

Report of the 2016 Judicial Compensation Commission

October 27, 2016

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Executive summary

The 2016 Judicial Compensation Commission (“Commission”)’s mandate is to report to the Attorney General and Chief Judge of British Columbia on all matters respecting the remuneration, allowances and benefits of Provincial Court judges and judicial justices, and to make recommendations for the period of April 1, 2017 to March 31, 2020. The Commission’s work is conducted pursuant to the *Judicial Compensation Act*, S.B.C. 2003, c. 59 (“Act”), and serves the purpose of protecting the financial security component of judicial independence.

As part of its work, the Commission visited and toured some of British Columbia’s Provincial Courthouses and the Justice Centre. The Commission was impressed with the quality and breadth of the Court’s work—work that spans criminal, family, bylaw, traffic and civil jurisdiction. The Provincial Court is the busiest court in the province. At the time of the Commission’s hearings there were 110 full-time and 37 part-time judges and 10 full-time and 22 part-time judicial justices who had heard over 219,752 new matters in fiscal year 2014/15 at 89 locations across British Columbia.

In June 2016, the Commission received written submissions from 10 participants including the Government, the Provincial Court Judges Association of British Columbia and the Judicial Justices Association of British Columbia. It held oral hearings in Vancouver on July 4 to 7, 2016, during which it heard from participants and five witnesses. It also received written reply submissions from the Government and the two judicial associations. The Commission greatly appreciates the contributions of all participants and witnesses.

Although each commission makes its assessment in its own context, the starting point is ideally the date of the previous commission’s report. However, the Government’s responses to the 2010 Judges Compensation Commission, 2010 Judicial Justices Compensation Commission and to the 2013 Judges Compensation Commission have all resulted in litigation, which has made reference to compensation set by previous commissions difficult. While the Commission considered the 2013 compensation reports, it focused on determining reasonable compensation for judges and judicial justices for each year of the Commission’s mandate in light of statutory and constitutional requirements.

In addition to annual salary for judges and judicial justices, participants raised the following issues:

- Should the pension accrual rate for judges be increased, and if so, by how much?
- Should the *per diem* for travel for judges and judicial justices be increased, and if so, by how much?
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- Should judges and judicial justices be part of the Government's new flexible benefit plan?
- Should full-time judicial justices be provided with the same pension provisions as judges?
- Should judicial justices receive premiums for afternoon, evening, weekend and holiday shifts?
- Should the professional development allowance for judicial justices be increased?
- Is education leave for judicial justices outside of the Commission's jurisdiction?

Under sub-section 5(5) of the Act, the Commission must consider the following criteria: the need to maintain a strong court by attracting highly qualified applicants; changes, if any, to the jurisdiction of judges or judicial justices; compensation provided in respect of similar judicial positions in Canada, having regard to the differences between those jurisdictions and British Columbia; changes in the compensation of others paid by provincial public funds in British Columbia; the generally accepted current and expected economic conditions in British Columbia; and the current and expected financial position of the government over the three fiscal years that are the subject of the Commission's report. The Commission may also consider other factors it considers relevant as long as it explains the relevance of any such factors (Act, sub-section 5(5.2)). All of the criteria considered are ultimately in service of the need to provide reasonable compensation for judges and judicial justices over the three fiscal years of the Commission's mandate. The question for each commission is always what is fair and reasonable in the present circumstances.

The Commission, by way of summary, considered the sub-section 5(5) criteria as follows:

- **Need to maintain a strong court by attracting highly qualified applicants (Act, ss. 5(5)(a)):**
 - Judges—It is unclear if there is a link between the number of applicants and the salary of Provincial Court judges, but the Commission is concerned that the number of applications received in 2015 dropped to nearly half the average of the preceding 10 years. Thus far, the Court does not seem to have had a problem attracting a sufficient number of qualified candidates to do its work, but the Commission is mindful that attracting the best candidates could become a problem if the compensation of the Court does not keep pace with the other options open to highly desirable candidates. It is necessary to maintain a reasonable

salary that is sufficient to attract exceptional candidates who can meet the needs of the Court.

- Judicial justices—While there was no evidence establishing that there is a link between the number of applicants and the salary of judicial justices, there is a real need to increase the applicant pool, particularly considering that in less than two years almost half of the current judicial justices will be retiring. Something must be done. Ensuring a reasonable salary that is sufficient to attract exceptional candidates who meet the needs of the Court is crucial.
- **Changes to the jurisdiction of judges or judicial justices (Act, ss. 5(5)(b))**—There have been no changes to the jurisdiction of either judges or judicial justices since the 2013 compensation commissions.
- **Compensation provided in respect of similar judicial positions in Canada, having regard to the differences between those jurisdictions and British Columbia (Act, ss. 5(5)(c))**—This factor is an important consideration in determining reasonable compensation. In order to preserve judicial independence, judges and judicial justices cannot negotiate with the executive branch of government over their salaries. In the absence of the parties being able to bargain over what constitutes a reasonable salary, the Commission considers comparator groups as objective markers of reasonableness. It considered the salaries and pensions of a number of comparator groups including federally-appointed judges and provincial court judges and judicial justices/justices of the peace of other provinces, keeping in mind the difference between those jurisdictions and British Columbia. The evidence regarding the position of British Columbia judicial salaries in comparison with other provinces and territories is compelling, especially given the Government's own reliance on relative salary in some circumstances.
- **Changes in the compensation of others paid by provincial public funds (Act, ss. 5(5)(d))**—Similar to the criterion in ss. 5(5)(c), the utility of this factor lies in ensuring commissions consider whether judicial salaries in British Columbia are getting out of step. However, it must be remembered that the judicial role is unique: judges and judicial justices hold an office. They are not employees. They are not easily compared with others in the British Columbia economy, even those in senior leadership in the public service. Moreover, the constitutional role of judicial compensation commissions is to depoliticize the determination of reasonable compensation. Therefore, too much emphasis on compensation changes to public sector employees, which is the result of political decisions made by Government in setting its fiscal policy, must be avoided.

- **Current and expected economic conditions (Act, ss. 5(5)(e))**— British Columbia’s current and expected economic outlook is one of moderate growth over the term of the Commission’s mandate. There have been three successive years of small budget surpluses. Small surpluses are forecasted for each of the fiscal years ending in 2018, 2019 and 2020. Through prudent management, British Columbia is better positioned nationally than many of its comparators. Over the past three years, the Province has continued its policy of restraint, and judges and judicial justices have had only very modest increases. While the Government asserts that British Columbia is facing potential downside risks, its own conservative forecasts, as well as those from independent experts, are for sustained, moderate growth.
- **Current and expected financial position of government (Act, ss. 5(5)(f))**—The financial position of Government does not demonstrate that increases in compensation should not be made to judges and judicial justices of the Provincial Court if such increases are found to be in the public interest.
- **Changes to the nature of the work (Act, ss. 5(5.2))**—While the Commission recognizes that the jurisdiction of judges and judicial justices has not changed since the 2013 compensation commissions, the fact that both the volume and complexity of work within the existing jurisdiction has increased is relevant to determining reasonable compensation.

After considering all these factors, the evidence and the submissions of all participants, the Commission makes the following recommendations:

Judges

RECOMMENDATION 1: Over the course of the Commission’s three-year mandate, the annual salary of puisne judges be set as follows:

- (a) Effective April 1, 2017, the salary for puisne judges be \$273,000;
- (b) Effective April 1, 2018, the salary for puisne judges be \$277,095; and
- (c) Effective April 1, 2019, the salary for puisne judges be \$281,251.

RECOMMENDATION 2: Effective April 1, 2017, the salaries for judges with administrative responsibilities be set as follows:

- (a) The Chief Judge be paid 112% of the salary of a puisne judge;
- (b) Associate Chief Justices be paid 108% of the salary of a puisne judge; and
- (c) Regional Administrative Judges be paid 106% of the salary of a puisne judge.

RECOMMENDATION 3: Effective April 1, 2017, the accrual rate for judicial pensions be 3.0%.

RECOMMENDATION 4: There be no change to the flexible benefits plan for judges.

RECOMMENDATION 5: The *per diem* for travel for judges be set at Level III of Treasury Board Directive 01/07.

RECOMMENDATION 6: Sub-section 19(1)(b) of the *Judicial Compensation Act* be amended to remove the two-year vesting period for members who ceased to hold office after September 30, 2015.

RECOMMENDATION 7: Sub-section 22(2) of the *Judicial Compensation Act* be amended to provide an early retirement reduction factor for a member with less than two years of contributory service who has reached age 55.

RECOMMENDATION 8: The *Judicial Compensation Act* be amended to clarify that a judge who ceases to hold office before age 55 may receive, at his or her option, the lump sum commuted value of his or her earned pension or a deferred pension.

RECOMMENDATION 9: The *Judicial Compensation Act* be amended to clarify that if a judge dies prior to retirement, his or her spouse or beneficiary is entitled to receive the lump sum commuted value of the judge's pension.

Judicial justices

RECOMMENDATION 10: Over the course of the Commission's three-year mandate, the annual salary of judicial justices be set as follows:

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

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

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

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

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

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

Costs

RECOMMENDATION 16: The Government pay 100% of the reasonable costs of the Provincial Court Judges Association of British Columbia and the Judicial Justices Association of British Columbia, including legal fees and disbursements, and the cost of the opinions and evidence of Mr. McKinnon and Mr. Smith.

Composition of the Commission

The 2016 Judicial Compensation Commission (“Commission”) was appointed under the provisions of the *Judicial Compensation Act*, S.B.C. 2003, c. 59, as amended (“Act”). In 2015, the Act was amended to merge the Provincial Court judges and judicial justices compensation commissions into a single judicial compensation commission.

Section 2 of the Act provides that the Commission be comprised of five members: two appointed by the Attorney General of British Columbia and two appointed by the Chief Judge of the Provincial Court in consultation with the Provincial Court Judges Association of British Columbia (“PCJA”) and the Judicial Justices Association of British Columbia (“JJA”). These four members then appoint a fifth, who sits as Chair of the Commission.

The 2016 appointments to the Commission are as follows:

Commission Chair	The Honourable Frank Iacobucci, C.C., Q.C. Toronto, ON
Attorney General Appointments	Brenda Eaton Victoria, BC Randal Kaardal, Q.C. Vancouver, BC
Chief Judge Appointments	Peter Lloyd Victoria, BC Robin McFee, Q.C. Vancouver, BC

Mandate of the Commission

Sub-section 5(1) of the Act sets out the Commission’s mandate to report to the Attorney General and Chief Judge on all matters respecting the remuneration, allowances and benefits of Provincial Court judges and judicial justices, and to make recommendations concerning those matters for the next three fiscal years. Sub-section 5(5) lists criteria that the Commission must consider in carrying out its mandate. These factors are set out and discussed further below. The Commission’s recommendations cover the period of April 1, 2017 to March 31, 2020.

Judicial independence and purpose of the Commission

The judiciary is one of three branches of government, with the other two being the legislative branch (elected members of the Legislative Assembly) and the executive branch (the Cabinet and civil service). As noted by the 2004 Judges Compensation Commission (“2004 JCC”), when making recommendations concerning judicial compensation, the Commission is “involved in no less a matter than the proper funding of a separate and independent branch of government” (at p. 5). As the 2001 Judges Compensation Commission noted, “to safeguard the freedoms of our democratic society and to maintain public confidence in the justice system, the judiciary must be independent from the other branches. The public needs to know that judges will make their decisions based on the law, not on politically prompted bias or on who is paying their salary” (at p. 14).

Although the judiciary is a branch of government, where the term “Government” is used in this report, unless otherwise stated, it refers to the executive branch of government, which was represented before this Commission.

In *Reference Re Public Sector Pay Reduction Act (PEI)*, [1997] 3 S.C.R. 3 (“*PEI Reference*”), the Supreme Court of Canada discussed the constitutional requirements of judicial independence. Judicial independence extends to all courts in the country (at para. 106) and has three core characteristics: security of tenure, financial security and administrative independence (at paras. 115 to 117). Judicial independence also has two “dimensions”: the individual independence of a judge and the collective or institutional independence of the court (at para. 118). A core character, like financial security, may have both individual and institutional implications. On an individual level, the salary paid to a judicial officer must not affect the way in which he or she decides cases. On an institutional level, the courts—even statutorily created provincial courts—protect Canadian constitutionalism and therefore “must be free from political interference through economic manipulation by other branches of government”, and from becoming entangled in the politics of remuneration from the public purse (at para. 131).

The Commission’s purpose relates to the financial security component of judicial independence. In the *PEI Reference*, the Court established the framework for independent judicial compensation commissions to meet the constitutional requirements of financial security to ensure judicial independence. As summarised by the 2004 JCC (at pp. 5 to 6):

Although it may be obvious, this Commission affirms that a healthy and independent judiciary is the very cornerstone of democracy. Judges must be paid salaries that adequately reflect their essential importance to proper functioning of our constitutional machinery. It must be borne in mind, as well, that when making recommendations concerning judicial compensation, we are involved in no less a matter than the proper funding of a separate and independent branch of government. Judicial independence “requires objective conditions that ensure the

judiciary's freedom to act without interference from any other entity. That principle finds explicit constitutional reference in ss. 96 to 100 of the *Constitution Act 1867* and s. 11(d) of the *Canadian Charter of Rights and Freedoms*": see *Ell v. Alberta*, [2003] 1 S.C.R. 857 per Major J. at paragraph 18.

For the very reason that all judicial operations are funded by consent and approval of the legislature and, through it, the executive, the Supreme Court of Canada in the *P.E.I. Reference Case* has declared that the matter of judges' pay and emoluments must be scrupulously depoliticized to maintain public confidence in judicial independence. The specter must never arise of judges being manipulated by financial means for political ends. Thus it is said that the depoliticization of the relationship between the judiciary and the other branches of government is constitutionally mandated, and therefore part of the supreme law of this country.

The constitutional principles that apply are set out in the *P.E.I. Reference Case* and include the following:

- Salaries of Provincial Court Judges may be reduced, increased or frozen, subject to prior recourse to a special process which is independent, effective and objective, for determining judicial remuneration [para. 133];
- Under no circumstances is it permissible for the judiciary to engage in negotiations over remuneration with the executive or representatives of the legislature [para. 134];
- Any reduction to judicial remuneration, including de facto reduction through the erosion of salaries by inflation, cannot take those salaries below a basic minimum level of remuneration required for the office of a judge [para. 135]; the principles that apply to salaries for judges apply equally to judicial pensions and other benefits [para. 136]; judges, although they must ultimately be paid from the public purse, are not civil servants, since civil servants are part of the executive and judges, by definition, are independent of the executive [para. 143];
- If a government rejects the recommendations of a judicial compensation commission, the government must articulate legitimate reasons why it has chosen to depart from the recommendations of the Commission;
- If judicial review is sought after a government rejects the recommendations of a judicial compensation commission, a reviewing court must inquire into the reasonableness of the factual foundation of the claim made by the government [para. 183];
- There should be no negotiation of remuneration between the judiciary and the executive and legislature, because negotiations from the public purse are "inherently political" [para. 146]. However, it is proper for the Provincial Court Judges to convey their concerns and make submissions to government regarding the adequacy of current levels of remuneration [paras. 186-189];

- Financial security is a means to an end of judicial independence and is therefore for the benefit of the public purse [para. 193];
- judges' salaries must not fall below the basic minimum level of salary that is "adequate and commensurate with the status, dignity and responsibility of the office of judge" [para. 194].

The Supreme Court of Canada also commented on the judicial compensation process in *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); et al*, [2005] 2 S.C.R. 286 ("*Bodner*"). The process is a "structural separation between the government and the judiciary" (at para. 14). It is "neither adjudicative interest arbitration nor judicial decision making" but a flexible process focused on identifying the "appropriate level of remuneration" (at para. 14). The rationale for independence flows from a judicial compensation commission's constitutional function as an institutional "sieve, to prevent the setting or freezing of judicial remuneration from being used as a means to exert political pressure through the economic manipulation of the judiciary" (at para. 14, citing *PEI Reference* at paras. 170, 185 and 189).

