COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General),* 2015 BCCA 136

Date: 20150327
Docket: CA041691

Between:

Provincial Court Judges' Association of British Columbia

Appellant
(Petitioner)

And

Attorney General of British Columbia

Respondent
(Respondent)

Before: The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated March 3, 2014 (*Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*), 2014 BCSC 336, Victoria Docket 13-1714).

Counsel for the Appellant:	J.J. Arvay, Q.C. & A.M. Latimer
Counsel for the Respondent:	S.K. Gudmundseth, Q.C. & S.H. Coulson
Place and Date of Hearing:	Vancouver, British Columbia November 27 & 28, 2014
Place and Date of Judgment:	Vancouver, British Columbia March 27, 2015

Written Reasons by:
The Honourable Mr. Justice Chiasson

Concurred in by:
The Honourable Mr. Justice Frankel

Dissenting Reasons by:
The Honourable Mr. Justice Harris (**page 31, para. 90**)

Summary:

In 2011, the Province rejected aspects of the compensation recommendations for Provincial Court judges in a report of the 2010 Judges' Compensation Commission ("JCC"). The rejection was set aside on judicial review by Mr. Justice Macaulay and a direction given that the Province reconsider the matter. It did so and provided a further response in 2013 based, in part, on financial circumstances extant at that time. Again, many of the JCC's recommendations were rejected. The appellant's application for judicial review was dismissed. There are three recommendations at issue on appeal: salary, pension accrual rate and pension contribution period.

Held: per Chiasson and Frankel JJ.A., appeal allowed. When reconsidering its response to the JCC's 2010 recommendations, the Province was not entitled to rely on 2013 financial circumstances or to advance new reasons for rejecting the recommendations. The JCC's recommendations are based on prospective financial data projections. The parties take their positions in that context. To allow the Legislature to reject the JCC's recommendations based on actual results or new projections, long after the fact, distorts the process. It risks a complete disconnection between the JCC process and the Legislature's response and eliminates the judges' ability to react other than through the judicial process, which is antithetical to the commission process mandated by the Supreme Court of Canada in Bodner. If consideration of economic circumstances other that those extant in 2011 is eliminated, there would appear to be no basis for rejecting the JCC recommendations that were not found to be unacceptable by Macaulay J. In the circumstances, it is not appropriate to refer the matter back again to the Province. A declaration is made that the Provincial Court judges are entitled to the recommendations in the 2010 JCC report. It is assumed that the Province will respond accordingly.

Per Harris J.A. dissenting, would have dismissed the appeal: Accepting that it was illegitimate to rely on current data, the reconsideration nevertheless was rational and satisfied the Bodner test. The Legislature did not rely on new reasons not previously articulated, had a sufficient and independent basis to reject the salary recommendation, and, in any event, the underlying rationale for rejecting the salary recommendation, although supported by current data, was that it was not fair and reasonable given the burden borne by others compensated by public funds in a time of fiscal austerity. Setting aside the Legislature's motion and declaring that the Provincial Court judges are entitled to the JCC recommendations, encroaches on the jurisdiction of government and the Legislature to allocate public resources from the public purse.

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] This appeal concerns the approach to the judicial review of the Provincial government's response to the recommendations of the Judges' Compensation Commission ("JCC").

Background

[2] In previous related proceedings, Mr. Justice Macaulay described the process for determining appropriate remuneration for provincial judges, with which this case is concerned:

> [6] … constitutional convention requires the interposition of an independent commission, referred to by the Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, R. v. Campbell; R. v. Ekmecic; R. v. Wickman, Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice),* [1997] 3 S.C.R. 3 ("*PEI Reference*"), as a form of "sieve" between the [Provincial Court Judges], on the one hand, and the Cabinet or the [Legislative Assembly ("LA")], on the other, in dealing with issues of remuneration. The government response, to which I referred above, relates to the recommendations of the British Columbia Commission.
>
> [7] In British Columbia, the Judges Compensation Commission ("JCC or commission") is an independent tribunal formed every three years with a mandate under the [*Judicial Compensation Act* [*JCA*]] to report to the Attorney General and the Chief Judge of the Provincial Court "on all matters respecting the remuneration, allowances and benefits of judges" (s. 5(1)(a)) and "make recommendations with respect to those matters for each of the next 3 fiscal years" (s. 5(1)(b)). …
>
> (*Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General),* 2012 BCSC 1022).

[3] The proceeding before Macaulay J. was the judicial review of the Legislature's 2011 response to the 2010 recommendations of the JCC, which covered the period April 1, 2011 to March 31, 2014. On July 11, 2012, he set the response aside stating:

> [112] I issue the order of *certiorari* as sought and declare that the government response and the LA motion respecting the 2010 JCC

> recommendations do not conform to the applicable constitutional principles. I direct the return of the matter to government and to the LA for reconsideration in accordance with these reasons within the time limited by s. 6 of the *JCA.*

[4] On reconsideration, the Attorney General provided a submission and recommendations to Cabinet and on March 12, 2013, moved that the Legislature reject most of the recommendations in the 2010 JCC report. The motion was passed in due course.

[5] The appellant's application for judicial review was dismissed by Mr. Justice Savage on March 3, 2014. The present appeal is from that order.

[6] Later in 2013, a new JCC was constituted and made recommendations with respect to the compensation of Provincial Court judges ("PCJs") for the period from April 1, 2014 to March 31, 2017. At the hearing, we were informed that this JCC used the March 2013 response of the Legislature, which accepted a small salary increase, as the starting point in its deliberations.

[7] On March 24, 2014, the Legislature accepted some and rejected other recommendations of the 2013 JCC report. The appellant has sought or intends to seek judicial review of the Legislature's response. Mr. Justice Tysoe refused the Crown's application for a stay of this appeal pending a determination of the judicial review proceedings concerning the 2014 response (*Provincial Court Judges' Association of British Columbia v. Attorney General of British Columbia*, July 9, 2014, CA041691 (in Chambers)).

The 2010 JCC Process and Recommendations

[8] The 2010 JCC was established pursuant to the *Judicial Compensation Act*, S.B.C. 2003, c. 59 [*JCA*]. Sections 5 and 6 provide:

> **5** (1) Not later than September 1 following its formation, a commission must, in a preliminary report to the minister and chief judge,
>
> > (a) report on all matters respecting the remuneration, allowances and benefits of judges or judicial justices, and

(b) make recommendations with respect to those matters for each of the next 3 fiscal years.

(2) Within 14 days of receiving the preliminary report, the minister or chief judge may apply to the commission for a clarification of a matter in the report or in respect of a matter the commission did not address in the report.

(3) If an application is made under subsection (2), the commission must make a final report to the minister not later than September 30 following its formation.

(4) If an application is not made under subsection (2), the preliminary report is the final report.

(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.

(6) Before preparing a report, a commission may

(a) write and receive submissions,

(b) hold hearings in the manner the commission may decide, and

(c) with the approval of the minister, engage and retain consultants the commission considers necessary.

6 (1) The minister must lay the final report of a commission before the Legislative Assembly, and must advise the Legislative Assembly about the effect of subsection (3),

(a) within 7 sitting days of the Legislative Assembly after the date on which the minister receives the report, and

(b) if the Legislative Assembly is prorogued or dissolved within 16 sitting days after the date on which the report is laid before the Legislative Assembly and the Legislative Assembly has not passed a resolution under subsection (2), within 7 sitting days after the opening of the next session.

(c) [Repealed 2012-6-6.]

(2) The Legislative Assembly may, by a resolution passed within 16 sitting days after the date on which a report is laid before the Legislative Assembly under subsection (1),

(a) reject one or more of the recommendations made in the report as being unfair or unreasonable, and

> (b) set the remuneration, allowances or benefits that are to be substituted for the remuneration, allowances or benefits proposed by the rejected recommendations.
>
> (3) If a recommendation is not rejected by the Legislative Assembly within the time limited by subsection (2), the judges or judicial justices are entitled to receive the remuneration, allowances and benefits proposed by that recommendation beginning on April 1 of the year following the year referred to in, or applicable under, section 2 (1) or 3 (1).
>
> (4) If the Legislative Assembly does resolve to reject a recommendation under subsection (2) (a), the judges or judicial justices are, in respect of that recommendation, entitled to receive the remuneration, allowances and benefits set by the resolution under subsection (2) (b) beginning on April 1 of the year following the year referred to in, or applicable under, section 2 (1) or 3 (1).
>
> (5) If the 16 sitting days specified in subsection (2) end after April 1 of the year for which the recommendations in the report, subject to subsection (2), were to apply, the recommendation applicable under subsection (3) or the resolution applicable under subsection (4) is retroactive to the extent necessary to give effect to the recommendation or resolution on April 1 of that year.
>
> (6) If a resolution referred to in subsection (2) or a recommendation referred to in subsection (3) conflicts with a provision of this Act, the resolution or recommendation prevails over that provision to the extent of the conflict.
>
> (7) A resolution referred to in subsection (2) or a recommendation referred to in subsection (3) may set different salaries for different responsibilities.

[9] The JCC met with representatives of the government and the Provincial Court Judges' Association ("PCJA") at a number of Provincial Court venues. It received and considered ten written submissions from interested parties and conducted public hearings at which oral presentations were heard. On September 20, 2010, the JCC delivered its report.

[10] The JCC began by reviewing the 2007 JCC report as background. That report recommended salary increases based on the JCC's conclusion that "the Province's economic outlook was 'healthy'". The Legislature adopted the 2007 salary recommendation.

[11] The 2010 JCC report made 15 recommendations. Three are at issue on this appeal: salary, pension accrual rate and pension contribution period. Mr. Justice Savage addressed these issues as follows:

[40] The 2010 JCC Report makes the following recommendations respecting the salaries of PCJs at 33:

> The Commission recognizes that Provincial Court Judges are called upon to perform important work under conditions that are often difficult and stressful, and that they should be appropriately compensated. However, salary is only one component of a judicial compensation package that also includes pension and other benefits.
>
> It is the view of the Commission that the current financial condition of the Government does not support salary increases in 2011/12 and 2012/13. This view is clearly shared by the Association, which has not requested an increase in those years. This is appropriate and to be respected.
>
> The Association has proposed a salary increase for the 2013/14 fiscal year which would bring Provincial Court Judges' salaries to 90% of Supreme Court Justices' salaries. In this regard, the Commission adopts the following passage from the Report of the 2007 Commission (page 23):
>
> > *Judicial salaries must be set at a level that will continue to attract highly qualified lawyers from both the private bar and public service. British Columbians would not be well served by a Provincial Court that is overlooked for financial reasons by those lawyers best suited for it. While the Commission does not recommend that the salaries of Provincial Court Judges be tied to those of Supreme Court Justices, the Commission does recognize the importance of setting Provincial Court salaries with a view to minimizing the wage disparity between the two courts.*
>
> Given that Supreme Court Justices' salaries are due for reconsideration in 2011, it is impossible to accurately foresee what they will be in 2013/14. However, the Commission observes that Supreme Court Justices' salaries are statutorily indexed against the eroding effects of inflation and is of the view that Provincial Court Judges' salaries should be similarly protected. Accordingly, the Commission recommends that effective April 1, 2013, *puisne* judges of the Provincial Court receive a salary increase equal to the accumulated increase in the B.C. Consumer Price Index over the preceding three fiscal years, compounded annually. The accumulated increase in the B.C. Consumer Price Index should be calculated based upon an annual average monthly percentage change in that Index using figures published by Statistics Canada on a calendar year basis which should then be adjusted to the Government's fiscal year ending March 31.
>
> The Commission recommends that the Chief Judge's salary remain at *puisne* judge salary plus 12%, and that the Associate Chief Judge's salary remain at *puisne* judge salary plus 6%.

[41] The 2010 JCC Report makes the following recommendations respecting the pension accrual rate for PCJs at 34:

> In recent years, the average age of appointment of a Provincial Court Judge has risen to 53.3 years. This increase is primarily driven by the changing needs and expanded jurisdiction of the Court. The Judicial Council is recruiting senior practitioners with considerable expertise to fill judicial vacancies. At the current accrual rate of 3%, an appointee with no pre-existing pension accrual must sit for 23.3 years before qualifying for the maximum pension benefit of 70% of salary. At that rate, most judges will not reach maximum pension before mandatory retirement at age 75 years.
>
> The Commission believes that there is significant value to the public in maintaining a vibrant and energetic Provincial Court bench, wherein senior judges are replaced by new appointees at appropriate intervals. Furthermore, the challenging caseload and travel expected of a Provincial Court Judge may in some cases be unsustainable for a judge in his or her 70s. It does not serve the public interest to have judges continue to sit on a fulltime basis past the point at which their capacity to do so may be compromised by age, simply to accrue the maximum pension benefit of 70% of salary.
>
> In light of the foregoing, the Commission recommends an increase in the Provincial Court Judges' pension accrual rate to 3.5%, effective April 1, 2013. This will allow judges to accrue the maximum pension benefit of 70% after 20 years of service. Based upon the current average age of appointment of 53.3 years, at an accrual rate of 3.5% judges will reach maximum pension at the age of 73.3 years.
>
> On this issue, the Commission had the benefit of an actuarial report prepared on behalf of the Association by Mr. Don Smith of Western Compensation and Benefits Consultants. Mr. Smith indicates that the annual additional cost to the Government of the proposed increase in the judges' pension accrual rate from 3.0% to 3.5% is $1,272,500.00 for the first 15 years following the implementation of the change. Thereafter, the annual additional cost to the Government will be $1,082,000.00 per year (in 2010 dollars).
>
> The Commission is satisfied that this is a reasonable cost for the Government to bear. An increase in the pension accrual rate to 3.5% will also serve to narrow the disparity between Supreme Court Justices' and Provincial Court Judges' compensation packages.
>
> The Commission recommends that there be no change to the statutory contribution ratio of 24:76. The statutory contribution ratio is part of the overall compensation package payable to judges, and the Commission is satisfied that it is set at a reasonable level. There was no evidence presented to the Commission that would justify a change in the contribution ratio at this time.

