

**Government's Proposed Response to
the Judicial Compensation Commission 2019 Final Report
in Respect of Provincial Court Judicial Justices
July 6, 2020**

This is the government's proposed Response to the *Judicial Compensation Commission 2019 Final Report* ("the Commission Report") respecting judicial justices of the Provincial Court.

The 2019 Judicial Compensation Commission (the "Commission" or the "JCC") was an independent commission mandated by the *Judicial Compensation Act* (the "Act") to report on and make recommendations respecting Provincial Court judicial justices' remuneration, allowances and benefits. The recommendations of the 2019 Commission cover the period from April 1, 2020 to March 31, 2023.

Independence of the Judiciary

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

The Supreme Court of Canada has recognized three essential conditions for judicial independence: security of tenure, financial security and administrative independence.¹ Each of these components has been the subject of careful analysis by the Court.

The Supreme Court of Canada has stated that financial security embodies three requirements.² First, judicial salaries can only be changed by recourse to an independent commission. Second, there can be no negotiations between the government and the judiciary. Third, judicial salaries may not fall below a minimum level.

Judicial salaries in British Columbia are established through a process that incorporates an independent, objective and effective judicial compensation commission which every three years reports and makes recommendations on judicial remuneration to the government.³

The commission's recommendations must have a meaningful effect on the process of determining judicial remuneration. They must be considered by the government and given weight.

¹ *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); et al*, [2005] 2 SCR 286 at para. 6 (commonly referred to as the "Bodner" decision)

² *Bodner* at para. 8

³ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 (hereinafter referred to as the "PEI Reference")

If the government decides to depart from the commission's recommendations, then it must justify its decision with rational reasons that are clearly and fully stated in a public response. The public response must be sufficient to inform the public, members of the legislature and the reviewing court of the facts on which the government's decision is based and to show that the process has been taken seriously. As the Supreme Court of Canada explained:

The government can reject or vary the commission's recommendations, provided that legitimate reasons are given. Reasons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality. Legitimate reasons must be compatible with the common law and the Constitution. The government must deal with the issues at stake in good faith. Bald expressions of rejection or disapproval are inadequate. Instead, the reasons must show that the commission's recommendations have been taken into account and must be based on facts and sound reasoning. They must state in what respect and to what extent they depart from the recommendations, articulating the grounds for rejection or variation. The reasons should reveal a consideration of the judicial office and an intention to deal with it appropriately. They must preclude any suggestion of attempting to manipulate the judiciary. The reasons must reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence.

The reasons must also rely upon a reasonable factual foundation. If different weights are given to relevant factors, this difference must be justified. Comparisons with public servants or with the private sector may be legitimate, but the use of a particular comparator must be explained. If a new fact or circumstance arises after the release of the commission's report, the government may rely on that fact or circumstance in its reasons for varying the commission's recommendations. It is also permissible for the government to analyse the impact of the recommendations and to verify the accuracy of information in the commission's report.⁴

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

Provincial Court Judicial Justices

Provincial Court judicial justices are appointed under section 30.2 and 30.3 of the *Provincial Court Act*. The Chief Judge of the Provincial Court is authorized under section 11(1) of the *Provincial Court Act* to prescribe the jurisdiction of judicial justices through an "Assignment of Duties". The 2019 Assignment of Duties identifies a broad range of jurisdiction for judicial justices, including traffic and bylaw hearings, considering police applications for search warrants and production orders under

⁴ *Bodner* at paras. 25-26

the *Criminal Code of Canada*, hearing applications for detention or bail, and conducting small claims payment hearings.

