risks are likely to materialize.²³

86. The JJA further points out that the Government's current financial mandate is a negotiating mandate and JJs have no ability (and ought to have no ability) to negotiate or influence government budgets.

87. As acknowledged by the Province's representatives at the Commission hearing, this criteria does not serve as a controller or filter to be applied once the other criteria have been considered. It is an important consideration but only one of several. The fact that the Province is

²³ See Appendix A of the JJA Reply Submissions: The Report of Ian McKinnon on Government's Financial Position.

justifiably committed to balancing its budget does not mean that every fiscal category must be treated with the same “net zero” formula. The Province has the ability and room in their fiscal structures with contingency accounts to enable it to prioritize and adjust its financial resources to meet its constitutional and statutory obligations to ensure that its judicial officers are sufficiently compensated to ensure their independence.

88. On the other hand the Commission is mindful that the Supreme Court of Canada has made it clear the judges should not be immune from legitimate and reasonable restraint measures. In *PEI Reference* (Supra) (at para 196) the majority of the Court held:

Finally, I want to emphasize 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. 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. Rather, as I said above, financial security is one of the means whereby the independence of an organ of the Constitution is ensured. Judges are officers of the Constitution, and hence their remuneration must have some constitutional status.²⁴

On the evidence before the Commission it is apparent that the economic outlook for British Columbia is for very modest improvement that is vulnerable to real downside risks both domestically and globally. The government is continuing its restraint policies in its efforts to balance the B.C. Budget. In reaching our conclusion on the reasonable remuneration

²⁴ See *PEI Reference* at paragraph 196.

for JJ's the Commission is of the view that the Judiciary should not be immune from the effects of the economic circumstances facing the province over the next 3 years.

b) The Principle of Reasonable Compensation (s. 5(5) (b))

89. What is a reasonable salary and what considerations influence its determination? As a starting point, we recognize the importance Judicial Justices play in the administration of justice in our province. Secondly, from our direct observation, and from the representations to the Commission from the Province and the Chief Judge and from reading previous reports, it is clear that the JJs, as a group, demonstrate an exemplary professional dedication to and a pride in the performance of their duties under often stressful and emergent circumstances. These considerations must be weighed, together with the fact that the Judicial Justices performs their responsibilities working closely with members of the Provincial Court Bench, as well as with members of the bar, representing the Crown or individuals engaged in the juridical process. Reasonable remuneration should reflect the similarities to comparators such as Provincial Court judges and Crown Counsel qualifications. Any perceived difference in the importance and complexity of the work performed by and the qualifications of Judicial Justices does not justify all of the current gap in remuneration, particularly as compared to the Provincial Court Judges. A reasonable salary should reflect the common qualifications and hard work of the individuals and the common

importance of their endeavours. A reasonable compensation requires some closing of these financial gaps in recognition of the importance of the work done by the JJs.

90. The Taylor Commission provided a significant increase to the JJs in 2008/2009 and presumably recommended reasonable remuneration for JJs at that time based on the circumstances before them. We note that since that report the increases for the JJs have allowed them to keep pace with CPI. Between 2009 and 2013, the CPI has increased 5.7% and the JJs have received cumulative increases of 6.5% (based on a simple addition of the annual increases for both CPI and salaries respectively) (data from p.30 of provinces submission). However, CPI is but one consideration. The Commission has also considered other comparators in both the justice system and with government generally. We note that JJs have been frozen at 0 increases in each of the past two years. Some public sector employees have been eligible for "co-operative" gains increases or increases through normal progression through salary bands or promotions. JJs do not have the opportunity for promotion, nor would co-operative gains be appropriate, as they would risk the independence of the Judiciary. As a whole the Commission finds that the economic outlook for the province is not such that a modest increase in remuneration for JJs would be out of order provided the Commission finds it to be in the public interest.

c) Attracting Qualified Candidates (s. 5(5) (c))