[42] The 2010 JCC Report makes the following recommendations respecting the pension contribution period for PCJs at 34-35:

> The Commission recommends the adoption of the Association's proposal in regard to the pension contribution period. In light of the 2008 amendment to the *Provincial Court Act* which increased the age

> of mandatory retirement from 70 to 75 years, it is appropriate that the Government make the necessary statutory amendments which will allow Provincial Court Judges who choose to sit past the age of 70 to continue making pension contributions until he or she retires.
>
> The implementation of this recommendation will require the Government to request that the federal Minister of Customs and Revenue permit pension benefits to be paid commencing upon the date of actual retirement of the judge, pursuant to s. 8502(e) of the *Regulations*. Mr. Donald Smith of Western Compensation and Benefits Consultants advised the Commission that the Minister is likely to approve this change as a matter of course.
>
> The Government must also request the B.C. Legislature to amend the [*JCA*] by defining "latest retirement age" as "the last day of the month in which the judge reaches the age of mandatory retirement". This will allow judges and Government to continue to make pension contributions until the date of actual retirement, regardless of whether retirement occurs before or after the age of 71.
>
> The Commission further recommends that the necessary statutory amendments be made effective as of April 1, 2011.

Decision of Macaulay J.

[12] As noted previously, Macaulay J. reviewed the relevant decisions of the Supreme Court of Canada and the statutory framework for determining judicial salaries in British Columbia.

[13] Mr. Justice Macaulay referred to the JCC's description of the government's position on salaries stating:

> [70] In its summary of issues relating to salaries in the final report, the commission described the government position, as follows:
>
> > The Government observes that due to the recent recession, growing provincial debt and deficit budgets forecast to continue through at least 2012/13, it has an obligation to contain spending. Accordingly, it has adopted a "net zero" public sector compensation mandate. This mandate requires that any public sector salary or benefits enhancement must be offset by savings elsewhere, so that there is no net cost to the Government.
> >
> > The Government proposes that the judges accept the model that it has asked all members of the public service to adopt, which is to acknowledge the extraordinary character of contemporary economic events and the need for restraint in government spending.
> >
> > Accordingly, the Government proposes no net salary increases for the period covered by the Commission's mandate.

[14] He quoted the JCC's consideration of economic circumstances and concluded that the government's response was neither acceptable nor appropriate:

> [72] Under that heading, the commission weighed the evidence in light of its responsibility under the *JCA* to consider the current financial position of government:
>
> > The reference in s. 5(5)(a) of the *Act* to "the current financial position of the government" should not be understood to be limited to the Government's current financial circumstances alone. Since the Commission is required to make recommendations spanning 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. Generally speaking, judicial compensation forms such a small part of Government expenditure that increases in that compensation will always be affordable.
> >
> > For the purposes of its assessment the Commission has assumed that the Province will recover from its present economic circumstances and return to fiscal balance in 2013/14. The Commission does so recognizing that the difficulties of forecasting can be illustrated by the fact that the 2007 Commission felt confident in making its recommendations on the basis that there would be substantial budgetary surpluses to 2010/11. The 13.7% increase in judicial salaries which flowed from the 2007 Commission's recommendations was based upon an economic forecast that was ultimately not borne out by actual events.
> >
> > The Commission accepts that the global economic downturn has had a significant negative effect on the Government's finances as compared to 2007. While the Commission is not bound by the Government's "net zero" mandate, it is of the view that significant enhancements to judicial salaries and benefits are not supportable for the 2011/12 and 2012/13 fiscal years. However, the Commission has concluded that it is reasonable to expect that the Government will be in a position to support increases in the 2013/14 fiscal year which will ensure fair and reasonable compensation for Provincial Court Judges.
>
> Later, after recognizing an additional factor, namely, the minimizing of the wage disparity between Supreme Court Justices and PCJs, in recommending the salary increase for *puisne* judges in 2013/14, the commission stated:
>
> > However, the Commission observes that Supreme Court Justices' salaries are statutorily indexed against the eroding effects of inflation and is of the view that Provincial Court Judges' salaries should be similarly protected. Accordingly, the Commission recommends that effective April 1, 2013, *puisne* judges of the Provincial Court receive a salary increase equal to the accumulated increase in the B.C. Consumer Price Index over the preceding three fiscal years, compounded annually.

> In my view, the government response to the report of the commission respecting the recommended increase lacks legitimacy and rationality.
>
> [73] In standing by its "net-zero" mandate argued before the JCC and reiterating it as the principal basis for concluding that the recommended increase was unreasonable, the government diverted its attention from the evidence and conclusions of the commission as they relate to the constitutional requirements applicable to setting the salaries and benefits of judges. No party, including the PCJA, disagreed that judges must share the burden of economic downturns but that does not entitle government to avoid real involvement in the constitutional process for determining the salaries and benefits of judges. Instead, the primary concern of government throughout appears to have been to avoid the potential impact of accepting recommendations on other public sector bargaining units.
>
> [74] In the result, the continuing invocation and repetition by government at all stages of the process primarily consisting of the "net-zero" mantra is neither legitimate nor rational under [*Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Québec (Attorney General); Minc v. Québec (Attorney General)*, 2005 SCC 44 [*Bodner*]].

[15] The judge continued:

> [78] *PEI Reference* does not grant government a pass on its constitutional obligation, even in difficult economic times. The government reliance on the net-zero mandate cannot be permitted to trump the constitutional obligations applicable to setting judicial remuneration. The mandate is only a negotiating position for bargaining with public sector unions. Judges are not constitutionally permitted to participate in collective bargaining with government. The JCC understood that it was not bound by the net-zero mandate of government.
>
> [79] It is unfortunate that government chose not to participate meaningfully in the constitutional process. I agree with the PCJA that the approach taken by government rendered the process largely pointless.

[16] Recognizing that it was not strictly necessary to do so, Macaulay J. turned to the question of benefits.

[17] The JCC recommended an increase in the pension accrual rate from 3.0% to 3.5%. The judge described the JCC reasoning as follows:

> [86] The recommendation of the JCC took into account that the average age of appointment for a PCJ is 53.3 years, and with the current accrual rate of 3.0% per year, "most judges will not reach maximum pension before mandatory retirement age at age 75 years." The JCC expressed concern that judges may continue to sit on a full-time basis "past the point at which their

capacity to do so may be compromised by age, simply to accrue the maximum pension benefit of 70% of salary." The recommended change to the accrual rate, if accepted, would permit judges to accrue the maximum pension benefit after 20 years, or using the average age of appointment, by the age of 73.3 years.

[87] The JCC considered the associated additional total annual cost of the proposed increase to the accrual rate of $1,272,500 for the first 15 years, and $1,082,000 thereafter, to be reasonable and also emphasized that the increase "will also serve to narrow the disparity between Supreme Court Justices' and Provincial Court Judges' compensation packages."....

[18] He summarized the government's response at para. 88:

1. The current 3.0% accrual rate is higher than the 2% accrual rate that applies to most members of the Public Service Pension Plan;
2. It is unreasonable to attempt to ensure that judges retire with the maximum pension benefit;
3. It is reasonable to expect that judges will have prudently saved for retirement during their careers as lawyers in private practice or, if in public service, will have already contributed to the Public Sector Pension Plan and be able to bring that accumulated service with them;
4. Given the current statutory division of pension contributions as between judges and government, the cost burden associated with a higher accrual rate would fall disproportionately on government; and
5. The commission failed to consider government's proposal that the accrual rate might be increased if the contribution rates were rebalanced so that the effect was cost neutral to government.

[19] Mr. Justice Macaulay assessed the government's response stating:

[91] I agree that the government response mischaracterizes the reasoning of the JCC. Nor does it rationally explain why, in the circumstances, the accrual rate applicable to non-judicial members of the plan was appropriate. Common sense suggests that the average age, apart from PCJs, at which contributions to Public Service pensions commence is long before age 53.3 years. At the very least, government is required to explain its reasoning for relying on the comparator to reject the recommendation.

[92] As well, absent any empirical evidence respecting the pre-appointment retirement savings of private lawyers, the government response is not legitimate. It is nothing more than a reiteration of a submission made to and rejected by the JCC.

[93] Finally, I observe that the JCC did address the questions relating to the respective contribution rates. It concluded its discussion on the pension accrual issue, as follows:

> The Commission recommends that there be no change to the statutory contribution ratio of 24:76. The statutory contribution ratio is part of the overall compensation package payable to judges, and the Commission is satisfied that it is set at a reasonable level. There was no evidence presented to the Commission that would justify a change in the contribution ratio at this time.
>
> [Emphasis added.]
>
> Having not presented evidence respecting the matter of contributions, and also having accepted recommendation 7 that there be no change to the contribution ratios, the government cannot legitimately justify its position in this way.

[20] The judge then turned to the JCC's recommendation to increase the pension contribution from age 71 to age 75. He observed:

> [94] … According to the commission, this [increase] is appropriate because the *Provincial Court Act* was amended in 2008 to increase the age of mandatory retirement from 70 to 75 years. The proposed change would allow judges who sit beyond age 70 to continue making pension contributions until retirement. The commission recognized that implementing the recommendation would require government to request permission from the federal Minister of Customs and Revenue to permit the payment of benefits upon the date of actual retirement, something that the commission concluded, based on the advice of Mr. Smith, would occur "as a matter of course."

[21] The government rejected the recommendation relying on information received from a representative of the Public Service Plan that had not been presented to the JCC. The judge concluded:

> [97] *Bodner* recognizes that government may rely on new facts or circumstances that arise after the release of the commission's final report but that does not, in my view, entitle the government to rely on information that was reasonably available to government but not put forward at the time of the hearing. To permit that approach could render the process meaningless.
>
> [98] I find the government response on this question less than legitimate. It fails to address the substance of the Smith evidence in a meaningful and timely way.

Decision of Savage J.

[22] Mr. Justice Savage undertook a comprehensive review of the history of proceedings concerning the 2010 JCC report and recommendations, including the

legislative framework, the decision of Macaulay J. and the subsequent legislative response. He stated:

> [183] Under the third stage of the Bodner Test, I must consider the 2013 Response from a global perspective. Although I may find fault with certain aspects of the process followed by the government or with some particular responses or lack of answer, I must now determine whether the 2013 Response, viewed in its entirety, is impermissibly flawed even after the proper degree of deference is shown to the government's opinion on the issues. My focus now shifts to the totality of the process and of the response. If I conclude that the response as a whole does not meet the required standard of rationality, a violation of the principles of judicial independence will have been made out.
>
> [184] Viewed globally, I find that the 2013 Response meets the required standard of rationality for the following reasons.
>
> [185] First, the 2013 Response is not inexorably tainted by the "net zero" mantra of the 2011 Response. To find otherwise would undermine Macaulay J.'s order that the government reconsider its response to the 2010 JCC Report. Rather, I must examine the reasons for rejection in the 2013 Response on their own, but in the context of the earlier response and judicial review. That process cannot permit an *a priori* determination of the issue.
>
> [186] Second, the 2013 Response addressed 15 recommendations in the 2010 JCC Report, accepting nine of them, accepting a tenth but with delayed implementation, and accepting an eleventh in part. Only four recommendations were rejected, and only three of those were challenged in this petition.
>
> [187] Third, of the three rejected Recommendations, I have found the [government's] reasons for rejecting two of them to be legitimate and supported by a reasonable factual foundation.
>
> [188] Fourth, the most prominent rationale throughout the 2013 Response is the current economic climate in British Columbia and how it has worsened from the economic forecast on which the 2010 JCC Report is based. That is supported by the proceedings recorded in Hansard. The theme here is one of temporary austerity in which members of the judiciary share some of the burdens of an adverse economic climate during the years in question, after receiving significant increases in prior years. The constitutional guarantee of a minimum acceptable level of judicial remuneration does not shield judges from sharing the burden of difficult economic times, to limit increases: *PEI Reference*, at para 196.
>
> [189] In the circumstances, and viewed in this light, I find that, on balance, the 2013 Response meets the test of rationality.

Positions of the Parties

[23] In its factum, the appellant asserts:

> 16. Savage J. erred by failing to properly apply the '*Bodner* test,' discussed below. He failed to properly consider the reasons in light of the process as a whole and was overly deferential. The LA's reasons are not legitimate and do not have a reasonable factual foundation. Viewed globally, the JCC process was not respected and did not achieve its purpose of depoliticizing the setting of judicial remuneration.

[24] The appellant seeks to introduce new evidence dealing with the current financial position of the Province. This is opposed by the respondent.

[25] The respondent contends that the judge properly applied the *Bodner* test.

Discussion

New Evidence

[26] I would not admit the new evidence. It was not before the Legislature and did not influence its response. More importantly, on the view I have of this matter, the evidence is not admissible because it seeks to introduce data which I conclude is not relevant to the Legislature's reconsideration of the 2010 JCC recommendations.

Scope of Reconsideration

[27] As a starting point, *Bodner* provides the framework for determining the rationality of a government response to a JCC report. The analysis involves the following three steps (para. 31):

> (1) Has the government articulated a legitimate reason for departing from the commission's recommendations?
>
> (2) Do the government's reasons rely upon a reasonable factual foundation? and
>
> (3) Viewed globally, has the commission process been respected and have the purposes of the commission – preserving judicial independence and depoliticizing the setting of judicial remuneration – been achieved?

