

REPORT OF THE 2010 BRITISH COLUMBIA JUDICIAL JUSTICES
OF THE PEACE COMPENSATION COMMISSION

I. INTRODUCTION

A. The Commission's Task

1. Judicial Justices of the Peace (“Judicial Justices”)¹ are officers of the provincial judiciary who derive their authority from the *Provincial Court Act*, RSBC 1996 Ch. 379. The jurisdiction of the Judicial Justices is contained in section 31 of the Act. The functions of the Judicial Justices, as assigned by the Chief Judge, primarily include: i) sitting in court to adjudicate ticket violation offences under provincial statutes, primarily traffic offences, and under municipal bylaws; ii) acting as ‘justices’ under the *Criminal Code* hearing applications for judicial interim release (bail) 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.

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. 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. 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

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 Justices Association of British Columbia), PCJ (Provincial Court Judge) and PCJA (Provincial Court Judges Association).

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.

3. This Commission was appointed pursuant to the *Judicial Compensation Act*, SBC 2003 Ch 59 with Ms. Erin D. Dance as Commission Counsel. The statute provides under section 3(1) that on or before March 1, 2010 and on or before March 1 in every third year after that, 5 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. For this Commission the recommendations will cover the period between April 1, 2011 and March 31, 2014.

B. The Process

4. The 2010 Commission is the fourth Commission to review compensation of the JJs in British Columbia; the first was established in 2002 under the *Provincial Court Act*, as it then was, the second and third commissions under the present statute made recommendations in 2004 and 2007 respectively.³

2002 Commission

5. The 2002 Compensation Commission was the first independent Commission to review compensation of JJs. The Commission made 13 recommendations, including a substantial increase in compensation. While the Legislative

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”).

³ The statistics pertaining to the 2002, 2004 and 2007 Commissions are found in the government’s written submissions at pages 7 – 10.

Assembly accepted nine of the recommendations, they largely rejected the recommendations for salary increases. Specifically, the Commission had recommended an increase to salary that would see a 2.5% increase in each of the years between 2001 and 2003 and a 9.0% increase in 2004. The Legislature rejected the recommendation for the final two years and substituted a 0% increase to reflect its 'zero increase' public sector compensation policy. The base salary going into the 2004 Commission was \$73, 872.

2004 Commission

6. The 2004 Commission, the first to report to the Legislature under the *Judicial Compensation Act*, also recommended increases to remuneration, but on a more modest basis than the previous Commission. The Commission recommended the salary for JJs be set at \$75,600 for Jan 1, 2005 with increases of 0%, 2% and 2% for the remaining three fiscal years. Again, following the zero increase in the public sector mandate, the Legislature rejected the recommendations for 2004 and 2005. The Legislature did, however, implement increases to remuneration in 2006/2007 that resulted in an increase of approximately 6.1% over the three years. The base salary going into the 2007 Commission therefore was \$78, 654. The 2004 Commission also recommended, and the Legislature accepted, vacation entitlement to be set at 30 days/year as well as a \$500/year Professional Development Allowance ("PDA") for the JJs.

2007 Commission

7. The 2007 Commission was the first Commission to consider the compensation of the JJs at a time when the province's finances were in substantial surplus. The Commission recommended, and the Legislative Assembly accepted, significant increases in remuneration that would amount to a cumulative increase of 26.5 % and a base salary of \$99, 525 by 2010/2011. The Commission also recommended, and the Legislature accepted, an increase of the PDA from \$500 to \$1000.

8. The 2007 Commission was also the first Commission tasked with determining the appropriate remuneration for the newly created “per diem” JJs. When the position of the per diem JJ was first posted, the initial rate of pay was set at \$550/day. The Commission drafted a formula for compensation that divided the full time salary of the JJs, plus benefits, by the number of working days in a year plus \$75 for overhead expenses. The base rate for per diem JJs was set at \$625 /day by 2010/2011; this calculation resulted in a 13.6% increase from the original posted daily rate.

2010 Commission

9. The 2010 Commission is faced with the challenge of providing recommendations for remuneration at a time of economic uncertainty. As was emphasized to the Commission by the government in their written and oral submissions, the provincial economy has been significantly affected by the recent global economic recession. After five years of surplus budgets, the Province recorded a deficit in 2009/2010 and projects deficits for the next three fiscal years.⁴ These circumstances, the government asserted, are markedly different from the picture of public finances in 2007.
10. 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 1 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 30. By section 6(1), the Attorney General is to lay the Commission’s final report before the Legislative Assembly within 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

⁴ See the government’s written submissions at page 11.

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 28 days of being laid before the Legislative Assembly, the recommendations of the Commission will have effect from April 1 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 may be subject to judicial review on the standard of reasonableness.⁵

11. Under section 5(5), in preparing the report the Commission must consider: the current financial position of the government; the need to provide reasonable compensation to the Judicial Justices; the need to maintain a strong court by attracting qualified applicants; the laws of British Columbia; and any other matter the Commission considers relevant.

12. The statute provides in section 5(6) that the Commission may hold hearings in any manner they see fit including receiving written and oral submissions. In accordance with this section, the Commission issued a Notice of Hearing and Information Circular on April 9, 2010, posted on the Ministry of the Attorney General's website and sent by mail or email to:
 - The Attorney General of British Columbia
 - The Chief Judge of the Provincial Court
 - Provincial Court Judges Association
 - Legal Services Society
 - Trial Lawyers Association of British Columbia
 - Canadian Bar Association (British Columbia Branch)
 - Law Society of British Columbia

⁵ See *PEI Reference* at paragraph 183.

- British Columbia Association of Chiefs of Police
- British Columbia Crown Counsel Association
- Judicial Justices Association of British Columbia and
- All Judicial Justices

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.

13. Following the precedent set by earlier Commissions, the Commissioners attended at the Justice Centre in Burnaby, the Richmond Provincial Court and the Robson Square Provincial Court on June 12, 14, and 15, respectively, to view the work of JJs.
14. The Commission received written submissions from the Trial Lawyers Association, the Canadian Bar Association (British Columbia Branch) and the Law Society. While their submissions did not offer specific recommendations for remuneration, the written submissions were unanimous in their recognition of the importance of the work done by the JJs as well as the need to ensure that their remuneration was fair and reasonable and remained at a level that protected judicial independence and maintained a strong court by attracting qualified applicants. The written submissions from these parties also included a useful summary of the applicable case law that should guide the Commissioners through the process.
15. The Commission also received a formal submission from the Judicial Council. The submissions gave the Commission an overview of the history and current role of JJs and focused on the relationship between compensation and the need to attract the best candidates in the province and to retain the “fine judicial officers” appointed previously. Similar to the above-mentioned parties, no specific

recommendations were provided for remuneration beyond the statement that the salary ought to be at a level capable of attracting and maintaining a strong court.

16. The per diem JJs, or lawyer JJs as they refer to themselves, also provided a written submission to the Commission. Their proposals dealt primarily with remuneration and will be discussed later in this report.

17. The *Judicial Compensation Act* only recognizes JJs as a single group. However, the appointment of per diem JJs in 2007 has led to a decision by them to form a separate group to advocate what they perceive to be their different concerns on matters under review by this Commission. This Commission has received their representations consistent with its duty to understand the full range of compensation issues that are of concern to all JJs whether they are full-time, per diem or ad hoc appointees.

18. The Commission held its public hearings on June 28, 29 and 30 at the UBC Robson Square Campus. It considered oral submissions from:
 - The JJA represented by Thomas Roper, Q.C.⁶
 - Zahid Makhdoom, JJ, in person
 - The government represented by Richard Fyfe, Q.C., Neil Reimer and Deputy Minister of Finance, Graham Whitmarsh
 - The Honourable Thomas J. Crabtree, Chief Judge who appeared with his colleague, Associate Chief Judge, Honourable James Threlfall.

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 also filed reply submissions in response to the written submissions of the per diem JJs, the government and the Chief Judge. Subsequent to the hearings, the Commission received additional clarifying submissions from the government, the Chief Judge and the JJA.

⁶ The JJA has 18 members and under the *Judicial Compensation Act* appears on behalf of all JJs.