91. S. 5(5) (c) of the *Act* requires the Commission to consider the “the need to maintain a strong court by attracting qualified applicants.” The Lieutenant Governor in Council appoints Judicial Justices on the recommendation of the Judicial Counsel. We are advised that the appointment process in place is similar to that of the PCJs.
92. As noted earlier, in October of 2006 the Judicial Council passed a resolution changing the minimum qualifications for a then judicial justice of the peace to include a degree in law and a minimum of five years of active practice as a member of the Law Society of BC. In 2008 that resolution was reflected in the change to the *Provincial Court Act* providing for the appointment of lawyer per diem judicial justices.
93. The Judicial Justices appointed since the change to the *Provincial Court Act* in 2008 have all been per diem JJs and are provided with a minimum of 40 working days per year and are appointed for a single 10-year term.
94. The Commission was advised that at present there is a “pool” of two candidates who have been approved by Judicial Council and further that in the first half of 2013 the Judicial Council has received three new applications. It was noted that there has been no solicitation for JJ applicants since 2010.
95. There was no compelling evidence led by any party to suggest that difficulties were being experienced in attracting “qualified applicants”. In addition, we heard that only one of the JJs appointed in 2007 had resigned; they left to return to full time legal employment. In the written submission of the Judicial Council it was noted that they “may take steps to more actively recruit applicants with a view to increasing the size of the approved candidate pool” as more JJs get closer to retirement and/or the end of their 10 year appointment.

96. It was further noted in the oral submissions by the Chief Judge on behalf of the Judicial Council, that while there is presently a desire to make several appointments in order to reduce the number of shifts being worked by the current compliment, the Council is also aware of the potential reduction to the work load of the JJs if and when the traffic ticket resolution moves to an administrative adjudicative model.²⁵ Further uncertainty respecting workload flows from the recommendations contained in the recent report of Geoffrey Cowper Q.C. As such, at this point in time, there is no active movement towards making new appointments.

97. The shared sentiment from the Judicial Council, Chief Judge and the CBA (who all play an active role in the application process) was that compensation needed to be maintained at a level that would continue to attract outside applicants with significant professional and adjudicative experience to maintain a strong JJ bench.

(d) Laws of British Columbia (s. 5(5) (d))

98. There are no Laws of British Columbia that influence the consideration of the Commission's recommendations in the report.

(e) Other Matters the Commission Considers Relevant (s. 5(5) (e))

99. There are no other issues the Commission considered relevant to its recommendations.

²⁵ The Government notes that the legislative changes to ticket dispute resolution are targeted for implementation for 2017.

VII. THE COMMISSION'S CONCLUSIONS AND RECOMMENDATIONS

A. Remuneration of Full-Time Judicial Justices

100. Weighing all of the criteria set out at s. 5(5) (a) through (e) of the Act as discussed above we have decided that it is necessary to recommend an increase in JJ salary over the three years of the Commission's mandate. Our recommendation will result in a very modest closing of the gap with the current salary of Provincial Court Judges, but is a start in recognizing that the existing gap is too wide and results in unreasonably low remuneration for JJs. The Commission has concluded that the increase recommended by Government is insufficient and that sought by the JJs is neither reasonable nor achievable.

101. **RECOMMENDATION** – The Commission recommends that there be a 5% increase to the JJ salary in the first year of our mandate, a 2% increase in the second year of the mandate and a further 2% increase in the third year of this Commission's mandate.

102. The Commission does not recommend that the JJ salary be tied to that of a PCJ as it is believed that creating that link would remove the necessary flexibility required to address future changes in the JJ qualifications, job description and time demands, jurisdiction and other matters which cannot be properly assessed at this time.

103. The Commission recommends that the per diem compensation formula should be amended to reflect the fact that JJs receive 12 Chambers days per annum. Thus the divisor should be reduced to 207. We heard no submissions that the current provisions for a 20% allowance in lieu of benefits or \$75 per diem allowance for overhead be changed, and we recommend that they continue.