Each of these stages, and especially the second stage, requires consideration of the factual matrix relied upon by the government to reach its conclusion.

[28] At the hearing of this appeal, we expressed concern with the scope of the Legislature's reconsideration. Counsel addressed this issue.

[29] As Savage J. noted:

> [188] … the most prominent rationale throughout the 2013 Response is the current economic climate in British Columbia and how it has worsened from the economic forecast on which the 2010 JCC Report is based.

[30] When responding to the recommendations, the Legislature was entitled to take into account changes in data from the time the recommendations were made. The Court stated in *Bodner*:

> [26] … 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. …

In my view, this comment must be read in the context of the particular process in question. It is not an invitation to alter the basic framework of that process.

[31] Mr. Justice Macaulay quashed the Legislature's response and ordered it to reconsider the JCC recommendations. I see nothing in *Bodner*, the legislation or the decision of Macaulay J. to suggest that the reconsideration should be based on anything other than what was before the Legislature when it made the response that was set aside.

[32] In my view, considering the recommendations on the basis of financial circumstances in 2013 was unacceptable for a number of reasons.

[33] While consideration of changes in circumstances from the time of a JCC's recommendations to when the Legislature considers them is acceptable, the time during which such changes may occur is defined. The *JCA* requires the Legislative Assembly to act within 16 sitting days after a JCC report is laid before it; after that period, the recommendations are automatically deemed to be active (*JCA,* s. 6). This is consonant with the direction of the Court in *PEI Reference*:

> [179] … The legislature should deal with the report directly, with due diligence and reasonable dispatch.

[34] In British Columbia, the JCC process allows the parties to put forward their positions in the context of stated financial circumstances based on projections. Although there could be a dramatic unforeseen change within the time provided for the Legislature's response that seriously affects the JCC's report, the risk is limited. To permit reconsideration based on circumstances two years after the JCC recommendation risks making those recommendations meaningless or impossible to analyze. Judicial review should not have that result. There are other difficulties.

[35] The 2013 JCC process began with the Legislature's position on the 2010 recommendations, which had accepted a small salary increase. It was appropriate to do so. The process is ongoing (*Bodner* at paras. 14 and 15). Sometimes, the result may be to over-compensate judges based on unforeseen financial circumstances that subsequently develop, as, arguably, was the case in 2007. Because the accepted 2007 salary levels were based on an optimistic financial forecast that changed, no increase was sought or recommended for 2010. On other occasions the compensation may fall short.

[36] Subsequent commissions can and do address these situations. Although commissions may be informed by previous recommendations, each commission inquiry is a discrete event. The process followed in this case frustrates the scheme. The interjection of judicial review should not alter the basic framework and self-regulation of the process.

[37] The JCC's recommendations are based on prospective financial data projections. The parties take their positions in that context. To allow the Legislature to reject the JCC's recommendations based on actual results or new projections, long after the fact, distorts the process. It risks a complete disconnection between the JCC process and the Legislature's response and eliminates the judges' ability to react other than through the judicial process, which is antithetical to the commission process mandated by the Supreme Court of Canada. This was made clear by the Court in *Bodner*, which strove to avoid the type of litigation between judges and governments that has occurred in this case (*Bodner* at paras. 12, 28 and 43).

[38] A further concern is that if current data are to be used, why would the appellant not be entitled to have this Court look at the fiscal circumstances as they exist today? They show a much improved performance over what was predicted. There would be no end in sight to the process.

[39] Finally, reconsidering based on current data leaves the salaries of judges in limbo. Today, in 2015, they do not know the salary to which they are entitled for the years 2011 – 2014. The parties do not know whether the starting point used by the JCC for its 2013 report is sustainable or the basis on which the Legislature's response to those recommendations will be reviewed judicially.

[40] I agree with the observation of Savage J.:

> [188] … The constitutional guarantee of a minimum acceptable level of judicial remuneration does not shield judges from sharing the burden of difficult economic times…

In my view, the Commission process is fully consistent with this, but the economic times surely must be those relevant to each commission. Each commission will consider the compensation of judges in the context of existing and forecasted economic conditions and the government will respond accordingly. In the present case, the government seeks to oblige judges to bear the burden of difficult economic conditions that were not present at the time of the 2010 recommendations; economic conditions that can be addressed by the 2013 Commission. The attempt to limit the compensation of judges for the period beginning in 2011 by imposing on them the burden of subsequent economic times is not consistent with the constitutional guarantee of a minimum acceptable level of compensation.

[41] There also is concern that the 2013 response asserts new reasons for rejecting the report. In particular, the government stated, and Savage J. agreed, that the 2010 salary recommendation was based on a desire for income parity with Superior Court judges and recruitment issues, although the JCC did not find recruitment to be a problem. Savage J. addressed the issue as follows:

> [125] It is logical for the government to question why, if the JCC cannot conclude that the wage disparity affects recruitment, the JCC recommends a salary increase in order to minimize the wage disparity and associated recruitment issues. It is permissible for the government to verify the accuracy of information in the commission's report: *Bodner* at para. 26. This includes challenging the underlying logic of the JCC recommendations, which is what this does.

[42] My colleague has quoted from the government's 2011 response. None of the reasons for rejecting the proposed salary increase refer to an objective of achieving wage parity. There is no suggestion that a driving force for seeking wage parity is recruitment or that the recommendation is not logical because recruitment is not a problem. In fact, the government appears to recognize a link between recruitment and salary stating:

> Maintaining judges' salaries through fiscal year 2012/14 would not result in a salary falling below the level necessary to attract high-quality candidates to the provincial bench or that would otherwise harm judicial independence.

[43] The government is obliged to engage fully with the judges in the commission process. In my view, it is not appropriate for it to do so piecemeal. The order to reconsider gave the government an opportunity to review its initial response in light of the reasons of Macaulay J. I do not consider that it was an opportunity to ferret out new reasons for rejecting the recommendations. To do so would not be consonant with the approach on judicial review prescribed by the Court in *Bodner*:

> [62] In the *Reference*, this Court stated that the government's response must be complete. In other words, all the reasons upon which the government relies in rejecting the commission's recommendations must be stated in its public response. As a result, once the matter is before the reviewing court, it is too late for the government to bolster its response by including justifications and reasons not previously mentioned in the response.

[44] In my view, if *Bodner* mandates that the government is limited to its stated reasons for rejecting JCC recommendations on judicial review, it is not logical to then leave it unconstrained on an ordered reconsideration. As was stated by Macaulay J., the reconsideration was to be in light of his reasons for judgment. It was not a consideration *de novo*.

[45] The legislative scheme is designed to set judges' compensation in three-year cycles. The parties make submissions to a commission. It provides recommendations for a three-year period. The Legislature responds. Judicial review may ensue, but it is judicial review of a particular decision made in the context of a statutory mandate which fixes judges' compensation based on financial projections for the years under consideration. The judge on judicial review ordered the Legislature to reconsider its decision. To bring subsequent data into the process sees the Legislature not reconsidering the subject JCC report in light of the data that gave rise to that report, but on the basis of data that are unrelated to that report. In that sense, the subject JCC is not being reconsidered. Whether the Legislature will approve an increase in judges' salaries is based not on the projections considered by the JCC to which the parties responded, but on actual results or new projections two years later. That is not the process mandated by the legislation.

[46] The appellant suggests that Savage J. should have viewed the respondent's 2013 response skeptically. It asserts that although the projected shortfall numbers were large, in the context of the overall Provincial budget, they were not of great significance. The appellant accepts that deference must be given to the respondent, which is responsible for the public purse, but contends that less deference should be given in a second round after judicial review. In my view, this approach impermissibly draws the court into the risk of interposing its fiscal judgment into the process.

[47] Mr. Justice Savage addressed this issue stating:

> [133] The petitioner would have me find that a change in fiscal forecast that is anything other than extraordinary cannot be the type of new circumstance that the Supreme Court of Canada contemplated by this statement. With respect, I disagree.
>
> [134] As I emphasized when outlining the rationality [standard] as a deferential standard of review, the allocation of funds from the public purse is a political decision that is exclusively within the jurisdiction of the Legislature. For me to embark on an examination of whether an estimated $2.9 billion more in tax-payer supported debt, or a greater than 50% reduction in the projected surplus, is significant enough to amount to a new fact or circumstance, would trench on that jurisdiction.

> [135] A change in economic circumstances can legitimately be raised by the government as a justification for departing from the JCC recommendation. It is not suggested that the change is trifling, nor could it be. In my opinion it is generally not for the Court to assess the severity of change in fiscal forecast when determining the legitimacy of this reason, provided it is within the range of what might reasonably be considered meaningful and significant. The Supreme Court of Canada is clear that it is permissible for the government to analyse the impact of a JCC recommendation: *Bodner* at para. 26.

I agree with these comments, but if the respondent is entitled to rely on completely new data, the court is constrained from undertaking a meaningful assessment of the rationality of the respondent's rejection of the JCC's 2010 recommendations when that rejection occurred.

[48] In my view, the Legislature's response to the JCC's 2010 recommendations on the reconsideration must be set aside. The issue remains what should follow.

[49] Although I would allow this appeal and set aside the Legislature's 2013 response to the 2010 JCC recommendations, I consider it appropriate to address the decision of Savage J., because this has relevance to the appropriate remedy.

The Merits

[50] As noted, there were three recommendations in issue on judicial review: judges' salaries; accrual rate for judges' pensions; and extension of judges' pension contribution period.

[51] Mr. Justice Macaulay rejected the Legislature's position on the JCC's salary recommendation essentially because it was based on the government's "net-zero" approach to civil service remuneration. In 2013, the government had a "co-operative gains" policy. Increases in remuneration were linked to savings in the sector affected. Mr. Justice Savage appears to have considered that the two concepts were connected (at para. 111), but the respondent stated that it did not rely on the co-operative gains policy in rejecting the JCC's salary recommendation.

[52] The respondent contended that the JCC report was flawed because it tied its salary recommendations to the objective of PCJs obtaining parity with Superior

Court judges as a basis of preserving and fostering recruitment to the Provincial Court bench when it stated expressly that it could not conclude that recruitment was a problem. As noted, the judge accepted this contention.

[53] As I have indicated, I do not think it was appropriate for the respondent to anchor its 2013 response on substantive reasons which were not advanced in its initial response. It was not foreclosed from raising the issue in its response to the 2013 JCC report, but the objectives of the process are not served if the Legislature can keep advancing new substantive reasons for rejection on court ordered reconsiderations.

[54] The judge concluded that "the primary basis for the salary recommendation in the 2010 JCC report can reasonably be understood to be a concern for the wage disparity between PCJs and judges of the superior courts" (para. 121). He continued, "nowhere in the recommendation on page 33 is it suggested that the primary concern is the nature and importance of the work of PCJs … [a]t best this is … a secondary basis for the salary recommendation" (para. 122).

[55] In my view, a review of the JCC's analysis does not support the contention that its salary recommendation was based on striving for parity with Superior Court judges. Reference is made to this objective, but it is not stated as the basis for the salary recommendation.

[56] The recommendation section of the report begins:

> The Commission recognizes that Provincial Court Judges are called upon to perform important work under conditions that are often difficult and stressful, and that they should be appropriately compensated.

[57] The recommendations are preceded by a number of relevant sections, some of which state:

> **Work of the Provincial Court**
>
> … [T]he Provincial Court brings the administration of justice to the citizens of British Columbia, and for the vast majority of them it is the face of justice.

> Given the broad jurisdiction of the Provincial Court, judges must be capable and competent across many areas of the law. As those who appear before them are often unrepresented, judges often do not have the assistance of counsel to direct them to relevant law. The Commission heard evidence from the Association that approximately 90% of civil litigants are unrepresented, as are 40% of criminal accused and 90-95% of family law litigants. Dealing with unrepresented litigants demands that Provincial Court judges possess the qualities of patience, humility and compassion, and a keen understanding of human nature.
>
> **Need to Provide Reasonable Compensation to Judges**
>
> …
>
> > *The salary and benefits provided to judges of every court should reflect the position of dignity and respect in which they are held by society. Judges make a unique and essential contribution to the stability and order that British Columbians value and their remuneration should reflect that fact.*
>
> As noted elsewhere in this Report, the expanding jurisdiction of the Provincial Court means that now, more than ever, judges are required to have or develop expertise in broad areas of the law. Trials are longer and more complex than in the past, but decisions must be rendered quickly. Judges are also called upon to be mediators, to coordinate community and government services to youth, aboriginal, addicted and mentally ill offenders, and to ensure that the rights of unrepresented parties are protected.
>
> The Commission also heard evidence that despite strong efforts by all parties to create procedural and technological efficiencies in the use of judicial time, Provincial Court Judges' caseloads are steadily increasing. Court time is double and triple booked, and matters are often adjourned for lack of an available judge. Backlogs develop quickly. Judicial appointments that would ease these pressures have not been made. This combination of factors creates a stressful working environment for judges, who are not only the face of justice for the people of British Columbia but often also the face of delay, frustration and inconvenience.
>
> It is with all of these factors in mind that the Commission approaches the task of determining a reasonable level of compensation. …

[58] Details of the areas of law dealt with by Provincial Court judges are set out. The fiscal position of the government is addressed as is the need for recruitment. Comparison with Supreme Court judges' salaries, the salaries of Provincial Court judges in other jurisdictions, and those of employees in the public sector is made. I see no basis for concluding that the primary basis for the 2010 salary recommendation was wage disparity with judges of Superior Courts.