The 2000 *Independence of the British Columbia Provincial Court Justices of the Peace* decision of the B.C. Supreme Court affirmed that judicial justices exercise judicial functions that require a significant level of judicial independence, including security of tenure and financial independence.⁵

There are two types of judicial justices and they are remunerated differently. Full-time judicial justices, who are appointed until the age of 75, receive annual salaries, pensions and other benefits. Part-time judicial justices are appointed for a term of 10 years. Per the *Provincial Court Act*, part time judicial justices are guaranteed a minimum number of 40 working days per year. The per diem, for part time judicial justices is derived from a formula that divides full-time judicial justices' salary by the annual number of working days, plus 20% in lieu of benefits and \$80 to compensate for overhead expenses associated with maintaining a law practice during days spent working as a judicial justice.

Government reaffirms its recognition of the invaluable work of the Provincial Court and Provincial Court judicial justices. The Provincial Court, including its judicial justices, have continually adapted processes to improve its level of service to the public and meet the needs of the justice system. Government especially commends the Provincial Court on its efforts during the Covid-19 pandemic to ensure the Court functions as effectively and efficiently as possible in these unprecedented times. Government is dedicated to ensuring that Provincial Court judicial justices are supported to continue to demonstrate their innovation, flexibility and hard work when carrying out their important work of dispensing justice.

Determining Judicial Compensation in British Columbia

The process for setting the remuneration, allowances and benefits of Provincial Court judicial justices is governed by both the common law referred to above and by statute.

The British Columbia *Judicial Compensation Act* ("the Act") sets out requirements for the Commissions' consideration of compensation for the judiciary including:

5(5) In preparing a report, the commission must be guided by the need to provide reasonable compensation for judges and judicial justices in British Columbia over the 3 fiscal years that are the subject of the report, taking into account all of the following:

- (a) the need to maintain a strong court by attracting highly qualified applicants;
- (b) changes, if any, to the jurisdiction of judges or judicial justices;
- (c) compensation provided in respect of similar judicial positions in Canada, having regard to the differences between those jurisdictions and British Columbia;
- (d) changes in the compensation of others paid by provincial public funds in British Columbia;

⁵ *Re Independence of the Provincial Court of B.C. Justices of the Peace*, 2000 BCSC 1470

(e) the generally accepted current and expected economic conditions in British Columbia;

(f) the current and expected financial position of the government over the 3 fiscal years that are the subject of the report.

(5.1) The report of the commission must demonstrate that the commission has considered all of the factors set out in subsection (5).

(5.2) The commission may consider factors it considers relevant that are not set out in subsection (5), but if it relies on another factor, the report of the commission must explain the relevance of the factor.

The Act requires the Attorney General to table the report of a Commission before the Legislative Assembly within a legislated timeline and advise the Assembly of its statutory obligations respecting the acceptance or rejection of Commission recommendations.

Section 6(2) of the Act authorizes the Legislative Assembly to:

(a) reject one or more of the recommendations made in the report, and

(b) set the remuneration, allowances or benefits that are to be substituted for the remuneration, allowances or benefits proposed by the rejected recommendations.

If a recommendation is not rejected by the Legislative Assembly within the timeline, the Act specifies that judicial justices are entitled to receive, beginning on the date recommended by the Commission, the remuneration, allowances and benefits proposed by that recommendation. Substituted recommendations by the Legislative Assembly take effect on the date stipulated in the resolution.

The Legislative Assembly must consider the Commission's Report in the context of the principle of judicial independence, the Act and the Legislature's responsibility to deal with matters of public interest broadly understood. This includes responsible fiscal management of public funds. It is government's task to balance the competing interests and demands for public funds, to set policy and priorities having regard to government's financial commitments, and to present its spending proposals to the Legislative Assembly for approval.

The 2019 Judicial Compensation Commission

In accordance with section 2 of the Act, the members of the Commission were appointed on or before March 1, 2019. The 2019 Commissioners were Hon Thomas A. Cromwell C.C (Chairperson); Vern Blair FCPA, FCA, FCBV, FRICS; Michael Marchbank; Robin McFee Q.C.; and Lisa Southern.

The Commission's responsibility pursuant to section 5 of the Act was to report on and make recommendations respecting the remuneration, allowances and benefits of Provincial Court judges and judicial justices for the fiscal years 2020/21, 2021/22, and 2022/23. The recommendations of the Commission are contained in the *Judicial Compensation Commission 2019 Final Report* (the "Commission Report").