C. The Function of Judicial Justices

History

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 amendment 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*⁷ 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 recommending commissions. 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 JJs underwent dramatic changes. A plan was implemented to replace the full-time JJs with part-time justices recruited from the legal community. The Judicial Council passed a resolution changing the

⁷ *Re Independence of the Provincial Court of B.C. Justice of the Peace*, 2000 BCSC 1470.

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 limit the appointment of JJs to those individuals qualified to practise 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 JJs would take up the offer of retirement compensation, with the unusual result that these judicial resources are filled by two groups of justices, each with a different service 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

24. At present there are 15 full-time, 17 per diem and 6 ad-hoc JJs. In addition, three of the full-time JJs act as Administrative JJs for the province and are responsible for the day-to-day administration of the JJ system. All JJs work side-by-side performing the same judicial function both at the Justice Centre and adjudicating in Provincial Court; their jurisdiction is identical as is their constitutional protection of judicial independence and financial security.

Justice Centre, Burnaby, BC

25. 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. When the Justice Centre is not open, JJs are available on an on-call basis.

26. Judicial Justices deal with judicial interim releases at the Justice Centre by teleconference or by videoconference. In conducting these hearings they are frequently dealing with unrepresented litigants and inexperienced police officers. As in court, these hearings are conducted without the benefit of additional support staff. The responsibility of the JJs is considerable as the outcome of these hearings could result in the incarceration of an individual until the conclusion of their trial – regardless of whether the individual is ultimately found guilty of the offence charged. We are informed that since the last Commission in 2007, JJs have conducted 53, 000 bail hearings.⁸

27. Judicial Justices also hear the majority of the Province’s search warrant and production order applications; these are dealt with by telephone, fax and face to face from every part of the province. The applications can be straightforward and dealt with within an hour or quite complex requiring a day or more to decide to grant or refuse the application. The JJs must be cognizant of the *Charter* and the *Criminal Code* when processing these applications; theirs is the role of the “gatekeeper” between an individual’s privacy rights and state intervention, often in the face of urgent circumstances. There is an expectation of written reasons, albeit brief, when refusing these applications. Since 2007, 13, 500 applications for search warrants and production orders have been processed by the JJs.⁹

Provincial Court

28. As noted by Martin Taylor, Q.C., in the 2007 Commission Report:

When presiding in court JJP’s 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.

⁸ JJA submissions at p. 6.

⁹ JJA submissions at p. 8.

To such persons 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.¹⁰

29. When sitting in Provincial Court, the JJs primarily adjudicate traffic cases but also hear municipal bylaw cases, Small Claims payments hearings and a variety of other claims and charges under 77 other provincial statutes. We are advised by the JJA that standard sittings in these courts are 15 minutes per trial or hearing with up to 60 hearings a day.
30. In 2009, JJs adjudicated over 90, 000 hearings.¹¹ These hearings are conducted, for the most part, without any additional support, security or assistance. They are also conducted primarily with unrepresented litigants and sometimes with the aid of interpreters. There is an expectation and obligation on the JJs to take care to explain the process to litigants. JJs must apply the principles of natural justice, procedural fairness and the rules of evidence. They have the ability to impose fines for traffic and bylaw offences and their adjudication of traffic offences can potentially result in a change in insurance premiums or a suspension of licence. At the conclusion of the hearings, reasons will be given, typically orally.
31. Judicial Justices serve on the front line of the criminal justice process and daily perform judicial functions that can, and do, profoundly impact the rights, liberties and livelihoods of individuals. For many appearing in front of JJs, this will be their only interaction with a court, and as such the JJs are the face of the court and, for all intents and purposes, the only judge they will ever know. While there is a clear and meaningful distinction between the roles and functions of a JJ and a

¹⁰ 2007 Judicial Justices of the Peace Compensation Commission, p. 7.

¹¹ According to the submission from the Judicial Council, in 2009 there were 230, 285 cases heard in the Provincial Court of British Columbia. Of these cases, JJs presided over 15, 300 bylaw cases and 80,195 traffic cases.

Provincial Court Judge, the role the former plays within the provincial judiciary is important to the fair, efficient and expeditious functioning of the Provincial Court.

32. It is the responsibility of the Commission to prepare its recommendations mindful of these considerations and the requirements set out in section 5(5) of our governing Act.

II. SUMMARY OF COMPENSATION ISSUES SUBMITTED TO THE COMMISSION

A. Remuneration of Full-Time Judicial Justices

33. The JJA proposes an increase in remuneration of full-time JJs over the next three fiscal years @ 8% annually, resulting in \$ 107,487 (2011-12), \$ 116,085 (2012-13) and \$ 125,372 (2013-14). This is described as a “nominal increase” necessary to address the ongoing salary imbalance between the PCJs, their “most logical” comparator, and the JJs.
34. The Chief Judge “supports the representations made by the JJA for appropriate increases to their salary level” without further comment or elaboration, specifically without mention of the appropriate “balance” to be struck between the respective remuneration of PCJs and JJs. His comments on the base rate/divisor calculations for the per diem JJs will be addressed separately.
35. The Government is unable to recommend any increase to the remuneration of JJs over the next three years, given the significant budgetary challenges facing the government, its net-zero public sector compensation mandate, and what is deemed to be reasonable remuneration and benefits available to JJs resulting from the 2007 JJPCC process of 26.5 % over 3 years (to March 31, 2011), under which total compensation (including benefits and allowances) stands at \$118,528.

36. JJP Makhdoom submits that JJ remuneration should rise to 62-65% of PCJ's level, in line with the 1978 benchmark figure.
37. The Judicial Council of BC “respectfully adopts the analysis presented in the JJs submissions” for full-time JJs, without further reference to specific remuneration figures.
38. The Law Society of BC reiterated the Society's representations to the 2007 JJPCC that financial security and competitive remuneration and benefits were essential public interest values in ensuring and protecting a strong and independent judiciary from government influence or pressure.
39. The Trial Lawyers Association of BC noted that “the pay rates of full-time JJs and per diem JJs are substantially below what they ought to be” and are “unduly low notwithstanding the range of compensation paid to others in the justice system”. Particular note was made of the 2007 JJPCC's observation that there ought not to be too great a disparity between the pay of BC Supreme Court judges and those of the PCJs, without accepting the argument for a formal tie between the two pay rates. The pay rates, according to the TLABC's reading of the 2007 Report, should instead be “considered in relation to each other” to avoid unreasonable disparities within the hierarchy of the courts' pay ranges; such reasoning applies to the JJ-PCJ situation.
40. The Canadian Bar Association (BC Branch) recommended that the Commission award “fair and reasonable compensation commensurate with the duties and responsibilities of JJs.

B. Remuneration of Ad Hoc and Per Diem Judicial Justices

41. The Ad Hoc JJs are PCJs or JJ retirees who take up JJ duties on a part-time basis. Currently there are 6 ad hoc JJs. The 2007 Commission recommended their remuneration utilizing a formula equivalent to the full-time JJ salary divided by a ‘divisor’ of duty days for full-time JJs, plus percentages for benefits and \$75 per

day to recognize fixed overhead expenses. Specifically, the JJA recommended a “reasonable formula for a daily salary calculation” for both ad hocs and per diems as follows: JJ full-time salary divided by divisor (219) + benefits @ 23.8% (accepting the Chief Judge’s figure) + \$75 = the daily work rate.

42. The Chief Judge submitted that the divisor calculation for per diems and ad hoc JJs should be the same, following the reasoning of the 2007 Report. If the fixed overhead rate of \$75 is subtracted, the pay results for both part-time JJs are almost identical and appropriate, a point also made by the JJA, who argued for the inclusion of the \$75 overhead amount for the ad hoc JJs on equitable grounds.
43. The Government did not make separate recommendations concerning the ad hoc or per diem JJs’ remuneration. The freeze applies to all aspects of remuneration for all JJs, whether full-time, ad hoc or per diem.
44. The Per Diem JJs submitted that any increase in the full-time JJ’s salary be reflected in their own rate (an argument implicit in the JJA representations), while recommending a benefits amount set at 25% as a “fair and middle point” and an overhead amount of \$85, up from the present \$75. The group seeks a revised divisor figure that would subtract of 9.5 days to reflect out of court chambers days and their claim of longer workdays vis-à-vis full-time JJs, amounting to 20 minutes per 8 hour shift. Additional comparisons were made to duty counsel and Crown counsel daily rates, for example, appearing on bail hearings in which they are paid “substantially more” than the per diem JJs who preside over the hearings.
45. The Chief Judge accepted the per diem divisor submission and recommended that the divisor for per diems should be between 205-210 to better take into account sick days and unassigned work day issues. The more accurate amount for benefits is 24.5% and no position was taken on the per diem claim for an increase in overhead. Thus, the proper per diem formula should be full-time salary/207 + benefits @ 24.5% + \$ 75 overhead.

