

**Government’s Proposed Response to the Report of
the 2016 Judicial Compensation Commission in Respect
of Provincial Court Judicial Justices
October 23, 2017**

This is the government’s proposed Response to the Report of the 2016 Judicial Compensation Commission (the “Commission Report”) respecting Judicial Justices of the Provincial Court.

The 2016 Judicial Compensation Commission (the “2016 Commission”) was an independent commission mandated by the *Judicial Compensation Act* (the “Act”) to report on and make recommendations respecting Judicial Justices’ remuneration, allowances and benefits. The recommendations of the 2016 Commission cover the period from April 1, 2017 to March 31, 2020.

Independence of the Judiciary

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

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

The Supreme Court of Canada has affirmed, as a constitutional requirement for financial security, that judicial remuneration must not become the subject of negotiation between the judiciary and government. Instead, it must be established through a process that incorporates an independent, objective and effective judicial compensation commission that reports and makes recommendations on judicial remuneration.¹

In 2005, the Supreme Court of Canada provided further guidance on the tests a government must meet if it wishes to reject recommendations from a judicial compensation commission:

[A commission’s] recommendations must be given weight, but the government retains the power to depart from the recommendations as long as it justifies its decision with

¹ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] S.C.R. 319 (hereinafter referred to as the “PEI Reference Case”)

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

The government's response is subject to a limited form of judicial review by the superior courts. The reviewing court is not asked to determine the adequacy of judicial remuneration but must focus on the government's response and on whether the purpose of the commission process has been achieved.²

Provincial Court Judicial Justices

Provincial Court Judicial Justices are appointed under the *Provincial Court Act*. They have jurisdiction over traffic and bylaw hearings; conduct interim release (bail) hearings; and consider police applications for search warrants and production orders under the *Criminal Code of Canada*.

The 2000 *Independence of the British Columbia Provincial Court Justices of the Peace*³ 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.

There are two types of Judicial Justices and they are remunerated differently: either as full-time members of the bench appointed to age 75 with salary, pension and other benefits; or as per diem appointments. Per diem Judicial Justices are appointed for a 10-year term and are guaranteed a certain number of working days each year. The per diem is derived from a formula that divides full-time Judicial Justice 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.

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

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

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 statutory framework is set out in the British Columbia *Judicial Compensation Act* (“the Act”).

The Act sets out the requirements for the Commission’s consideration of compensation for the judiciary:

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;
- (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.

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.

The Attorney General is required 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.

The Legislative Assembly must consider the Commission Report in the context of the principle of judicial independence, the Act and the Legislature's responsibility to deal with matters of the public interest broadly understood. This includes responsible fiscal management for all of government and recognizing that it is government's task to set policy and priorities having regard to government's commitments as a whole. Government must then present its spending proposals to the Legislative Assembly for approval.

Recommendations of the Commission Report that are not rejected by the Legislative Assembly within the time limits set out in the Act take effect beginning on the date recommended by the Commission. Substituted recommendations by the Legislative Assembly take effect on the date stipulated in the resolution.

The 2016 Judicial Compensation Commission

In accordance with section 2 of the Act, the members of the Commission were appointed on or before March 1, 2016. The members were the Hon. Frank Iacobucci, C.C., Q.C. (Chairperson), Robin McFee Q.C., Randy Kaardal Q.C., Brenda Eaton and Peter Lloyd.

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 2017/18, 2018/19, and 2019/20. The recommendations of the Commission are contained in the *Report of the 2016 British Columbia Judicial Compensation Commission* ("the Commission Report").

The 2016 Commission is the first to consider compensation for both Judges and Judicial Justices under the statutory criteria listed above following amendments to the Act in 2015.⁴

⁴ Section 5(5) previously read as follows:

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

**Commission Recommendations Respecting Judicial Justices and Government's
Proposed Response**

The Commission Report makes six recommendations respecting Judicial Justices' salaries, per diems and benefits. 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. As set out in the motion accompanying this response, government proposes that that recommendation be rejected.

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.