Commission Recommendations Respecting Judicial Justices and Government's Proposed Response

The Commission's Report makes eight recommendations with respect to Provincial Court judicial justices.

Three of the Commission's recommendations, respecting Provincial Court judicial justices' professional development allowance, per diem travel allowances, and administrative judicial justice salaries were the result of the joint submissions/uncontested issues. As set out in the motion accompanying this response, government proposes that these recommendations be accepted.

The Commission Report makes three recommendations respecting Provincial Court judicial justices' salaries, shift premiums, and pensions. As set out in the motion accompanying this response, government proposes that one recommendation be rejected and that the remaining recommendations be accepted.

The Commission Report also makes a recommendation respecting the costs payable to the Judicial Justices Association of British Columbia in connection with their participation in the JCC process. As set out in the motion accompanying this response, government proposes that that recommendation be rejected.

Further, the Commission Report makes a recommendation respecting interest on retroactive salary adjustments. As set out in the motion accompanying this response, government proposes that this recommendation be accepted.

In accordance with section 6 (2) of the Act and the common law respecting judicial independence, where government proposes that a recommendation of the Commission be rejected, reasons specific to the rejected recommendation and a proposed substitute recommendation are provided.

Recommendations concerning matters that were either joint submissions or not the subject of dispute

The Commission made the following recommendations with respect to Provincial Court judicial justices:

Recommendation 2: That the remuneration for Administrative Judicial Justices be 106% of judicial justice salary for the next three fiscal years.

Recommendation 5: An increase in the judicial justices' professional development allowance to \$3,250 as of April 1, 2020. Judicial justices are allowed to use up to \$1,500 of the professional development allowance towards general expenses reasonably incurred in the execution of the office of judicial justice

Recommendation 6: Judicial justices receive the same per diem travel reimbursement as Members of the Legislative Assembly.

Response to Recommendations concerning matters that were either joint submissions or not the subject of dispute with respect to Provincial Court judicial justices

Government proposes that Recommendations 2, 5 and 6 concerning matters that were either joint submissions or not the subject of dispute, with respect to Provincial Court judicial justices, be accepted.

Recommendations concerning Provincial Court judicial justices' salaries

The Commission made the following recommendations:

Recommendation 10: The annual salaries of judicial justices be set at:

- (a) \$138,000 effective April 1, 2020;
- (b) \$142,000 effective April 1, 2021;
- (c) \$146,000 effective April 1, 2022.

Recommendation 11: A shift premium of \$245 for shifts worked on the following statutory holidays: New Year's Day, Family Day, Good Friday, Victoria Day, Canada Day, British Columbia Day, Labour Day, Thanksgiving Day, Remembrance Day and Christmas Day.

Recommendation 12: No change to the pension plan for full-time judicial justices.

Response to Recommendations concerning Provincial Court judicial justices

Government proposes that Recommendation 10 be rejected, and the following salaries be substituted:

- (a) Effective April 1, 2020, that the salary for Provincial Court judicial justices be \$125,750;
- (b) Effective April 1, 2021, that the salary for Provincial Court judicial justices be \$129,500;
- (c) Effective April 1, 2022, that the salary for Provincial Court judicial justices be \$133,500.

Government proposes that Recommendation 11 and 12 be accepted.

If the Legislature accepts government's proposed response to the 2019 Commission Report, the proposed substituted salaries would represent a total three-year increase of 9.42% above the 2019/20 judicial justice salary of \$122,000. The recommendation of the JCC would result in a total three-year increase of 19.67%. The total three year estimated fiscal impact of the JCC's salary recommendations would be \$1,616,958 compared to \$633,610 for the proposed substituted salaries.