[59] In fact, as was noted by the appellant in its factum, the recommendation increased the disparity between the salaries of Provincial Court judges and Superior Court judges. The so-called "parity" merely gave Provincial Court judges the same protection against inflation as Superior Court judges by indexing against the erosion of inflation. Necessarily, this is likely to increase wage disparity because the base is higher for the Superior Court salary indexing.

[60] The judge also accepted the respondent's contention that it was entitled to reject the 2010 JCC salary recommendations because financial circumstances had deteriorated by the time of the reconsideration and 2013 response. I have rejected the appropriateness of the respondent basing its analysis of the 2010 JCC report on 2013 data.

[61] Turning to the respondent's 2013 rejection of the 2010 JCC recommendation increasing the accrual rate for PCJs' pensions, the judge observed "that the 2013 Response provides a degree of clarity around the reasons for rejecting the recommendation that is not present in the 2011 Response" (at para. 146).

[62] The appellant contended that the respondent's 2013 response merely repeated positions advanced to and rejected by the 2010 JCC, contrary to *Bodner*. On appeal, the appellant also asserts that these positions were advanced to and rejected by Macaulay J.

[63] In *Bodner*, the Court stated:

> [23] … The government's response must be complete, must respond to the recommendations themselves and must not simply reiterate earlier submissions that were made to and substantively addressed by the commission. The emphasis at this stage is on what the commission has recommended.

It is not clear to what extent Savage J. addressed the appellant's contention, but an examination of the reasons for judgment of Macaulay J. and the material presented to the 2010 JCC supports the appellant's position.

[64] The judge identified four bases on which the respondent rejected the recommendation of the JCC:

> [146] …
>
> 1. there is no evidence that judges are continuing to sit beyond their capacity to do so;
> 2. there is no compelling evidence that requires setting Provincial Court Judges' compensation as close as possible to that of the superior courts;
> 3. the JCC erred in assuming that the pension plan should be configured to ensure maximum accrual for Judges.
>
> [147] … the ongoing fiscal context militates against raising the accrual rate.

[65] I have addressed the ongoing fiscal context.

[66] Savage J. considered that judges continuing to sit beyond their capacity and the objective of maximizing pensions

> … appear intended to address … the principal rationale in the 2010 Report … that "it does not serve the public interest to have judges continue to sit on a full-time basis past the point at which their capacity to do so may be compromised by age, simply to accrue the maximum pension benefit" (at para. 149).

[67] The respondent contended that this was a hypothetical concern of the JCC which was not supported by evidence.

[68] The absence of evidence that judges continue to sit beyond their capacity was not advanced previously, although the concern that they might do so as expressed in the 2010 JCC report was noted by Macaulay J. at para. 86.

[69] Apart from the fact that this is a new argument advanced in the respondent's 2013 Response, I question the approach of the judge. He stated that the respondent noted in its 2013 Response "that there was no evidence before the JCC that any PCJs are sitting beyond their capacity to do so" (para. 154). What the Response actually stated was that "no evidence was presented to [the JCC] that this is a problem".

[70] Reading the JCC recommendation, it is clear that the JCC was identifying a risk. The judge agreed that "it is in the public interest not to have judges sit full-time beyond their capacity". The judge continued:

> [157] The government is entitled to depart from a JCC recommendation if it gives a legitimate reason supported by a reasonable factual foundation. In doing so, the government is entitled to give different weights to different factors and verify the accuracy of the information underlying the JCC recommendation. Where a JCC recommendation is based upon a reasonable concern rather than empirical evidence, I would interpret *Bodner* to permit the government to depart from the recommendation based on a factual foundation that contradicts the logic of the concern.

[71] The respondent advanced no factual foundation that contradicts the logic of the reasonable concern. That concern was expressed by the JCC as follows:

> … the challenging caseload and travel expected of a Provincial Court Judge may in some cases be unsustainable for a judge in his or her 70s. It does not serve the public interest to have judges continue to sit on a full-time basis past the point at which their capacity to do so may be compromised by age, simply to accrue the maximum pension benefit of 70% of salary.

[72] In its 2011 Response, the respondent advanced four reasons for rejecting the recommended accrual rate increase:

1. the relationship between the accrual rate of judges and those of employees in the public service;
2. it is unreasonable to assume that the intent of the pension plan is to provide the maximum available pension to judges;
3. lawyers who become judges will have saved prudently for their retirement; and
4. a disproportionate burden on the public purse.

[73] Macaulay J. stated that the government's response mischaracterized the reasoning of the JCC (at para. 91). He rejected the pre-appointment savings and disproportionate contributions contentions as having no evidentiary foundation. Nothing has changed.

[74] Although Savage J. considered that the objective of maximizing pensions was part of the sitting beyond capacity issue and the matter was before Macaulay J., I have difficulty with the logic of the respondent's position. In its 2011 Response, the government stated it was unreasonable to infer that:

> … the intent of the Public Service Pension Plan is to ensure that judges retire with the maximum pension benefit…The intent of the pension plan is not necessarily to guarantee that its members achieve the maximum benefits possible…it is to ensure a reasonable retirement benefit for members given their length of service, and contribution, to the plan.

Recapitulating the arguments that had been advanced to the 2010 JCC, the position of the government was expressed in its 2013 Response as follows:

> … the overall purpose of a pension plan is not to necessarily provide a full pension to all, but to ensure a reasonable level of pension commensurate with service. It is assumed that lawyers should be saving for their retirement…

[75] Obviously, the benefits of a pension plan will reflect the service and contribution of its beneficiaries, but surely the objective is to maximize those benefits. The recommendation of the 2010 JCC merely sought to provide the opportunity for judges to do so. That may not be acceptable for any number of reasons, but it is not unreasonable.

[76] On the issue of the pension contribution period, Savage J. concluded that the respondent's ground for rejecting the 2010 JCC recommendation to extend the judges' pension contribution period from age 71 to age 75 did not "meet the standard of rationality under the first two stages of the *Bodner* test" (at para. 182). I would not disturb this finding.

Remedy

[77] A court must be very reluctant to instruct a Legislature how to proceed (*Bodner* at para. 44), but in the context of establishing judges' compensation there is precedent for doing so.

[78] The circumstances in *Conférence des juges du Québec c. Québec (Procureur général),* 2007 QCCS 2672, were in some respects similar to those in the present case. There had been judicial review and a referral back to the government and a subsequent rejection. As of 2007, the judges' conditions of employment for the period July 1, 2001 to June 30, 2004 were not settled. A report had been prepared for the 2004 – 2007 period.

[79] The Court recognized the caution expressed by the Supreme Court at para. 44 of *Bodner*, but in the circumstances ordered the government to implement the committee's recommendations. Similarly, in *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice and Consumer Affairs),* 2009 NBCA 56, on the basis of exceptional circumstances, the Court of Appeal gave directions to the government.

[80] In *Manitoba Provincial Judges' Assn. v. Manitoba*, 2013 MBCA 74, the Court noted the *Bodner* caution and referred to the exceptional circumstances analysis in the New Brunswick case. The Court was concerned with delay, among other things, and declined to merely refer the matter back to the Legislature. The Court affirmed the decision of a judge of the Court of Queen's Bench ordering the immediate implementation of a judicial compensation commission's recommendations.

[81] In the circumstances of this case, it is my view that it is not appropriate again to refer the 2010 JCC report to the Legislature for reconsideration. I reach this conclusion for two main reasons.

[82] If consideration of economic circumstances other that those extant in 2011 is eliminated, there would appear to be no basis for rejecting the JCC recommendations that was not found to be unacceptable by Macaulay J.

[83] Continuation of uncertainty is not in the best interest of either party and is not consistent with the scheme of the process mandated by the *Judicial Compensation Act*. PCJs still do not know what remuneration they are to receive for the period 2011 – 2014. The 2013 JCC report that was rejected in part by the Legislature used

the Legislature's 2013 response to the 2010 JCC report as a starting point. Directing a further reconsideration of the 2010 JCC report re-opens that response with further uncertainty. It is difficult to see how the judicial review of the Legislature's response to the 2013 report could proceed while the 2010 JCC process remains incomplete. Subject to the Legislature's further response to the 2010 JCC report, there may be yet another judicial review concerning that report. In my view, it is necessary for the 2010 JCC process to end.

Conclusion

[84] Pursuant to s. 2(2) of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241, the Court has the authority to quash a decision and issue a declaration in relation to the exercise of a statutory power.

[85] In my view, the Legislature was neither entitled to reconsider its response to the 2010 JCC report on the basis of 2013 financial data, nor to advance new substantive reasons for rejecting the report. On that basis, I would allow this appeal.

[86] Absent consideration of 2013 data and new arguments, in light of the reasons of Macaulay J., there is no basis on which the recommendations of the 2010 JCC report can be rejected.

[87] I would set aside the Legislature's 2013 response to the 2010 JCC report pursuant to s. 2(2) of the *Judicial Review Procedure Act*.

[88] I would declare that the PCJs are entitled to the recommendations in the 2010 JCC report.

[89] I do not consider it appropriate to direct the Legislature how to act, but assume it will respond in accordance with the declarations made.

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Mr. Justice Frankel"

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[90] I have read the draft reasons for judgment of Mr. Justice Chiasson. He proposes to allow this appeal on the basis that the 2013 Response by the Legislature to the 2010 Recommendations of the Judges' Compensation Commission ("JCC") does not comply with the constitutional obligations of government and the Legislature. He would quash the Legislature's response to the 2010 JCC report and declare that the Provincial Court judges are entitled to the recommendations in the 2010 JCC report.

[91] The foundation of that conclusion is twofold. First, that in reconsidering its response to the 2010 recommendations, government and the Legislature cannot rely on current data; rather they must rely on facts and forecasts known at the time of their first response in 2011. I take that to mean that the reconsideration must be based on the record as it existed when the Legislature first considered its response, although as observed in *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Québec (Attorney General); Minc v. Québec (Attorney General)*, 2005 SCC 44 [*Bodner*], government may, if called on to justify its position on judicial review, provide more detailed information with respect to the factual foundation it has relied on: see, para. 27. Secondly, the government and Legislature cannot rely on new substantive reasons by ferreting out new reasons to reject the 2010 Recommendations in reconsidering its response when they did not, but could have, relied on them in their first response.

[92] I respectfully disagree with the conclusion reached by my colleague on his application of those principles. In my view, the reasons given by government and the Legislature in reconsidering and then rejecting particular recommendations in the 2010 JCC report are not fatally undermined by any inconsistency with the statements of principle on which my colleague relies. In the result, I agree with the

conclusion of the Chambers judge, albeit for somewhat different reasons, that when viewed "globally" the 2013 response meets the required standard of rationality set out in *Bodner*.

[93] Before explaining the basis of my disagreement with my colleague, I want to emphasize areas of broad agreement. I agree in principle that a reconsideration should be based, except perhaps in exigent circumstances, on the circumstances and the record that existed at the time the Legislature first considered its response to a JCC report. I agree that, in British Columbia, the JCC process is based on forecasts and projections and that relying on actual results or new projections distorts the process and risks frustrating it.

[94] I agree too that government and the Legislature have a constitutional obligation to engage fully with the recommendations made by a JCC and that that obligation limits their ability to rely in a judicial review on new or additional reasons not set out in their response.

[95] Accordingly, I share the view that on a reconsideration there are limits on "new substantive reasons" that may be advanced to reject recommendations if they had not been offered in the first response and could have been. Nonetheless, a reconsideration is just that. It is an opportunity to reconsider a response in light of the reasons for judgment. In my view, on a reconsideration, the government and Legislature are not prohibited from rearticulating reasons, reweighing considerations, elaborating, explaining or expanding on reasons already provided, or reformulating their response provided that the issues addressed arise fairly out of the record that existed at the time of the first response and address appropriately any deficiencies identified in the first judicial review. Moreover, I see nothing wrong with the government or Legislature relying on reasons given in its first response for a second time if they were rational and legitimate at the time of the first response.

[96] I think this approach to reconsideration is consonant with critical principles that emerge from *Bodner.* The relevant standard of review to be applied by a court is

deferential. A government response should be accepted if it is rational in the sense that it is complete and deals with a commission's recommendations meaningfully, relying on reasonable factual foundations, explaining different weights given to relevant factors, and articulating grounds for acceptance and rejection: paras. 22-7. The standard of review is deferential because it acknowledges that commission recommendations are not binding and government's unique position, accumulated expertise and constitutional responsibility for management of the province's financial affairs: para. 30. Accordingly, the standard of review is rationality alone: para. 29. This requires government to articulate legitimate reasons to depart from a recommendation, at the first stage of assessment. Second, the court must assess whether the government has explained the factual basis of its response (para. 36) and assess whether it is rational for the government to rely on the stated facts (para. 37) by looking at the soundness of those facts in relation to the position taken. Finally, the response must be assessed globally to determine whether government has engaged in a meaningful way with the process and given a rational answer to the commission's recommendations: para. 38. In my view, these principles inform the scope of legitimate reconsideration after judicial review in the manner I have described above.

[97] I do not think it possible to identify in the abstract the demarcation line between when reasons advanced on a reconsideration cease to be legitimate reconsideration and become illegitimate new substantive reasons. It may be that what underlies drawing the line in a particular case may be an application of the principle of procedural fairness. Under the JCC statutory scheme, government and the legislature have the last word, provided their response is rational, reflecting the fact that commission reports are not constitutionally binding and, subject to some limits, decisions about the allocation of public resources and the setting of judicial salaries fall within the jurisdiction of legislatures; see, *Bodner,* paras. 20 and 42. The Provincial Court judges are limited to judicial review and have no further input into the process. To allow wholly new reasons to be advanced in response to a recommendation that does not fairly arise from the original recommendations or a

full engagement in response to those recommendations defeats procedural fairness. The judges will have not had a fair opportunity to address the substantive matters that arise. This difficulty arises most particularly where, on a reconsideration, the government or Legislature relies on data that was not available to the JCC when it made its recommendations or to the judges when they made their submissions.