46. The JJA on Per Diems accepts the 24.5% full time benefits figure and the Chief Judge's \$75 overhead per diem rate but takes issue with his 207 divisor, preferring 219, resulting, in their view, in a per diem compensation formula of full-time JJP salary/219 @ 24.5% + \$75 overhead for the per diem JJs.
47. The JJA's governing principle is that there should be equal pay for equal work for all JJs, without additional premiums for the law degrees of the per diems. In their reply submission to the Chief Judge, the JJA takes issue with the reasoning that 12 judgment days or unassigned days should be removed from the divisor for the per diem JJ rate calculation, arguing that these are workdays both in principle and by the terms of the Judicial Administration and Policy Procedures Manual. The Chief Judge's divisor recommendation would leave them as working days for full-time JJs and create "a higher level of compensation for the per diems JJs for the same work performed". Nor should sick days be deducted from the per diem's divisor, as suggested by the Chief Judge, since the per diems receive 24.5% "in lieu of benefits which includes pay for days missed due to illness and injury". Finally, any discriminatory pay treatment of the per diems should not be influenced by arguments of working hours flexibility offered by the per diems. The per diems were hired on express 24/7 service availability terms which, in practice, has still permitted them to determine when they work and, in some cases, when they are unavailable for certain days or shifts.
48. The JJA's Reply to Government objects to the government's inadequate recognition of the place and role of the JJs in the criminal justice system, citing in support the *PEI Reference* case, the words of Sigurdson, J. and the 2007 JJPCC Report. On compensation, "reasonableness" is an objective determination made by comparing compensation paid to JJs to that paid to others performing similar work, with particular reference to the PCJs as their logical comparator. The gap between the JJ salary and a PCJ salary "remains unreasonably low", even while acknowledging that the 2007 Commission "closed the gap somewhat".
49. The JJA's Reply to Per Diem JJs stresses their disappointment and concern that the per diems seek "enhanced" compensation on the basis of their being qualified

to practise law when in fact the JJs, whether full-time, ad hoc or per diem, “all perform exactly the same work and should receive exactly the same salary, whether paid on a daily or annual basis”. For compensation purposes, the only point of distinction relevant to this Commission is that some JJs are engaged on a per diem basis, receive their salary on that basis and a percentage payment in lieu of benefits and for overhead; and some JJs are either employed on a full-time basis or an ad hoc basis. Their work and functions are identical. The weekend and holiday work shifts for the per diems were the norm from the start so that service could be maintained and strengthened on a 24/7 basis. With respect to the respective working day lengths of full-time and per diem JJs, the calculation is both in error and more significantly would introduce a quibbling approach over minutes in a professional’s day of work. Nor is there any justifiable reason to introduce a separate travel expenses policy for the per diems when the PCJs and JJs have a common travel policy. Finally, the JJA position on PDA, by which professional expenses actually incurred would be reimbursed, would resolve the PDA issues raised by the per diems. As a governing principle, “actual professional expenses should be reimbursed through the PDA, and not as an add-on to the per diem rate”.

C. Allowances and Benefits

50. The Flexible Benefits Program: The JJA proposes the 15 full-time JJs to be included in the “Flexible Benefits Program” which is currently available for a range of excluded government employees such as managers, Order-in-Council appointees, physicians, etc. The advantages of inclusion are significant and the administrative costs for the government are minimal. The Chief Judge supports the position of the JJA. However, the government indicated its unwillingness to extend the program for full-time JJs, citing the startup and annual administrative costs of some \$300 per JJ.

51. Professional Development Allowance: The JJA seeks three changes to the present PDA: (1) an increase from \$1000 to \$1500; (2) administration in the same manner as available to the PCJs, applying the Judges Benefit Manual for better flexibility and consistency; and (3) a common PDA for all the JJs, including the ad hoc and per diem JJs. These three submissions received the support of the Chief Judge. In his submission, JJ Makhdoom sought an increase in the PDA to \$2500 and a yearly clothing allowance in lieu of provided judicial attire. For its part, the government is prepared to increase the range of claims that are allowed for the full-time JJs PDA to equal that available to the PCJs; however, the present amount of the PDA should not be increased and it cannot support the extension of the PDA to the ad hoc or per diem JJs who are currently ineligible for the PDA.
52. Wellness Allowance: The JJA proposes a \$500 wellness allowance which would provide for the reimbursement of necessary health maintenance and improvement expenses such as chiropractors, physiotherapists, home fitness and health club memberships. The PCJs currently receive a \$4000 PDA which includes a wellness allowance. Administration would be undertaken by the OCJ as set out in the Judges Benefits Manual. The Chief Judge did not address the JJA's request in his submission. The government turned down the wellness allowance recommendation of the JJA, noting that in its opinion, the broader scope of the PDA would provide sufficient assistance.
53. Vacation: The JJA proposes that the annual allotment of vacation days for full-time JJs should be increased from 30 to 35 days. In reply, the government argued that 30 days is currently the norm for 20 years' employment in the public service and that a request for 35 days had been turned down by the 2007 Commission, a figure which in the public service is only available after 25 years of service. No submission was made by the Chief Judge.
54. JJA Prioritization of Proposed Benefits and Allowances: During the hearing, the JJA was asked for their ranking of their benefits and allowances claims. The question was one of a number of questions prepared by the Commission and

given to the JJA, the Chief Judge and the government in advance of the hearing to facilitate discussions with the Commission at the hearing. In reply, their counsel, following table consultation with the 3 JJA representatives in attendance, offered the following advice: given the government's willingness to broaden the PDA scope of coverage to that presently available to the PCJs, then the proposals list starts with an increase in the PDA to \$1500; next would be Vacation Days; and third, access to the Flexible Benefits Program.

III. THE CURRENT FINANCIAL POSITION OF THE GOVERNMENT PER SECTION 5(5) (a) OF THE ACT

55. Section 5(5) of the JCA instructs the Commission to consider five factors in preparing its report, as recited above in paragraph 11. The first factor, "*the current financial condition of the government*", was at the core of the government's position that it was unable to recommend any increase to the remuneration of the JJs over the next 3 fiscal years. The government submitted that the extraordinary economy events since September 15, 2008 fully justify the government's position that the commission should approve no net increase in compensation over the course of its mandate.
56. It was noted that the JJs would continue to enjoy the awards from the 2007 Commission to the end of the current fiscal year, March 31, 2011. However, for the upcoming 3 years, starting April 1, 2011, the government argued against any increase in the JJs' compensation package given the serious budgetary challenges affecting public finances and the necessity to contain and reduce public sector expenditures while protecting "critical health, education and social services". In support of this position the government observed that the provincial economy had recently been in a recession and that the recovery from the recession is fragile and uncertain with the most recent data suggesting that significant risks exist to the global economic outlook and to British Columbia's economic prospects.

57. In relation to the recession it was undisputed that Canada's real GDP declined in 2009 by approximately 2.6%, that British Columbia's unemployment rate exceeded 8% in 2009, that BC's housing stats declined some 71.9% between September 2008 and March 2009, that BC's merchandise exports declined some 36.7% from October 2008 to September 2009 and that manufacturing over the same period was down 22%.¹²
58. Although each of these figures had improved since the spring of 2009, the recovery that was thought to be robust at the end of the first fiscal quarter of 2010 had by the date of the commission's hearings appeared to falter somewhat.
59. In response to the "unprecedented economic effects of the provincial crisis", the government has set out a five-year plan (2009/10-2013/14) to balance the budget by 2013/14. The essential elements of the plan are laid out in the 'Five Year Fiscal Plan Update' which was tabled by the Deputy Minister of Finance, Mr. Graham Whitmarsh, on the Commission's final hearing day.
60. The Provincial forecast is based on a return to a growing economy with a decrease in the rate of the increase in spending. That forecast anticipates a substantial deficit returning to a balanced budget sometime in the fiscal year 2013-14.
61. In order to reduce public expenditures, discretionary spending and the budgets for ministries other than education, health and advanced education have undergone a broad cost cutting review. This has resulted in cuts of over \$300 million to the budgets of other ministries and a significant loss of jobs in the public service.
62. The justice system has not been spared from serious budget cuts. The Ministry of Attorney General has lost 104 positions since September 2009, and is facing a reduction of more than 7% of its full-time equivalent staff over the next 3 years.