Provincial Court Judicial Justices' Salaries

The Commission made the following recommendations respecting the salaries of Provincial Court Judicial Justices:

Recommendation 10:

- (a) Effective April 1, 2017, that the salary be \$125,000;
- (b) Effective April 1, 2018, that the salary be \$126,875;
- (c) Effective April 1, 2019, that the salary be \$128,778.

Response to Commission Salary Recommendations Respecting Judicial Justices

Government proposes that Recommendation 10 of the Commission Report be rejected and the following salaries be substituted:

- (a) Effective April 1, 2017, that the salary for judicial justices be \$118,000;
- (b) Effective April 1, 2018, that the salary for judicial justices be \$120,000;
- (c) Effective April 1, 2019, that the salary for judicial justices be \$122,000.

The 2016/17 salary for judicial justices is \$110,249. The salaries for judicial justices recommended by the Commission would result in a three-year increase of \$18,529 or 16.81%.

The proposed substituted salaries would represent an increase of \$11,751 or 10.66% over three years.

The total three-year estimated fiscal impact of the Commission's salary recommendations would be \$1.533 million, compared to \$0.921 million for the proposed substituted salaries.

The Commission's recommended salaries are the same as those proposed by the Judicial Justices Association. The Commission's rationale for its salary recommendations is found on pages 43-59 of its report, with a summary of that rationale on pages 64-65. In summary, the Commission found the following:

- While there is no evidence establishing a link between the number of applicants and the salary of judicial justices, there is a need to attract and retain highly qualified applicants. There is currently no one in the approved candidate pool, two judicial justices are eligible for retirement in 2016 and 2018, and nine per diem appointments are set to expire in 2018 (pp. 45-46 and 64).
- The salary proposal made by the Judicial Justices Association (JJA) was found in all the circumstances to be reasonable (p. 64).
- The judicial role is unique and judicial justices are not employees of government. Thus judicial justices are not easily compared with others in the British Columbia economy, even those in senior leadership in the public service. Moreover, too much emphasis on compensation changes for others paid by provincial public funds, which is the result of political decisions made by government, risks politicizing judicial compensation and must be avoided (p. 53).
- British Columbia's current and expected economic outlook is one of moderate growth over the term covered by the Commission. Small surpluses are forecast. Through prudent management, British Columbia is better positioned nationally than many other provinces (p. 57).
- Based on the evidence, the financial position of government does not demonstrate that increases in compensation should not be made to the judiciary (p.58).
- B.C.'s judicial justices rank eighth out of eight provinces that have an equivalent position (p. 65).
- The recommended salaries would decrease the salary gap in percentage terms to Provincial Court Judges (p. 65).

- The recommended salaries would place judicial justices closer to salaries of senior management in the public sector (p. 65).
- There is significant evening, weekend and holiday shift work required (p. 65).

Government proposes that the Commission’s recommended salaries be rejected for the following reasons:

1. *The Commission failed to properly consider section 5(5)(d) of the Act*

Section 5(5)(d) requires the Commission to consider changes in the compensation of others paid by provincial public funds in British Columbia.

The Commission’s consideration of section 5(5)(d) is very limited. In government’s view, the Commission did not meaningfully engage with this factor in the manner required by the Act.

The Commission erred by misconstruing the concept of “politicization” in respect of judicial compensation as described by the Supreme Court of Canada in the *PEI Reference* (p. 53) when it found that “too much emphasis on compensation changes to public sector employees, which is the result of political decisions made by Government, must be avoided”. Section 5(5) simply sets out the factors which must be taken into account. The Commission, apart from saying that too much emphasis should not be placed on compensation changes to public sector employees, does not set out how it has in fact taken into account those changes. Taking such changes into account is not politicization of compensation. Further, compensation changes for others paid from the public purse is only a political decision in the sense that it is a decision made by government in its determination of how public funds are to be allocated.

The Supreme Court of Canada in *PEI Reference* said the following in respect of depoliticization and the role of compensation commissions:

....[T]he imperative of protecting the courts from political interference through economic manipulation requires that an independent body — a judicial compensation commission — be interposed between the judiciary and the other branches of government. The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature.⁵

⁵ PEI Reference, para 147.