[98] I turn now to summarize why, notwithstanding my general agreement with the principles articulated by my colleague, I disagree with the conclusion he has reached.

[99] In my view, the recommended salary increase was rejected in 2013/14 for two principal reasons. First, according to the 2013 Response, the recommendation was rejected as unfair and unreasonable because its primary basis was a concern with wage disparity between Provincial and Superior Court judges so as not to adversely affect recruitment to the Provincial bench. I consider that to be a rational response to the 2010 recommendations, as found by the Chambers judge. It is not, in my opinion, an illegitimate new substantive reason advanced for the first time on the reconsideration. To the contrary, it was a reason that elaborated fairly and more fully explained a reason given in the 2011 response to reject the JCC recommendations. Moreover, it was not a reason that was criticized as irrational in the first judicial review. It was not addressed.

[100] The second basis for rejecting the salary recommendation was that the actual financial circumstances of the Province had turned out to be worse than they had been forecast to be in 2010. I agree that it was illegitimate to rely on the actual data, rather than the forecast. Nevertheless, it is artificial to read the 2013 response without any regard to the 2011 response. Part of the rationale for the 2011 response was that it was unfair and unreasonable to award judges' salary increases out of the public purse when others paid from it were shouldering the burden of hard times. In my view, that rationale continues to inform the 2013 response. On a fair reading, it is the foundation or the underlying premise of the rejection of the recommendations. While government and the Legislature relied on facts they ought not to have relied

on to support the rationale, the essential rationale remains: a salary increase is unfair and unreasonable having regard to the burden being carried by others paid for by public funds in the face of hard fiscal times. With respect, that judgment call is one for the Legislature to make, provided it is a rational judgment within the meaning of *Bodner.* In my view, it was a rational judgment in 2011 (even though the 2011 response was also tainted by illegitimate considerations) and remained so in 2013.

[101] The Chambers judge concluded that the 2013 reconsideration of the recommendation on pension accrual was rational. I agree with his reasoning. More particularly, I do not share the view that the response is merely a reiteration of positions advanced to and rejected by the 2010 JCC and advanced to and rejected on the first judicial review. To the contrary, I find that the reasons advanced in 2013 are responsive to the criticisms levelled at the 2011 response in the first judicial review. In my view, they properly fall with the legitimate scope of reconsideration and respond in a rational way to the 2010 recommendation.

[102] Lastly, I agree with the views expressed both by the Chambers judge and my colleague that the 2103 response to the contribution period issue does not meet the *Bodner* test, but that conclusion does not affect my assessment that the global response was rational.

[103] I turn now to address these issues in more detail.

Salary Increase

The 2010 Recommendation

[104] The 2010 Commission recommendations and supporting rationale concerning Provincial judge salaries are set out at p. 33 of the Report:

> The Commission recognizes that Provincial Court Judges are called upon to perform important work under conditions that are often difficult and stressful, and that they should be appropriately compensated. However, salary is only one component of a judicial compensation package that also includes pension and other benefits.

> It is the view of the Commission that the current financial condition of the Government does not support salary increases in 2011/12 and 2012/13. This view is clearly shared by the Association, which has not requested an increase in those years. This is appropriate and to be respected.
>
> The Association has proposed a salary increase for the 2013/14 fiscal year which would bring Provincial Court Judges' salaries to 90% of Supreme Court Justices' salaries. In this regard, the Commission adopts the following passage from the Report of the 2007 Commission (page 23):
>
> > *Judicial salaries must be set at a level that will continue to attract highly qualified lawyers from both the private bar and public service. British Columbians would not be well served by a Provincial Court that is overlooked for financial reasons by those lawyers best suited for it. While the Commission does not recommend that the salaries of Provincial Court Judges be tied to those of Supreme Court Justices, the Commission does recognize the importance of setting Provincial Court salaries with a view to minimizing the wage disparity between the two courts.*
>
> Given that Supreme Court Justices' salaries are due for reconsideration in 2011, it is impossible to accurately foresee what they will be in 2013/14. However, the Commission observes that Supreme Court Justices' salaries are statutorily indexed against the eroding effects of inflation and is of the view that Provincial Court Judges' salaries should be similarly protected. Accordingly, the Commission recommends that effective April 1, 2013, *puisne* judges of the Provincial Court receive a salary increase equal to the accumulated increase in the B.C. Consumer Price Index over the preceding three fiscal years, compounded annually. The accumulated increase in the B.C. Consumer Price Index should be calculated based upon an annual average monthly percentage change in that Index using figures published by Statistics Canada on a calendar year basis which should then be adjusted to the Government's fiscal year ending March 31.
>
> [Emphasis added.]

[105] The Chambers judge characterized the salary recommendation at paras. 121-122:

> In my opinion, the primary basis for the salary recommendation in the 2010 JCC Report can reasonably be understood to be a concern for the wage disparity between PCJs and judges of the superior courts. The 2010 JCC Report refers to the salaries of superior court judges on at least three occasions on page 33. Further, the 2010 JCC Report specifically cites a passage from the 2007 Report that recognises the importance of minimising the wage disparity so as not to impact the recruitment of PCJs. As such, it is also reasonable to understand that the JCC's focus on the wage disparity arises from a primary concern with recruitment issues.
>
> Certainly, nowhere in the recommendation on page 33 is it suggested that the primary concern is the nature and importance of the work of PCJs, although I

> do not dispute that it is an important consideration in the JCC process as a whole. At best this is, in my opinion, a secondary basis for the salary recommendation.

[106] I agree with this characterization of the primary basis of the 2010 salary recommendation. The purpose of the recommendation is to minimize wage disparity to continue to attract qualified candidates. The point of recommending a salary increase tied to the accumulated increase (compounded annually) in the Consumer Price Index ("CPI") is to limit the divergence in judicial salaries between the Superior Courts and the Provincial Court thereby minimizing the wage disparity that would otherwise occur, since Superior Court salaries are "statutorily indexed against the eroding effects of inflation". I do not doubt that the goal of minimizing wage disparity is informed by recognition of the nature of the workload in Provincial Court.

The 2011 Government Response

[107] In its 2011 response, the government rejected the proposed increase in salary for a number of reasons, only some of which formed the basis of the first judicial review. The reasons given were:

> a. The Commission recommendation of a salary increase in 2013/14 to take into account accumulated inflation contradicted its rationale for recommending no salary increases in 2011/12 and 2012/13; the practical effect, according to the Government, was to provide compensation increases for 2011/12 and 2012/13, but defer implementation to 2013/14.
>
> b. Government had determined that it must limit compensation increases paid by public funds. A compensation arrangement for judges that provided protection against inflation was not consistent with that determination. Protection against inflation had not been offered to employees in the public service.
>
> c. In pursuit of its policy of deficit reduction, the government had established a "net zero" public sector compensation mandate. The mandate applies across the board affecting everyone paid from the public purse. A similar approach applied to provincial court judges was determined to be fair and reasonable. That approach reflected the comment of the Supreme Court of Canada that "nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times".
>
> d. Judicial salaries had increased significantly, by a cumulative increase of 43.3% since 2004. In light of the then existing uncertain fiscal situation for

> government, a recommendation of no increase in salary of judges for 2013/14, as well as the two previous years, is fair and reasonable.
>
> e. The government identified as an additional consideration the uncertainty regarding the financial impact on public finances of the referendum to be conducted later that year concerning the Harmonized Sales Tax.
>
> f. Maintaining judges' salaries at $231,138 through fiscal year 2013/14 would not result in a salary falling below the level necessary to attract high-quality candidates to the provincial and order would otherwise harm judicial independence.

The First Judicial Review

[108] Mr. Justice Macaulay rejected the government response as adopted by the Legislature as neither legitimate nor rational under the *Bodner* test. In reaching this conclusion, he analyzed the government submissions to the Commission, Cabinet submissions in response to the recommendation, and the government response itself. The government submissions to the Commission focused, in part, on applying the "net-zero" public sector compensation mandate to the entire public sector, including judicial compensation. The submissions to Cabinet reflected a concern for the effect of an increase in judicial salaries on compensation of certain public sector employees whose compensation was linked to judicial salaries.

[109] Mr. Justice Macaulay summarized his conclusions as follows (2012 BCSC 1022):

> [73] In standing by its "net-zero" mandate argued before the JCC and reiterating it as the principal basis for concluding that the recommended increase was unreasonable, the government diverted its attention from the evidence and conclusions of the commission as they relate to the constitutional requirements applicable to setting the salaries and benefits of judges. No party, including the PCJA, disagreed that judges must share the burden of economic downturns but that does not entitle government to avoid real involvement in the constitutional process for determining the salaries and benefits of judges. Instead, the primary concern of government throughout appears to have been to avoid the potential impact of accepting recommendations on other public sector bargaining units.
>
> [74] In the result, the continuing invocation and repetition by government at all stages of the process primarily consisting of the "net-zero" mantra is neither legitimate nor rational under *Bodner*.
>
> …

> [78] … The government reliance on the net-zero mandate cannot be permitted to trump the constitutional obligations applicable to setting judicial remuneration. The mandate is only a negotiating position for bargaining with public sector unions. Judges are not constitutionally permitted to participate in collective bargaining with government. The JCC understood that it was not bound by the net-zero mandate of government.
>
> …
>
> [81] … the Attorney General has the responsibility of advising Cabinet as to its constitutional obligations in formulating the government response to a JCC report. The Cabinet briefing document, signed by the Attorney General, evidenced, at best, a lack of good faith commitment to the constitutional process. At worst, it is a deliberate information shell game. The inappropriate emphasis on the costs associated with linked outcomes for some other non-judicial public sector employees appears intended as a "silent" answer to the commission's conclusion that "judicial compensation forms such a small part of Government expenditure that increases in that compensation will always be affordable."
>
> [82] … the approach taken here does not demonstrate the necessary respect for the process and, in the result, the purposes of the JCC, preserving judicial independence and depoliticizing the setting of judicial remuneration, have not been achieved.
>
> [Emphasis added.]

[110] As is apparent, the principal defects in the government response are twofold. First, the judge found that the primary concern of the government was the potential effect of accepting the recommendations for the compensation of other bargaining units. Second, the judge concluded that the government departed from its constitutional obligations by relying on a collective bargaining negotiating mandate. Mr. Justice Macaulay commented at para. 61, that "a fair reading of the Cabinet submission, both in its opening and insofar as salary increases (the single largest cost item) are concerned, is that, in spite of the warnings, the linked costs are an important factor for government to consider but must not be disclosed as such in the constitutionally mandated government response".

[111] In my view, the combination of an improper reason, the consequences of compensation linkage, and the attempt to impose a collective bargaining mandate, were jointly sufficient for the judge to conclude that the response must be set aside because they inexorably tainted the whole response leading to remitting the matter for reconsideration.

[112] It is important to note that Mr. Justice Macaulay did not consider a number of the reasons given by government and adopted by the Legislature which might, in the absence of the illegitimate and irrational reasons, have justified the conclusion that the rejection of the JCC salary recommendation satisfied the *Bodner* test. I do not think the reasons for judgment can be taken as impliedly concluding that these additional reasons were not genuine and were nothing more than a window-dressing ruse intended to deflect attention from the true reasons why the recommendations were not accepted. These reasons include the following which I set out again:

> a. The Commission recommendation of a salary increase in 2013/14 to take into account accumulated inflation contradicted its rationale for recommending no salary increases in 2011/12 and 2012/13; the practical effect, according to the Government, was to provide compensation increases for 2011/12 and 2012/13, but defer implementation to 2013/14.
>
> b. Government had determined that it must limit compensation increases paid by public funds. A compensation arrangement for judges that provided protection against inflation was not consistent with that determination. Protection against inflation had not been offered to employees in the public service.
>
> c. In pursuit of its policy of deficit reduction, the government had established a "net zero" public sector compensation mandate. The mandate applies across the board affecting everyone paid from the public purse. A similar approach applied to provincial court judges was determined to be fair and reasonable. That approach reflected the comment of the Supreme Court of Canada that "nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times".
>
> d. Judicial salaries had increased significantly, by a cumulative increase of 43.3% since 2004. In light of the then existing uncertain fiscal situation for government, a recommendation of no increase in salary of judges for 2013/14, as well as the two previous years, is fair and reasonable.
>
> e. The government identified as an additional consideration the uncertainty regarding the financial impact on public finances of the referendum to be conducted later that year concerning the Harmonized Sales Tax.
>
> f. Maintaining judges' salaries at $231,138 through fiscal year 2013/14 would not result in a salary falling below the level necessary to attract high-quality candidates to the provincial and order would otherwise harm judicial independence.
>
> [Emphasis added.]

[113] Item "c" referred to the net-zero mandate. But it did more than that. It reflected a general approach to budgetary restraint to be applied consistently across the spectrum of public sector compensation. It reflected the observation of the Supreme Court of Canada that judges should be seen to shoulder their share of the burden in difficult economic times. In my view, that imperative remains a legitimate and rational basis on which to reject the salary recommendation; even when the illegitimate application of the collective bargaining mandate and the concern with linkage to other public sector compensation costs are eliminated from the analysis.

[114] Item "b" similarly reflects the concern with limiting public sector compensation increases and the unfairness of protecting judicial salaries from erosion against inflation when others paid from the public purse are not similarly protected. I consider that reason to be rational and legitimate and untouched by the reasons of Macaulay J.