¹² These figures were provided to the Commission by the government in their oral submissions at the Hearings and are documented in Exhibit 14 tendered by the government in the course of their submissions.

These measures have been accompanied by serious funding cutbacks to a range of justice system organizations including the Justice Education Society and the People's Law School and a freeze on funding for legal aid despite the loss of substantial third party funding by the Legal Services Society. In an exchange of supplementary submissions to the Commission after the conclusion of the hearing, the Chief Judge advised, in his opinion, that "[t]he reductions to the Court's operating budget [by the government] will significantly impact operations in the short and long term".

63. A "key element" of the government's strategy to contain spending is "the institution of a 'net-zero' public sector compensation mandate, under which any enhancements to salary or benefits at any public sector compensation negotiations or arrangements must find off-setting savings, with the result that there is no net increased cost to the government." A firm line has been taken by the government in all recent public sector labour negotiations, adhering to the principle that "there is no incremental funding available for compensation principles in this round of bargaining". As of June 22, 2010, according to a notice released by the Public Sector Employers' Council Secretariat, over 96,000 employees of 13 employers have ratified or tentatively settled two year 'under net-zero' compensation agreements. In the case of nurses (3% in each of years 1 and 2) and doctors (two year reopener; approximately 3% in 2010/11 and 3% in 2011/12), labour market adjustments, reflecting the proven need to retain core staff, limited exceptions were made to the net-zero policy. Since public sector compensation accounts for over 50% of the provincial budget, a 1% wage increase across the public sector, according to the government's figures, amounts to approximately \$220 million per year. For consistency and fairness, the government's policy "applies the mandate to all groups regardless of the groups' relative sizes", including in our case, the small group of JJs. The Deputy Minister expressed the concern that any recommendation for increased judicial compensation would set a precedent for increases to other persons paid from public funds that would be difficult to resist and might imperil achievement of the government's fiscal plan.

64. The question that now arises is whether the net-zero “mandate” applies to the JJs and, if so, with what effect. In its submission, the government argues that its net-zero mandate applies “to all current public sector processes, including judicial compensation”. Interestingly, earlier in its brief (p.4), in discussing the purpose and independence of the Commission, the government submitted that it is the very process of setting up the JJPCC “that ensures...their compensation does not result from ...unilateral action by government...”
65. The question is not one of affordability. The government, through Mr. Whitmarsh, conceded its capacity to pay the judiciary more. That approach, however, would breach the net-zero mandate which in the interests of fairness and consistency should be applied to all publicly compensated groups, including those in the justice sector.
66. In light of these remarks, how are we to characterize the effect of the net-zero policy in our JJ case in which it is unilaterally proposed as binding the government’s position on judicial compensation into the 2013/14 fiscal year, one year or more past the two-year term of the collective bargaining agreements? The net-zero position mandate is a blanket public sector employees’ collective bargaining strategy designed for two-year agreements. The government may well, as here, attempt to extend its net-zero strategy to the separate realm of three-year judicial compensation packages. Acceptance of that position will be for the Commission to consider within the terms of our statutory directions. The first directs us to consider the weight and influence of the government’s “current financial position”. Then we must address how the proposed three-year JJ compensation freeze relates to the recognized purpose and reach of the JPPCC process itself under its host legislation.
67. The JJA takes issue with the government’s picture of its current financial condition and the submission that its alleged long term fiscal plight could be used to stifle reasonable compensation claims into 2013-14. It would be “unfair in the extreme” for the Commission to conclude that the economic circumstances faced

by BC over the 2008-10 period “should freeze JJs salaries out to 2014 given the recent positive economic forecasts for the coming year and years” following. In support, the JJA referred to recent government announcements, News Releases and statements by the Premier highlighting the Province’s “Positive Economic Indicators”, BC’s top ranking for economic recovery in Canada and revisions to prior forecasts reflecting the improving economic trends the Province is now experiencing. These announcements, the JJA argues, speak to an improving economy, higher employment and a better “financial condition” of the government as we move into the 3 year forward mandate of the Commission that starts in April, 2011.

68. For the government, Mr. Whitmarsh sought to distinguish between the purpose and analysis of the government’s Five Year Fiscal Plan (2009/10 to 2013/14) and the ‘good news’ announcements cited by the JJA. The former, in its current Update report as tabled with the Commission, recites the Plan’s underlying principles and its expenditure and revenue assumptions and projections. The purpose is to lay out a fiscal management strategy for the province to return to a balanced budget and the elimination of operating debt. The document acknowledges the uncertainty of medium-term forecasts and says that the government will make the necessary tax and spending adjustments during the Plan’s life to achieve the promised balanced budget on time or even ahead of time, as the case may be. Particular reference is made to the \$22 billion of BC public sector expenditures by ministries, crown agencies, social service agencies, school districts, universities, colleges and health employers on wages and benefits. Ministries account for \$3 billion annually of that amount. The net-zero freeze on public sector wages and benefits is at the core of the government’s determined strategy to contain compensation expenditures in the public sector.
69. With respect to the “improving economic performance” announcements made by the Premier, other ministers, ministries and some business groups, Mr. Whitmarsh characterized them as good faith statements to uplift public and investor confidence in BC’s recovery prospects. The variability of economic

forecasting, including the measurement of public confidence, has always been acknowledged. He was “not comfortable” with the June 22 Provincial Outlook report issued by BMO Capital Markets Economics that was submitted by the JJA to the Commission. It suggested that the deficit might be eliminated “a year or two earlier”. The earlier return to a balanced budget will depend on a “sturdy rebound in revenue” of 4.6 % annually through 2013/14 and just a “moderate slowdown” in per capita spending, “similar to the restraint seen in the 1990s and mid-2000s”.

70. Mr. Whitmarsh took issue with the assumptions and predictions of the BMO report. He submitted that the government was required to take a more disciplined view of economic prospects, including revenue and consumer spending estimates. The government remained committed to its fiscal restraint plan for the next three years. This was also the answer given by the Minister of Finance, as reported in the *Globe & Mail* of July 9 (p. S1), in responding to the release of public accounts showing that the deficit is almost \$ 1-billion less than the \$2.8-billion forecast in September 2009. The Minister refused to discuss whether the new figures increased the prospects for getting rid of the deficit before 2013/14, save to remark “the sooner we can get this province back into a surplus position, the sooner we will have the opportunity to explore new programs and new fiscal measures”.
71. BC was in a *surplus position* when the 2007 JPPCC released its Report in August of that year. At page 37, the Commission referred to the “current financial position of the government” language of section 5(5) (a), briefly noting its (then) surplus position. That finding, it continued, permitted “*establishment of a reasonable level of compensation without concern for any governmental policy of fiscal restraint, but nothing more*” and the Commission moved immediately to its consideration of the second ground of “reasonable compensation”, as required by section 5(5) (b). (emphasis added). We shall do the same now.

IV. THE PRINCIPLE OF REASONABLE COMPENSATION RECOGNIZED IN SECTION 5(5) (b)

A. Full-Time Judicial Justices

72. By section 5(5) (b), we must consider the separate “need to provide *reasonable compensation* to the...judicial justices” in preparing our report. The ‘reasonable compensation’ requirement was discussed in our opening Part and stems from the Supreme Court’s 1997 decision in the *Provincial Court Judges* case (known as the *PEI Reference Case*). As noted in the 2007 JJPCC Report (at pp.35-36), Chief Justice Lamer there observed that judicial salaries must not permit the perception that “the judiciary could be tempted to adjudicate cases in a particular way in order to secure a higher salary from the executive or the legislature or to receive benefits from one of the litigants”.

73. As well, the Chief Justice said: “I have no doubt that the *Constitution protects judicial salaries from falling below an acceptable minimum level*. The reason it does is for financial security to protect the judiciary from political interference through economic manipulation, and to thereby ensure public confidence in the administration of justice” (emphasis added).