The JCC's rationale for its judicial justice salary recommendations is on pages 15-26 of its Final Report, with a summary on pages 31-32. In summary, the JCC concluded that:

- There is a pressing recruitment problem with respect to judicial justices, noting that from 2010 to 2019 there were only 11 applicants for new positions and only five new appointments. At the same time, the Commission found that Provincial Court judges are increasingly used to cover shifts for judicial justices (10% of weekend shifts and 3% of midnight shifts in 2018). The Government acknowledged at the hearings that there is a recruitment problem. The Commission described the situation as "not sustainable" and noted this is a very inefficient use of judicial resources. The Commission found that current remuneration is not sufficient to attract enough highly qualified applicants, and recommended a significant salary increase as a result.
- There have been no changes to the jurisdiction of judicial justices and, therefore, this factor does not support any change beyond an inflationary adjustment of remuneration.
- There was no disagreement at the hearings that judicial justices in British Columbia are paid less than in all other Provinces and territories except one, and that judicial justices have at least as broad jurisdiction as their counterparts in other jurisdictions. The JCC held that the best comparators are justices of the peace in Alberta and Ontario who are paid significantly more than judicial justices in British Columbia.
- The JCC noted that judicial justices are unique in constitutional status and job function and are not equivalent to civil servants, and they cannot negotiate their terms of employment. Judicial justices constitute a small, highly trained and highly skilled group with enormous power over their fellow citizens. Unlike some who are paid from the public purse, judicial justices are not eligible for step increases, bonuses or promotions, and judicial justices cannot supplement their earnings from other sources.
- Government has given wage increases to some groups paid from Provincial public funds that exceed the *Sustainable Services Negotiating Mandate* of 2% per year, including to physicians, legal aid lawyers, and Crown Counsel. Under the mandate, an additional 0.25% can be available per year.
- BC's current and expected economic conditions and government's current and expected financial position (at the time the 2019 JCC Report was prepared) are "sound" and are expected to remain so over the next three fiscal years. The Commission concludes that these two factors suggest that judicial remuneration should be roughly in line with the three other provinces with the soundest

economies and government finances, which are the most similar to BC in their populations, budgets and jurisdiction - Alberta, Saskatchewan and Ontario – and which currently have judicial justice salaries above British Columbia's.

Government proposes that the Commission's recommendation for judicial justices' salaries be rejected for the following reasons:

1. *The economic condition and financial position – factors 5(5)(e) and 5(5)(f) - of British Columbia has changed significantly since the Commission issued its final report and recommendations.*

The Commission's conclusions, concerning factors 5(5)(e) and (f), that the province's economic and financial position is sound, and will remain sound over the next three years, must be considered in light of the worsening of the province's economic position. The Covid-19 pandemic is an unanticipated public health emergency that arose after the Commission issued its final report. Accordingly, the Commission's final report and recommendations were not able to account for the significant impact Covid-19 is having on British Columbia's current and expected economic and fiscal position.

The Commission Report concluded that judicial remuneration should not be out of step with the generally accepted current and expected economic conditions in British Columbia or the financial position of the Government. Due to the fluidity of the Covid-19 situation, detailed economic forecasting is not available at this time. However, the impacts of the economic slowdown due to the Covid-19 crisis are expected to be significant and unprecedented.

The impacts of the pandemic on the province's budget result from increased spending and reduced revenues. Spending is forecasted to increase by \$5 billion to provide relief to people and businesses in British Columbia. The Covid-19 Action Plan, approved by the Legislature, dedicates \$2.8 billion to fund the services to help British Columbians weather the crisis and \$2.2 billion to provide relief to businesses and help them recover after the outbreak.

Because of the Covid-19 public health emergency, almost all of the revenue streams of the Province are expected to be significantly impacted with the exception of federal government contributions, including taxation revenue, natural resources revenue, fees and other revenue, and Crown corporations' net income. Notably, this significant revenue decline, the full extent of which cannot be determined at this time, is occurring in a fiscal context that already required the BC government, both in fiscal year 2019/20 and in *Budget 2020*, to undertake expenditure management measures to keep the budget balanced as housing markets cooled, revenues declined, economic growth slowed, and global financial risk increased.