In summary, according to the *PEI Reference* and *Bodner*, judicial compensation commissions have the following attributes:

- They are a special process for determining judicial remuneration, which is independent, effective and objective (*PEI Reference* at para. 133; *Bodner* at para. 16);
- They are a "structural separation between the government and the judiciary" (*Bodner* at para. 14);
- They are "neither adjudicative interest arbitration nor judicial decision making," but a flexible process focused on identifying the "appropriate level of remuneration" (*Bodner* at para. 14);
- Their purpose is not simply to "update" the previous commission's report, but in the absence of reasons to the contrary, the starting point should be the date of the previous commission's report (*Bodner* at para. 14);
- Each commission makes its assessment in its own context, but this does not mean that, "each new compensation commission operates in a void, disregarding the work and recommendations of its predecessors. The reports of previous commissions and their outcomes form part of the background and context that a new compensation committee should consider" (*Bodner* at para. 15);
- They must objectively consider the submissions of all parties and any relevant factors identified in the enabling statute and recommendations (*Bodner* at para. 17);
- The recommendations must be objective and fair and dictated by the public interest (*PEI Reference* at para. 173);

- The recommendations must result from a fair and objective hearing and the report must explain and justify a commission’s position (*Bodner* at para. 17); and
- The recommendations must have a “meaningful effect” even though they are not binding on government (*Bodner* at paras. 17 and 20).

From the foregoing it is clear that what is ultimately at stake in the judicial compensation process is the constitutional imperative of judicial independence, which is ensured through the specific commission mandate of determining compensation for judges and judicial justices. In other words, in this exercise judicial independence is the “forest” and salary and benefits are the “trees”. The Commission is concerned that the litigation arising in the wake of the 2010 and 2013 compensation commissions (described below) indicates a weakening of the judicial compensation commission process in British Columbia. The Commission thus urges all participants to refresh their commitment to the essential goal of judicial independence.

The 2016 Judicial Compensation Commission process

Sub-section 5(6) of the *Act* provides as follows:

Before preparing a report, the 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.

In the spring of 2016, after consultation with counsel for the PCJA, JJA and the Government, the Commission directed that public hearings would be held on July 4 to 7, 2016.

In May 2016, the Commission sought submissions about judge and judicial justice remuneration from the interested public. It posted information about the Commission and its process on the Ministry of Justice’s website. The Commission Chair also wrote to the following potentially interested parties, seeking submissions:

- The Honourable Chief Judge Thomas Crabtree;
- The Judicial Council of the Provincial Court of British Columbia;
- The Law Society of British Columbia;
- The Canadian Bar Association, BC Branch;
- The Senior Judges’ Association of British Columbia;
- The Legal Services Society of British Columbia; and
- Trial Lawyers Association of British Columbia.

Also in June and July 2016, the Commissioners attended at various Provincial Court locations to observe the workings of the Court:

- The Justice Centre;
- Surrey Provincial Court;
- Vancouver Provincial Court (traffic court, small claims payment hearings and criminal court);
- Vancouver Drug Treatment Court;
- Vancouver Downtown Community Court;
- Victoria Provincial Court; and
- Victoria Integrated Court.

The Commission received and fully considered the written submissions from the following participants:

- The Provincial Court Judges Association of British Columbia;
- The Judicial Justices Association of British Columbia;
- The Government of British Columbia;
- Judicial Justice Anna-Maya Brown;
- Judicial Justice Gerry Hayes;
- Judicial Justices Joseph Chellappan Susheela and Joseph-Tiwary;
- The Honourable Chief Judge Thomas Crabtree;
- The Judicial Council of the Provincial Court of British Columbia;
- The Law Society of British Columbia; and
- The Canadian Bar Association, BC Branch.

Prior to the hearings, the Commission circulated all written submissions to participants and posted them on the Ministry of Justice's website.

The hearings proceeded on July 4 to 7, 2016, in Courtroom 101 of the Robson Square Provincial Courthouse located at 800 Hornby Street in Vancouver. The Commission conducted the hearings informally. Witnesses were not required to be under oath; and the format was one of submissions or presentations rather than conventional court-room examination. Over the course of the four days, the Commission heard from the following individuals:

- Susan Dawes, counsel for the PCJA;
- Tom Roper, Q.C., counsel for the JJA;
- Eric Harris, Q.C., counsel for the Government;
- Chief Judge Thomas Crabtree, on his own behalf;

- Jan Lindsay, Q.C., on behalf of the Judicial Council of the Provincial Court of British Columbia;
- Jennifer Chow, on behalf of the Canadian Bar Association, BC Branch;
- Ian McKinnon, Pacific Issues Partners, witness for the PCJA;
- Ken Peacock, Business Council of British Columbia, witness for the Government;
- David Galbraith, Assistant Deputy Minister, Treasury Board Staff, witness for the Government;
- Don Smith, Smith Pension & Actuarial Consultants, witness for the PCJA; and
- Angie Sorrell, Executive Director, Public Sector Employers' Council Secretariat, Ministry of Finance, witness for the Government.

During the Canadian Bar Association, BC Branch ("CBABC")'s oral submissions, the Commission requested information on salaries of the potential candidate pool for judges and judicial justices. In response, the CBABC submitted further written submissions on July 21, 2016. Also, on July 21, 2016, the PCJA provided the Commission with a copy of the Report and Recommendations issued by the Judicial Compensation and Benefits Commission in respect of compensation for federally-appointed judges and prothonotaries, which was tabled in Parliament in July 2016.

During the hearings, the PCJA, JJA and the Government informed the Commission about ongoing discussions relating to non-contentious issues regarding:

- Changes to the Act regarding judges' pensions to reflect changes in the Public Service Pension Plan;
- Including judges and judicial justices in the Government's new flexible benefits plan;
- A salary increase for judicial justices effective 2016/17; and
- Parity in compensation between *ad hoc* and *per diem* judicial justices.

On August 29, 2016, the PCJA and the Government provided the Commission with a joint submission regarding proposed amendments to the Act to ensure consistency with the *Pension Benefits Standards Act*, S.B.C. 2012, c. 30, which was repealed and replaced, effective September 30, 2015.

On September 6, 2016, the Government provided the Commission with a supplemental submission regarding the inclusion of judges and judicial justices in the Government's new flexible benefits plan. Although at the time of the hearings, the parties were in discussion about this issue, ultimately they did not reach agreement. On September 15, 2016, the PCJA and JJA filed their respective supplementary submissions on this issue.

Also during the hearings, the Chief Judge agreed to consult with the Government and JJA to provide the Commission with draft language regarding education leave for JJAs. On September 16, 2016, the Chief Judge provided the Commission with a supplemental submission regarding this issue.

The Commission intended its process to be non-adversarial and the Commission greatly appreciated the genuine spirit of cooperation among all participants. The Commission also very much appreciated the work of participants to answer questions and provide follow-up information when requested. The Commission thanks all participants for their excellent contribution to the process.

Work of the Provincial Court

Overview

The Provincial Court was officially established in 1969. It has been called the “People’s Court” because most citizens who come in contact with the justice system experience it only through the Provincial Court. The quality of the work performed by judges and judicial justices of the Provincial Court is remarkable. The Commission is convinced that the people of British Columbia are well-served by its dedicated and impressive Provincial Court judges and judicial justices.

The Court’s work is guided by its mission and vision adopted in 2006:

Mission

As an independent judiciary, we will impartially and consistently provide a forum for justice that assures equal access for all and enhances respect for the rule of law and confidence in the administration of justice.

Vision

Our vision is to provide an accessible, fair, efficient and innovative system of justice for the benefit of the public.

The Court is also guided by core values and goals as follows:

Core values

- Independence
- Integrity
- Fairness
- Excellence

Goals

1. To excel in the delivery of justice.
2. To enhance meaningful public access to the Court, its facilities and processes.

3. To ensure judicial innovation and reform to anticipate and meet the needs of society.
4. To ensure that the administration and management of the Court is transparent, fair, effective and efficient and that it is consistent with the principles of judicial independence.

In addition to the Chief Judge, since April 1, 2013, the administrative structure of the Provincial Court has included two Associate Chief Judges (Judicial Administration and Special Projects) and an Executive Director of Organizational Services. The Court has five administrative regions, each administrated by a Regional Administrative Judge who report to the Associate Chief Judge of Judicial Administration. Where necessary, Regional Administrative Judges are assisted by a Local Liaison Judge in a particular court facility who performs his or her duties in the course of a regular sitting schedule. The Chief Judge chairs the Court's Governance Committee and an Associate Chief Judge chairs the Administrative Committee. The Regional Administrative Judges sit on both of these committees.

The current remuneration for judges involved in the judicial administration of the Court is as follows:

- Puisne judge salary (presently \$244,112) plus 12% for the Chief Judge;
- Puisne judge salary plus 8% for the Associate Chief Judges; and
- Puisne judge salary plus 6% for the Regional Administrative Judges.

As of June 24, 2016, the Provincial Court was comprised of 110 full-time judges, 1 part-time judge (calculated at 0.60 of a full-time judge) and 37 senior judges (calculated at 0.45 of a full-time judge) for a full-time complement of 127.25 judges. Senior judges are judges who are 55 years of age or older, have 10 years of judicial service and elect to retire from full-time work but continue sitting on a part-time basis. There is no fixed complement of judges for the Court. The full-time complement has decreased since March 31, 2009 when it was 139.45 and has been in the range of 120 to 130 since 2010. In oral submissions, the Chief Judge told the Commission that the number of judges has decreased over the past decade by about 16 judges and that 127 judges are not sufficient to meet the needs of the Court. In 2012, concern about this led to a report to Government (D. Geoffrey Cowper, Q.C., *A criminal Justice System for the 21st Century: Final Report to the Minister of Justice and Attorney General Honourable Shirley Bond*, August 27, 2012). In response to this report, the Government drafted legislation to enable a fixed complement, but it has not yet been enacted.

The average number of cases per judge rose from 961.1 in 2013/14 to 996.3 in 2014/15.

Sub-section 6(2) of the *Provincial Court Act*, R.S.B.C. 1996, c. 379, requires prospective judges to have been a member of the Law Society of British

Columbia for at least five years, but the Judicial Council of British Columbia requires applicants to have at least 10 years at the Bar and most newly appointed judges have practised law for approximately 20 years prior to appointment. The average age at appointment over the last three years has been 55.3.

At the time of the hearings, the Provincial Court was also comprised of 10 full-time judicial justices and 22 part-time judicial justices (18 *per diem* and 3 *ad hoc* judicial justices and one on long-term disability) appointed pursuant to sections 30.2 and 30.3 of the *Provincial Court Act*. Full-time and *ad hoc* part-time judicial justices were appointed prior to 2007 when a law degree was not required. Many were Court Services Branch or Provincial Court staff prior to appointment. These judicial justices are able to work until age 75. Although at the time of their appointment a law degree was not required, some full-time judicial justices do have law degrees. All judicial justices appointed since 2007 are lawyers who are paid on a *per diem* basis and who are each appointed for a one 10-year term. The Chief Judge must offer a minimum of 40 working days per year to *per diem* judicial justices, but many of them in fact work full-time. The *per diem* is calculated as:

Full-time judicial justice salary / 207 (days of work) + 20% (in lieu of benefits)
+ \$80 (office overhead)

The Judicial Council of British Columbia requires all applicants for a judicial justice appointment to have been a member in good standing of the Law Society of British Columbia for at least five years or have other legal or judicial experience satisfactory to the Judicial Council. The average age of appointment is 45 to 50 years.

In addition to Provincial Court judges and judicial justices, the Court's services include the work of judicial case managers who deal with court scheduling, coordination of judges' sittings, conducting initial criminal appearances and case flow management. As of June 1, 2016, there were 29 full-time, 12 part-time and 5 auxiliary judicial case managers.

The Court has 89 locations in 88 communities across the Province. Travel expectations are high for judges who serve outside the lower mainland and for a number of judicial justices. For example, a judge based in Smithers may travel to courts in Hazelton, Houston and Burns Lake. A judge in Kelowna may travel to Princeton, Penticton, Vernon, Salmon Arm and Revelstoke. A judicial justice based in Vancouver may sit in Vancouver, Burnaby and in a number of locations on Vancouver Island.

In order to ensure that judges are able to fill assignments across the province, the Chief Judge must assign case Rotas to judges up to a year in advance. This means that judges must also submit requests for annual leave up to a year in advance. The Chief Judge relies on senior judges to fill unexpected absences such as those owing to illness or medical leave.

As at every level of court these days, unrepresented litigants add to the workload of Provincial Court judges and judicial justices. Such litigants increase the complexity of the matters heard because appearances by self-represented litigants impose additional responsibilities on judicial officers to ensure equal access to justice. The Provincial Court is now tracking the numbers of self-represented appearances (defined as a hearing where at least one party is not represented by counsel or an agent). The Chief Judge submitted that there were 130,351 self-represented appearances during the 2014/15 fiscal year.

Provincial Court judges complete five days of mandatory education programming annually, receive online legal updates from the Office of the Chief Judge as well as other updates and receive up to five additional days of paid education leave annually to attend conferences and educational seminars. Judges receive a \$4,000 professional development allowance against costs incurred.

Judicial justices receive five days of judicial education leave organized by judicial justices with the support of the Office of the Chief Judge. Judicial Justices currently receive an annual professional development allowance of up to \$1,500 as an expenditure-based reimbursement.

Broad jurisdiction

The Provincial Court has broad jurisdiction in adult criminal, youth, civil, family, child protection and traffic and bylaw matters. As noted by the past commissions, the Provincial Court has one of the broadest and most comprehensive jurisdictions of any provincial court in Canada. At the time of the Commission hearings, the numbers of cases for the fiscal year ending 2016 were not available, but for the 2014/15 fiscal year a total of 219,752 new cases were commenced. New cases in the adult criminal, family and child protection divisions increased from the previous year while new cases in the small claims and youth criminal divisions declined by 10 and 11% respectively.

Criminal Jurisdiction

Provincial Court criminal jurisdiction extends to all matters except for a limited few over which the Supreme Court has exclusive jurisdiction (adult murder charges and cases where the accused elects to be tried by a Supreme Court justice). Even for these latter matters, a preliminary inquiry may be held in Provincial Court before a trial is held in Supreme Court. As a result, the Provincial Court hears more than 98% of the criminal cases by volume in the province.

In addition to hearing adult criminal cases, the Court has jurisdiction over young offenders under section 13 of the *Youth Criminal Justice Act*, S.C. 2002, c. 1. These cases range from mischief to murder. In a very limited number of cases, the young offender may elect trial in the Supreme Court.

Family jurisdiction

The Court has exclusive jurisdiction in child protection matters of which there are in excess of 1500 new cases each year. These cases are among the most serious that the Court deals with, and take much more time than most criminal or civil cases, as they involve decisions of whether to remove children from the care of their parents and place them within the care of the state.

Under the *Family Law Act*, S.B.C. 2011, c. 25, the Court has concurrent jurisdiction with the Supreme Court on issues of spousal protection, guardianship, parenting time and child and spousal maintenance. The Court does not have jurisdiction to order divorces, divide matrimonial property or make orders relating to the occupation of the family home (apart from ancillary orders relating to occupation under the *Family Law Act*). In 2015, there were 30,468 new cases and applications in this area. The volume of Provincial Court family cases is approximately equal to that of Supreme Court.

Civil jurisdiction

The Court has jurisdiction over civil matters with a \$25,000 monetary limit. These cases include debt recovery, damages related to personal property, specific performance of contracts, negligence and all forms of breach of contract. Every party to a civil dispute in Provincial Court must attend a settlement conference presided over by a judge. Also, once the Government's Civil Resolution Tribunal is fully operational and mandatory (targeted for 2017), the Provincial Court will hear applications for exemption to this Tribunal process and appeals *de novo* of the Tribunal's decisions.