74. As we observed earlier, the position of JJs dates back to amendments made to the *Provincial Court Act* in 2001 which recognized that JJs sit on the Provincial Court bench and serve other judicial functions in prescribed areas of law, reflecting a greater degree of judicial independence than other Justices of the Peace (‘JPs’). Financial independence is one of the most important guarantors of that independence; hence the cross-Canada establishment of JJPCCs, including the BC case.

75. The Judicial Council of the Provincial Court is charged with assessing candidates for appointment to the Provincial Court judiciary (including JJs). The Council

has a “vested interest” in the importance of the reasonable compensation benchmark “in terms of the Court’s capacity to recruit the best candidates available in the province and to retain the fine judicial officers who have been appointed previously”.

76. In its submission, the government appreciates the judiciary’s need for financial security, independent from government, a principle that underpins the establishment of the JJPCC process. It accepts the related protective principle that judicial salaries may not fall below a “minimum level”. That finding means that salaries have fallen so low, on judicial review, as to threaten the public’s confidence in the independence of their judicial officers. In the present case, the government further submitted that the principle of financial security did not mean that “judicial officers’ salaries cannot be affected, *including being frozen or reduced, as a part of an overall economic measure*” (p.4) (emphasis added). It follows that frozen or reduced compensation is not of itself determinative as to whether the JJs are being provided “reasonable compensation” in 2011-2014.
77. In the present case, the government submits that the increases resulting from the 2007 Compensation Commission process make the current full-time JJ compensation ‘reasonable’, particularly when the benefits and allowances are taken into account: extended health; 30 days’ vacation; PCJ level long-term disability benefits; life insurance; \$1000 PDA, and pension benefits under the Public Sector Pension Plan, resulting in a total take-home compensation package of over \$118,000. The economic recovery plan affects virtually the entire public sector of the Province, including all taxpayer- funded compensation arrangements. The government recognizes and respects the JJPCC process. Given the Province’s “current financial condition” and without offending the “minimum level” standard, it proposes a 3 year freeze on JJ compensation. The net-zero compensation policy is directed at the entire public sector, including the justice system. The government asserts that its freeze proposal results neither from unilateral action by government aimed only against provincial judicial officers nor does it found in direct negotiations between the parties. The JJPCC

process permits neither situation to arise, given its support of judicial independence and financial security. In the JJ case, the net-zero freeze is a proposal put to the Commission for its consideration and review.

78. The government referred to the Chief Justice Lamer's observation in the *Provincial Court Judges Case/PEI Reference* (para.196):

“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...”

79. The JJA made a number of submissions in response to the government's representations. The JJA reminded us that the *PEI Reference Case* also emphasized the need for judiciary compensation commissions to base their recommendations on an objective assessment of the facts in a system where JJs are “the lowest paid of those to whom judicial independence is constitutionally assured, but exercise important criminal law authority” (2007 JJPCC, p.35). Subjective assertions of ‘reasonableness’ were insufficient. The government continues to downgrade the responsibilities of the JJs and fails to see reasonableness of compensation as an objective, comparative calculation that considers what other adjudicative officers in the justice system are paid for doing similar work, with particular reference to the PCJs as their “logical comparator”. The JJs should not bear the discriminatory impact of a 3 year freeze imported by a net-zero policy used in 2 year bargaining negotiations with public sector unions.
80. According to the Public Sector Employers' Council, the ratified and tentative agreements negotiated to date only run for a two-year term ending in early 2012. As argued by the JJA, the government may argue that the net-zero mandate will run to a later date, but it could well be terminated earlier by fiat if, in its opinion, the economy has improved sufficiently. Based on what is known now about the current application of the mandate to public sector employees (which JJs are not), the “mandate would apply (if it did) only to the first year of the Commission's

mandate, but not years 2 and 3". This means that the objective standard of "reasonable compensation", at a minimum, should be considered by the Commission for years 2 and 3, should the Commission accept only the freeze submission of the government for year 1.

81. The 2007 award was made in a time of surplus. The 2004 Commission's recommendations, as noted at p.15 of the 2007 JJPCC Report, "were influenced by the then continuing government policy of fiscal restraint". In 2002, the JJPCC, after declaring (see p.13, 2007 Report) that the decline in the relationship of JJP remuneration to that of the PCJ "must be redressed", recommended pay increases totaling over 24% for the following 4 calendar years (its operative timeline). The Attorney General (p. 14, 2007 Report), exercising his statutory authority to vary the Commission's recommendations, proposed that the Legislative Assembly reject the recommended increases for years 3 and 4, "citing particularly the government's fiscal strategy designed to eliminate a (growing) deficit..." The Legislative Assembly adopted the minister's recommendation.
82. The JJA's current proposal for remuneration would take the JJs salary in 3 years' time to 56%, up from the present 43%, of the current PCJ pay, compared to the high water mark of 65% in 1978. A table of comparisons included by the JJA in their submission (p. 11) showed that the relationship since 2000 has ranged between 38% and 48%. The JJ compensation increases recommended by the 2007 Commission were directly related, *inter alia*, to the Commission's concern to arrest what it concluded (p.38) was "the widening disparity between their pay and that of the judges of the Provincial Court, the only other persons who can perform their function". In expressing its concern, the 2007 Commission confirmed the significance of the relationship between the salaries of the JJs and the PCJs. That relationship may be defined in percentage terms which will vary over time in the JJPCC process, as we have noted. The ebbs and flows of the figures confirm the absence of a fixed or tied relationship, reflective of the duty of each Commission to consider the weight and relevance of the evidentiary factors dictated by s.5 (5) of the Act.

83. By section 5 of the Act, the mandate of the 2010 Judges Compensation Commission is identical to the mandate of our Commission. The PCJ Commission held its hearings in the same time period as our Commission. The government proposed the same net-zero argument to both Commissions. The PCJA accepted that the current financial position of the government and the general state of the provincial economy provided sufficient reason to restrain from proposing any compensation increases over the next two fiscal years. The PCJA did propose a salary increase in the third year of the mandate as well as changes to the pension accrual rate.
84. Three other salary comparators were put forward by the JJA for our consideration, namely, “in order of applicability”, (i) JPs in Alberta and Ontario, (ii) administrative tribunals in B.C., and (iii) bylaw notice adjudicators, also in B.C. The JPs in Alberta and Ontario, as a result of their respective Compensation Commission processes, are paid in the range of 10% more than their B.C. counterparts. Similar arguments were put to the 2007 JJPCC which observed (p.39), “in deciding how much weight to give [to these comparisons]”, that “the qualifications required, jurisdiction exercised and tenure inevitably differs between provinces”. For its part, the government noted that the higher awards in Ontario and Alberta predated the current economic problems.
85. In the case of this province’s administrative tribunals, the 2007 JJPCC did not find it appropriate “to single out a single tribunal or other civil service category as comparable to the JJP function” (p.40). Weighing the evidence presented for the first two comparators, the 2007 JJPCC was attracted to the salary paid in B.C. to member appointees at the midpoint on the tribunal scale of \$99,000 per annum, equal to a 26% hike of the then present full-time JJP salary, which translated into an annual 17.5% increase plus a 2.5 % annual inflation adjustment. The pay by 2010/11, according to these calculations, would thus reach \$99,525. In response, the government noted that the mid-point salary (excluding the inflation adjustment) remains in effect today and remains subject

to the net-zero mandate, meaning in its view, that the JJs will not lose any salary ground vis-à-vis tribunal appointees.

86. Bylaw Notice Adjudicators preside over hearings involving parking tickets and other minor municipal bylaw infractions pursuant to the 2003 Local Government Bylaw Notice Enforcement Act. Over 40 local governments have elected to opt into this hearing process. The adjudicators are contracted by the local governments and are assigned, according to the JJA, up to 18 cases per day for which they receive \$625, a rate paid to the Chair of a Group 1 administrative tribunal. The JJA submits that at the 2007 JPPCC hearings it was assumed the rate was \$400 per day, the tribunal member rate, resulting now in an even more unreasonable pay gap, given the “enormous disparity” between their respective duties and responsibilities. In response, the government undertook to investigate the pay arrangements for the Bylaw Notice Adjudicators.