The Court elsewhere acknowledged that the setting of public compensation, including that of judges, is “inherently political” because control over the public purse necessarily resides with either the Legislature or the executive branch of government.⁶ The risk of politicization is minimized through the use of independent and effective compensation commissions. There is nothing in the Court’s reasons that discourages such independent commissions from considering changes to the compensation paid to others from public funds. To the contrary, compensation commissions in several other Canadian jurisdictions compare judicial compensation to compensation paid to others in the public sector (including rates of change in public sector compensation), either in the statutory direction given to the commissions or in the practices they themselves have adopted.⁷ In British Columbia, the 2013 Judges Compensation Commission, absent specific statutory direction, found that examining the salaries and wage growth/decline of comparator groups, including deputy ministers and assistant deputy ministers in the public service, was helpful because they constitute “objective markers of reasonableness”.⁸

At page 53 of its Report, the Commission states that the utility of considering changes in the compensation of others paid from public funds is “in ensuring commissions consider whether judicial salaries in British Columbia are getting out of step”. The Commission did not explain how it took this concept into account in its analysis. The government does not agree with this view of the purpose of s. 5(5)(d) of the Act. First, s. 5(5)(d) is not focused on the magnitude of judges’ and judicial justices’ salaries, but rather on the extent of compensation changes having regard to changes in the compensation of others paid by provincial public funds, which will be reflective of matters such as the state of the economy and government policies in relation to matters such as deficit management and debt reduction.

Second, s. 5(5)(d) in part reflects the Supreme Court’s observation that judicial independence “can be threatened by measures which treat judges either differently from, or identically to, other persons paid from the public purse”.⁹ The Chief Justice stated that “in my opinion, the risk of political interference through economic manipulation is clearly greater when judges are treated differently from other persons paid from the public purse”.¹⁰ In this regard, s. 5(5)(d) contemplates that Commissions will consider how judges and judicial justices are treated compared to others paid from the public purse, not in terms of the size of their salary, but in terms of the magnitude of any changes to salary. The Commission must recognize that judges

⁶ PEI Reference, para 146.

⁷ Alberta, Quebec and New Brunswick provide statutory direction. Nova Scotia and Saskatchewan compensation commissions have adopted similar practices.

⁸ 2013 Judges Compensation Commission report, p. 36.

⁹ PEI Reference, para 158.

¹⁰ PEI Reference, para 158.

and judicial justices are not civil servants, but the Commission must consider the implications of recommending salary increases for judicial justices that differ in magnitude from increases received by others paid from provincial public funds. For example, the Commission should consider the implications of sparing judicial justices from expenditure management policies that impact others paid from provincial public funds, or conversely the implications of treating judicial justices less generously than others paid from the public purse. In turn, the Legislature must consider this issue as well.

At page 64-65 of its Report, where it sets out the bases for its salary recommendations, the Commission makes no mention of the changes in compensation of others paid from provincial public funds or how this may have been considered. It is government's view that the Commission did not sufficiently consider this issue.

Government has not taken issue with the notion that the judiciary is distinct from the civil service, nor does government propose that judicial justices must receive increases of the same magnitude as those received by others who are paid from the public purse. The government's position has been that both the judiciary and civil servants may have to participate in sharing the burden of government's expenditure management. This principle applies regardless of whether government is in a surplus or deficit position: changes to judicial justices' salaries must take into account changes in compensation paid to others by provincial public funds, as the *Judicial Compensation Act* requires.

The evidence before the Commission was that unionized employees would be receiving increases of 1.5% on average, with the potential for an Economic Stability Dividend. Management employees were eligible to receive performance-based adjustments within their existing salary ranges of up to 2% per year. Deputy ministers and assistant deputy ministers have received small wage increases, and a number have received no increases at all.¹¹ Notwithstanding those comparatives, the Commission recommended a wholly disparate salary increase of 16.81% over 3 years for judicial justices.