Judicial justice jurisdiction

Subject to section 2.1 of the *Provincial Court Act*, which sets out certain matters that only a judge may hear, the current assignment of duties to judicial justices by the Chief Judge under section 11 of the *Provincial Court Act* is as follows:

- All matters to which Court Services justices of the peace and judicial case managers are assigned;
- Matters in which there is a judicial determination affecting the liberty of a person taken into custody, other than such matters as are assigned exclusively to, or are under the exclusive jurisdiction of, Provincial Court judges;
- All applications pursuant to federal or provincial enactments for search warrants, and warrants or authorizations to enter a dwelling house, premises or other place, whether application is made in person or by telephone or other means of telecommunication. With respect to telewarrants, in addition to sub-section 11(1) of the *Provincial Court Act*, this assignment constitutes a designation pursuant to section 487.1 of the *Criminal Code*, R.S.C. 1985, c. C-46 and section 22 of the *Offence Act*, R.S.B.C. 1996, c. 338;

- Payment hearings pursuant to the *Small Claims Act*, R.S.B.C. 1996, c. 430 and *Small Claims Rules*, B.C. Reg. 261/93;
- Hearings in respect of all provincial offences and federal *Contraventions Act*, S.C. 1992, c. 47 offences, in which proceedings are commenced by ticket information;
- Hearings in respect of all municipal bylaw offences; and
- Hearings in respect of any traffic-related offences under the *Government Property Traffic Regulations*, C.R.C., c. 887, and *Airport Traffic Regulations*, C.R.C., c. 886, made pursuant to the *Government Property Traffic Act*, R.S.C. 1985, c. G-6 (adult only).

All matters heard by judicial justices are matters that would otherwise have to be heard by a Provincial Court judge. Given the nature of the cases heard, judicial justices are the face of justice in the province for many people and shape the public's impressions about the justice system and the principles of independence, impartiality and other values.

Judicial justices provide 24-hours-a-day, 7-days-a-week service to the public on judicial interim release (bail) hearings as well as applications for search warrants and production orders under the *Criminal Code* and *Missing Persons Act*, S.B.C. 2014, c. 2. Some of the bail hearings are conducted using video technology, but many hearings are held under challenging circumstances over the telephone and are presented to the judicial justice by a police officer rather than a Crown prosecutor. Also, owing to the urgency of the situation in bail hearings, an accused person will often proceed without the assistance of a lawyer. Applications for search warrants or production orders are often determined under a sense of urgency. In summary, by its nature, the criminal work done by judicial justices is unscheduled and is performed in "real time" in a fast-paced environment with high expectations for timely and "right" decisions and little presence of counsel.

With respect to civil cases (traffic, bylaw and small claims payment hearings), judicial justices perform this work without the assistance of support staff, a court clerk or a sheriff. Courts lists can be as high as 60 matters per day. Here too, the complexity of the work is impacted by the large number of self-represented litigants.

Adapting and improving

The Commission is impressed with the Provincial Court's continuing willingness to adapt its processes to improve its level of service to the public. The Commission heard from the Chief Judge about a number of current and ongoing initiatives.

New administrative model

In April 2013 (with a period of transition until June 2014), the Court implemented a new administrative structure. The Chief Judge told the Commission that the new structure increases transparency, simplifies administrative structure and allows for meaningful input of judicial officers into the decision-making process of the Court.

Provincial Court Scheduling Project

Beginning in the spring of 2012, this project has revised judicial scheduling practices to make them more effective, equitable and efficient. In December 2013, a new Practice Direction was issued amending the Criminal Case Flow Management Rules to simplify the front-end criminal process. The Court has also implemented “delayed assignment” throughout the Province in all divisions. This means that judges are assigned to cases at or near the hearing date once counsel or the parties have confirmed that the matter requires judicial determination. In support of the new scheduling process, the Court has designed and implemented new software.

The balanced Rota template

Since 2014, balanced Rota templates have been in place throughout the province. This process involves judiciary and court staff objectively reviewing and analyzing the ongoing needs of the Court and using that information to build scheduling patterns of various types of court hearings and activities that are responsive to caseload and available resourcing.

Management information system

The Court is developing key performance measures as well as the ability to retrieve data to provide the Court with better management information and business intelligence. The types of data that will be obtained and the reports that will be generated include on-time case processing information, case completion rates, case age, next date surveys, reserve judgment reports and a number of trial scheduling reports. The Court also intends to automate its management reports.

The Backlog Reduction Project

This project was a joint effort of the Ministry of Justice and the Chief Judge in the 2013/14 fiscal year to reduce backlogs in criminal and child protection matters. Specific court locations were targeted with 170 additional judge sitting days. An analysis of the outcomes indicated that while the backlog of criminal cases was reduced at the two test locations, in child protection cases many locations showed no improvements.

Vancouver Downtown Community Court

The Downtown Community Court (“DCC”) coordinates with multiple agencies in an attempt to address the root causes of crime in Vancouver. It opened in 2008 as a collaboration between the Office of the Chief Judge and the Government. The

DCC aims to prevent criminal activity through a partnership of justice, social and health care services. The needs of victims are also addressed with an onsite victim support worker. A peer-reviewed evaluation concluded that the DCC successfully reduced recidivism to a significant degree for a cohort of its most chronic and high needs offenders.

Vancouver Drug Treatment Court

Created in 2001, the Vancouver Drug Treatment Court (“DTC”) is one of the busiest in Vancouver. It provides an alternative to the regular criminal court process for individuals who commit drug offences or other minor criminal offences arising out of their addiction to cocaine, heroin or other controlled substances. The program aims to help offenders achieve abstinence from drug use, reduce or eliminate future contact with the criminal justice system, improve their overall well-being (including improved housing), find employment, further their education and engage in pro-social use of their time. For a minimum of 14 months, DTC participants undergo drug addiction treatment supervised by a DTC judge. Participants receive services from addiction counsellors, case managers, a psychologist, a physician who specializes in addictions medicine, a nurse and a financial assistance worker.

Victoria Integrated Court

The Victoria Integrated Court (“VIC”) was opened in 2011 and takes an integrated approach to improving access to health, social, and economic services for offenders, to improving public safety and to holding offenders accountable for their actions in a timely manner. Judges are told about housing, medical and other issues affecting an offender and hear recommendations for orders to help a team support and supervise the offender. The VIC is not a trial court, but eligible individuals may have bail hearings or plead guilty and be sentenced in VIC. Those who plead not guilty are tried in the regular court system, but if found guilty and given a community sentence, they may have that sentence supervised in the VIC. In 2014, a Master’s thesis by students at the University of Victoria’s School of Public Administration concluded that the VIC provided benefits to the health care system and the administration of justice, including lowered costs and reduced recidivism.

First Nations Court

Four First Nations Courts operate in British Columbia (New Westminster, North Vancouver, Kamloops and Duncan). The approach of these criminal courts is holistic, recognizing the unique circumstances of First Nations offenders within the framework of existing laws. With the input of local First Nations communities, these courts provide support and healing to assist offenders in their rehabilitation and to reduce recidivism. The Chief Judge also said that he is currently in discussions with First Nations leaders and communities in a number of locations to assess local needs and interests and that future steps could include the development of new initiatives in both criminal and child protection areas.

Cowichan Valley Domestic Violence Court Project

This is the first dedicated court in British Columbia to address issues of domestic violence and has been in operation since March 2009. The court is a blend of an expedited case management court and a treatment or problem-solving court. The goal is to bring cases to disposition as soon as possible to reduce the rate of victim recantation or other witness-related problems, to offer a less punitive approach for those who accept responsibility for their actions and seek treatment and to ensure the safety of victims and the public.

Video technology

The Court uses video technology at many court locations to accommodate remand appearances and bail hearings heard remotely at Provincial Courts and the Justice Centre. In addition, sentencing proceedings and family and civil matters are conducted by video where appropriate. The Chief Judge told the Commission that for 2014/15, the use of video technology resulted in the elimination of almost 23,000 prisoner transports.

Bail Reform Project

Initiated in December 2007, the Bail Reform Project allows bail hearings to be remotely scheduled before a judicial justice at the Justice Centre in Burnaby.

Civil Division

The Court began piloting civil reforms in November 2007 by streaming small claims cases into “under \$5000,” “institutional debts” and “over \$5,000” streams.

Communications initiatives

In 2014/15, the Court launched several initiatives to help achieve accessibility and openness:

- Redesign of the Court’s website to provide simpler language and navigation and additional resources;
- An online news service, which issues short news bulletins and weekly articles; and
- A Twitter feed to provide updates about the justice system, recent judgments, education resources and other stories.

Interjurisdiction Support Orders Act reform

Provincial Court and Supreme Court judges and staff from the Ministry of Justice began implementation in 2014 to help parents who live in different jurisdictions reach agreements on child support.

University of British Columbia Intern Program

Since January 2007, the Court and the University of British Columbia have partnered in a judicial internship program for third-year law students (16 students each year).

All of the above initiatives demonstrate the innovation, flexibility, and hard work of the Provincial Court in meeting the needs of the justice system. Innovations and reforms such as these confirm the Commission's view that the Court's work is impressive and that British Columbians are well served by their Provincial Court judges and judicial justices.

Summary of the 2013 Judges Compensation Commission

Overview

In *Bodner*, the Supreme Court of Canada stated that the "starting point" for the work of each commission is the date of the previous commission's report. The Court went on to say (at para. 15):

Each commission must make its assessment in its own context. However, this rule does not mean that each new compensation commission operates in a void, disregarding the work of its predecessors. The reports of previous commissions and their outcomes form part of the background and context that a new compensation committee should consider. A new commission may very well decide that, in the circumstances, its predecessors conducted a thorough review of judicial compensation and that, in the absence of demonstrated change, only minor adjustments are necessary. If on the other hand, it considers that previous reports failed to set compensation and benefits at the appropriate level due to particular circumstances, the new commission may legitimately go beyond the findings of the previous commission, and after a careful review, make its own recommendations on that basis.

Government's response to the 2010 Judges Compensation Commission

To understand some aspects of the 2013 Judges Compensation Commission ("2013 JCC"), it is important to first consider the Government's response to the 2010 Judges Compensation Commission ("2010 JCC"). This is relevant context because the uncertain outcome of the 2010 JCC at the time of the 2013 JCC impacted the latter's recommendations on salary and pension accrual rate.

Beginning in the third year of its mandate (2013/14), the 2010 JCC recommended an increase equal to the cumulative increase in the British Columbia Consumer Price Index over the preceding three fiscal years, compounded annually (this would have meant a 4.9% increase). It also recommended an increase in the pension accrual rate to 3.5% from 3.0%, effective April 1, 2013.

In May 2011, the Government issued its response to the 2010 JCC's recommendations. This response was adopted by the Legislative Assembly. The Government rejected the salary and pension recommendations. The PCJA subsequently applied to the British Columbia Supreme Court for judicial review of the Government's response. The Court released the reasons for judgment of Mr. Justice Macaulay on July 11, 2012. Macaulay J. concluded that the Government's response as adopted by the Legislative Assembly did not meet the constitutional and administrative law standards set by the Supreme Court of Canada (*Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022).

Following the direction of Macaulay J., the Legislative Assembly considered the matter a second time and on March 12, 2013, the Government issued a new response to the 2010 JCC ("Second Response"). It substituted a 1.5% increase in salary for the third year of the 2010 JCC's mandate. The PCJA again brought a judicial review. This judicial review was ultimately decided in favour of the PCJA by the British Columbia Court of Appeal. The Government was ordered to implement all of the 2010 JCC recommendations.

2013 JCC recommendations and the Government's response

The 2013 JCC's recommendations and rationale along with the current state of the Government's responses on these issues is summarized below.

Salary

When the 2013 JCC was drafting its report, the outcome of the judicial review of the Second Response was not yet known. Thus, the 2013 JCC took as its starting point for salaries and pension rate the actual compensation that the judges were receiving at the time it conducted its hearings (*i.e.*, the compensation substituted by the Government in its Second Response, which was a 1.5% increase in salary for fiscal year 2013/14 and no change from the 3.0% pension accrual rate).

The 2013 JCC accepted that British Columbia's economic outlook was for "gradual improvement" (at p. 4). It determined that "while the salary of BC Provincial Court judges should not be rigidly pegged to any comparator, given British Columbia's cautious but positive economic outlook, the salary of British Columbia judges ought to be in the range of 3rd to 4th place amongst salaries of provincial court judges in Canada" (at p. 47). In the result, the 2013 JCC recommended that salaries should increase by 2.9, 1.5 and 2.0% in each of the three years of its mandate.

In March 2014, the Government issued its response. The salary recommendations were rejected as unfair and unreasonable. Instead, the Government substituted a 1.0, 1.5 and 1.5% increase in each of the three fiscal years. This response recognized that fiscal restraint continued to be a key component of the Government's overall fiscal plan and reduced the fiscal impact of the salary recommendations by approximately \$2.4 million over three years. The

Government also noted that its proposal “largely achieves the objectives of the Commission’s recommendations and the considerations set out at p. 47 of the JCC report” (at p. 6). It also accorded with the 2013 JCC’s findings that there was no problem attracting qualified candidates notwithstanding the salary gap between judges and federally-appointed Supreme Court justices, with Government’s view that there was no likelihood of future recruitment problems arising from these salary levels and placed judges’ salaries at about the mid-point among other provinces.

Pension

The 2013 JCC recommended what it considered to be a 0.25% increase in the pension accrual rate to 3.25%, but after the Court of Appeal’s decision on the Second Response, this became a decrease from the 3.5% accrual rate ordered for the 2013/14 fiscal year. The 2013 JCC also recommended that: (1) Government take reasonable steps to avoid the double taxation of judges on the non-registered component of their pension contributions; (2) Government rectify the inconsistency that requires judges who work full-time past the age of 71 to collect both pension and full-time pay; and (3) implement the 2010 JCC’s recommendation to provide cost-neutral life insurance to judges aged 71 to 75.

While the Government accepted most of the recommendations on pension, it rejected the increase to the pension accrual rate and left it at 3.0%. In its 2014 response to the 2013 JCC Report, the Government said that increasing the pension accrual rate was unfair and unreasonable because the current 3% accrual rate was 50% higher than the accrual rate that applies to most members of the Public Service Pension Plan. Also, the estimated cost of implementing this recommendation was \$0.65 million per year, but fiscal restraint was a key component of the Government’s overall fiscal plan. Given that the 2013 JCC recognized that there were no recruitment problems for judicial appointments, and, in the Government’s view there was no likelihood of future recruitment problems arising from a 3.0% accrual rate and the purpose of a pension plan is not to ensure that recipients can retire with the maximum possible pension, the *status quo* was sufficient to ensure a reasonable retirement benefit.

Costs

The 2013 JCC recommended that the Government pay 100% of the PCJA’s reasonable legal fees, including the cost of experts. The Government accepted this recommendation.

Subsequent litigation

After the Government issued its response to the 2013 JCC recommendations, the PCJA filed a petition for judicial review. The petition was heard on June 26 and 27, 2016. On July 29, 2016, the Supreme Court allowed the petition (*Provincial Court Judges’ Association of British Columbia v. British Columbia (Attorney General)*, 2016 BCSC 1420). Mr. Justice Grauer found that in rejecting the 2013

JCC recommendations regarding salary and pension, the Government did not adhere to the approach mandated by the Act and the Constitution of Canada. The Government is now appealing Grauer J.'s decision and the PCJA is cross-appelling on the issue of remedy.

Summary of the 2010 and 2013 Judicial Justices Compensation Commission recommendations

Recommendations and the Government's response

2010 Judicial Justices Compensation Commission

The 2010 Judicial Justices Compensation Commission ("2010 JJCC") recommended salary increases of 0, 0 and 8.0% for each of the three years of its mandate. It also recommended the following:

- An adjustment to the formula used to determine part-time judicial justice *per diems*;
- The application of the same formula to *ad hoc* judicial justices (*i.e.*, parity between *ad hoc* and *per diem* part-time judicial justices);
- An increase in the professional development allowance from \$1,000 to \$1,500; and
- The extension of the Government's flexible benefits program to judicial justices.

In May 2011, the Government brought forward its response to the Legislative Assembly, which was unanimously accepted. Citing the need to continue its net-zero compensation mandate and apply it across the public sector, the response rejected the proposed salary increase in 2013/14 and substituted no increase. It also rejected achieving parity between *ad hoc* and *per diem* judicial justices.

2013 Judicial Justices Compensation Commission

The 2013 Judicial Justices Compensation Commission ("2013 JJCC") recommended a salary increase of 5.0, 2.0 and 2.0% in each of the three years of its mandate. The 2013 JJCC also recommended that the *per diem* compensation formula be changed to account for the 12 chamber days available to full-time judicial justices but not to part-time judicial justices. The recommended formula was as follows:

Full-time judicial justice salary / 207 (days of work) + 20% (in lieu of benefits)
+ \$80 (office overhead).