87. In his submission of August 11 and a clarifying submission of August 13, filed with the Commission and made available to the JJA counsel, the government’s counsel made these points: (1) the 2007 Commission’s assumption was correct; (2) a letter sent by the Court Services Branch in December 2008, responding to a question arising from a mediation complaint, misinterpreted the applicable Bylaw Enforcement Regulation and erroneously referred to the Chair rate as applying to the Bylaw Notice Adjudicators; (3) that the Chair rate had been paid in error since December 2008; and (4) that the December 2008 communication will be corrected and the Member rate, not the Chair rate, remains in effect in compliance with Treasury Board Directive 1/10. The government’s submissions prompted several responses from the JJA’s counsel, including reference on August 17 to two situations where Bylaw adjudicators were allegedly paid the Chair rate, one predating 2007 and the other since July 2007.

B. Per-Diem and Ad-Hoc Judicial Justices

88. With respect to the “reasonable compensation” requirement as it applies to the 17 serving per diem JJs and the 6 serving ad-hoc JJs, refer to paragraphs 41-49 *supra*, for a detailed summary of the submissions made to the Commission. We note here, for the sake of disclosure, that members of the per diem group (15 of 17 signed their written submission) did not attend our hearings, except for one observer member who was in attendance for part of the first day’s session.
89. The government recommended that the net-zero freeze apply to all JJs. In response, the JJA submitted that the per diems, the ad hocs and the full-time JJs “all perform exactly the same work and should receive exactly the same salary, whether paid on a daily or annual basis”. The Chief Judge’s 24.5% full-time benefits figure is appropriate, also his \$75 overhead rate; the per diems identified a 25% benefits figure and an increase in the overhead rate to \$85. The principal point of difference between the per diems and the full-time JJs rests on the choice of the formula by which the salary of the full-time JJ is divided by a ‘divisor’ of duty days for the full-time JJs, plus, as we have noted, a percent for benefits and a daily sum to recognize fixed overhead expenses. The Chief Judge and the JJA submitted that the reasoning of the 2007 JJPCC should be followed, whereby the divisor for both per diems and ad hocs should be identical because it results in the same pay results. Equitably, the Chief Judge added, the overhead allowance should also go to the ad hoc JJs.
90. For the JJA, the correct divisor number is 219; the Chief Judge settled upon 207 “to better take into account sick days and unassigned work day issues”. In response, the JJA disagreed with the recommendation of the Chief Judge to take out 12 judgment days or unassigned work days because the net result would be to provide “a higher level of compensation for the per diems for the same work performed by the full-time JJs” and would be contrary to the Judges Procedures Manual. The per diem JJs advanced reasons for a reconsideration of the divisor number developed by the 2007 Commission that, in their view, would reduce it

by 9.5 days to “account for chambers days awarded to full-time JJs but not credited” to the per diems and a claim that their work shifts are 20 minutes longer than the full-time JJs’ shifts. The new number would then be 209 as compared to the Chief Judge’s 207 figure.

91. At page 9 of their submission, the per diem JJs raised the suggestion that “it may be appropriate for this *or a future* Compensation Commission to reduce its emphasis on analysis of full-time JJ remuneration as the methodology for determination of fair per diem remuneration” (emphasis added). It would be more equitable in their case to look at the pay earned by Crown Counsel and Duty Counsel appearing on bail hearings before the per diem JJs. Each is paid “substantially more than the [Lawyer] per diem JJs with similar qualifications who preside over those hearings”(p.10). The JJA’s short answer to the submission is that all the JJs are expected to handle the same work and that the per diems were hired to enable the JJ group to maintain 24/7 service, particularly on weekends and statutory holidays. The Act only identifies JJs. Any increase in full-time JJs’ compensation as recommended by this Commission will benefit *pro rata* both the per diem and ad hoc JJs.
92. The per diem JJs’ submission did not address the issue of the “current financial position” of the government. While the group, as we have noted, submitted representations for raising the per diem rate, there was no suggestion that their present compensation arrangements were raising recruitment problems in the context of s. 5 (5) (c)’s “need to maintain a strong court by attracting qualified applicants”. The Judicial Council, in its brief (p.8), confirmed its practice of interviewing per diem JJ applicants. In 2007, all of its approved applicants were appointed relatively quickly, given the voluntary retirement of 13 full-time JJs. Currently, there is a “pool” of only one approved candidate but this is not seen as a problem since “the Court has not required any new appointments”. Associate Chief Judge Threlfall, speaking for Chief Judge Crabtree, agreed that the pool should probably be expanded in the near future to have candidates available to

take up new per diem appointments to vacant posts attributable to full-time JJ retirements and/or normal personnel turnover.

V. ISSUES UNDER SECTION 5(5) (c)-(e) OF THE ACT

A. Attracting Qualified Candidates

93. As the intention of the OCJ is to appoint only per diem JJs in the future and since no persuasive evidence was led by any party to suggest that measurable difficulties were being experienced in attracting “qualified applicants” per section 5(5) (c) to the JJ bench “to maintain the needs of the court”, any further need on our part to address this consideration appears to be unwarranted. The absence of recruitment interviews by the Judicial Council in 2009 was explained by the government as evidence that the per diem appointments made in 2007 had met the needs of the JJ bench. While some 37 per diem applications were recorded in 2007 when the positions were first advertised, the JJA noted, the applications fell to 17 and 10 in 2008-09, respectively. Both the government and the Chief Judge suggested the declines could be explained by the fact that there were no posts to fill immediately and would-be applicants now have a more informed view of the qualifications sought by the Judicial Council and their own recruitment prospects. The recent numbers, submitted the government, were “reasonable in the circumstances”. At the same time, we are reminded by the recommendation of the 2007 Commission (p.27) that per diem recruitment notices should be advertised more widely than has been the case to present if they are to reach the intended market of eligible applicants. None of these observations, in our view, prejudices the merits of the current per diems’ proposals for differential compensation adjustments, save to note that the proposals did not cite evidence of present recruitment challenges in the context of section 5(5) (c).

B. Retention of Judicial Justices

94. On the related issue of the retention of JJs, we recognize the continuing evolution of the JJ position as the size of the present full-time complement declines over time, primarily for reasons of voluntary retirement, followed by the appointment of per diem JJs. Over time (and time here may well be 10-15 years or more in some cases), the JJ service will be comprised primarily of lawyer-qualified JJs and some supporting ad hoc JJs. The ‘retention’ factor thus needs to be viewed differently from the PCJ situation where a proposed salary increase in the third year was based on different retention considerations.

95. We were not given information concerning a failure to retain currently-serving full-time JJs, except for the assertion in the hearing by the respected President of the JJA that many JJs simply cannot afford to take early voluntary retirement. We are advised that only one per diem JJ has resigned since the 2007 appointments, and in the absence of fresh recruitment efforts, we are reluctant to speculate further on the merits or otherwise of any retention factor in the context of section 5(5) (c).

C. Laws of BC and Other Matters Identified in Section 5(5) (d)-(e) of the Act

96. These provisions require us to consider, respectively, “the laws of British Columbia” and “any other matter the Commission considers relevant” in preparing our Report. The government made no submissions on either criterion in its written brief to the Commission. The government’s fiscal strategy to balance the budget by 2013/14 is set down in the *Balanced Budget and Ministerial Accountability Act* and its elements are found in the *Five Year Fiscal Plan Update* filed in evidence and addressed in considerable detail by the Deputy Minister of Finance on behalf of the government at the hearing. No other laws

were brought to our attention. With respect to our consideration of “any other matter”, we refer here to our Conclusions at paragraph 103(d), *infra*.

VI. THE COMMISSION’S CONCLUSIONS AND RECOMMENDATIONS

A. A Preliminary Observation and Non-Compensation Recommendation

97. The reorganization of the JJ complement in 2007, led by the appointment of 17 per diem JJs and the voluntary retirement of 11 full-time JJs, and augmented by ad hoc JJs (currently 6 in number), has resulted in the formation of a ‘hybrid’ JJ service designed to provide key adjudicative functions on a province-wide, 24/7 basis. Over time (beyond the 3 year window of this Commission), the number of the per diem JJs will increase as they succeed resigned or retired full-time JJs. However, it is beyond our capacity or knowledge to forecast the pace or extent of this staffing trajectory as the OCJ and the government are regularly reassessing the organizational and budgetary ramifications of JJ service contributions to the Provincial Court system.