The first quarterly report for 2019/20 showed an operating surplus \$95 million lower than projected in *Budget 2019*, and a revenue forecast which decreased by \$153 million. The second quarterly outlook for 2019/20 showed an operating surplus \$31 million lower than the projection in the *First Quarterly Report*, reflecting a \$30 million reduction in the revenue forecast. To keep the budget balanced, all government ministries were asked to examine the discretionary spending in their budgets to look for

savings that could be put into contingencies. Some examples of discretionary spending include employee travel, office expenses, consulting contracts and room rentals. The goal was to recover \$300 million that could be used for critical programs and services, and unexpected issues in the remainder of fiscal year 2019/20.

Budget 2020, as it was tabled in February 2020, continued government's expenditure management program through restrictions on spending, prioritization of resources and finding efficiencies as part of prudent financial management. In *Budget 2020*, government redirected a modest amount of previously planned ministry budget allocations to core programs and services. These adjustments represented less than one percent of government's annual operating expenses and enabled new investments towards the growing demand for services such as health care, education, social and family support services, and community safety and justice services.

As discussed above, the Covid-19 crisis will require substantial changes to the 2020 B.C. budget that was tabled in February. The extent of the revenue decline, and required spending, resultant of Covid-19, cannot be fully determined at this time, except to say it will be significant. The extent to which further expenditure management measures are required as a result of Covid-19 will be assessed as the impact of Covid-19 is better understood.

The 2019 JCC also cited BC's real gross domestic product and unemployment rate as factors supporting the conclusion that British Columbia's economic condition is stable. While it is too early for government to accurately forecast the impact of Covid-19 on British Columbia's real gross domestic product and B.C.'s unemployment rate, some preliminary information and projections have been made available by some organizations.

The BC Business Council released an economic projection that assessed the impacts and implications of Covid-19 for the BC economy over hypothetical time periods where segments of the economy remain in shutdown and social distancing remains in place. In their projections a shutdown for eight weeks is projected to cost the B.C. economy \$18.3 billion and to shrink the provinces' real gross domestic product by 6-8%.

Statistics Canada Labour Force data revealed that employment fell by nearly two million in April, bringing the total employment decline since the start of the Covid-19 economic shutdown to three million. The unemployment rate rose from 7.8% in March to 13.0% in April. In addition, the number of people who were employed but worked less than half their usual hours because of the pandemic increased by 2.5 million from February to April. The data showed that in April, 36.7% of Canada's potential labour force did not work or worked less than half of their usual hours. As of April 13, 2020 figures from the Employment Minister's office show that nearly six million people have applied for Covid-19 emergency aid benefits. This includes the 3.5 million applications for Canada's Emergency Response Benefit that were received since April 6th.

According to Statistics Canada data accumulated over March 15-21, BC saw a loss of over 132,000 jobs in this one week period. This data does not include temporary layoffs or those put on a leave of absence.

This raised the province's unemployment rate to 7.2%. In April, BC lost 264, 1000 jobs and the unemployment rate rose to 11.5%. The unemployment rate in British Columbia was 13.4% in May. BC's Finance Minister stated on May 8, 2020 that approximately 400,000 British Columbians had applied for the province's Covid-19 emergency employment benefit since May 1, 2020. The Minister cautioned that at this time it was not possible to know if the impacts of the public health emergency would worsen or improve in coming months.

Government believes that the impacts of the Covid-19 crisis render the recommended increase for judicial justices' salaries as out of step with the current and expected economic and financial position of BC.

The BC government has provided guidance to public sector employers regarding staffing plans to allow them to ensure business continuity as much as possible within the current financial and operational environment. It is expected that some employers will reduce their workforce to respond to the impacts of the Covid-19 crisis. Because more than 90% of collective agreements have already been signed, Government has not indicated any changes at this time to the *Sustainable Services Negotiating Mandate*. The impact of the pandemic may necessitate austerity measures in the near term.