There is no analysis or discussion by the Commission of how its recommendations relate to these changes to the compensation paid to others from public funds, and no apparent weight is given to them. The Commission relies upon one element of the province's executive compensation policy (its intended inter-provincial ranking) without considering the extent to which the policy reflects actual compensation levels.

¹¹ The average Deputy Minister salary (without holdback) increased from \$201,277 in 2013 to \$204,778 in 2016. The average Assistant Deputy Minister salary (without holdback) declined from \$146,100 in 2013 to \$143,438 in 2016. (Province's submission to the Commission, p. 49.)

Further, the Commission finds that its recommendations will put judicial justices' salaries "closer to salaries of senior management in the public sector". (p. 65) It is not clear what the Commission meant by this, nor why the Commission believed this was relevant to the factors set out in s. 5(5) of the Act. As indicated above, s. 5(5)(d) compels the Commission to consider changes in the compensation paid to others in the public sector. The actual range of compensation for "senior management" is vast, depending on how one defines senior management. To simply state that the Commission's recommendations put judicial justices closer to senior management salaries does not provide a meaningful rationale for the recommended salary increases.

In Government's view, when section 5(5)(d) is taken into account, it militates in favour of smaller salary increases than the Commission recommended in view of the changes in the compensation of others paid by provincial public funds in British Columbia. Government has taken this into account in making its salary proposal.

2. The Commission failed to properly consider section 5(5)(f) of the Act

Concerning the current and expected financial position of government, the Commission found that "the financial position of Government does not demonstrate that increases in compensation should not be made to the members of the Court if such increases are found by this Commission to be in the public interest"(p. 58). However, the issue was not whether there should be increases in compensation – all parties agreed there should be. The issue for the Commission to consider was how the current and expected financial position of government might impact the size of those increases. The Commission does not explain how evidence of the government's program of expenditure management, and evidence that the modest surplus results from the program of expenditure management, were taken into account in determining the size of salary increases that were recommended.

In its conclusion, the Commission returns to this topic, finding that "as Government has acknowledged, full salary and compensation costs of Judges and Judicial Justices are within the fiscal capacity of Government to pay"(p. 61).

This demonstrates that the Commission focused on whether government had the capacity to pay, rather than on the question of whether, and to what extent, salary increases should be moderated by the fact that the context for the government's financial position is a program of expenditure management. Further, the reference to the government's "acknowledgement" takes the government's submission out of context. What the government said on this point is as follows:

It is acknowledged that the full salary and compensation costs of judges and judicial justices are within the fiscal capacity of Government to pay. The annual budget of the Court in 2014/2015 was \$54,000,000. That is not the issue. The issue is what is reasonable and adequate compensation to meet the factors under the Act. (Government submission, para 17)

The reference to “fiscal capacity” is clearly a recognition that judges’ and judicial justices’ salaries are a fraction of the total justice budget and an even smaller one in regard to the overall provincial budget. This will always be the case and viewed this way the government will always have the capacity to pay because it can always raise taxes or incur debt.

However, government’s statement was not an acknowledgement that government can afford to pay generous increases when viewed within the context of the government’s program of expenditure management, nor was it an acknowledgment that generous salary increases do not have a fiscal impact on government.

Government views the fiscal impacts set out above, and in particular the difference between the Commission’s recommendations and government’s proposed response, as significant given the size of the judicial justice complement and despite the fact that they are small in the context of government’s total budget.

3. The Commission failed to properly consider section 5(5)(c) of the Act

Section 5(5)(c) requires the Commission to consider compensation provided in respect of similar judicial positions in Canada, having regard to the differences between those jurisdictions and British Columbia.

The Commission, in comparing B.C. judicial justices’ salaries to those of other provinces, did not explain how it took into account differences amongst the jurisdictions, if at all. For example, the Commission did not address the broader jurisdiction that equivalent judicial officers have in some provinces. The evidence before the Commission included several such examples: judicial justices in Ontario may issue orders to apprehend an individual for a mental health examination and to apprehend a child in need of protection or emergency protection order; in Manitoba, judicial justices conduct trials and sentencing hearings for summary convictions; and in Yukon, judicial justices may impose custodial sentences of up to 90 days and conditional sentences of up to 180 days.