The Government accepted these recommendations except for the 5% increase in fiscal year 2014/15 for which it substituted a 1.5% increase. The Government said that its response accorded with the 2013 JJCC's finding that there should be a

modest increase in judicial justice salaries; recognized that fiscal restraint continues to be a key component of the Government's overall fiscal plan; would reduce the fiscal impact of the 2013 JJCC's recommendations by about \$160,000 over three years; took into account the further fiscal impact of adjusting the *per diem* formula; accorded with the 2013 JJCC's findings that there was no problem attaching and retaining qualified candidates; reflected the Government's view that there was no apparent likelihood of future recruitment problems; indicated the Government's rejection of the 2013 JJCC's finding that the wage gap between judicial justices and judges should be reduced; and ensured that the wage gap would not grow.

Subsequent litigation

The JJA filed for judicial review of the Government's response to the 2010 JJCC and 2013 JJCC recommendations. At the hearings, the Commission was told that the parties had engaged in facilitated discussions to explore whether there was any common ground between the parties and had reached a resolution. The Attorney General agreed to place a motion before the Legislative Assembly for the fiscal year 2013/14 to increase the salary of full-time judicial justices by 4.9% from the previous fiscal year. The Attorney General also agreed to place a motion before the Legislative Assembly for *ad hoc* judicial justices to receive the same *per diem* rate as *per diem* judicial justices beginning in 2014/15.

In order for these recommendations to be implemented, the Legislative Assembly must accept the proposed motions. Thus, the JJA asked the Commission to include a statement of support in its report. On July 28, 2016, the Legislative Assembly adopted a resolution to: (1) to increase judicial justice salaries to \$110,249, effective April 1, 2013; and (2) to pay *ad hoc* and non-*ad hoc* part-time judicial justices on the same *per diem* basis, effective April 1, 2014.

Issues before the 2016 Commission

For the fiscal year 2016/17, judges will receive \$244,112 in salary. As is mentioned above, the Chief Judge receives 12% more per year than puisne judges; Associate Chief Judges receive 8% more per year than puisne judges; and Regional Administrative Judges receive 6% more per year than puisne judges. All Provincial Court judges have a pension accrual rate of 3%.

For fiscal year 2016/17, judicial justices will receive a salary of \$110,249, if the Legislative Assembly accepts the Government's motion arising from the facilitated discussions that resolved the litigation stemming from the 2010 and 2013 JJCC recommendations. If the Legislative Assembly does not adopt the motion, then the judicial justice salary for 2016/17 will be approximately \$105,000. The *per diem* for part-time judicial justices is \$719 or \$689, under these two scenarios.

Ad hoc judicial justices make more than 20% less than *per diem* judicial justices. Full-time judicial justices are a part of the Public Service Pension Plan. Part-time judicial justices do not have a pension.

In this remuneration context, a number of issues were raised before the Commission.

Judges

Salary

Both the PCJA and the Government sought recommendations from the Commission relating to judges' salaries.

Puisne judges

The PCJA sought an increase in the salary of Provincial Court puisne judges to \$285,000 starting April 1, 2017, and further increases on April 1, 2018 and April 1, 2019 of 2.0%, respectively. The PCJA acknowledged that this would be a significant increase (a "catch-up"), but said that it was justified based on consideration of the statutory criteria and because judges' salaries have fallen so far in relation to their counterparts. Past commissions have recommended substantive increases where warranted. Currently, the salaries of British Columbia judges are at almost 80% of that for Supreme Court justices and are 10th place compared to other provincial courts in Canada. In comparison, salaries of teachers and nurses in British Columbia usually rank 5th nationally. The PCJA submitted that compensation must be adequate to attract and retain highly qualified applicants and referenced the drop in the number of applicants in 2015, from an average of 50 to 26. One important consideration was the fact that the Provincial Court and Supreme Court compete for members from the same candidate pool. The proposed salary would result in a Provincial Court judge receiving 88.7% of the salary of a justice of the Supreme Court of British Columbia and would improve the disparity in salary to a reasonable level. A raise to \$285,000 would put British Columbian judges in 4th place out of 10 provinces, which is consonant with the province's comparative size and economic strength. It would also bring salaries closer to those in Alberta, Saskatchewan and Ontario, which the PCJA pointed to as the most directly similar jurisdictions to British Columbia. A fourth place ranking is also consistent with the Government's policy on executive compensation. The 2.0% annual increases in the second and third years would protect judges' salaries from erosion of purchasing power and keep them within the reasonable range of comparators. The positive current and expected economic conditions and the relatively strong fiscal position of Government did not undermine the requested salary.

Also, while the Court of Appeal required the Government implement the 2013/14 salary increase recommended by the 2010 JCC, as a result of the uncertain outcome of this litigation at the time of the 2013 JCC, the 2014/15 salary recommended by the 2013 JCC resulted in a reduction from the eventual 2013/14

salary and so judges are already receiving less than what was determined to be appropriate by past commissions.

The Chief Judge adopted and supported the PCJA's submission as consistent with his opinion as to what is necessary to attract and retain qualified applicants and to support judges in serving the needs of the citizens of British Columbia.

In contrast, the Government proposed that judges' salaries be as follows:

- 2017/18: \$247,774;
- 2018/19: \$251,491; and
- 2019/20: \$255,263.

According to the Government, the best indicator of whether compensation is sufficient to attract qualified applicants is whether the Court is experiencing any unmet need in the number of applicants approved by the Judicial Council of British Columbia. The evidence is that the Court is able to attract sufficient numbers of highly qualified applicants, the complement of judges is stable and there is diversity in the Bench. There are no changes to the jurisdiction that would justify a large salary increase. The Government focused on the median and average salaries of provincial court judges in other jurisdictions, which are \$250,050 and \$259,055, respectively. It viewed a comparison to federally-appointed judges as inappropriate because superior courts serve a different function from provincial courts. The Government submitted that the average deputy minister salary for the five largest portfolios in the province is \$249,600.

Government said that its position recognized levels of compensation across Canada and within British Columbia and the economic and fiscal realities of the province, including the fact that, via the Economic Stability Mandate, public sector employees have only received cost of living increases. While economic conditions and the financial position of Government are currently and in the short-term expected to be moderately positive, there are significant risks on the horizon. Most importantly, absent factors heavily favouring a significant salary increase (as Government submitted was the case), judicial independence favours similar treatment with others paid by public funds. The Government argued this is one of the most reliable markers of reasonableness. There were modest wage increases for unionized public sector workers of just over 1.0% on average from 2012/13 to 2015/16 and there will be annual increases of 1.5% from 2016/17 to 2018/19. Management and executives will receive no increases in their salary ranges or general wage increases (although there is eligibility for merit increases of up to 2.0%), deputy ministers and assistant deputy ministers have received modest or no wage increases and remuneration for tribunals has not changed since 2007. In oral submissions, the Government acknowledged that the 1.5% wage increase proposed for 2017/18 is derived from what public sector employees are getting.

In response to the Government's position regarding its Economic Stability Mandate, the PCJA said that while salary recommendations supported by increases to public sector groups reflected the Government's assessment of its ability to pay, it was inappropriate to make any linkage between these groups and compensation for judges. The 2013 JCC rejected this approach as harmful to judicial independence. Employees have step- and merit-based increases that increase their compensation and collective agreements include monetary and non-monetary items that are all valuable to a bargaining unit and make up the full compensation package. Moreover, Crown lawyers received a 12.07% increase from 2013 to 2016.

Administrative judges

The Chief Judge sought a recommendation to continue the 2013 JCC's recommendation regarding the salaries for administrative judges. The recommendation sought was: the Chief Judge to receive 12.0% more per year than puisne judges; Associate Chief Judges to receive 8.0% more per year than puisne judges; and Regional Administrative Judges to receive 6.0% more per year than puisne judges. The Chief Judge suggested that in order to avoid the need for each commission to make the same recommendation, the Act could be amended.

No other participant addressed this issue.

Pension

The PCJA sought a recommendation to raise the accrual rate on judges' pensions from 3.0% to 3.5% per annum. This recommendation was made by the 2010 JCC, and as is explained above, although it was not implemented by the Government, it will now be implemented retroactively from April 1, 2013 to March 31, 2014. A recommendation for an accrual rate of 3.25% was made by the 2013 JCC, but was not implemented as is explained above. The PCJA submitted that a 3.5% rate would ensure the financial security of judges following their retirement and encourage judges to retire at an appropriate age to allow for new appointments and avoid burn out. The average age of appointment for judges means that many judges would not reach full pension even with a 3.5% accrual rate and working until the age of 75. The Government's presumption of pre-retirement savings is inappropriate and an increased accrual rate is of particular concern for judges appointed from the private bar who do not have prior public service pensions.

The PCJA's main argument in favour of the increase is that it would help narrow the disparity between the compensation packages of Provincial Court judges and Supreme Court judges (who have an accrual rate of 4.44%). According to the PCJA, even if its recommendations on salary and pension were accepted, there would still be just over a \$100,000 negative annual comparison between a Provincial Court and Supreme Court judge appointed at age 55.

In oral submissions, the PCJA noted that public sector pensions are generally built around a 2.0% accrual rate, but that this is based on a 35-year career and

portability around the public sector. Members of the Legislative Assembly (“MLAs”) have very good pensions because they are not expected to hold office for their lifetime. Judges in Ontario and Saskatchewan enjoy accrual rates in excess of what British Columbia judges have. Also, the cost of the proposed change was reasonable given the Government’s current and expected financial position and the positive economic conditions.

The PCJA also recommended that the Commission make no change to the relative contribution rates of the Government and judges to judicial pensions.

The Government opposed the proposed increase in the accrual rate. In essence, its position was that the judges’ pension is already very generous. Seven other provinces have an accrual rate of 3.0%. The 3% accrual rate is 50% higher than for any identified public servant other than MLAs. Also, the period on which pension amount is calculated is based on the last three years of service rather than the last five years. According to the Government, a pension of 70% is achieved in 23.3 years. The Government also said that while economic conditions and the financial position of the Government were currently and in the short-term expected to be moderately positive, there were significant risks on the horizon.

In support of their respective positions on pension, the PCJA and the Government called Don Smith and Angie Sorrell to provide testimony at the hearings. Each provided the Commission with a PowerPoint presentation and Mr. Smith also tendered a written report.

Flexible benefits plan

At the hearings, the PCJA and the Government stated that they intended to provide the Commission with supplemental joint submissions on a proposal to include judges in the Government’s new flexible benefits plan. Although at the time of the hearings the PCJA and the Government were in discussions regarding this issue, they were ultimately unable to reach agreement.

On September 6, 2016, the Government provided the Commission with a supplemental submission regarding the inclusion of judges and judicial justices in the Government’s new flexible benefits plan, effective January 2018. The Government asked the Commission to make a recommendation that judges remain members of the plan and be subject to forthcoming changes in its benefit coverage. The Government submitted that changes to the plan are cost neutral and intended to simplify and streamline benefits. Conversely, if judges do not remain in the redesigned plan, then this will result in additional cost and administrative burden on Government. In Government’s view, under the revised plan, while some individuals may have reduced access to some benefits, they will correspondingly receive improved access to other benefits.

In response, the PCJA asked the Commission to reject the Government’s proposal. In the PCJA’s view, the matter is more appropriately raised before the next judicial compensation commission in order to allow the parties and that

commission full opportunity to assess the proposed changes. One concern for the PCJA was that certain judges would be adversely affected by the imposition of an annual cap on physiotherapy benefits. The PCJA also noted that there was no evidence before the Commission to allow it to properly assess the proposed changes.

Per diem for travel

The Chief Judge asked this Commission to recommend that the *per diem* travel reimbursement for judges and judicial justices be fixed at the same rate as for MLAs. He told the Commission that judges and judicial justices spend a considerable number of days each year on travel status. For example, in 2015, judges assigned to chambers in Prince George spent on average approximately 30 to 50% of their sitting time on travel status. According to the Chief Judge, the current *per diem* rates are inadequate.

The current *per diem* travel allowance follows Treasury Board Directive 01/07 and reimburses judicial officers at the same rate as deputy ministers and others in the Government, which is \$51.50 per day. MLAs receive \$61.00 per day and the rates are set by the speaker of the Legislative Assembly.

The Government asked the Commission to make no change to the *per diem* rate. Judicial officers already receive the highest level of *per diem* available pursuant to Treasury Board Directive 01/07.

Non-contentious issue

At the hearings, the PCJA and the Government agreed to provide the Commission with supplemental joint submissions with recommendations regarding proposed amendments to the Act for consistency with the amended *Pension Benefits Standards Act* (“PBSA”). On August 29, 2016, the PCJA and the Government provided the Commission with this joint submission.

Changes to the PBSA effective September 30, 2015, have resulted in an inconsistency between the Act’s two-year pension vesting period and the PBSA’s immediate vesting requirement. Also, the Act’s early retirement pension reduction formula does not currently cover all members who are now entitled to a reduced pension under ss. 65(1) of the PBSA. As a result, the PCJA and the Government proposed as follows:

- Sub-section 19(1)(b) of the Act be amended to remove the two-year vesting period for members who ceased to hold office after September 30, 2015;
- Sub-section 22(2) of the Act be amended to provide an early retirement reduction factor for a member with less than two years of contributory service who has reached age 55;

- The Act be amended to clarify that a judge who ceases to hold office before age 55 may receive, at his or her option, the lump sum commuted value of his or her earned pension or a deferred pension; and
- The Act be amended to clarify that if a judge dies prior to retirement, his or her spouse or beneficiary is entitled to receive the lump sum commuted value of the judge's pension.

Judicial justices

Salary

The JJA, individual judicial justices and the Government sought recommendations from the Commission related to salary. The Chief Judge did not make a specific recommendation, but asked this Commission to maintain remuneration at a level that will retain and attract judicial justices.

Full-time judicial justices

The JJA asked the Commission to recommend a minimum salary of \$125,000, commencing on April 1, 2017 with an increase of 2 to 3% on April 1, 2018 and 2019, respectively. According to the JJA, the Government has rarely increased judicial justice salaries as recommended by past commissions. Also, it is important to consider that the gap between judges and judicial justices has increased since 1978 (when judicial justice salary was 65.0% of Provincial Court judge salary) to now (judicial justices earn 42.0% of what Provincial Court judges do, although this will be 45.0% if the pay increase from the facilitated discussions is adopted by the Legislative Assembly). The 2013 Saskatchewan justices of the peace compensation commission compared the salary gap between provincial court judges and judicial justices/justices of the peace across Canada and noted that only in British Columbia and Ontario did judicial justices earn less than 50% of Provincial Court judges. The JJA submitted that the fact that there is only one candidate in the judicial justice applicant pool indicates, "an alarming lack of interest in the judicial justice role" (at p. 7). Given retirements and appointment terms ending in 2017, there is a very real need to improve compensation sufficient to attract qualified candidates. With respect to compensation provided to similar judicial positions in Canada, the JJA said that, as recognized by the 2007 Judicial Justice Compensation Commission ("2007 JJCC"), Alberta and Ontario were particularly relevant as comparators. The salary of judicial justices is either last or second-to-last place (depending on whether the anticipated \$110,249 salary is considered or not). The JJA did not agree with the Government that salary increases provided to public service employees are an appropriate comparator and submitted that it is inappropriate to apply the public sector bargaining mandate to judicial justices. Finally, the generally accepted current and expect economic conditions and financial positions of Government are positive and do not necessitate restraint.

Judicial Justices Chellappan and Joseph-Tiwarly submitted that the low salaries of judicial justices have implications for their pensions.

The Government proposed the following salaries for full-time judicial justices over the three years from April 1, 2017 to March 31, 2020:

- 2017/18: \$111,903;
- 2018/19: \$113,581; and
- 2019/20: \$115,285.

In support of its proposal, the Government submitted that there is evidence that qualified applicants are available when required and noted that the jurisdiction of judicial justices has not expanded. While the Government agrees that judicial justices/justices of the peace in other jurisdictions are appropriate comparators, it noted that the median salary was \$128,114 and the average salary was \$126,323. Furthermore, British Columbia's overall fiscal plan involves restrained levels of compensation while meeting cost of living increases. The Government pointed to modest wage increases for unionized public sector workers of just over 1.0% on average from 2012/13 to 2015/16 and 1.5% from 2016/17 to 2018/19. It also noted that management and executives will receive no increases in their salary ranges or general wage increases (although it acknowledged that there is eligibility for merit increases of up to 2.0%), deputy ministers and assistant deputy ministers have received modest or no wage increases and remuneration for tribunals has not changed since 2007. It also said that its position recognized the fiscal and economic realities in British Columbia, which is that conditions and the financial position of Government are moderately good now but that there are significant risks on the horizon.