[115] Item "d" reflects a concern that the JCC had not adequately recognized the implications of the rapid increase in judicial salaries based on unduly optimistic forecasts as supporting holding the line in the face of uncertain forecasts. Again, I consider that reason to be rational and legitimate and untouched by the reasons of Macaulay J.

[116] I observe, moreover, that item "f" deals expressly with the sufficiency of maintaining salaries at current levels to attract qualified candidates while protecting judicial independence. In my view, this rationale is directly related to the issue of minimizing wage disparity since the purpose of doing so is to ensure the continuing ability to recruit qualified candidates. This rationale was not criticized in the first judicial review.

[117] One further comment is in order. The government treated the recommendation as, in substance, merely deferring the salary increases for 2011/12 and 2012/13 to 2013/14. I think that conclusion is clearly wrong. The recommendation involves no increase in the first two years followed by a catch up in

the third year. In the third year, judges would earn what they would have earned in that year by applying the cumulative increase in the CPI, but they do not recoup the salaries foregone in the first two years. In my view, the government response was irrational in its detail, but there remains a core of rationality to the objection related to item "b". The effect of the recommendation is to protect judicial salaries from erosion by inflation and alleviate from the shoulders of judges some of the financial burden being borne by others in the face of fiscal restraint.

The 2013 Response

[118] Mr. Justice Macaulay refused to declare that the judges were entitled to the 2010 JCC recommendation. Rather, he remitted the matter for reconsideration in light of his reasons for judgment. Practically speaking, that meant that the government and Legislature were required to reconsider the 2010 JCC recommendation without regard to either the effect of a salary increase on other public sector compensation or the application to the judges of a collective bargaining mandate. The Chambers judge, on the second judicial review, dealt with the scope of the reconsideration as follows:

> [109] I understand the petitioner to be making numerous arguments for why the 2013 Response lacks both legitimate reasons and a sufficient factual foundation. Overall, the petitioner suggests that either the 2013 Response is tainted by the "net-zero mantra" of the 2011 Response. If that is not the case, the petitioner argues that the 2013 Response is just a resubmission of the 2011 Response minus the offending rationale and, as such, surely cannot suddenly be legitimate.
>
> [110] With respect, I do not see the matter that way. Since this court found that linking public service salaries and judicial salaries is offensive, the 2013 Response could obviously not reiterate that linkage. That does not mean that absent the linkage, the response must be flawed. Rather, the proper question is whether the 2013 Response, viewed in the appropriate context, contains a legitimate reason and reasonable factual foundation for its rejection of the recommended salary increase. To do otherwise would be to render meaningless Macaulay J.'s direction to remit the matter back to the LA.

[119] In my view, in principle, the government was entitled to continue to rely, to the extent that it chose to do so, on any rational and legitimate considerations that had not been contaminated by the conclusions of the judicial review.

[120] The 2013 response once again rejected the 2010 salary recommendation. In doing so, it awarded a salary increase in year three equal to the increase in the CPI for that year. The response stated:

> Recommendation 3, the recommended salary increase for fiscal year 2013/14, is rejected as unfair and unreasonable. The salary increase for Provincial Court Judges in fiscal year 2013/14 will be 1.5%.
>
> The Commission agreed with both the Association and government that no wage increases for 2011/12 and 2012/13 was reasonable given the financial position of the Province at the time of the Commission process. The amount of the increase recommended by the Commission for 2013/14 depends in part upon future changes in the Consumer Price Index (CPI) and thus cannot be definitively determined now. The CPI increase for 2010/11 was 1.8% and for 2011/12 was 2.2%. The estimated change for 2012/13 is 0.9%, yielding a cumulative compounded change that is estimated to be 4.9%.
>
> The Commission's recommendation is rejected for the following two reasons:
>
> 1. It rests upon a conclusion, unsupported by evidence, that salaries for Provincial Court Judges should be set as closely as possible to those of the superior courts; and
>
> 2. It rests upon a fiscal forecast that was overly optimistic.

[121] The 2013 response goes on to explain the underlying rationale justifying the first reason for rejecting the recommendation. This is what was said:

> The Commission's recommendation is articulated in the following passage from the Commission Report:
>
> > … [T]he Commission adopts the following passage from the Report of the 2007 Commission (page 23):
> >
> > > Judicial salaries must be set at a level that will continue to attract highly qualified lawyers from both the private bar and public service. British Columbians would not be well served by a Provincial Court that is overlooked for financial reasons by those lawyers best suited for it. While the Commission does not recommend that the salaries of Provincial Court Judges be tied to those of Supreme Court Justices, the Commission does recognize the importance of setting Provincial Court salaries with a view to minimizing the wage disparity between the two courts.
> >
> > ... [T]he Commission observes that Supreme Court Justices' salaries are statutorily indexed against the eroding effects of inflation and is of the view that Provincial Court Judges' salaries should be similarly protected.

> This conclusion is at odds with the Commission's finding elsewhere in the report on the relationship between the salaries of Provincial Court Judges and those of the superior courts:
>
> > On the evidence before it, the Commission is unable to reach any conclusion as to whether the disparity in compensation paid to Provincial Court Judges and Supreme Court Justices has had a material effect on recruitment on qualified judicial candidates to the Provincial Court, in particular, the evidence presented to the Commission does not allow the Commission to conclude whether the disparity In compensation has deterred excellent candidates with a breadth of experience, particularly in civil litigation, from applying to the Provincial Court. In this regard, there was no evidence that the list of persons approved for Federal and Provincial appointments overlap significantly, although there was some anecdotal evidence that applications to both Courts are more common than in the past. The Commission also notes that, while a small number of Provincial Court Judges have been appointed to the Federal Bench in recent years, it remains the case that few judges serve on both Courts in the course of their careers. While it is reasonable to expect that the need for a civil litigation background will increase with the increase in the Small Claims monetary jurisdiction it is premature to predict what effect this will have on recruiting new judges.
>
> The Commission thus was unable to find that compensation differences between the two courts cause any harm to the recruitment and retention of Provincial Court Judges. In fact, evidence presented by the Judicial Council Indicates that for the years 2007-2009 the Court had an approved pool of 21 candidates available for appointment. Actual appointments during this time averaged approximately five per year. This trend has continued: in 2010 there were 17 approved applicants and eight appointments, and in 2011 there were 12 approved applicants and six appointments. The most recent report by the Council indicates that by the end of 2011 there was a pool of 26 approved applicants available for appointment.
>
> Accordingly, the evidence indicates that, far from being a deterrent, the compensation provided to Provincial Court Judges continues to attract more than a sufficient number of highly qualified lawyers.

[122] My colleague treats this reason as a wholly new reason, and one that was ferreted out in support of rejecting the salary recommendation. His view is, in part, that the government response is illegitimate because it could have been, but was not, relied on in the 2011 response. He takes the view that none of the reasons given in 2011 for rejecting the proposed salary increase refer to the objective of achieving wage parity and the Chambers judge's conclusion that the primary basis for the recommendation was a concern for wage disparity is wrong. Respectfully, I

do not see the matter the same way. In brief, I see this reason as a reiteration, with appropriate elaboration, of a consideration relied on in 2011.

[123] The 2011 response asserted that maintaining judicial salaries would not result in a problem recruiting highly qualified candidates to the Provincial bench or would otherwise harm judicial independence. The 2013 response points to the JCC's view that the salary of Provincial Court judges should be set as closely as possible to those of the Superior Courts. The government asserts that the underlying rationale offered by the JCC for minimizing the salary disparity is the concern that highly qualified candidates would overlook applying to the Provincial Court for financial reasons. The government responded to the Commission recommendation by asserting a contradiction within the report about whether the disparity in compensation has any material effect on recruitment and by pointing to both historic and more recent evidence demonstrating that the compensation provided to Provincial Court judges is sufficient to attract more than a sufficient number of highly qualified lawyers. This is essentially the same point that was made in 2011: maintaining salaries will not cause a recruitment problem nor compromise judicial independence. This consideration was not criticized by Mr. Justice Macaulay and I see no basis for concluding that it was illegitimate or irrational for the government to rely on substantively the same point on the reconsideration.

[124] Respectfully, I do not think that this reason for rejecting the 2010 recommendation can properly be seen as the government relying on a new reason that it had not relied on previously. It is an elaboration and more complete explanation of a reason given earlier. That being so, the question whether the reason given satisfies the *Bodner* test must be determined on its own merits.

[125] This is what the Chambers judge had to say on this question:

> [121] In my opinion, the primary basis for the salary recommendation in the 2010 JCC Report can reasonably be understood to be a concern for the wage disparity between PCJs and judges of the superior courts. The 2010 JCC Report refers to the salaries of superior court judges on at least three occasions on page 33. Further, the 2010 JCC Report specifically cites a passage from the 2007 Report that recognises the importance of minimising

> the wage disparity so as not to impact the recruitment of PCJs. As such, it is also reasonable to understand that the JCC's focus on the wage disparity arises from a primary concern with recruitment issues.
>
> [122] Certainly, nowhere in the recommendation on page 33 is it suggested that the primary concern is the nature and importance of the work of PCJs, although I do not dispute that it is an important consideration in the JCC process as a whole. At best this is, in my opinion, a secondary basis for the salary recommendation.
>
> [123] As such, I cannot agree that the 2013 Response is "not responsive to the JCC's reasoning". Rather, I find that the 2013 Response directly responds to what can reasonably be understood to be primary basis for the salary recommendation.
>
> [124] The 2013 Response then contrasts the apparent basis for the salary recommendation with the JCC's own assertion that it cannot conclude whether the wage disparity has impacted recruitment. In this regard, I cannot agree with the petitioners assertion that it is plainly wrong to say there is an inconsistency.
>
> [125] It is logical for the government to question why, if the JCC cannot conclude that the wage disparity affects recruitment, the JCC recommends a salary increase in order to minimize the wage disparity and associated recruitment issues. It is permissible for the government to verify the accuracy of information in the commission's report: *Bodner* at para. 26. This includes challenging the underlying logic of the JCC recommendations, which is what this does.
>
> [126] The government then cites evidence, which I recognise was for the most part before the JCC, that from 2007-2011 the number of approved candidates has exceeded the number of judicial appointments. It is permissible for the government to give different weights to different factors if the difference is justified: *Bodner* at para. 26. The 2013 Response clearly weights the ratio of approved candidates to judicial appointments as an important indicator of whether the court faces recruitment issues.
>
> [127] The petitioner's argument about the number of applications in 2010 and 2011 falling below the 10 year average is just weighting a different statistic more highly. The conclusion varies depending on what subset of the available data is considered. Neither take on the evidence is necessarily correct.

[126] The Chambers judge, after considering this reason given for rejecting the salary recommendation, concluded that the response meets the required standard of rationality under the first two stages of the *Bodner* test. I agree. I am also of the view that this consideration standing alone is sufficient to justify the rejection by the Legislature of the salary recommendation.

[127] The second reason given for rejecting the 2010 recommendation was that it rested on an overly optimistic fiscal forecast. As I have already said, I agree with my colleague that the approach to setting judicial salaries in British Columbia contemplates a prospective analysis based on forecasts. I agree with the general proposition that it was illegitimate for the government to rely on subsequent data that was not available at the latest by the time of the first judicial review.

[128] It is clear that the government put its 2013 response on the footing that subsequent events had demonstrated that the financial assumptions and projections incorporated into the 2010 recommendations had been demonstrated to be too optimistic and that the financial position at the time of reconsideration was, in fact, worse than it had been expected to be.

[129] It seems clear that the Chambers judge was not invited to decide that the new data was information that could not be considered on the reconsideration because it arose after the first response. Rather, the point taken was that only when a change in fiscal forecast was extraordinary was a government entitled to rely on it. The Chambers judge rejected that proposition:

> [133] The petitioner would have me find that a change in fiscal forecast that is anything other than extraordinary cannot be the type of new circumstance that the Supreme Court of Canada contemplated by this statement. With respect, I disagree.
>
> [134] As I emphasized when outlining the rationality as a deferential standard of review, the allocation of funds from the public purse is a political decision that is exclusively within the jurisdiction of the legislature. For me to embark on an examination of whether an estimated $2.9 billion more in tax-payer supported debt, or a greater than 50% reduction in the projected surplus, is significant enough to amount to a new fact or circumstance, would trench on that jurisdiction.
>
> [135] A change in economic circumstances can legitimately be raised by the government as a justification for departing from the JCC recommendation. It is not suggested that the change is trifling, nor could it be. In my opinion it is generally not for the Court to assess the severity of change in fiscal forecast when determining the legitimacy of this reason, provided it is within the range of what might reasonably be considered meaningful and significant. The Supreme Court of Canada is clear that it is permissible for the government to analyse the impact of a JCC recommendation: *Bodner* at para. 26.

[130] This is a novel situation. Clearly the Supreme Court of Canada had contemplated, in *Bodner*, that a change in economic circumstances can be considered and may be raised by the government as a justification for departing from a commission recommendation. Moreover, even though government is required fully to engage with a JCC report and give its full response, it may provide additional factual support on a judicial review. Here, the problem arises because we are dealing with a reconsideration of recommendations based on forecasts which has taken place when actual results can be compared to projections. This is a situation not contemplated in the cases to date.

[131] Reduced to its essentials, on this point, the 2013 response amounts to this. The recommendations were, based on the forecasted fiscal position of the province, unfair and unreasonable given the anticipated hard economic times and they remain unfair and unreasonable now that we know the province's financial circumstances have turned out to be worse than expected, and the province has had to respond to the deteriorating economic circumstances with continuing and deeper austerity measures.