The Covid-19 pandemic has required government to balance the Commission's findings relating to judicial justice recruitment and the need to improve judicial justices' salaries comparative to those in other jurisdictions with the impact of Covid-19 on BC's economy and financial position. The significant unanticipated expenditure of \$5 billion and the significant anticipated loss of revenues, has led government to conclude that while it will support modest increases in salary, government will not, at this time, prioritize significant wage increases as a response to the recruitment issue and comparative salary issue identified by the JCC. A 9.42% increase in salaries for judicial justices over three years represents a higher increase than most others paid from provincial public funds, as government wants to ensure, even during the Covid-19 crisis, that it is moving to improve and not exacerbate the problems identified by the JCC. However, it is the government's view that the increase proposed by the JCC of 19.67% over three years cannot be justified in the current economic and fiscal climate resulting from the Covid-19 emergency.

2. *The Commission Misapplied section 5 (5) (d).*

Government's position is that the JCC misapplied section 5 (5) (d) of the Act, "changes in the compensation of others paid by the provincial public funds in British Columbia" when making recommendations concerning the remuneration of judicial justices. In its final report, the 2019 Commission concluded that this factor does not support the government's position of a 2% increase as strongly as government submits that it does. Several reasons were given:

- Judicial justices are unique in constitutional status and job function and are not equivalent to civil servants. They constitute a small, highly trained and highly skilled group with enormous power over their fellow citizens.

- Judicial justices cannot negotiate their terms of employment and do not receive bonuses, step increases or promotions. Further, judicial justices cannot supplement their earnings from other sources.
- Others paid from provincial public funds received increases that are not in fact limited to 2%, such as Crown Counsel. Government has given wage increases that in some cases exceed the mandate, and has given greater than 2% increases to some groups who are not subject to the mandate such as physicians and legal aid lawyers.

a) *Judicial justices are unique in constitutional status and job function and are not equivalent to civil servants.*

The unique constitutional status and job function of judicial justices, and the fact that they are not equivalent to civil servants, was well-established legal context when the Legislature amended the Act in 2015 to require the Commission to consider “changes in the compensation of others paid by provincial public funds”.

The unique constitutional status of judicial justices is what requires a unique process for the setting of judicial remuneration, involving an independent commission which makes recommendations to Government: *PEI Reference*. The unique constitutional status and job function of judicial justices does not militate in favour of treating them differently from others paid from provincial public funds when it comes to the magnitude of salary increases. Judicial justices need not receive identical raises to those received by others paid from provincial public funds, but if others paid from public funds are being held to raises of a certain level on account of government expenditure management policies, salary increases for judicial justices should reflect this context.

b) *Judicial justices cannot negotiate their terms of employment and cannot receive bonuses, step increases or promotions.*

Again, when the Legislature amended the Act in 2015 to require the Commission to consider “changes in the compensation of others paid by provincial public funds” it was well established that judicial justices cannot negotiate their terms of employment with government. Accordingly, that should not militate in favour of giving s. 5(5)(d) less weight.

The Supreme Court of Canada in the *PEI Reference* held that the judiciary cannot negotiate their salaries with Government, but did not suggest that this militates in favour of higher increases for judicial justices than for others paid from public funds.

It is appropriate for the Commission to note that others paid from provincial public funds have, in some instances, not been held to the limits of a negotiating mandate. This is addressed in the next section. However, Government does not view the inability of judicial justices to receive bonuses, step increases or promotions as a basis for limiting the weight given to s. 5(5)(d) of the Act or the weight given to the government’s submission on this factor.

No party put evidence before the Commission as to what percentage of those paid from provincial public funds in British Columbia receive step increases, or how frequently. While Provincial Court judicial justices do not receive step increases, their salaries are reviewed every three years as a matter of law, and each review typically leads to annual salary increases which take into consideration a range of factors.