Part-time judicial justices

As *per diem* rates are based on the salaries of full-time judicial justices, any change to full-time salaries will necessarily result in a change to part-time salaries. With respect to the specific formula for determining the *per diem* rate, the JJA submitted that it should stay as it is. Judicial Justice Brown requested that *per diems* be increased to between \$800-875, with annual increases of 2.0%.

The Government did not make any submission about changes to the *per diems* for part-time judicial justices.

Pension

The JJA asked for the same pensions for full-time judicial justices as for judges. Currently, judicial justices are included in the Public Service Pension Plan, pursuant to section 15 of the Act. According to the JJA, judicial justices have achieved partial parity with Provincial Court judges on other non-salary benefits and the financial impact of such a recommendation would be minimal. Also,

qualification requirements necessarily result in appointment at middle age or later, with the average age of appointment being 45 to 50 years, which means that judicial justices do not fit the career profile for public servants, but do fit that for judges. In the JJA's view, a pension plan that matches the responsibilities of the position, age and qualifications of judicial justices is warranted. Further, providing the same pension plan as judges would go some way to addressing the need to attract qualified candidates and promote diversity and would have modest cost implications. Because *per diems* do not receive a pension, if the Commission accepts the JJA proposal on pension for full-time judicial justices, then the JJA asked for the *per diem* rate to be increased by changing the *per diem* formula to allow for 30% in lieu of benefits.

The Government did not support the JJA's request. It stated that judicial justices are included in the Public Service Plan pursuant to section 15 of the Act and thus it is clear that Part 3 of the Act only applies to judges. Also, benefits such as pension plans evolve carefully. For example, in 1995, the question of judges' pensions was first raised and what followed was a process of study and discussions whereby the parties eventually arrived at a pension with a very significant cost attached to it. Thus, the judges' pension was built step-by-step. If judicial justices want to seek a new pension plan, then the Government submitted that a similar incremental process should be followed rather than this Commission recommending a significant change to full-time judicial justice pensions.

Parity among part-time judicial justices

The JJA asked the Commission to recommend that all part-time judicial justices (*ad hoc* and *per diem* judicial justices) be paid the same for their work. *Ad hoc* judicial justices are paid more than 20% less than *per diem* judicial justices. The JJA submitted that the distinction between *ad hoc* and *per diem* judicial justices was based on an antiquated and unfair historical policy.

As is described above, by the time of the hearings, as a result of facilitated discussions between the JJA and the Government, the Government had agreed to recommend to the Legislative Assembly parity between *ad hoc* and *per diem* judicial justices such that all part-time judicial justices are to be paid the same *per diem* rate.

Shift premiums

The Commission heard from the JJA, individual judicial justices and the Government regarding the question of shift premiums. The JJA and Judicial Justices Brown, Chellappan and Joseph-Tiwary all asked for shift premiums. Many judicial justices perform their work on afternoons, evenings, weekends and/or holidays. The JJA and individual judicial justices cited the physical, emotional and social impact of working outside of regular business hours, as well as the need to have people willing to take these shifts. The JJA and Judicial Justice Brown told the Commission that in Alberta justices of the peace receive a shift differential. The JJA requested the following shift premiums:

- Weekday afternoon shift: \$50;
- Weekend day shift: \$50;
- Weekend afternoon/overnight shift: \$75;
- Statutory holiday day shift: \$75; and
- Statutory afternoon/overnight shift: \$100.

Judicial Justice Brown asked for an additional 10% of *per diem* for any day or afternoon shift on a statutory holiday or long weekend and double-time for any day shift or afternoon shift on Christmas Day.

The Government opposed any recommendation regarding shift premiums.

Professional development allowance

The JJA and Judicial Justice Brown asked for an increase to the judicial justice professional development allowance from \$1,500 to \$2,500. The professional development allowance does not increase salary as the expenditure is reimbursement-based. Judicial Justice Brown requested that the allowance be added to the *per diem* or be continued as part of the allowance already provided to all judicial justices.

The Government opposed increasing the professional development allowance for judicial justices.

Flexible benefits plan

At the hearings, the JJA and the Government stated that they intended to provide the Commission with supplemental joint submissions on a proposal to include judicial justices in the Government's new flexible benefits plan. Although at the time of the hearings the JJA and the Government were in discussions regarding this issue, they were ultimately unable to reach agreement.

On September 6, 2016, the Government asked the Commission to make a recommendation that judicial justices remain members of the plan and be subject to forthcoming changes in its benefit coverage effective January 2018. The Government submitted that changes to the plan are cost neutral and intended to simplify and streamline benefits. Conversely, if judicial justices do not remain in the redesigned plan, then this will result in additional cost and administrative burden on the Government. In the Government's view, under the revised plan, while some individuals may have reduced access to some benefits, they will correspondingly receive improved access to other benefits.

The JJA supported the submissions made by the PCJA in this regard and also submitted that the Government's proposal should be rejected as being untimely and not properly supported.

Per diem for travel

The Chief Judge asked the Commission to recommend that the *per diem* travel reimbursement for judges and judicial justices be fixed at the same rate as for MLAs. He told the Commission that judges and judicial justices spend a considerable number of days each year on travel status. For example, judges assigned to chambers in Prince George spent, on average, approximately 30 to 50% of their sitting time on travel status in 2015. According to the Chief Judge, the current *per diem* rates are inadequate.

The current *per diem* travel allowance follows Treasury Board Directive 01/07. The Chief Judge informed the Commission after the hearings that the *per diem* for judicial justices is set at Level II, which is \$49.00. MLAs receive \$61.00 per day and rates are set by the speaker of the Legislative Assembly.

The Government asked for no change to the *per diem* rate.

Education leave

The Chief Judge asked the Commission to address an issue that in his view arose from a recommendation made by the 2013 JCC regarding education leave for judicial justices. Before the 2013 JCC, and before this Commission, the Chief Judge took the position that while he intended to make available two days of education leave for judicial justices in addition to the existing five days of in-house programming, this issue is under the assignment responsibilities of the Chief Judge under section 11 of the *Provincial Court Act* and not within the jurisdiction of the Commission. Nevertheless, the 2013 JCC made a recommendation in this regard.

No other participants addressed this issue at the hearing other than counsel for the Government noting that the Chief Judge wanted the Commission to leave this issue to him. In supplemental submissions to the Commission on this issue, the Chief Judge advised that the Government and JJA took no position on this issue.

At the hearing, the Commission asked the Chief Judge, in consultation with the Government and JJA, to submit proposed language for a recommendation or statement by the Commission regarding education leave. In supplemental submissions, the Chief Judge reiterated his request from the hearing that the Commission clarify that education days are a matter within the Chief Judge's assignment authority based on section 11 of the *Provincial Court Act*.

Non-contentious issues

In order for the salary increase to \$110,249, and parity between *ad hoc* and *per diem* judicial justices to be implemented, the Legislative Assembly must accept the Government's proposed motions. Thus, the JJA asked the Commission to include a statement of support in its report for these changes to judicial compensation. On July 28, 2016, the Legislative Assembly adopted a resolution to: (1) to increase judicial justice salaries to \$110,249, effective April 1, 2013; and

(2) to pay *ad hoc* and non-*ad hoc* part-time judicial justices on the same *per diem* basis, effective April 1, 2014.

Facts and context considered by the Commission

Introduction

While careful not to “dictate the exact shape and powers of the independent commission,” in the *PEI Reference*, the Supreme Court of Canada discussed what was necessary for an independent, effective and objective commission process. With respect to objectivity, the Court said commissions “must make recommendations on judges’ remuneration by reference to objective criteria, not political expediencies” (at para. 173). Objectivity is aided by having a non-exhaustive list of relevant factors for consideration in the enabling legislation or regulations. In *Bodner*, the Court described it this way (at para. 17):

The commission must objectively consider the submissions of all parties and any relevant factors identified in the enabling statute and regulations. Its recommendations must result from a fair and objective hearing. Its report must explain and justify its position.

So, objectivity and fairness guide the Commission. In the *PEI Reference*, the Supreme Court of Canada described how the constitutional guarantee of financial security is not for the benefit of judges: “Judicial independence is valued because it serves important societal goals—it is a means to secure those goals” (at para. 9). In *Ell v. Alberta*, cited in *Bodner*, the Court made the similar point that judicial independence exists “for the benefit of the judged not the judges” (*Ell v. Alberta*, [2003] 1 S.C.R. 857 at para. 29; *Bodner*, para. 4).

Reasonable compensation is not about looking for the minimum compensation that would secure judicial independence. The compensation available to Provincial Court judges and judicial justices already meets the bare minimum to satisfy the financial security component of judicial independence. When the Commission turns its mind to “reasonable compensation,” it must consider the existing circumstances and context while remembering that judicial independence is the driving force behind the setting of judicial remuneration. It also considers reasonable *total* compensation and not individual items of remuneration.

As is discussed earlier in this report, specific criteria for the Commission’s consideration are set out in sub-section 5(5) of the Act:

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

(a) the need to maintain a strong court by attracting highly qualified applicants;

- (b) changes, if any, to the jurisdiction of judges or judicial justices;
- (c) compensation provided in respect of similar judicial positions in Canada, having regard to the differences between those jurisdictions and British Columbia;
- (d) changes in the compensation of others paid by provincial public funds in British Columbia;
- (e) the generally accepted current and expected economic conditions in British Columbia;
- (f) the current and expected financial position of the government over the 3 fiscal years that are the subject of the report.

The Act requires consideration of all of these factors. No one criterion is *prima facie* more important than the other; the Commission's report must show that we have considered all of the above factors (sub-section 5(5.1)). However, as each commission must look at what is reasonable on the unique facts and context before it, depending on those facts and context, the importance of each of the criteria will vary from commission to commission. As the Government stated (Government Written Submissions at para. 10):

It is easy to imagine circumstances where one of [the criteria] might be more important than another. For example, a significant expansion of the jurisdiction of the Court might lead to a theme being of greater importance, or an established pattern of significant increases and compensation for provincial court judges across Canada might have greater importance, or a significant deterioration in the economy of the province might have greater importance.

Past commissions worked under a different version of sub-section 5(5), which directed consideration of the following factors:

- (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; and
- (e) Any other matter the Commission considers relevant.

Despite facial differences between the former and current sub-section 5(5), as the PCJA pointed out, past commissions took into account many of the factors that are now explicitly identified in the provision.

Finally, similar to the former version of sub-section 5(5) (see sub-section 5(5)(e)), the Act now provides that commissions may consider other factors they consider relevant (sub-section 5(5.2)). If a commission relies on an unenumerated factor, then its report must explain the relevance of that factor.

The Need to maintain a strong court by attracting highly qualified individuals

Judges

The PCJA told the Commission that it should weigh five considerations under this criterion:

- The relevance of the Commission process;
- The significance, if any, to be drawn from the number of applicants;
- The need to attract highly qualified candidates;
- Competition for applicants with section 96 courts; and
- The need to promote legal diversity.

In the PCJA's view, with respect to the relevance of the Commission process, it is important to have a commission that is effective and meaningful as that in and of itself will help to attract and retain highly qualified judges. Furthermore, there will always be applicants, but the goal is to attract the best candidates. The PCJA said that there is a risk of candidate self-exclusion if the gap in salary between provincial and federal judicial appointees is significant. The 2007, 2010 and 2013 Judges compensation commissions all recognized this risk. The PCJA submitted that the proposed salary of \$285,000 beginning in April 1, 2017, would restore judges' base salary to within the range of what past commissions have found to be an appropriate relationship with federal salaries. The PCJA further submitted that there will only be legal diversity on the Provincial Court bench if there continues to be highly qualified applicants from the private bar, and, that in turn, there will only be highly qualified applicants from the private bar if the level of remuneration is adequate compared to what one might be expected to earn in private practice.

The Chief Judge said Provincial Court judges are the finest group of colleagues he has ever worked with. The Provincial and Supreme Courts seek qualified candidates from the same pool of potential candidates. His submission emphasized that the Provincial Court loses judges to the British Columbia Supreme Court, noting that in the past 35 years, 20 Provincial Court judges have been appointed to the Supreme Court. The Chief Judge is also aware that a number of his colleagues have applied for appointment to the Supreme Court. He said that he adopted and supported the PCJA's submission as being consistent with what he believes is necessary to attract and retain qualified applicants to the Court and support judges in their work serving British Columbians. Compensation and travel are two of the most common issues that he hears about from judges in relation to attracting and retaining applicants. While the Government cannot do anything about the travel-intensive nature of the work, it can do something about salary.

The Judicial Council of the Provincial Court—the independent statutory body that receives and considers applications from lawyers seeking appointment as a judge or judicial justice—said that the need to maintain a strong court by attracting highly qualified applicants is particularly critical to its statutory object of improving the quality of judicial service and its function of recommending qualified judicial candidates for appointment. Reasonable compensation is required to retain as well as attract judges. The Provincial Court competes with the Supreme Court for applicants and it is likely that the Provincial Court is losing applicants to the Supreme Court, possibly due to lower remuneration, a shorter pension accrual rate, the greater prestige of the Supreme Court or because of the different work and judicial “style”. A significant widening of the gap in remuneration levels could only intensify the problem.

The average number of applicants received per year for the last ten years was 50.6. The Judicial Council noted that in 2007—the year in which a significant salary increase was recommended for 2009—applications to the Court reached their all-time high at 89 applications. The second highest year for applications (59) was in 2009—the year this increase took effect. Since 2009, the number of applicants has not exceeded 50. The Judicial Council and the Chief Judge both commented on the fact that in 2015, the number of applicants decreased markedly to 26 from 50 in, the year before. Although they both acknowledged that it is premature to consider this a downward trend, they said that it was nevertheless troubling. The Judicial Council in 2015 had a pool of 10 qualified applicants ready for appointment.

The CBABC—an important section of the national professional association for lawyers—submitted that the need to attract highly qualified applicants is key within the Commission’s statutory mandate and reflects the constitutional principles enunciated in the *PEI Reference* and *Bodner*.

The Law Society of British Columbia—the provincial regulator of the legal profession—told the Commission that the interest of the public as well as litigants requires that the most capable people dispense justice. The public interest is not served if Provincial Court judges’ compensation falls significantly behind that of Supreme Court judges because the potential candidates may overlap.

The Government agreed that it is in the public interest for the Provincial Court to attract highly qualified applicants. In its view, the best indicator of whether compensation is sufficient to attract qualified applicants is whether the Court is experiencing any unmet need in the number of applicants approved and recommended by Judicial Council. The information before this Commission is that the Provincial Court is able to attract sufficient numbers of highly qualified applicants for appointment. An average of seven judges has been appointed each year over the last 10 years. Only three judges have left the Court for appointment to the Supreme Court since 2012/13. Furthermore, the complement of judges has been stable and there is diversity on the bench.

In the Commission's view, based on the current data, it is unclear if there is a link between the number of applications and the salary of Provincial Court judges, but we echo the concern that the number of applications received dropped in 2015 to nearly half received in the previous year and the average for the previous ten years. To date, the Court has not had a problem attracting a sufficient number of qualified candidates to do its work, but the Commission is mindful that attracting the highly qualified applicants could become a problem if the compensation of the Court does not keep pace with the other options open to these candidates. In any event, it is necessary to maintain a reasonable salary that is sufficient to attract exceptional candidates who can meet the needs of the Court.

The legal diversity of the judges on the bench indicates a potential over-representation of Crown counsel relative to the bar generally. That is not necessarily a problem in that former Crown counsel are experienced in criminal law, which is a main need of the Court. Nevertheless, a lack of diversity can exacerbate the needs in other areas, especially civil and family law.

Judicial justices

In the JJA's submission, the numbers of applicants to judicial justice positions indicates an "alarming lack of interest in the Judicial Justice role" (JJA Written Submissions at p. 7). There was only one interview of an applicant in 2015 and only one candidate under consideration for appointment in 2016. In 2016, one judicial justice retired and at the time of the hearings two more were in a position to retire. Potentially further exacerbating the situation is the fact that in 2018, when the 10-year terms of the *per diem* judicial justices expire, there will be 9 part-time judicial justices retiring. Given all of this, the JJA is very concerned about improving compensation for judicial justices to an amount sufficient to attract qualified candidates to this role.