[132] In the Legislature the Minister moving the motion said the following:

> The Supreme Court of Canada has recognized that the constitutional guarantee of a minimal acceptable level of judicial remuneration is not a device to shield judgments from the effects of difficult economic times. We are clearly in such times today. Our government has worked very hard to balance the budget, and we have done so by making difficult decisions. We've had to make these decisions in fiscal circumstances that are significantly more constrained than those predicted when the 2010 Judges Compensation Commission was deliberating.

[133] The Minister then observed that the budget deficits for the previous two years have exceeded the forecasts that were before the JCC. She noted the restraint measures the government had initiated to bring the budget into balance. Those measures had involved limiting compensation increases paid by public funds, a freeze on new hirings, and freezing the salaries of management public servants. The

Minister referred to the cumulative effect of three years' worth of consumer price index increases leading to a current estimate of an increase in salaries of 4.9%.

[134] After discussing the difficulties, the government discerned in the recommendation that Provincial Court judges' compensation be as close as possible to those of the Superior Courts; the Minister recommended as fair and reasonable a modest increase in salary of judges for 2013/14, following two years of no increase.

[135] The Opposition Critic supported the motion. In his speech, he referred also to the many British Columbians who have seen no compensation increase in the last few years. After commenting on the salary disparity between Provincial and Superior Court judges, he said:

> What this legislature can do is look at the facts as they exist in British Columbia, look at the ability of citizens to pay compensation for judges, to provide benefits to them, to ensure that judicial independence and to ensure that the justice system functions as well as it possibly can within the budgetary constraints that are imposed on all of us. As each of us must impose budgetary constraints in our personal lives, we in the legislature likewise have to consider that proposition when it comes to judicial compensation.

[136] It is, I think, apparent that the underlying theme leading to the rejection of the 2010 salary recommendation is that the proposed increase was unreasonable and unfair in the context of the overall budgetary situation of the Province. Those considerations expressly underlay the rejection of the recommendations in 2010. The same considerations, it appears to me, underlie the rejection of the recommendations in 2013. The point taken was that the budgetary forecasts underlying the 2010 recommendations were unduly optimistic and that the fiscal situation was in fact worse in 2013 at the time of the reconsideration that had been in 2010.

[137] Even if one takes the view that it was illegitimate for the government to reconsider the 2010 recommendation using current data rather than the original forecasts, it is not apparent to me that the original rationale and legitimate considerations relied on in 2011, which implicitly underlie the 2013 response, ceased

to be of any relevance. I have set those considerations out at paras. 112-117 above. To the contrary, in my view, they continue to inform a fair reading of the 2013 response.

[138] I cannot read the 2013 report as abandoning those considerations articulated in 2011 that are legitimately rooted in the imperative that all, including judges, bear the burden of hard times. The government abandoned its illegitimate imposition of a collective bargaining mandate and did not rely on the consequences for other public sector compensation of linkage to judicial salaries as the Chambers judge accepted. But in my opinion, the 2013 response continues to be informed by those considerations which underlay its 2011 response such as a concern that a salary increase in year three equal to the increase in the cumulative price index provides protection against inflation to judges not available to others and, most crucially, the observation that judges have an obligation to shoulder their fair share of the burden borne by others in difficult economic times.

[139] It may be that the 2013 response ought to have more expressly articulated reasons that are in substance the premise on which it is based. Those circumstances and considerations remained as pertinent in 2013 as they had been in 2010, even if the government could not rely on subsequent deterioration in public finances.

[140] In these circumstances, I cannot agree that the appropriate remedy is a declaration that Provincial Court judges are entitled to the 2010 salary recommendations. In *Bodner*, the Court expressed caution about the choice of remedies on a judicial review. The Court said:

> 42 The limited nature of judicial review dictates the choice of remedies. The remedies must be consistent with the role of the reviewing court and the purpose of the commission process. The court must not encroach upon the commission's role of reviewing the facts and making recommendations. Nor may it encroach upon the provincial legislature's exclusive jurisdiction to allocate funds from the public purse and set judicial salaries unless that jurisdiction is delegated to the commission.

> 43 A court should not intervene every time a particular reason is questionable, especially when others are rational and correct. To do so would invite litigation, conflict and delay. This is antithetical to the object of the commission process. If, viewed globally, it appears that the commission process has been effective and that the setting of judicial remuneration has been "depoliticized", then the government's choice should stand.
>
> 44 In light of these principles, if the commission process has not been effective, and the setting of judicial remuneration has not been "depoliticized", then the appropriate remedy will generally be to return the matter to the government for reconsideration. If problems can be traced to the commission, the matter can be referred back to it. Should the commission no longer be active, the government would be obliged to appoint a new one to resolve the problems. Courts should avoid issuing specific orders to make the recommendations binding unless the governing statutory scheme gives them that option. This reflects the conclusion in *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, that it is "not appropriate for this Court to dictate the approach that should be taken in order to rectify the situation. Since there is more than one way to do so, it is the government's task to determine which approach it prefers" (para. 77).

[141] Even accepting the criticism that the government and Legislature illegitimately relied on current data, I cannot conclude that the error grounds a judgment that the setting of judicial remuneration had been "politicized". A declaration of entitlement to the recommendations is, in my respectful view, too close to an order making the recommendations binding. This, I consider, encroaches on the Legislature's jurisdiction to allocate funds from the public purse. As I think the rejection of the salary recommendation was rational and legitimate, even given the frailty in the response, I would respectfully not grant the declaration proposed by my colleague.

Pension Accrual

[142] The 2010 JCC report makes the following recommendations respecting the pension accrual rate for PCJs at 34:

> In recent years, the average age of appointment of a Provincial Court Judge has risen to 53.3 years. This increase is primarily driven by the changing needs and expanded jurisdiction of the Court. The Judicial Council is recruiting senior practitioners with considerable expertise to fill judicial vacancies. At the current accrual rate of 3%, an appointee with no pre-existing pension accrual must sit for 23.3 years before qualifying for the maximum pension benefit of 70% of salary. At that rate, most judges will not reach maximum pension before mandatory retirement at age 75 years.

> The Commission believes that there is significant value to the public in maintaining a vibrant and energetic Provincial Court bench, wherein senior judges are replaced by new appointees at appropriate intervals. Furthermore, the challenging caseload and travel expected of a Provincial Court Judge may in some cases be unsustainable for a judge in his or her 70s. It does not serve the public interest to have judges continue to sit on a fulltime basis past the point at which their capacity to do so may be compromised by age, simply to accrue the maximum pension benefit of 70% of salary.
>
> In light of the foregoing, the Commission recommends an increase in the Provincial Court Judges' pension accrual rate to 3.5%, effective April 1, 2013. This will allow judges to accrue the maximum pension benefit of 70% after 20 years of service. Based upon the current average age of appointment of 53.3 years, at an accrual rate of 3.5% judges will reach maximum pension at the age of 73.3 years.
>
> On this issue, the Commission had the benefit of an actuarial report prepared on behalf of the Association by Mr. Don Smith of Western Compensation and Benefits Consultants. Mr. Smith indicates that the annual additional cost to the Government of the proposed increase in the judges' pension accrual rate from 3.0% to 3.5% is $1,272,500.00 for the first 15 years following the implementation of the change. Thereafter, the annual additional cost to the Government will be $1,082,000.00 per year (in 2010 dollars).
>
> The Commission is satisfied that this is a reasonable cost for the Government to bear. An increase in the pension accrual rate to 3.5% will also serve to narrow the disparity between Supreme Court Justices' and Provincial Court Judges' compensation packages.
>
> The Commission recommends that there be no change to the statutory contribution ratio of 24:76. The statutory contribution ratio is part of the overall compensation package payable to judges, and the Commission is satisfied that it is set at a reasonable level. There was no evidence presented to the Commission that would justify a change in the contribution ratio at this time.

[143] In rejecting the increased pension accrual rate recommended in the 2010 JCC report, the 2011 response states:

> Recommendation 6, respecting an increase in the pension accrual rate for judges to 3.5% annually, is rejected as unfair and unreasonable. The pension accrual rate will remain at 3%.
>
> Judges are members of the Public Service Pension Plan. The current 3% accrual rate is already 50% higher than the 2% accrual rate that applies to most members of the Public Service Pension Plan. It can be inferred from its recommendation that the Commission appears to implicitly accept that the intent of the Public Service Pension Plan is to ensure that judges retire with the maximum pension benefit. This approach is unreasonable. The intent of a pension plan is not necessarily to guarantee that its members achieve the maximum benefit possible; rather, it is to ensure a reasonable retirement

> benefit for members given their length of service, and contribution, to the plan.
>
> The submissions of the judges association indicate that the average age of a Provincial Court judge appointed in the last 3 years is 53 and the average age on the court is 58.8 It is reasonable to expect that judges will have prudently saved for retirement during their careers as lawyers, in the expectation that they will have to rely to a large degree on their own retirement savings. In the case of public service lawyers who are subsequently appointed to the bench, they will have contributed to the Public Sector Pension Plan during their service and will bring that accumulated service with them.
>
> Given that the Commission recommended retaining the current statutory division of pension contributions of 24% from judges and 76% from government, the burden of added contributions necessary to fund a higher accrual rate would fall disproportionately, and unreasonably, on the public purse.
>
> Finally, there is no evidence in the Commission's report that the Commission considered government's submissions on this issue, in particular government's proposal to examine the possibility of increasing the accrual rate if the contribution rates were re-balanced so that the effect was cost-neutral to government.

[144] Macaulay J. found the reasons given in the 2011 response for rejecting the recommended increase in the pension accrual rate to be illegitimate and irrational, stating at paras. 85-92:

> [85] The JCC recommended an increase in the pension accrual rate from 3.0% to 3.5%, effective April 1, 2013 (recommendation 6). The government rejected the recommendation as unfair and unreasonable.
>
> [86] The recommendation of the JCC took into account that the average age of appointment for a PCJ is 53.3 years, and with the current accrual rate of 3.0% per year, "most judges will not reach maximum pension before mandatory retirement age at age 75 years." The JCC expressed concern that judges may continue to sit on a full-time basis "past the point at which their capacity to do so may be compromised by age, simply to accrue the maximum pension benefit of 70% of salary." The recommended change to the accrual rate, if accepted, would permit judges to accrue the maximum pension benefit after 20 years, or using the average age of appointment, by the age of 73.3 years.
>
> [87] The JCC considered the associated additional total annual cost of the proposed increase to the accrual rate of $1,272,500 for the first 15 years, and $1,082,000 thereafter, to be reasonable and also emphasized that the increase "will also serve to narrow the disparity between Supreme Court Justices' and Provincial Court Judges' compensation packages." I note that the evidence before the commission revealed that the accrual rate for Supreme Court Justices is 4.67%.

[88] According to the government response summarized below, the recommendation is unfair and unreasonable for five reasons:

1. The current 3.0% accrual rate is higher than the 2% accrual rate that applies to most members of the Public Service Pension Plan;
2. It is unreasonable to attempt to ensure that judges retire with the maximum pension benefit;
3. It is reasonable to expect that judges will have prudently saved for retirement during their careers as lawyers in private practice or, if in public service, will have already contributed to the Public Sector Pension Plan and be able to bring that accumulated service with them;
4. Given the current statutory division of pension contributions as between judges and government, the cost burden associated with a higher accrual rate would fall disproportionately on government; and
5. The commission failed to consider government's proposal that the accrual rate might be increased if the contribution rates were rebalanced so that the effect was cost neutral to government.

The PCJA says that none of these responses is legitimate.

[89] In submissions before me, the PCJA says that the first response simply reiterates the position that government took before the JCC and fails to address the basis for the recommended increase. It also says that the second response mischaracterizes the JCC recommendation. According to the PCJA, the committee sought to restructure the pension plan to encourage judges to make retirement decisions for reasons other than maximizing their pension benefit. The Attorney General denies that the government was unresponsive.

[90] The PCJA also contends that the third response simply repeats an unsubstantiated government submission made before the commission that assumed lawyers in private practice, before their judicial appointment, will have saved for retirement. As a commission member pointed out at the time, most lawyers in private practice do not have pension plans and, in accepting appointments, may be giving up their highest earning years in exchange for a fixed salary and eventual pension with the result that they may feel forced to keep working until eligible for full pension. Another member of the commission pointed out that the government position on accrual rates was "thin on the ground."

[91] I agree that the government response mischaracterizes the reasoning of the JCC. Nor does it rationally explain why, in the circumstances, the accrual rate applicable to non-judicial members of the plan was appropriate. Common sense suggests that the average age, apart from PCJs, at which contributions to Public Service pensions commence is long before age 53.3 years. At the very least, government is required to explain its reasoning for relying on the comparator to reject the recommendation.

> [92] As well, absent any empirical evidence respecting the pre-appointment retirement savings of private lawyers, the government response is not legitimate. It is nothing more than a reiteration of a submission made to and rejected by the JCC.