B. Professional Development Allowance

104. The Commission recognizes the importance of maintaining expertise in the areas of the JJs jurisdiction, and in the criminal law generally. The Commission also recognizes that some of the full time JJs are not legally trained, and that the per diem JJs are prohibited from practicing criminal law. Mistakes in the bail and search and seizure decisions made by JJs can be costly in both financial and human terms. The law of Search and Seizure, particularly, is complex and continually evolving. The only way for the JJs to remain current is to ensure that they receive sufficient continuing professional education. The only way to ensure that that happens is to ensure that sufficient financial resources, and time, are made available to them. To do otherwise would be “penny wise and pound foolish” and would work a disservice to the people of British Columbia.

105. **RECOMMENDATION** – The Commission recommends the PDA amount be set at \$1500.00 for all JJs. The Commission further recommends that the PDA have the ability to “roll over” for one year for all eligible items.

C. Educational Leave

106. **RECOMMENDATION** – Acknowledging that the JJs are already attending five days of courses sponsored by the OCJ, the Commission recommends that an additional two days of educational leave be available for all JJs and that they the ability to “roll over” in the same fashion as the PDA.

D. Shift Differentials

107. **RECOMMENDATION** – The Commission does not recommend that there be a provision for shift differentials. The Commission feels this would interfere with the existing arrangements between the per diem JJs and the OCJ pursuant to the various Memoranda of Agreement applicable to each per diem JJ.

E. Ad Hocs as Per Diem

108. **RECOMMENDATION** – The Commission found no reasonable basis to provide a recommendation that the Ad Hoc JJs be remunerated in the same manner the as Per Diem JJs.

F. Senior Judge Program

109. **RECOMMENDATION** - The Commission was not provided with sufficient evidence that would clearly recommend the need for a Senior JJ program. Accordingly, we do not recommend that such a program be put in place. Furthermore, the Commission has been provided with no basis to support the recommendation that public funds be spent on a study into the possible need for a Senior JJ program and therefore will not be making a recommendation in that regard. It is the Commission's view that if this proposal is to move forward that those interested consult with the Chief Judge to better formulate the need, purpose and feasibility of such a program.

We submit this Final Report and Recommendations under Section 5(1) of the *Judicial Compensation Act*, made at Vancouver, B.C., this 30th day of September, 2013.

“Murray Clemens”

MURRAY CLEMENS, Q.C.
Chair

“Randal Kaardal”

RANDAL KAARDAL
Commissioner

“David Butcher”

DAVID BUTCHER, Q.C.
Commissioner

“Beverly Park”

BEVERLY PARK
Commissioner

“Brian Burtch”

DR. BRIAN BURTCH
Commissioner

SCHEDULE I

Written Submissions Received by the Commission

<u>Party</u>	<u>Date</u>
Judicial Justice Gerry Hayes	June 14, 2013
Judicial Justice Association	June 28, 2013
Judicial Justice Anna-Maya Brown	July 2, 2013
Judicial Justice Tim Holmes	July 3, 2013
Judicial Justice Bradley Beer	July 6, 2013
Government of British Columbia	July 8, 2013
Judicial Justice Tim Holmes (Reply)	July 9, 2013
Judicial Justice Anna-Maya Brown (Reply)	July 11, 2013
Judicial Justice Association (Reply)	July 17, 2013
Chief Judge	July 17, 2013
Judicial Council	July 17, 2013
Canadian Bar Association, BC Branch	July 17, 2013
Judicial Justice Zahid Makhdoom	July 17, 2013
Government Power Point Presentation	July 19, 2013
Chief Judge (Reply to Commission Inquiries)	Aug 19, 2013

SCHEDULE II

Exhibits Received at the Commission Hearings July 23, 24 & 30, 2013

<u>No.</u>	<u>Description</u>	<u>Date Received</u>	<u>Party</u>
1.	Sample Written Decisions from Judicial Justices	July 23, 2013	JJA
2.	Alberta Justice of the Peace Act	July 24, 2013	JJA
3.	Alberta Justice of the Peace Regulations	July 24, 2013	JJA
4.	Sample Memorandum of Agreement between the Office of the Chief Judge and the Per Diem Judicial Justices	July 30, 2013	Chief Judge
5.	Judicial Administration Policy Re: Unassigned Days	July 30, 2013	Chief Judge
6.	Example of Divisor Calculations	July 30, 2013	Chief Judge