The Chief Judge explained that judicial justices are working day-in and day-out with little thanks. His office has attempted to make it clear to the public that the Provincial Court is one court with judges and judicial justices working together, but the difference in remuneration between the positions undermines this message. In oral submissions, the Chief Judge said that there has been no active recruitment of judicial justices because there has appeared to be a sufficient complement.

The Judicial Council reported that as of June 24, 2016, there was only one candidate approved for appointment. During oral submissions, counsel for the JJA informed the Commission that an appointment was made on July 7, 2016, resulting in there being no one left in the applicant pool. According to the Judicial Council, the role of a judicial justice is demanding and challenging. There is a need to keep them motivated and better remuneration is a key way to do this as it is an important component of positive morale. Judicial justices reflect the face of the Court for many citizens; they deal with serious issues; and they work all hours and holidays, which is disruptive to their personal lives. As with judges, self-

represented litigants are common, and unlike judges, judicial justices have no support staff or sheriffs to assist them.

The Government said that the current compensation for judicial justices is sufficient to attract highly qualified applicants and that there is no evidence that the roster of approved candidates for appointment is insufficient to meet the needs of the Court.

In the Commission's view, while there was no evidence establishing that there is a link between the number of applicants and the salary of judicial justices, there is a real need to increase the applicant pool, particularly considering that in less than two years almost half of the current judicial justices will be retiring. Something must be done. Ensuring a reasonable salary that is sufficient to attract exceptional candidates who meet the needs of the Court is crucial.

Evidence regarding the pool of potential candidates for judicial positions

At the hearing, the Commission asked the CBABC to provide publicly available information on the salaries of the pool of potential candidates for judicial positions. On July 21, 2016, the CBABC made further submissions in this regard. The CBABC noted that the publicly available information on public and private sector lawyer salaries was meager and inconsistent across Canada and years.

With respect to Crown Counsel in British Columbia for April 1, 2007 to March 31, 2019, salaries for Senior Crown Counsel (Level 4, which requires at least 10 years of call and is reserved for counsel who have exceptionally distinguished themselves in the practice of law) ranged from \$124,134.19 to \$149,996.52 (see also JJA's Book of Documents, Tab 14). Annual increases are the same percentage increases provided to judges plus 1.27%. Potentially equivalent positions in Manitoba, Nova Scotia, New Brunswick, Alberta and Ontario earn salaries ranging from \$73,070 to \$265,657. (This information was for different years ranging from 2014 to 2018.)

With respect to private sector salaries, the CBABC found little publicly available information for the likely candidate pool (senior private practitioners). In-house counsel with 10 or more years' experience earn on average at least \$250,000 in Toronto and Vancouver; \$225,000 in Montreal; \$180,000 in Calgary; and \$140,000 in Edmonton. The lack of data regarding compensation of the applicant pool impedes the ability of this Commission to better determine the potential impact of compensation on attracting highly qualified applicants.

Changes to the jurisdiction

The Government, PCJA and JJA agreed that there were no changes to the jurisdiction of judges or judicial justices. The Commission thus finds this factor to be neutral during the term of its mandate. We note, however, that there was evidence of the increase in the complexity of the work within the jurisdiction and address this factor under sub-section 5(5.2) below.

Compensation provided in respect of similar judicial positions

The PCJA urged the Commission to consider this the most significant of all of the factors because of the uniqueness of the judicial role with respect to the work and the manner in which compensation must be determined.

The Government submitted that there was a frailty to this factor because it changes periodically and no one can ever know why salaries are the way that they are. Also, there is no assurance that the work is identical among the provinces.

In response, the JJA said that the legislation does not invite any inquiry into the reasons for compensation in different jurisdictions, but tells the Commission to look objectively at the amount of compensation.

The Commission finds that this factor is an important consideration in determining reasonable compensation. Indeed, the statute was recently amended to specifically require consideration of this factor. In order to preserve judicial independence, judges and judicial justices cannot negotiate with the executive branch over their salaries. And thus reasonableness cannot be determined by what the “market” will bear. In the absence of the parties being able to bargain over what constitutes a reasonable salary, the Commission needs to look to other objective markers of reasonableness. It does so by looking at comparator groups. The Commission considered the salaries and pensions of a number of comparator groups including federally-appointed judges and provincial court judges and judicial justices/justices of the peace of other provinces, keeping in mind the difference between those jurisdictions and British Columbia. All of these comparator groups are relevant, but none is determinative of judicial salaries. It is not appropriate to specifically link compensation to any one of these groups. While each say something about what is reasonable compensation for British Columbia judges and judicial justices, each of these comparators has had salaries set in the unique circumstances of their job, workplace and respective economy.

Comparison to Supreme Court judges

The PCJA submitted that a comparison to federally-appointed Supreme Court judges is relevant because provincial and federal judges occupy “similar judicial positions” (PCJA Written Submissions at para. 197). The Commission agrees that federally-appointed judges are a relevant comparator group for Provincial Court judges.

The Government cautioned against a formulaic relationship between Provincial Court judges and federally-appointed judges because superior courts serve a different function from provincial courts and federally-appointed judges are compensated by a different level of government. It noted that the 2013 JCC agreed that a formulaic comparison is inappropriate. Significant to the Government is the fact that sub-section 5(5)(c) does not provide explicitly for a comparison to federally-appointed judges. In response to this, the PCJA noted that the provision does not say anything either way about federally-appointed judges

and the language is inclusive enough to cover federally-appointed judges (“similar judicial positions in Canada”).

The Commission finds that the disparity in compensation between judges of the Supreme Court and Provincial Court is an important factor in determining reasonable compensation for Provincial Court judges. This disparity should not become so great that it makes the compensation unreasonable in the eyes of those who might seek to undertake the office. But, as with past commissions, the Commission finds that the compensation for Provincial Court judges should not be held at a specific target percentage in relation to federally-appointed judges, as these positions are different. There is significant overlap in the needs of the two courts and while both the courts require excellent candidates and compete for the same senior members of the private bar and the best from the Crown counsel rank, the needs of each court are not identical. The Supreme Court has broader jurisdiction in civil matters, and a greater need of candidates with experience in complex corporate commercial matters. Also, federal court judges are compensated by a different government, with different financial and other considerations.

During the preparation of this Report, the report of the 2016 Quadrennial Commission, which determines compensation for federally-appointed judges was tabled in Parliament. For fiscal year 2016/17, federally-appointed judges will be paid \$314,100 per year compared to Provincial Court judges who will receive \$244,112, which means that judges will be paid approximately 78% of what federally-appointed judges make. This is in the low end of the percentage difference range (approximately 78% to 85%) over the last decade. The pension accrual rate for federally-appointed judges is 4.44% per year in comparison to the judges’ pension accrual rate of 3.0% per year.

Comparison to provincial court judges in other provinces

The Government stated that the most similar judicial position to Provincial Court judges are provincial court judges in other jurisdictions. The PCJA suggested that, in terms of similar work performed, judges in other provinces make good comparators to British Columbia Provincial Court judges. It also said that, historically, British Columbia judges’ salaries have ranked third highest among provinces, reflecting British Columbia’s relative economic position within Canada. The PCJA noted that for 2015, the salaries of British Columbia judges were in 10th place out of 12 provincial and territorial jurisdictions. The position was 8th if only provinces were considered.

The PCJA compiled the following information on provincial and territorial court judge salaries across Canada, including estimated salaries for 2017/18:

Province	2015/16	2016/17	2017/18
British Columbia	\$240,504	\$244,112	2016 JCC

Province	2015/16	2016/17	2017/18
Alberta	\$286,821	\$293,991	\$298,401*
Saskatchewan	\$272,295	\$282,184	\$293,471*
Manitoba	\$249,277	\$254,263	2017 JCC
Ontario	\$287,345*	\$290,882*	\$296,348*
Quebec (from July 1 to June 20)	\$241,955	Next JCC	Next JCC
New Brunswick	\$246,880	Next JCC	Next JCC
Nova Scotia	\$234,509	+NS CPI	Next JCC
Prince Edward Island	\$250,050	National average	National average
Newfoundland and Labrador	\$215,723 ⁺	\$215,723 ⁺	2018 JCC
Northwest Territories	\$260,302	\$272,000	\$283,424
Yukon	\$268,013	2016 JCC	2016 JCC

*Estimated and therefore subject to change following recommendations of independent commissions.

⁺Salary reflects the salaries imposed by Government following its decision to reject the recommendations of the 2014 Salary and Benefits Tribunal, which recommended salaries of \$238,025 and \$247,546, respectively. The Newfoundland Association of Provincial Court Judges has filed for judicial review.

According to the PCJA, the highest salaries are in Alberta, Saskatchewan and Ontario in accordance with the economic strength of these provinces to date. A salary of \$285,000 would put British Columbia judges in 4th place out of 10 provinces and within the range of judicial salaries in Alberta, Saskatchewan and Ontario, which is consistent with the reasoning of past commissions, the Government's argument to the 2007 Judges Compensation Commission ("2007 JCC") and the relative strength of British Columbia's financial position among the provinces (see discussion below regarding the Government's current and expected financial position).

The PCJA provided a comparison of some key features of judicial pension plans across Canada. The contribution rate for judges is comparable for other jurisdictions at 8.87%. The judges' accrual rate of 3.0% is the accrual rate for most of the other provinces. Only Ontario (varies), Nova Scotia (3.3-3.4%) and Newfoundland (3.3%) have higher accrual rates. The federal accrual rate is 4.44%.

The CBABC said that as a starting point, given the province's population size, geography and case loads, British Columbia judges should at least rank higher

than the much smaller Atlantic Provinces and should also rank higher among the Western provinces (Alberta, Saskatchewan and Manitoba) and Ontario.

The Government urged caution in comparing the salaries of British Columbia judges to judges in other provinces as each province faces unique financial circumstances. Governments in Alberta and Ontario have implemented fiscal plans that have differed significantly from British Columbia, which has restrained levels of compensation while meeting changes in the cost of living. It asked the Commission to assume that given the significant deterioration to the economies of some jurisdictions, the prospect of any further increases in these jurisdictions is compromised.

The Commission finds the evidence regarding the position of British Columbia judges' salaries in comparison with other provinces and territories compelling, especially given Government's reliance on relative salary in some circumstances.

Before the 2007 JCC the Government argued as follows (at p. 17):

The Government argues that the effect of the increases recommended by the 2004 Commission was to place British Columbia Provincial Court salaries precisely where they should be in comparison to the other provinces. The Government, relying on the economic indicators cited earlier, maintains that British Columbia's economy ranks third behind that of Ontario and Alberta, as do its wages. As such, it is entirely fitting that British Columbia's judges should receive the third highest salaries, behind their counterparts in Ontario and Alberta. It would not be appropriate, the Government argues, to pay one isolated segment of this province disproportionately higher than the rest.

Furthermore, the Government's Executive Compensation policy continues to be in effect. It states that the "province's target position for executive compensation in the public sector market is to be from 3rd to 5th nationally amongst the provincial and federal governments. A determination is made respecting the appropriate ranking based on demographic and labour market trends, and economic variables".

The 2013 JCC considered it appropriate that judges be in the range of 3rd to 4th place among salaries of provincial court judges in Canada (at p. 47):

The Commission has determined that, while the salary of BC's Provincial Court judges should not be rigidly pegged to any comparator, given British Columbia's cautious but positive economic outlook, the salary of BC judges ought to be in the range of 3rd to 4th place amongst salaries of provincial court judges in Canada.

As is described below, the province's financial position has moderately improved since the time of that Commission.

Just as the comparison to judges' salaries in other jurisdictions is compelling, so too is the comparison to the pension accrual rates for judges in other jurisdictions. Ms. Angie Sorrell, Executive Director of the Public Sector Employers' Council

Secretariat, Ministry of Finance, told the Commission that the pension accrual rate for most provincial court judges, including those in Alberta and Saskatchewan is 3.0%. The only exceptions are Ontario, Nova Scotia and Newfoundland.

Comparison to judicial justices/justices of the peace in other provinces

The JJA suggested that Alberta and Ontario are particularly relevant comparators, which was recognized by the 2007 JJCC. The median salary for judicial justices/justices of the peace in Canada was \$128,114 and the average salary was \$126,323. Depending on whether the anticipated salary for 2016/17 is adopted by the Legislature, judicial justice salaries ranked either 7th or 8th out of 8 provinces.

The Government submitted that it is inappropriate to compare Provincial Court judges and judicial justice compensation, but agreed that judicial justices and justices of the peace in other jurisdictions are appropriately compared.

For the same reasons described above for judges, the Commission finds the evidence regarding the position of British Columbia judicial justices' salaries in comparison with other provinces compelling.

Changes in the compensation of others paid by provincial public funds

According to the PCJA, it is inappropriate to make any linkage between appropriate adjustments for judges based on this factor. In the absence of a complete understanding of the financial terms of comprehensive agreements, information about wage increases in the public sector can only be considered as a general indicator of what Government has determined it can afford in relation to these groups. Judicial compensation commissions in other jurisdictions have exercised caution in considering information about general wage increases to public sector employees.

The JJA submitted that the public service is not an appropriate comparator for judicial justices and reminded the Commission that Government was rebuked for applying its public sector bargaining mandate to the judicial compensation process (*Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*). However, the Commission notes that this decision considered the prior version of subsection 5(5) of the Act, which did not include the explicit criterion of changes in the compensation of others paid by the provincial purse.

If changes to the compensation of others is to be considered, then the PCJA, JJA and Judicial Justice Brown assert that Crown counsel salaries should also be considered. Duty counsel of 4 to 10 years' call are paid approximately \$88.10 per hour, whereas the hourly rate for full-time and part-time *per diem* judicial justices is \$57.55 and \$46.04, respectively. Crown lawyers have received a 12.07% increase between 2013 and 2016 and other public sector employees have received increases.

Furthermore, Judicial Justice Brown made the point that judges are paid by provincial public funds and therefore changes to their compensation is relevant to determining reasonable compensation for judicial justices and regard should be had to the impact of increases to judges on the widening of the remuneration gap between the two types of judicial positions. The JJA also referred to the significant gap between judicial justices and judges when it comes to salaries.

The CBABC asked the Commission to approach this factor cautiously and to give it less weight in light of the *PEI Reference*'s determination that judicial officers are not civil servants, cannot negotiate for their compensation and cannot have their compensation fall below a minimum level that is "adequate, commensurate with the status, dignity and responsibility of their office" (at para. 194). The CBABC also reminded the Commission that the Court of Appeal had rejected the Government's "net zero" mandate as an impermissible basis on which to refuse to implement the 2010 JCC recommendations.

The Law Society of British Columbia's submissions noted that while cost implications for groups other than judges and judicial justices needs to be considered under sub-section 5(5)(d), this Commission should be cautious about how determinative this factor could be given the Supreme Court of Canada's statement in *Bodner* (at para. 160):

...[The Government] also stressed the need to retain a linkage with the salaries paid to certain classes of senior civil servants. It underlined its concerns about the impact of the recommendations on its overall labour relations policy in Quebec's public sector. The submissions seemed to be focused more on concerns about the impact of the judicial compensation committee process than on the objective of the process: a review on their merits of the issues relating to judicial compensation in the province. After the Committee submitted its report, the Government's perspective and focus remained the same. Its position is tainted by a refusal to consider the issues relating to judicial compensation on their merits and a desire to keep them within the general parameters of its public sector labour relations policy. The Government did not seek to consider what should be the appropriate level of compensation for judges, as its primary concerns were to avoid raising expectations in other parts of the public sector and to safeguard the traditional structure of its pay scales.

In contrast to other participants, the Government saw this criterion as one of the most reliable markers of reasonableness. The similar treatment of others helps sustain the perception of judicial independence. Under the Government's Economic Stability Mandate, unionized public sector employees have received only modest wage increases: just over 1.0% on average from 2012/13 to 2015/16. From 2016/17 to 2018/19, they will receive on average 1.5% in increases. Management and executives will receive no increases to their salary ranges or general wage increases, although they do have eligibility for merit increases of up to 2.0%. Deputy ministers and assistant deputy ministers have received modest or no wage increases. Tribunal members have not had any change to their remuneration levels since 2007. There have been no benefits and pension

improvements for the public service since 2013. With respect to pensions, Ms. Sorrell testified that at 28.08%, the Government contribution rate to judges' pensions is approximately 2 to 3 times that for public sector employees and about 11.0% lower than for MLAs.