These are meaningful differences that are relevant to inter-provincial compensation comparisons. The Commission’s report does not address these differences, and instead simply

asserts that the rank of British Columbia judicial justices in compensation compared to those in other provinces is “compelling” (p. 51).

4. Summary

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

- The Commission did not properly consider the issue of changes in the compensation of others paid by provincial public funds – these changes reflect the government’s program of expenditure management, which applies broadly;
- The Commission did not properly consider how the current and expected financial position of government should impact the magnitude of salary increases;
- The Commission did not properly consider differences between British Columbia and other jurisdictions that have similar judicial justice positions;
- The estimated fiscal impact of the Commission’s salary recommendations is \$1.533 million, whereas the estimated fiscal impact of the proposed increases is \$0.921 million;
- The fiscal situation in the province is improved in the current year, but expenditure management remains a focus of government and compensation increases must be assessed within that context, recognizing that there are many competing program needs faced by government;
- The extent of any recruitment issue for judicial justices is unclear given the lack of recruitment effort made by the Office of the Chief Judge (Commission Report, p. 45);
- To the extent that it is a relevant comparison, the substituted salaries reduce the gap in salary between B.C.’s judicial justices and Provincial Court judges in percentage terms by 1.5%.

Provincial Court Judicial Justices’ Benefits

The Commission made the following recommendations respecting the benefits of Provincial Court Judicial Justices:

Recommendation 11: There be no change to the pension plan for judicial justices.

Recommendation 12: There be no shift premium added to judicial justice salaries for shifts worked on afternoons, evenings, weekends or holidays.

Recommendation 13: Effective April 1, 2017, the professional development allowance for judicial justices be \$2,500.

Recommendation 14: There be no change to the flexible benefits plan for judicial justices.

Recommendation 15: The per diem for travel for judicial justices be set at Level II of Treasury Board Directive 01/07.

Response to Commission Benefits Recommendations Respecting Judicial Justices

Government proposes that the Commission's benefits recommendations be accepted.

Costs for Judicial Justices Association

The Commission made the recommendation that government pay 100% of the Judicial Justices Association ("JJA") reasonable costs for participating in the commission process. The government proposes that this recommendation be rejected and that the Legislature substitute an amount for costs that equals 100% of the Judicial Justices' costs up to \$30,000 and two thirds of their costs between \$30,000 and \$150,000.

In 2015 the *Judicial Compensation Act* was amended to stipulate the maximum amount that the government may pay out of the consolidated revenue fund for the reasonable costs incurred by the JJA in the commission process. The maximum amount that may be paid by government to the Association is as follows:

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

The statutory formula provides greater certainty respecting the costs the JJA may recover rather than leaving the ultimate resolution up to a Commission recommendation which may or may not be accepted by the Legislature. Also, government has no control over what costs the JJA might incur.

The statutory formula further provides, however, that the Lieutenant Governor in Council ("LGIC") may, by regulation, set higher amounts than those stipulated in the Act. The

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.

The Commission noted that there is a history of the government paying 100% of the reasonable costs of the JJA, citing 2004, 2007, 2010 and 2013 as examples. The Commission further held that as a matter of fairness the judges and judicial justices should be able to participate to the fullest extent without the need for incurring personal expense.

The Act now provides that the “maximum” amount that government may pay is in accordance with the formula above. The LGIC has not enacted a regulation to provide for greater reimbursement than is set out in the Act. The LGIC’s regulation-making power represents an exception to the statutory norm. The Act cannot be fairly read as contemplating that 100% reimbursement should be the norm.

While the Commission articulates its view of what is fair, it does not articulate any basis for regulating a different result from what the Legislature established as the norm. Put another way, the Commission does not identify a basis for concluding that the formula set out in the Act is not what the Legislature would have expected to be applied in this case.

Government has already reimbursed the JJA according to the statutory formula. Its total costs were approximately \$37,000 and government’s reimbursement was approximately \$35,000.