[145] The 2013 Response to the increased pension accrual rate recommended in the 2010 JCC report states:

> Recommendation 6, respecting an increase in the pension accrual rate for judges to 3.5% annually, is rejected as unfair and unreasonable. The pension accrual rate will remain at 3%.
>
> Judges are members of the Public Service Pension Plan. The current 3% accrual rate for judges is 50% higher than the 2% accrual rate that applies to most members of the Public Service Pension Plan. A higher accrual rate would require greater, contributions from both the judiciary and the government. Under the current pension contribution formula in the Act, 24% of the necessary contributions come from judges and 76% from government; the estimated cost to government of implementing the recommendation would be $1.272 million per year.
>
> The Commission based its recommendation on the following findings:
>
> > The Commission believes that there is significant value to the public in maintaining a vibrant and energetic Provincial Court bench, wherein senior judges are replaced by new appointees at appropriate intervals. Furthermore, the challenging caseload and travel expected of a Provincial Court Judge may in some cases be unsustainable for a Judge in his or her 70s. It does not serve the public interest to have judges continue to sit on a full time basis past the point at which their capacity to do so may be compromised by age, simply to accrue the maximum pension benefit of 70% of salary.
> >
> > …
> >
> > An increase in the pension accrual rate to 3.5% will also serve to narrow the disparity between Supreme Court Justices' and Provincial Court Judges' compensation packages.
>
> The recommendation is rejected on the following grounds:
>
> I. there is no evidence that judges are continuing to sit beyond their capacity to do so;
>
> II. there is no compelling evidence that requires setting Provincial Court Judges' compensation as close as possible to that of the superior courts; and
>
> III. the Commission errs in assuming that the pension plan should be configured to ensure maximum accrual for judges.
>
> There was no evidence before the Commission that Provincial Court Judges are continuing to sit full-time beyond their capacity or willingness to do so simply to accrue maximum pension. To the contrary, the make-up of the

current bench indicates that most judges are satisfied with the level of pension they receive. Evidence that the current accrual rate is sufficient can be found in the number of judges who retire before age 70 and enter the Senior Judges Part-time Program.

As of December 2012, there were a total of 27 judges in the 66-74 age bracket: six were full-time judges and 21 were part-time Judges. Over age 70, there were two full-time judges and six part-time judges. If the pension accrual rate were inadequate one would reasonably expect more judges to continue to sit full-time into their late 60s or early 70s in order to continue accruing service. But that is clearly not the case, as more than two-thirds of judges over the age of 65 are sitting part-time. If anything, an enhanced accrual rate would simply hasten the departure of full-time judges to the senior part-time judges program and reduce the length of full-time judicial service for a greater number of judges.

Second, the proposal put forward by the Association to the Commission was based upon the argument that Provincial Court Judges should be remunerated at a level as close as possible to those in the superior courts. The lack of a substantive finding by the Commission to support this conclusion has been addressed In regard to Recommendation 3 above and applies equally here.

Third, the Commission appears to accept that the intent of the pension plan for judges is to ensure that they retire with the maximum pension benefit. This approach is unreasonable. The intent of a pension plan is not necessarily to guarantee that its members achieve the maximum benefit possible; rather, it is to ensure a reasonable retirement benefit for members given their length of service and contribution to the plan. Prospective judges are aware of the pension provisions when they accept appointment to the bench.

The submissions of the judges association indicate that the average age of a Provincial Court judge appointed In the last 3 years is 53 and the average age on the court is 58, It is reasonable to expect that judges appointed at that age will have saved for retirement during their prior careers as lawyers, in the expectation that they will have to rely to some degree on their own retirement savings. In the case of public service lawyers who are subsequently appointed to the bench, they will have contributed to the Public Sector Pension Plan during their service and will bring that accumulated service with them.

If evidence is needed that lawyers are saving for their retirement, it can be found. In a recent survey conducted by the B.C. branch of the Canadian Bar Association. This survey of 80 lawyers in the province found that 83 per cent of respondents "were either fairly confident or very confident of their financial preparedness for retirement". The article also noted efforts made by the Bar Association to assist lawyers in preparing for retirement, including the creation of a lawyer-specific RSP plan.

The government, no less than the Commission, believes in maintaining a vibrant and energetic Provincial Court bench, and the evidence indicates that this [is] in fact occurring. Given these circumstances, and the fact that most of the burden for funding the higher contributions necessary to increase the

> accrual rate would rest on the public purse at a time of ongoing fiscal restraint, it would be unfair and unreasonable to increase the pension accrual rate for Provincial Court judges.

[146] The Chambers judge concluded that the government response was rational within the meaning of the *Bodner* test. I agree.

[147] The Chambers judge reasoned that the reference to the difference between accrual rates for judges (3%) compared to the accrual rate applying to most members of the Public Service Pension Plan was provided as background information. He focused his reasoning on the three reasons given in the 2013 response, as well as a fourth reason, namely the assertion that "Given these circumstances, and the fact that most of the burden for funding the higher contributions necessary to increase the accrual rate would rest on the public purse at the time of ongoing fiscal restraint, it would be unfair and unreasonable to increase the pension accrual rate for Provincial Court Judges."

[148] It is worthwhile to set out the principal elements of the reasoning of the Chambers judge:

> [149] The first and third reasons in the 2013 Response for rejecting the pension accrual recommendation appear intended to address what is, in my opinion, the principal rationale in the 2010 JCC Report for the recommendation; namely, that "it does not serve the public interest to have judges continue to sit on a full-time basis past the point at which their capacity to do so may be compromised by age, simply to accrue the maximum pension benefit".
>
> [152] I agree with the respondent's submission that the thrust of the JCC's recommendation can be recast as follows: (1) some judges are or may be tempted to sit full-time beyond their capacity to do so, something that is not in the public interest, (2) the reason for this is to accrue maximum pension benefits, and (3) an increase in the accrual rate will ensure a vibrant and energetic provincial court bench by removing this reason for a judge to sit full-time beyond a capacity to do so.
>
> [153] I find the 2013 Response addresses this logic in two principal ways.
>
> [154] First, the 2013 Response notes that there was no evidence before the JCC that any PCJs are sitting beyond their capacity to do so. Rather, the petitioner submits that the JCC "was assuming that some judges might" and emphasizes that PCJs <u>should not be tempted</u> to sit beyond their capacity for pension reasons. The 2013 Response suggests that the matter is at best

hypothetical: only 6 of 27 judges between the ages of 66-74 sit full-time and only 2 judges over the age of 70 sit full-time.

[155] The government is entitled to verify the accuracy of information in the commission's report: *Bodner* at para. 26. I have already found this to include challenging the underlying logic of a JCC recommendation, and would further find it to include challenging the factual foundation for a JCC recommendation. This is what I understand the 2013 Response to be doing in this respect.

[156] The petitioner's submissions do not indicate that there is evidence of judges sitting beyond their capacity to do so. Rather, my understanding of all the evidence before me shows the recommended increase in the pension accrual rate to be based on a hypothetical concern, not an existing problem. In saying this I am not commenting on the wisdom of the JCC recommendation. Indeed, I would agree that it is in the public interest not to have judges sit full-time beyond their capacity to do so. However, in reviewing the government's response I am assessing only its rationality.

[157] The government is entitled to depart from a JCC recommendation if it gives a legitimate reason supported by a reasonable factual foundation. In doing so, the government is entitled to give different weights to different factors and verify the accuracy of the information underlying the JCC recommendation. Where a JCC recommendation is based upon a reasonable concern rather than empirical evidence, I would interpret *Bodner* to permit the government to depart from the recommendation based on a factual foundation that contradicts the logic of the concern.

[158] In this case, the 2013 Response clearly weighs the evidence of the number of judges sitting full-time over 65 or 70 differently than the JCC does in making its recommendation based only on a concern that judges might be tempted to sit full-time beyond their capacity to do so. In my view, this response deals directly with the JCC recommendation and gives different weight to relevant evidence. I find that it meets the standard of rationality.

[159] Second, the 2013 Response says that it is a reasonable and logical assumption that PCJs will have saved for retirement prior to appointment, either through private savings or, in the case of public service lawyers, through the Public Sector Pension Plan. I do not view this as the principle reason for the rejection.

[160] The 2013 Response references a BarTalk article as evidence, if needed, of the fact that judges have pre-appointment retirement savings. I agree with the petitioner that this is not a reasonable factual foundation for asserting that most judges have pre-appointment retirement savings.

[161] The one thing that can be said with certainty is that any judge that worked for the government prior to appointment will have already made contributions to a pension plan. There is no evidence respecting judges that were lawyers in private practice prior to appointment. The more important question is whether any such evidence is required.

[162] As the respondent notes, in *Bodner* the government of Ontario relied on an assumption about pre-retirement savings as a percentage of income,

as part of its reasons for rejecting a JCC pension recommendation. The Supreme Court of Canada found no fault in Ontario's partial reliance on "the likely pre-appointment savings of the Judges" (para. 95), although that may have been because of the circumstances in which the assumption was presented.

[163] Justice Macaulay rejected this assumption in the First Judicial Review, finding that "absent any empirical evidence respecting the pre-appointment retirement savings of private lawyers, the government response is not legitimate". However, it does not appear that he noted this aspect of *Bodner*. Evidence of the pre-appointment retirement savings of judicial appointees or prospective judicial appointees is, I suspect, reasonably elusive.

[164] In judging the rationality of this aspect of the 2013 Response, however, the context in which this observation is made is relevant. The main thrust of this aspect of the 2013 Response is that the purpose of a pension plan is not to ensure that recipients retire with the maximum pension plan benefit. The purpose of a pension plan is to ensure a reasonable retirement benefit for members given their length of service and contribution to the plan. Prospective judges are aware of the pension provisions when they accept appointment to the bench. Prospective judges are also aware of their retirement savings. Presumably those factors are ones germane to their consideration in accepting an appointment. Considered in that context, I do not find 2013 Response either illegitimate or without a factual foundation.

[165] The third ground in the 2013 Response for rejecting the pension accrual recommendation is that there is no compelling evidence that requires setting the PCJs' compensation as close as possible to that of superior court judges. This ground relies upon the same line of reasoning provided as the first ground for rejecting the recommended salary increase. I have already given my thoughts on this reason, so will not repeat them. I would simply note that I see no objection to using the same basis for rejecting different recommendations if it is reasonably apparent that both recommendations are premised upon the same or a similar rationale.

[166] That being said, I hesitate to find the narrowing of the wage disparity to be a discrete rationale behind the pension accrual recommendation. It appears to a simple note about the consequence of the recommendation, if adopted, rather than an important basis for it.

[167] The fourth and final ground in the 2013 Response for rejecting the pension accrual recommendation is the ongoing fiscal context given the fact that any increase in the pension accrual rate will have implications for provincial finances. I have already provided my thoughts on this reason and my hesitation to pass judgment on trenching on the consideration of the significance of any financial impact on the allocation of funds from the public purse. I would apply the same reasoning here.

[168] Taken together, I find the four grounds stated in the 2013 Response for rejecting the pension accrual recommendation in the 2010 JCC Report to be legitimate and supported by a reasonable factual foundation. The 2013

> Response therefore meets the required standard of rationality under the first two stages of the *Bodner* Test.

[149] I see no error in the Chambers judge's analysis. The judge has correctly identified the relevant standards of review: rationality as defined by *Bodner*. I see no error in his application of that standard of review to the 2010 recommendation. I do not think, to the extent it referred to information acquired after the 2010 recommendation, that the response is sufficiently contaminated by relying on that information to justify setting it aside. At the very most, the later acquired information is merely corroborative of the view taken by the government of the factual frailty in the foundation of the recommendation.

[150] I do not share the view that the 2013 response simply reiterates positions advanced and rejected by the JCC and in the first judicial review. The 2013 response appropriately reconsiders what had been said in 2011 and more carefully articulates the reasons for rejecting the recommendations.

[151] First, the response responds squarely to the view expressed in the first judicial review that the 2011 response misapprehended the basis of the recommendation. The response focuses on the concern that without an increase in the accrual rate some judges might be tempted, inappropriately, to sit full-time beyond their capacity to do so. The response focuses appropriately on the risk that had been identified by the JCC and challenges the materiality of that risk. The response points out the lack of an evidentiary foundation for that concern and points more positively to evidence (some of it admittedly referring to the situation that had been reached in 2012) grounding the conclusion that a potential problem is not an actual one. The response also goes on to express a concern that an increase in accrual rate might create the wrong incentive by hastening the departure of full-time judges to the senior part-time judges' programme. In my view, these considerations arise fairly from the 2010 record. They are examples of entirely appropriate reconsideration of the 2010 recommendations in light of the reasons for judgment on the first judicial review.

[152] Second, pointing out that the recommendation of an increase in pension accrual reflected the view of the JCC that the disparity between Provincial and Superior Court judges' salaries should be minimized is consistent with the reasoning of the 2011 response on compensation generally. I see nothing objectionable in referring to it as a reason specifically in connection with pension accrual in 2013. I agree with the Chambers judge that the response on this particular point is rational and legitimate.

[153] Third, it seems to me, with respect, that the reiteration of the concern that the JCC appears to accept that the intent of the pension plan is to ensure that judges retire with a full pension is, on a fair reading, a legitimate comment. I do not share the view that it is obvious that the objective of a pension plan is necessarily to maximize pension benefits. It is not irrational to take a different view of the purpose of the scheme. In any event, the comment merely sets the stage for that part of the response focusing on the reasonable expectation that lawyers appointed to the Provincial bench would have made some personal provision for retirement and that those appointed from the public service would bring their contributions to the Public Sector Pension Plan with them. The response then refers to "evidence" of lawyers saving for retirement. In my view, the criticism of the 2011 response on this point was more that the point was not factually supported, not that the position was otherwise invalid. I share the view expressed by the Chambers judge that the point taken originally was based on common sense and, in light of Supreme Court of Canada authority, did not require the kind of factual support identified in the first judicial review. Although this point was essentially a reiteration of the same reason, supplemented by some reference to fact, I think the original criticism was misplaced. In those circumstances, the point is a rational and legitimate one to reiterate on a reconsideration.

[154] Finally, I do not think there is anything irrational on a reconsideration in the response referring again to the fact that most of the financial burden for funding the

higher contributions would fall on the public purse at a time of ongoing fiscal restraint.

[155] In conclusion, I agree with the substantive conclusion of the Chambers judge on the issue of pension accrual. I also take the view that the response did respond legitimately to the reasons on the first judicial review and that it cannot be treated as an improper or illegitimate exercise in reconsideration.

Conclusion

[156] For all of these reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Harris"