In this Commission's view, changes in compensation is a statutorily-mandated factor that it must, and did, consider. Similar to the criterion in sub-section 5(5)(c), its utility is in ensuring commissions consider whether judicial salaries in British Columbia are getting out of step. However, it must be remembered that the judicial role is unique: judges and judicial justices hold an office. They are not employees. Thus, they are not easily compared with others in the British Columbia economy, even those in senior leadership in the public service. Moreover, the constitutional role of judicial compensation commissions is to depoliticize the determination of reasonable compensation. Therefore, too much emphasis on compensation changes to public sector employees, which is the result of political decisions made by Government in setting its fiscal policy, must be avoided.

Generally accepted current and expected economic conditions

The PCJA and JJA relied primarily on the expert evidence of Mr. Ian McKinnon, an economist from Pacific Issues Partners who has given evidence before previous commissions. Mr. McKinnon provided a written report to the Commission and also a PowerPoint Presentation when he appeared at the hearings.

Mr. McKinnon made the following main points, which are relevant to both the criterion of generally accepted current and expected economic conditions and the financial position of Government for the three years of the Commission's mandate:

- While advanced economies internationally experienced a sharp and sudden recession after 2008/09, Canada was affected less than almost any of its peers. This was due in part to low leverage at government and corporate levels, which meant low debt-to-GDP ratios and a relatively quick return to a stable debt-to-GDP ratio. Canada's GDP annual growth from the 2008 recession to today has been slightly positive and continues to grow. Even with the substantial decline in oil and gas prices in 2014, Canada's economy continued to grow slightly. There are solid growth prospects for the future;
- Following the recession, Canadian job growth and retention was significantly better than for the United States;
- The recession affected British Columbia, however steady growth above the Canadian average soon returned;
- The Government returned to a balanced budget with relatively low "tax effort", which is a sign that it sees itself in a good financial position;

- The Government has now run three successive budgetary surpluses, with four more surplus budgets forecast for the next four years;
- British Columbia is in a good economic position:
 - There is strong provincial employment, which is the highest of all provinces. This is a good indicator of economic growth;
 - There are low levels of taxpayer-supported debt and general public sector debt (which includes debt from Crown corporations and agencies). British Columbia was the fourth lowest in tax-payer supported debt. There have been four successive years of declining taxpayer-supported debt-to-GDP ratios and declining total public debt-to-GDP ratios;
 - There is significant fiscal capacity. Tax levels for a government in as favourable a position as this Government are a political choice. Tax levels here are at the low end of the country;
 - We have a diversified economy and export markets. A diversified economy means that there is a lower risk of boom and bust cycles. Exports to the United States are at about 52% and that country's economy is growing more rapidly than British Columbia's. Our exports to the Pacific Rim nations have increased from 12.9% in 2006 to 27.6%;
 - We have the highest credit ratings of any province. Third party debt rating agencies have put British Columbia alone at the top of the provinces in ability to service its debt. Third party bond rating agencies provide an independent and neutral assessment of fiscal position;
 - The Government has demonstrated that it can meet its fiscal targets while maintaining high levels of capital investment; and
- The Commission can have confidence in the reliability of the Government's forecasting of predicted surpluses. There is a general pattern of underestimating revenue and predicting final budget balances and debt ratios that turn out to be more pessimistic than the actual results. This is reinforced by the inclusion of a forecast allowance of \$200 to \$750 million in projections and backed by the use of neutral external experts (the Economic Forecast Council) who advise on tax revenue estimates and macro-economic forecasts.

In its submissions, the Government said Mr. McKinnon underestimated the risks to the Province. It said British Columbia has seen modest improvement and the economy may be doing well now, but that there are significant risks on the horizon. It relied on the expert evidence of Mr. Ken Peacock of the Business Council of British Columbia. Mr. Peacock provided a written report, as well as a PowerPoint presentation when he appeared at the hearings:

- British Columbia is a small, trade-dependent, open economy and so is very affected by outside events and circumstances;
- The global economy is weak and fragile:
 - The world's economic growth outlook in real GDP percent change has repeatedly been revised downward;
 - The United Kingdom has voted to leave the European Union;
 - China is struggling economically (although statistics are not reliable);
 - Donald Trump may become president of the United States and bring a more protectionist trade philosophy, thereby affecting Canada's export volumes to the U.S.;
- The United States' economic expansion is moving along slowly at approximately 1.7 to 2.0% in 2016 and 2017;
- Unemployment rates in the United States have fallen;
- Canada is going through a painful and protracted adjustment process because of the oil and gas downturn;
- Relative to other provinces, British Columbia's economy is strong, but if one looks at historical data, British Columbia's recent and projected economic performance is average;
- Housing is providing a large lift to British Columbia's GDP growth and there are downside risks here. For example, if housing is not considered, British Columbia's growth would be at 2.0%;
- The United States is driving British Columbia's export growth;
- The British Columbia job market has picked up, but this is a Lower Mainland story only;
- While population demographics relate to medium- to long-term forecasts, it is of concern that the number of people aged 65 or older per 100 people aged 25 to 64 years in British Columbia is increasing;
- In comparison to other provinces, British Columbia has lower income levels and high household debt; and
- British Columbia has competitive challenges, including high marginal effective tax rates on investment (because of the Provincial Sales Tax), rising Medical Services Plan premiums, rising energy costs and rising business property taxes.

Mr. Peacock agreed that the Government's economic forecasting builds in some prudence and provides a cushion for unforeseen circumstances, which is viewed favourably by debt rating agencies. The Government has a good track record in meeting its targets.

The Government also relied on the evidence of Mr. David Galbraith, Deputy Secretary to Treasury Board and Assistant Deputy Minister in the Ministry of Finance. Mr. Galbraith gave evidence by way of oral and PowerPoint presentations. In his evidence, Mr. Galbraith made the following main points:

- British Columbia is doing well among a group of provinces that are not doing very well;
- The economy appears to be “moderating” and growth of 2.0% or less will be the norm;
- In-migration to the province is benefiting British Columbia's economy;
- The aging population of British Columbia is a concern to the economy over the long-term;
- The main risks to the economy are:
 - The potential for an economic slow down in Canada;
 - Renewed weakness in the United States' economy;
 - Fragility in Europe; and
 - Slower than expected economic activity in Asia, particularly China.

Regarding the current and forecasted economic conditions for the next three years, the Government acknowledged that, based on its practice of taking the Economic Forecast Council's independent projections and reducing those by 0.3%, the Ministry of Finance forecasted the economy to grow by 2.4% in 2016, 2.2% in 2017, and 2.3% for each of 2018 through 2020. This is a prudent forecast that incorporated risks of a further domestic economic slowdown and renewed weakness or ongoing economic problems with trading partners. Despite forecasts of growth, the Government emphasized that this is a time of restraint and fiscal discipline for the Province; it is not a time for significantly increasing compensation to Provincial Court judges.

The jurisprudence affirms that judges should not be immune from legitimate and reasonable restraint measures that apply across the public sector. In fact, to insulate judges from such measures might lead the public to view the judiciary as less independent, as was noted in the *PEI Reference* (at para. 158). As a result, the Court concluded as follows (at para. 196):

Finally, I want to emphasize that the guarantee of a minimum acceptable level of judicial remuneration is not a device to shield the courts from the effects of deficit reduction. Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times. Rather, as I said above, financial security is one of the means whereby the independence of an organ of the Constitution is ensured. Judges are officers of the Constitution, and hence their remuneration must have some constitutional status.

On all the evidence before it, the Commission determines that British Columbia's current and expected economic outlook is one of moderate growth over the term of the Commission's mandate. There are small surpluses forecasted for each of the fiscal years ending in 2014, 2015, and 2016. Also, it would appear that through prudent management, British Columbia is better positioned nationally than many of its comparators. Over the past three years, the Province has continued its policy of restraint, and judges and judicial justices have had only very modest increases. While the Government asserted that British Columbia is facing potential downside risks, its own conservative, forecasts as well as those from independent experts, are for sustained, moderate growth.

Current and expected financial position of Government

In its submissions, the PCJA and JJA emphasized that British Columbia is in a good financial position based on information from the Government itself. The Province has significant unused fiscal capacity to generate tax revenue. The Government has reliably predicted budgetary surpluses for each of the three years within the Commission's mandate. Nationally, British Columbia's fiscal capacity is above the average and below that of only Alberta and Saskatchewan. Debt levels are stable and future pension obligations are largely covered. British Columbia has the highest credit rating of any province and is economically strong.

The Government for its part took the position that its seemingly good financial position is fragile and unstable, with many risks that the Government does not directly control. Over the next three years, expected surpluses are not substantial; they are less than 1.0% of revenues. Projected surpluses do not represent a return to the province's pre-recession financial position. Deficit reduction and expenditure management initiatives were instrumental in returning the province to balanced budgets. The Government has to fund everything, not just judicial compensation. Also, provincial debt has increased due to the Government's capital infrastructure plan. Taxpayer-supported debt relative to GDP went up to 18.1% in 2013/14, but is now declining slightly.

In addition to what is set out above about the province's economic outlook, Mr. Galbraith gave the following evidence regarding the financial position of Government:

- The provincial surplus is relatively small;

- To control expenditure growth, British Columbia has instituted controls on travel and discretionary spending, a hiring freeze, a management salary freeze and control over health spending;
- To implement its fiscal policy, British Columbia also relies on affordable compensation mandates such as the Economic Stability Mandate, which stipulates modest wage increases;
- The Government has competing pressures due to demands for health care, education and social services spending; and
- The Government is focused on maintaining its tax competitiveness.

In summary, maintaining a surplus is very difficult and British Columbia's current financial position is the result of discipline and sustained fiscal restraint.

Based on the evidence, the Commission finds that the financial position of Government does not demonstrate that increases in compensation should not be made to the members of the Court if such increases are found by this Commission to be in the public interest.

Other factors pursuant to sub-section 5(5.2)

Judicial Justice Brown provided helpful submissions on the trend of continuing changes to the work being done by the Provincial Court, and increases in its volume and complexity. For example, there are new legal standards and criteria, new types of warrants and production orders (see for example the *Protecting Canadians from Online Crime Act*, S.C. 2014, c. 31 and the *Missing Persons Act*) and new forms and procedures. While the "jurisdiction" itself may remain static, the nature of the work within the jurisdiction is becoming ever more expansive and complex in nature.

The Chief Judge's written submissions summarizes the work situation of Provincial Court judges as follows (Chief Judge's Written Submissions at paras. 112 to 114):

The world has changed dramatically and judges are under far more stress and pressures than they were 10 to 15 years ago. Longer lists and serious cases require judges to render decisions in a timely fashion.

It is often the case that matters heard in the Provincial Court take less time than if heard in the Supreme Court. In the Provincial Court, decisions are often delivered orally at the end of the case, following a short opportunity to consider the material. Yet in those few cases which are appealed, the decisions of our Court are subject to the same appellate review and standard as the Supreme Court. While this is entirely appropriate, it creates a tension between the volume of the work and the desire to serve the public in a timely manner and to "get it right." This places an enormous burden on the judges of the Court.

The reduction in funding of Legal Aid has meant a significant increase in unrepresented litigants, particularly in criminal and family cases, which adds to the trial judges' obligation to ensure that an individual's right to a fair trial is safeguarded.

The CBABC, encouraged the Commission to consider the Provincial Court judge's work environment as the Province's "people's court", its heavy and complex caseload, the need for judges to travel and the unique demands imposed on them in working with large numbers of unrepresented litigants.

The Law Society of British Columbia noted that public scrutiny is now often focused on the Provincial Court; judges make very important decisions under much time pressure and often have to give oral reasons; and the issues the Court must address are becoming more complex.

The Government pointed out that the number of new cases in Provincial Court has decreased by almost 13% since 2010/11. Similarly, over the past five years, the number of cases per full-time equivalent has decreased slightly. The Government admitted, however, that amendments to the *Criminal Code* and *Youth Criminal Justice Act* have resulted in more serious and complex cases proceeding in Provincial Court.

While the jurisdiction of judicial officers is not expanding, this Commission finds that the fact that the work within the jurisdiction is evolving and becoming increasingly complex is a relevant factor to consider.

As is noted above, the Commission is very impressed with the work of the Court and the talent and skill of judges and judicial justices in managing difficult caseloads, which are becoming more and more complex.

Discussion and recommendations

Determining a "starting point" for salaries and benefits

In the Commission's view, determining what is reasonable compensation for judges and judicial justices by focusing too specifically on the previous commission's recommendations as a "starting point" is not helpful. First, in situations, as here, where prior commission recommendations are rejected by the Government and result in litigation such a focus arguably can create unintended results. Second, it effectively makes it very difficult for the Government, judges and/or judicial justices to accept percentage changes (up or down) in judicial compensation packages, even where a commission has applied the relevant criteria and objectively determined the reasonable compensation required to maintain judicial independence.

Bodner holds that the "reports of previous commissions and their outcomes form part of the background and context that a new compensation committee should

consider”. This does not direct compensation commissions to determine reasonable compensation from a specific salary and benefits starting point. Past reports have no binding precedent on this Commission. We must not lose sight of the “forest” here: ensuring judicial independence by determining appropriate financial security for judicial officers. Thus, while this Commission has reviewed past British Columbia compensation commission reports and finds the discussion of case law and the approach to reasonable compensation useful and instructive, we know that each commission must look at what is reasonable in the unique facts and context before it. Three years have passed since the last commission; the global, national, and international contexts have changed.

Judges

Salary

Puisne judges

Judges are the faces of the judicial system for many of the public and they play a major role in fashioning the jurisprudence of the country because it is their findings of fact and their application of the law, which start the “engine of jurisprudence” and give birth to the organic development of the law in a way that should make Canadians proud.

The Commission has considered the PCJA’s proposal that the salary of a puisne judge be increased to \$285,000 beginning April 1, 2017, with further increases of 2.0% on April 1, 2018 and April 1, 2019, respectively. It has also considered the Government’s position that the salary should be \$247,774 beginning on April 1, 2017, with further increases of 1.5% on April 1, 2018 and April 1, 2019, respectively. In the Commission’s view, neither of these proposals would provide reasonable and fair compensation to British Columbia Provincial Court judges.

In the Commission’s view, the salary of Provincial Court judges should be set as follows:

- Effective April 1, 2017, at \$273,000;
- Effective April 1, 2018, at \$277,095; and
- Effective April 1, 2019, at \$281,251.

The Commission comes to this determination based on the evidence summarised above regarding:

- The need to attract and retain highly qualified applicants, including the overlap in the candidate pool between federally- and provincially-appointed judges;
- Judges’ salaries in other provinces and territories, which indicate that British Columbia judges rank 11th nationally;

- The nature of the office held—judges are not civil servants;
- The Government’s policy regarding Executive Compensation;
- The positive economic outlook of moderate growth over the term of the Commission’s mandate, including in comparison to other provinces;
- The positive financial position of the Government, including in comparison to other provinces; and
- The evolving and increasingly complex nature of the work of the Court.

The recommended salary should put British Columbia Provincial Court judges in 4th place compared to other Provincial Court judges, which is appropriate given British Columbia’s financial position, economic conditions, population size and budget. As with the 2013 JCC, this Commission has determined that while the salary of Provincial Court judges should not be rigidly pegged to any one comparator the salary of Provincial Court judges ought at this time be in 3rd to 4th place amongst salaries of provincial court judges in Canada.

The recommended salary would put judges’ salaries in the range of salaries of senior leadership in the public sector. Salaries would still be behind those for Supreme Court justices, but the gap would be closed somewhat. The gap in salaries between Provincial Court judges and Supreme Court justices should not become so great that the ability to recruit highly desirable candidates is compromised.

Both the PCJA and the Government agreed that fiscal and economic measures are steady and that the province is in a moderately comfortable position. There have been three successive surpluses. There are small predicted surpluses over the course of the Commission’s mandate; they are small surpluses and they depend in part on the Government’s policies of fiscal restraint. The circumstances support the Commission’s view that the Government can afford to do what is required to ensure judges’ compensation is reasonable to meet the requirements of judicial independence and the specific criteria of the Act. As Government has acknowledged, “full salary and compensation costs of Judges and Judicial Justices are within the fiscal capacity of Government to pay” (Government’s Submissions at para. 17). Now is the time for significant adjustment of judicial salaries.