As for promotions, when a public servant is paid more on account of a promotion, it is because they have undertaken a job with greater responsibility and difficulty. This is not applicable amongst judicial justices. When a judicial justice is promoted to Administrative Judicial Justice, there is a salary increase reflecting the increased responsibility of the position.

As for bonuses, there was no evidence before the Commission on who receives them, how often, or how large they can be. Bonuses are rare amongst persons paid from provincial public funds and the few existing bonus programs that remain are part of legacy contracts in Crown corporations and research universities. A small number of senior executive level public servants have salary holdback plans subject to performance standards and Treasury Board approval.

c) The salary increases of others paid from provincial public funds are not in fact limited to 2%.

The 2019 JCC found that government has “on a fairly regular basis” given wage increases greater than 2%, and that while the government tries to achieve consistency with the *Sustainable Services Negotiating Mandate*, the salary increases paid to persons from provincial public funds are “often higher”.

While some groups received higher increases, it is not accurate to say this happened “often” or was “fairly regular”. There are over 330,000 unionized employees working in British Columbia’s core public service. As of April 2020 approximately 290,000 of these public sector employees are covered by tentative or ratified agreements reached under the *Sustainable Services Negotiating Mandate*.

The Commission cited Crown Counsel as an example of a group which received increases over 2%. While Crown Counsel have received greater increases than provided for under the Mandate, this is the product of a historical agreement, pre-dating the Mandate, under which Crown Counsel are entitled to receive salary increases that are 1.27% higher than the increases received by Provincial Court judges. This historical linkage with Provincial Court judges does not reflect a current decision by government to depart from the Mandate.

Notably, the Provincial Court Judges’ Association took the position in its submissions that the linkage between the increases given to Crown Counsel and the increases given to Provincial Court judges should not be considered by the JCC (pp. 58-60, PCJA Submission). The government agreed with the PCJA submission on this point. This agreement is not reflected in the Commission Report and the JCC did not mention the linkage or its historical origins.

The JCC also noted that government has given increases higher than the *Sustainable Services Negotiating Mandate* to certain categories of people paid from provincial public funds and cited the

recent increases in salary for physicians and legal aid lawyers. However, the Commission did not consider that while legal aid lawyers did receive an increase in their tariff rates as the result of an agreement between government, the Association of Legal Aid Lawyers and the Legal Services Society, tariff rates for legal aid lawyers had only been raised once before this since 1991. The tariff rate increase in this year was the first increase to the tariff rate since 2006. Comparatively, judicial justices have received a total of 47.6% in salary increases since the 2007 Commission salaries were implemented.

The Commission also did not consider the remuneration context for physicians in BC. Physicians are independent contractors performing work in a unique context. Physician Master Agreements have typically provided operational commitments in addition to compensation commitments - namely for facility/supply (business overhead), costs, service volume growth, and costs relating to new services to achieve Government policy objectives. In general, collective agreements do not include these types of costs, and the Employers Guide to Collective Bargaining for the 2019 *Sustainable Services Negotiating Mandate* distinguishes these operational costs from negotiated compensatory commitments.

Physician Master Agreements are unique in that some of these operational factors of service delivery commitments are included in the negotiated agreements. This recognizes that, for example, physicians run businesses within the health system and most of these businesses include the provision of physician offices. If business costs were to exceed negotiated increases, the difference erodes physician income. The 2019 PMA includes increases that help to mitigate inflationary costs such as rising rent.

The factors outlined above, which must be taken into account when determining Physician Master Agreements, explain why the increases have limited value as a comparable when considering salary increases for judicial justices.

To conclude, it is government's view that the Commission did not appropriately weigh the changes in compensation of others paid by provincial public funds. The Legislature is entitled to re-weigh this factor alongside the others and it is proposed that the Legislature do this. In government's view, giving greater weight than the JCC did to changes in compensation of others paid from provincial public funds is appropriate and militates in favour of lower salary increases than were recommended by the Commission.