98. This has meant that change has been a constant element of JJ responsibilities and postings in recent years - 24/7 Justice Centres, video bail hearings, circuit assignments to smaller communities, attacking backlogs in Traffic Courts - are but a few examples. The range and number of organizational changes and the prospect of further changes have posed substantial challenges of their own to this Commission since the absence of a stable history and institutional model makes comparisons with the past and other parts of the judicial system more difficult. The recent reorganization of the JJ system has produced the unusual result that these judicial resources are now being filled primarily by two groups of JJs with a different history, background and employment expectations. There are obvious differences between these two groups, reflected in their separate representations to us and the apparent concern over inequities in terms of service as between them. It is apparent that this situation, among many others no doubt, will require

the attention of the recently appointed Chief Judge and the Province to make whatever changes or adjustments are appropriate.

99. The particulars of the role of JJs in the general machinery of an independent judiciary deserve some comment as it bears on the task faced by this Commission. The JJs make up a small number of officers who are apart from other judicial officers in the Provincial Court by the nature of their work, to some degree the nature of their background and training, and the general sense that they represent collectively a convenient means of adjudicating large numbers of straightforward cases. Perhaps for these reasons the JJs themselves seem to have been less involved in the planning that has gone into changes to their complement and range of jurisdiction than would appear to be the case for the more senior levels of the judiciary.
100. In the case of the Traffic Courts, the sophistication of the equipment now used to support the ticketing of most traffic offences (such as hand-held radar and intersection cameras) means that the portion of cases where there seems to be a well-grounded factual dispute are vastly outnumbered by those ticketed who are hoping that the witnesses or police officer will not attend the hearing or for whom the delay associated with contesting a ticket appears convenient and inexpensive. Further automation of the process coupled with changes to the incentives and rewards associated with contesting traffic tickets appear inevitable, with resulting effects on the nature of the work carried out by JJs. We observe that the Judicial Justices may themselves be a rich source of learning for those charged with making that aspect of our justice system work more effectively.
101. With that in mind, we *suggest* that the JJs, both full-time and per diem, should be brought in earlier to a more inclusive process of consultation that would benefit from their considerable front line experience and their practical awareness of efficiency/effectiveness deficits in the system. We make this suggestion as a result of our three site visits, our review of the different submissions to the Commission, and three very interactive days of hearings. We believe that the evolution of the JJ

adjudicative model will continue and will be better advanced if the JJs are more collaboratively involved in addressing efficiency and effectiveness concerns.

102. In addition, for future Commissions, it would be very helpful if the JJs were in a position to recommend efficiency/effectiveness improvements to the adjudicative system in order to more fully serve the public interest. Assessment of reasonable compensation could be more meaningful to future Commissions if they could take efficiency and effectiveness measures into account.

B. Remuneration of Full-Time Judicial Justices

103. With respect to our remuneration recommendations for the full-time JJs, we list here our principal conclusions that underpin our recommendations:

- (a) The work of the JJs is valuable and important as they discharge a range of duties which contributes significantly to the administration of justice in British Columbia.
- (b) The government's fiscal situation must be taken into account this was a factor relied on by the 2007 Commission which decided that substantial increases in compensation were justified, in part, by projected government surpluses.
- (c) The reference in section 5 (5) to the "current financial position of the government" should not be understood to be limited to current financial circumstances alone. Since the Commission is required to make recommendations for the next three fiscal years, efforts at forecasting are relevant and helpful. Similarly, the current financial position of the government is not restricted to questions of affordability alone. We agree that JJ compensation will always form such a small part of government expenditures that increases in that compensation will always be affordable.
- (d) The Commission must take into account the current and forecast financial position of the government generally as well as the effect of any

recommendations on government finances over our three year mandate. To the extent that these considerations are not considered current within the meaning of section 5 (5) (a), we would include them as other matters under section 5 (5) (e) that are relevant to a proper consideration of the terms of JJ compensation.

- (e) Both the Supreme Court of Canada and previous Commissions have acknowledged that judges (and JJs), being publicly funded, must equitably ‘share the pain’ of lesser salary gains, even acceptance of the status quo, in difficult economic times in order to support the integrity and public support for judicial independence.
- (f) In their recent representations to its Compensation Commission, the PCJA did not seek increased remuneration in the first two years, namely, 2011-12 and 2012-2013. The PCJ’s are cited as the ‘logical [compensation] comparator’ by the JJA.
- (g) Given that the PCJA is not seeking any salary increase in the first two years, the salary gap between the PCJs and the JJs will not widen in that period. In the third year, we are aware of PCJA proposals for improved compensation and pension accrual rate adjustments.
- (h) We do not accept that there should be a fixed or tied relationship between JJ compensation and PCJ compensation levels. However, like the 2007 JJPCC, we accept that the disparity in those levels should not be unfairly widened to the prejudice of the JJs.
- (i) The evidence does not support the concern that a two-year freeze would result in a finding that “reasonable compensation” was not being provided to the JJs per section 5(5) (b). Other BC comparator adjudicators are caught by the net-zero mandate and we are not persuaded that JJ salaries are falling below the “minimum level” benchmark for protecting judicial independence and financial security.
- (j) There is insufficient evidence that there is an emerging difficulty in attracting qualified candidates (all of whom would be applicants for per diem posts). Similarly, following the voluntary retirements of a number of

full-time JJs in 2007, the turnover of both full-time and per diem JJs has been minimal. The evidence does not warrant increasing compensation for the purpose of addressing retention or recruitment concerns.

- (k) The case of mistaken overpayments to a comparator group (the Bylaw Notice Adjudicators) is not of itself a reason to recommend an increase in the JJ's salary.
- (l) Under its Five Year Fiscal Plan, the government proposes to continue its net-zero compensation mandate to 2013-2014. However, the termination date for the currently ratified or tentatively settled public sector wage agreements extends for only two years. We cannot defer our consideration of the appropriate compensation for the third year of our mandate until the expiry of the first two years as has been effectively done by negotiating two year agreements with other publicly funded positions. For similar reasons, the necessity for shared sacrifice is somewhat lessened since public servants have not agreed to a net zero mandate for that fiscal period. Both the need for continued sacrifice and the willingness of the public service to continue without increases in compensation are unknown and beyond reasonable forecasting.
- (m) For the purpose of our assessment, we will assume that the Province does recover from the recession and return to a fiscal balance before the third fiscal year, 2013-2014. We recognize the difficulties of forecasting as illustrated by the fact that the 2007 JJPCC felt confident in making its recommendations in the expectation that there would be substantial budgetary surpluses to 2010.
- (n) Given the weight of evidence before us and the instructive guidance of JJPCC precedent, we are not prepared to accept the government's proposal for what is essentially a complete freeze on JJ remuneration to March 31, 2014. This course of action, in our considered view, would lock the JJs into an unwarranted and unfair compensation position into the second quarter of 2014.

104. **RECOMMENDATION** –The Commission recommends that there be no increase in salary for the initial two-year period of our mandate ending on March 31, 2013. For the third year, fiscal 2013-2014, we recommend that an increase of 8% be made 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.

C. Remuneration of Per Diem Judicial Justices

105. Our Conclusions here may be summarized as follows:

- (a) We recognize that the per diem JJs will constitute a greater percentage of the JJ complement in coming years, assuming that the appointments plan, as supported by legislation, continues to be implemented.
- (b) That said, the substantial number of full-time JJs and a continuing reliance on ad hoc JJs will be significant features of the JJ service for a period of time well past this Commission’s three-year mandate.
- (c) Any recommended increase in compensation for full-time JJs will accrue *pro rata* to the per diem and ad hoc JJs.
- (d) With respect to the divisor submissions, we are persuaded by the JJPA submission to leave the figure at its present 219 level, reflecting the principle of ‘equal pay for equal work’ for full-time and per diem JJs. We do not support the reasoning whereby sick days and judgment days or unassigned work days (12 in number) would be removed from the divisor for the per diem rate calculation. In the circumstances, we do not need to address whether divisor changes might raise net-zero challenges.
- (e) The per diem JJs in their submission did not address the influence or otherwise of the “current financial position of the government” and the net-zero mandate on this Commission’s consideration of their compensation proposals;
- (f) The appointment of the per diem JJs was something of an experiment, but it is clear that this service has been found sufficiently rewarding that all

but one of the newly-hired per diem JJs remain in service and it was reported that several of them wish to have more hours assigned to them.

(g) No evidence was submitted that the per diems' current compensation arrangements were adversely impacting retention and recruitment considerations that must be addressed by the Commission in section 5 (5) (b) and (c).

(h) It follows from the foregoing that this Commission is not prepared to comment further on the relative compensation arrangements for the per diem JJs and their full-time JJ colleagues. This question may be taken up by a future Commission as suggested by the per diem JJs in their submission.

106. **RECOMMENDATION** – The Commission recommends, effective April 1, 2011, that the appropriate per diem compensation formula should be the full-time JJ salary/219 @ 24.5% benefits + \$80 overhead.

D. Remuneration of Ad Hoc Judicial Justices

107. Our conclusions here may be summarized as follows:

(a) Ad hoc JJs, currently six in number, are PCJs or JJ retirees who take up JJ duties on a part-time basis. Their availability adds an invaluable dimension to the capacity of the JJs to accomplish their adjudicative responsibilities across this vast province.

(b) The 2007 Commission recommended their remuneration utilizing a formula equivalent to the full-time JJ salary divided by a 'divisor' of duty days for full-time JJs, plus a benefits percentage and a \$75 overhead rate.

108. **RECOMMENDATION** – The Commission recommends, effective April 1, 2011, that on equitable grounds, that the compensation formula recommended above for per diem JJs should be applied equally to the ad hoc JJs.

E. Allowances and Benefits

Professional Development Allowance

109. The JJA and the OCJ have jointly recommended that the allowance be increased from the current \$1000 per full-time JJ to \$1500 and that this allowance be provided to per diem and ad hoc JJs. Further, they recommend that the scope of the PDA be increased to match the scope of the PDA for the PCJs and be administered under the Judges Benefit Manual. The government is prepared to accept that the scope be increased; however, staying in line with their net-zero mandate, they cannot recommend an increase in the amount of the PDA or that it be extended to the per diem and ad hoc JJs. The following conclusions underlie our recommendations with respect to the PDA.

- (a) The Professional Development Allowance is intended to reimburse JJs for costs incurred in maintaining professional standards and memberships or in procuring the necessary equipment, tools and services to carry out their duties. It is not an issue of compensation but rather a budgetary issue for reimbursement of professional costs incurred by the JJs. No additional compensation accrues to the individual JJs.
- (b) The OCJ administers expenses covered by the professional development allowance, and detailed policy guidelines are maintained by the OCJ.
- (c) With respect to the per diem JJs there is an obligation to maintain private practice standing; the Commission recognizes there are expenses incurred by the per diem JJs in meeting this obligation.
- (d) All JJs (full-time, ad hoc and per diems) should be encouraged to attend conferences in order to maintain a strong bench that is knowledgeable and up to date on the law as it currently stands. An increase to the PDA would allow greater flexibility to the Chief Judge to permit attendance at longer, more comprehensive courses and conferences.

110. **RECOMMENDATION** – The Commission recommends that the PDA be increased, in the first year (2011) and throughout the remaining years of our mandate from \$1000 to \$1500. Further, the Commission recommends that all JJs be eligible for the PDA and that the allocation be managed by the OCJ in accordance with the policy guidelines in the Judges Benefits Manual used to administer the PDA for the PCJs.

Wellness Benefit

111. The JJA has sought a wellness allowance of \$500 per year for all JJs. This request was not addressed by the Chief Judge and was not supported by the government. We note the following:

- (a) The PCJs do not have a stand-alone wellness allowance, but rather it is administered as part of their PDA under the Judges Benefits Manual.
- (b) The value of health and fitness is important to all; however, the Commission was not presented with any evidence, either through written or oral submissions, which would suggest the wellness allowance was required for the JJs as a result of the nature and/or impact of their employment.

112. **RECOMMENDATION** – The Commission does not recommend the requested wellness benefit.

Flexible Benefits Program

113. The 15 full-time JJs wish to be included in the “Flexible Benefits Program”, a proposal supported by the Chief Judge but not by the government. We note the following:

- (a) The government provides the Flexible Benefits program to some individuals employed by it and its agencies. The number of individuals

covered constitutes a large group that offers some economies of scale and choice in the provision of the benefits.

- (b) As noted by the JJA, each JJ has varying health and benefit needs and inclusion in this program would allow them flexibility in determining how best to address their individual needs.
- (c) We are advised if we recommend that the JJs be included in the "Flexible Benefits Program", that they can be simply enrolled in the Plan on the same terms as members of the Public Service. This would avoid creating a separate administrative category for the JJs, which would lead to increased administrative costs. This approach, we are advised, would mean that the JJs "would suffer no financial burden if they are enrolled [at their individual request] in the flexible benefits plan without bearing additional financial responsibility."
- (d) The per diem and ad hoc JJs are not eligible for the Flexible Benefits Program.

114. **RECOMMENDATION** – The Commission recommends, effective April 1, 2011, that the full-time JJs have access to the Flexible Benefits Program on the same basis afforded to members of the Public Service.

Vacation Days

115. The JJA has proposed that the vacation entitlement be increased from 30 to 35 days per annum. The government is not in favour of this increase and the Chief Judge made no submission. In coming to our recommendation, we note the following:

- (a) All full-time JJs are currently entitled to 30 days' vacation regardless of their years of employment. This is in contrast to the vacation entitlement for those in the public service where 30 days' vacation is currently the norm for those employed for 20 years and 35 days for those employed for 25 years or more.

(b) As was pointed out by the government, the JJ proposal, if accepted, would represent a loss of 15 weeks of JJs' time and a corresponding requirement for more capacity.

(c) The current vacation allotment of 30 days per annum is quite generous in the circumstances.

116. RECOMMENDATION – The Commission recommends that vacation days remain at 30 days per year.

We submit this Report and Recommendations under Section 5(1) of the *Judicial Compensation Act*, made at Vancouver, B.C., this 27th day of August, 2010 and as finalized this 28th day of September, 2010.

WILLIAM NEILSON
Chair

GEOFFREY COWPER, Q.C.
Commissioner

TERRENCE LA LIBERTÉ, Q.C.
Commissioner

JOHN DUSTAN
Commissioner

DR. BRIAN BURTCH
Commissioner

APPENDIX 1**JJPC 2010 - Exhibit List**

EXHIBIT NO.	DESCRIPTION	DATE ENTERED	PARTY ENTERING EXHIBIT
1	JJA Written Submissions	June 28, 2010	JJA
2	2010 Flexible Benefits Program Guide	June 28, 2010	JJA
3	Reply Submissions of the JJA	June 28, 2010	JJA
4	Reply Submissions of the JJA to the Chief Judge's Submissions	June 28, 2010	JJA
5	Justice of the Peace Code of Ethics	June 28, 2010	JJA
6	Chief Judge's Written Submissions	June 29, 2010	Chief Judge Crabtree
7	Zahid Makhdoom Written Submissions	June 29, 2010	Zahid Makhdoom, JJ
8	Government of British Columbia Written Submissions	June 29, 2010	Government
9	Court Services Branch 15yr Comparison Court Hours and New Cases	June 29, 2010	Government
10	Management Salary Schedule (BC PSA)	June 29, 2010	Government
11	Bylaw Notice Enforcement Regulation	June 30, 2010	Government
12	Public Sector Employers' Council Secretariat – Ratified and Tentative Agreements as of June 22, 2010	June 29, 2010	Government
13	Provincial Court New Cases for Jan 1, 2006	June 29, 2010	JJA

	to December 31, 2009		
14	Power Point Slides Re: Economy	June 30, 2010	Government
15	Press Release: "BC Recovery Among Strongest in Canada - BMO"	June 30, 2010	JJA
16	Government Web Posting: "Positive Economic Indicators"	June 30, 2010	JJA
17	Government Supplemental Written Submissions (Re: Budget)	July 7, 2010	Government
18	Chief Judge Supplemental Submissions (Re: Budget)	July 7, 2010	Chief Judge
19	Government Supplemental Written Submissions (Re: Bylaw Notice Adjudicator Compensation)	August 11, 2010	Government
20	Letter from Thomas Roper, Q.C. Re: Bylaw Notice Adjudicator Compensation	August 13, 2010	JJA
21	Government Clarification in Response to Letter from Thomas Roper, Q.C.	August 13, 2010	Government
22	Letter from Thomas Roper, Q.C. in Response to the Government's Letter of Clarification	August 17, 2010	JJA