Government's proposed salary substitutions take into account the following:

- The Covid-19 crisis has had, and will have, a significant negative impact on the Province's economy and the government's financial position, including forecasted \$5 billion spending for the Covid-19 Action Plan, and revenue losses in almost all of the revenue streams of the Province, including taxation revenue, natural resources revenue, fees, and Crown corporations' net income.
- The estimated fiscal impact of the Commissions' salary recommendations for judicial justices is \$1,616,958, whereas the estimated fiscal impact of the proposed increase is \$633,610.
- The Commission did not appropriately weigh the changes in compensation of others paid by the provincial public funds.

- Government, in light of the Covid-19 crisis, has concluded that salary increases should remain modest, but is recommending salary increases for the judicial justices that are higher than those given to almost all others paid from provincial public funds because of the findings of the JCC, including that there is a problem with recruitment.

Recommendations concerning costs and interests

Recommendation 13: That government pay 100% of the reasonable costs of the legal fees and disbursements of Judicial Justices Association of British Columbia, including the costs of experts.

Recommendation 14: That interest be paid to judicial officers if litigation occurs over a response to a JCC report and higher salaries are ultimately implemented retroactively.

Response to Recommendations concerning costs and interest

Government proposes that Recommendation 13 be rejected.

Government proposes that Recommendation 14 be accepted.

Government proposes that the Commission's recommendation that Cabinet seek to enact a regulation to cover 100% of the reasonable costs of legal fees and disbursements of the Judicial Justices Association ("JJABC") be rejected for the following reasons:

In 2015 the Act was amended to stipulate the maximum amount that the government may pay out of the consolidated revenue fund to cover the reasonable costs incurred by the PCJABC and the JJABC of participating in the commission process. The maximum amount that may be paid by government to each of the Associations is as follows:

- 100% of costs up to \$30,000; and
- two-thirds of costs between \$30,000 and \$150,000.

The legislative amendment provides certainty over costs in advance of the JCC for both government and the judiciary, rather than leaving the ultimate resolution up to a JCC recommendation which may or may not be accepted by the Legislature. It also addresses the fact that Government has no control over what costs the judiciary might incur.

The legislative amendment provides, however, that the Lieutenant Governor in Council ("LGIC") may, by regulation, set higher amounts than those stipulated in the Act which can be paid to the two associations to cover their costs. This regulation-making authority reflects the possibility that the nature and cost of the process might evolve over time and the formula may need to change in the future.

Government is of the view that the commission process is best served by the full participation of judges and judicial justices. However, government also asserts it is not unreasonable for parties to bear a modest amount of their costs for participating in the process. Government is of the view that the distributed costs does not prevent the judicial justices fully participating in the process. For the 2019 JCC, the JJ's Association costs were \$59,954 and they were reimbursed \$50,041. There are 32 judicial

justices (full and part time), and this would result in a cost of approximately \$300 per judicial justice for the outstanding cost.

In the ministry's view, the JCC's reasoning and recommendation does not sufficiently account for the amendment to the legislation. The Act now provides that the "maximum" amount that government may pay is in accordance with the formula above. The LGIC's regulation-making power represents an exception to the statutory norm. The Act does not contemplate that 100% reimbursement should be the norm. Whether to enact a regulation involves a consideration of whether circumstances have changed such that Government should depart from what the Legislature specified. Government does not view that such circumstances presently exist.

The JCC has not explained why there is a basis for enacting a regulation to depart from what the Legislature established as the norm. It is not sufficient to state why full indemnity for judges' and judicial justices' costs would generally be a good idea. The Legislature has enacted a law on the matter which does not contemplate full indemnity. It is not sufficient to note that the claimed costs are "reasonable", as the Legislature has identified norms for reimbursement that apply notwithstanding the reasonableness of the amounts expended or claimed in excess of the statutory maximum. The JCC has not identified any circumstances which are new, such as a materially different Commission process, since the Legislature amended the Act.