If economic conditions and the Government’s financial position change from what is forecasted, then in three years’ time the Government can propose an adjustment.

The Commission notes that the Provincial Court judges’ full-time complement has decreased since March 31, 2009 and although there is no fixed complement for the Court, it was suggested that the current level of 120 to 130 judges may be insufficient to meet the needs of the Court. Thus, the Commission encourages the

Government to maintain a sufficient complement of judges to ensure both the integrity of the justice system and good working conditions for judges.

RECOMMENDATION 1: Over the course of the Commission's three-year mandate, the annual salary of puisne judges be set as follows:

- (a) Effective April 1, 2017, the salary for puisne judges be \$273,000;**
- (b) Effective April 1, 2018, the salary for puisne judges be \$277,095; and**
- (c) Effective April 1, 2019, the salary for puisne judges be \$281,251.**

Administrative judges

The Chief Judge's proposal regarding administrative judges' salaries was not opposed. The Commission accepts that higher salaries for judges with administrative responsibilities provide reasonable and fair compensation for the work and extra responsibilities that these judges undertake.

RECOMMENDATION 2: Effective April 1, 2017, the salaries for judges with administrative responsibilities be set as follows:

- (a) The Chief Judge be paid 112.0% of the salary of a puisne judge;**
- (b) Associate Chief Justices each be paid 108.0% of the salary of a puisne judge; and**
- (c) Regional Administrative Judges each be paid 106.0% of the salary of a puisne judge.**

Pension

The current accrual rate of 3.0% is similar to the accrual rates for pensions of provincial court judges in most other provinces, but not as high as the rate for federally appointed judges (4.44%). The current terms of the judge's pension, including the 3.0% accrual rate are very generous in comparison to what is otherwise available in the public or private sectors. In the Commission's view, reasonable compensation does not require that all judges can reach a full pension at retirement. It must be remembered that all judges held other careers prior to coming to the bench. Moreover, the rationale for the Commission's recommended salary increase supports the Commission's determination that a 3.0% accrual rate is reasonable compensation. Furthermore, the Commission's mandate is to consider total compensation and not over-emphasize individual aspects of compensation in isolation. Judges' existing pensions have real value and with the recommended increase in base salary they will be improved.

RECOMMENDATION 3: Effective April 1, 2017, the accrual rate for judicial pensions be 3.0%.

Flexible benefits plan

The Government's proposal to include judges in its new flexible benefits plan effective 2018, was made two months after the conclusion of the hearings. There was therefore no opportunity to fully canvass this matter. The issue is, however, not trivial in relation to the Commission's mandate of determining appropriate compensation for judges. Therefore, to make a recommendation to change the *status quo* the issue needs to be fully canvassed at a hearing. The Commission notes that this topic is one that appears resolvable by the parties and thus the parties are encouraged to come to an agreement. If agreement cannot be reached, then the Government may raise the issue before the next judicial compensation commission in 2019.

If the Government does advance a new flexible benefits plan before the 2019 commission, it would be helpful to all parties and the Commission to receive full information respecting the proposed changes to the flexible benefits plan, the impact of these proposed changes on judges, the cost to the judges and the Government of the proposed changes to the plan and the administrative costs of maintaining the flexible benefits plan already in place for Provincial Court judges.

The Commission makes the following recommendation regarding the Government's proposal that judges be subject to the new flexible benefits plan.

RECOMMENDATION 4: There be no change to the flexible benefits plan for judges.

Per diem for travel

The Commission finds that the *per diem* now received, which are set at Level III of Treasury Board Directive 01/07, is reasonable compensation.

RECOMMENDATION 5: The *per diem* for travel for judges be set at Level III of Treasury Board Directive 01/07.

Non-contentious issue

The Commission makes the following recommendations regarding the non-contentious issue of changes to the Act to reflect changes to the Public Service Pension Plan.

RECOMMENDATION 6: Sub-section 19(1)(b) of the *Judicial Compensation Act* be amended to remove the two-year vesting period for members who ceased to hold office after September 30, 2015.

RECOMMENDATION 7: Sub-section 22(2) of the *Judicial Compensation Act* be amended to provide an early retirement reduction factor for a member with less than two years of contributory service who has reached age 55.

RECOMMENDATION 8: The *Judicial Compensation Act* be amended to clarify that a judge who ceases to hold office before age 55 may receive, at his or her option, the lump sum commuted value of his or her earned pension or a deferred pension.

RECOMMENDATION 9: The *Judicial Compensation Act* be amended to clarify that if a judge dies prior to retirement, his or her spouse or beneficiary is entitled to receive the lump sum commuted value of the judge's pension.

Judicial justices

Salary

Full-time judicial justices

The description of judges as the “faces” of the justice system applies equally to judicial justices. The Commission was very impressed with the work done by judicial justices, often in circumstances where they have no assistance from clerks, sheriffs or counsel. In the Commission's view, the current compensation for judicial justices is not reasonable and is inadequate. The Commission recommends that salaries for judicial justices be set as follows:

- Effective April 1, 2017, at \$125,000;
- Effective April 1, 2018, at \$126,875; and
- Effective April 1, 2019, at \$128,778.

The Commission comes to this determination based on the evidence summarised above regarding:

- The need to attract and retain highly qualified applicants, including the fact there is no one currently in the applicant pool, two judicial justices are eligible for retirement in 2016 and in 2018, nine judicial justices will be retiring;
- The salary proposal made by the JJA, which we find in all the circumstances to be reasonable;
- Judicial justice/justice of the peace salaries in other provinces, which indicate that British Columbia judicial justices rank last out of eight provinces (or second last if the proposed salary increase for 2016/2017 is implemented);

- The nature of the office held—judicial justices are not civil servants, in as much as they perform a role and duties that would otherwise be performed by judges;
- The positive economic outlook of moderate growth over the term of the Commission’s mandate, including in comparison to other provinces;
- The positive financial position of the Government, including in comparison to other provinces;
- The evolving and increasingly complex nature of the work of the Court; and
- The afternoon, evening, weekend and holiday shift work required.

While the recommended salary leaves judicial justice salaries still in second-to-last place nationally, it is the salary requested by the JJA and thus must be an indicator of what the judicial justices themselves consider necessary to attract and retain highly qualified applicants to the position. It would bring judicial justices closer to the national average and median. While the gap between judicial justice and Provincial Court judge salaries would remain significant, it would not increase (and in percentage terms the gap would decrease) and the Commission heard no evidence or submission that the hiring pool for judicial justices overlapped with Provincial Court judges. The recommended salary would put judicial justice salaries closer to salaries of senior management in the public sector.

Both the JJA and the Government agreed that fiscal and economic measures are steady and that the province is in a moderately comfortable position. However, while there are predicted surpluses over the course of the Commission’s mandate, they are small surpluses and they depend in part on the Government’s policies of fiscal restraint. These circumstances support the Commission’s view that the Government can afford to do what is required to ensure judicial justice compensation is reasonable to meet the requirements of judicial independence and the specific criteria of the Act. As Government has acknowledged, “full salary and compensation costs of Judges and Judicial Justices are within the fiscal capacity of Government to pay” (Government’s Submissions at para. 17). As with judges, now is the time for significant adjustment of judicial justice salaries.

If economic conditions and the Government’s financial position change from what is forecasted, then in three years’ time the Government can propose an adjustment.

RECOMMENDATION 10: Over the course of the Commission’s three-year mandate, the annual salary of judicial justices be set as follows:

- (a) Effective April 1, 2017, the salary be \$125,000;**
- (b) Effective April 1, 2018, the salary be \$126,875; and**

(c) Effective April 1, 2019, the salary be \$128,778.

Part-time judicial justices

As the salaries for part-time judicial justices are based on the salary for full-time judicial justices and no one suggested a change in this formula (with the exception of the JJA in relation to their submissions on pension) no recommendation is required. We note that based on the recommended increase to the salary of full-time judicial justices, the *per diem* effective April 1, 2017 would be \$805.

Pension

The JJA asked for full-time judicial justices to have the same pension as judges. The Commission is not persuaded by the evidence and submissions that reasonable compensation for judicial justices requires this recommendation. Given the increase in salary recommended for judicial justices, their pensions will be improved. The Commission's mandate is to consider total compensation and not over-emphasize individual aspects of compensation in isolation.

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

Shift premiums

Shift premiums are inconsistent with the fact that judicial justices are not employees, but hold an office. In oral submissions, the JJA stated that if judicial justices were otherwise reasonably compensated, then they would not have asked for shift premiums, which counsel characterized as a manifestation of their concern over their compensation generally. The Commission has recommended a significant salary increase to ensure that judicial justices are reasonably compensated.

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

Professional development allowance

The Commission finds that the continued legal education of judicial justices should be encouraged and supported and thus recommends the proposed increase of the professional development allowance to \$2,500.

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

Flexible benefits plan

The Government's proposal to include judicial justices in its new flexible benefits plan effective 2018, was made two months after the conclusion of the hearings.

There was therefore no opportunity to fully canvass this matter. As a contentious issue, it is not trivial in relation to the Commission's mandate of determining appropriate judicial compensation and therefore for this Commission to make a recommendation to change the *status quo* the issue needs to be addressed at a hearing. The Commission notes that as initially proposed, this topic is one that appears resolvable by the parties and thus the parties are encouraged to come to an agreement. If agreement cannot be reached, then the Government may raise the issue before the next judicial compensation commission in 2019.

If the Government advances a new flexible benefits plan before the 2019 commission, it would be helpful to all parties and that commission to receive full information respecting the proposed changes to the flexible benefits plan, the impact of these proposed changes on judicial justices, the cost to the judicial justices and the Government of the proposed changes to the plan and the administrative costs of maintaining the flexible benefits plan already in place for judicial justices.

The Commission makes the following recommendation regarding the Government's proposal that judicial justices be subject to the Government's new flexible benefits plan.

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

***Per diem* for travel**

The Commission finds that the *per diem* received now, which is set at Level II of Treasury Board Directive 01/07, is reasonable compensation.

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

Education leave

The Commission makes no recommendation regarding education leave for judicial justices because we accept the Chief Judge's submission that this is within the assignment duties of his Office and not within the mandate of the Commission.

Non-contentious issues

The JJA and the Government did not ask the Commission for recommendations regarding the Government's agreement to increase judicial justice salaries beginning in 2013/14. Rather, both parties asked the Commission to provide a statement in support, even though with respect to parity in compensation between *ad hoc* and *per diem* judicial justices, the JJA initially submitted that this might require a recommendation by the Commission. On July 28, 2016, the Legislative Assembly adopted the following resolution: (1) to increase judicial justice salaries

to \$110,249, effective April 1, 2013; and (2) to pay *ad hoc* and non-*ad hoc* part-time judicial justices on the same *per diem* basis, effective April 1, 2014. We note that the Commission was not notified of this resolution until October 14, 2016, after we had submitted a preliminary report to the Attorney General of British Columbia and the Chief Judge. As these issues relate to events occurring outside the Commission's mandate, which is to make recommendations for judicial compensation beginning on April 1, 2017, we make no further comment.

Costs

Section 7.1 of the Act provides:

7.1(1) Subject to subsection (2), the government may pay out of the consolidated revenue fund the reasonable costs, incurred by the Provincial Court Judges' Association of British Columbia and the Judicial Justices Association of British Columbia, of participating in the commission.

(2) The maximum amount that may be paid under subsection (1), which maximum amount applies separately to the Provincial Court Judges' Association of British Columbia and the Judicial Justices Association of British Columbia, is as follows:

- (a) the first \$30,000 in costs;
- (b) 2/3 of the costs over \$30,000 but under \$150,000.

(3) Despite subsections (1) and (2), the Lieutenant Governor in Council may by regulation, set higher amounts for the purposes of subsection (2).

The PCJA asked the Commission to recommend that the Government pay 100% of the PCJA's reasonable legal fees and disbursements, including 100% of the cost of expert evidence. The 2004 JCC recommended that the Government pay all of the reasonable legal costs and disbursements for the judges. In 2007, 2010 and 2013, the Judges' Compensation Commission made the same recommendation based on the Government's agreement to pay costs. Judicial compensation commissions in other provinces have made similar recommendations. In the PCJA's view, section 7.1 of the Act, does not preclude continuation of the past practice, it merely provides the framework as to how the Government can implement a recommendation on costs. There is no change to the jurisdiction of the Commission. Sub-section 7.1(3) specifically contemplates that Government can pay a higher amount. Government has many resources to support it during the judicial compensation process and paying for the judges' costs helps to even out the playing field. In addition, the public purse pays for the Government's costs in the commission process and there is no principled reason why the same source should not also pay for the judges' costs.

In oral submissions, the JJA adopted the PCJA's submissions regarding costs and asked the Commission to recommend that the Government pay the JJA's costs in

full. It submitted that, as a small group, any costs above the amounts in the legislation impairs the ability of judicial justices to participate meaningfully in the judicial compensation process.

The Government in written submissions noted that, owing to section 7.1, this Commission may not make a recommendation on costs. However, in oral submissions, it retreated from this position and said that while the Commission could make a recommendation, the statutory costs should apply as they are reasonable and appropriate.

The Commission notes there is a history in British Columbia of the Government paying 100% of the reasonable costs of the PJCA (see: 2004 Commission Report at pp. 29-30; 2007 Commission Report at p. 23; 2010 Commission Report at p. 32; and 2013 Commission Report at p. 53). At the hearing, the Commission was told that there have been no disputes about the reasonableness of costs claimed by the PCJA. After the 2007 JJCC, the Government paid the costs of the JJA in accordance with an agreement reached between counsel at the hearing. In the Commission's view, the constitutionally mandated process for the setting of judicial remuneration is best achieved by the participation of both judges and judicial justices and other branches of the Government (*PEI Reference* at para. 173).

Also, as is noted by the PCJA, "The Government uses external counsel and has available to it any number of civil servants who are presumably capable of utilizing Government resources as they see fit in order to advance the Government's position" (PCJA Written Submissions at para. 384). The judiciary is the third branch of government, yet does not have the executive branch's access to the government's resources. In this situation, where the participation of the judiciary is required for an objective and fair process, where the executive branch of government has access to government resources and is represented by external counsel and where the process is a public inquiry, it would be unfair to expect individual judges and judicial justices to personally fund their participation. Moreover, it would not be in the public interest.

Judicial compensation commissions in other jurisdictions in Canada have made recommendations for governments to pay 100% or significant portions of the reasonable costs incurred by judges. For example, in Ontario, the judges' association has repeatedly received contributions of more than \$400,000 to their costs.

The Commission found the PCJA and the JJA's participation in this Commission to be helpful and appropriate and, most importantly, necessary for an effective and objective process. Accordingly, the Commission recommends that the Government pay 100% of all the reasonable costs of the PCJA and JJA, including the legal fees and the costs of the opinions and evidence of Mr. McKinnon and Mr. Smith. There may well be a situation where less than 100% reimbursement of costs is appropriate, but this situation does not apply here.

In its preliminary report, the Commission advised the Government, the PCJA and the JJA that if they could not agree on what were reasonable costs, then they could submit the PCJA and JJA's actual costs to the Commission, along with any written submissions on the reasonableness of those actual costs by October 21, 2016. As a result, prior to finalising this report, the Commission received submissions from the JJA and the Government regarding the reasonableness of the costs of the PCJA and the JJA. These submissions indicate that the parties are in agreement that the PCJA and the JJA's costs are reasonable.

RECOMMENDATION 16: The Government pay 100% of the reasonable costs of the Provincial Court Judges' Association of British Columbia and the Judicial Justices Association of British Columbia, including legal fees and disbursements, and the cost of the opinions and evidence of Mr. McKinnon and Mr. Smith.

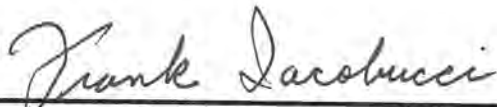
Concluding remarks

The Commission is very proud of the men and women who serve the Provincial Court. Judges and judicial justices are a critical component of the rule of law, which is essential to the progressive democracy that is Canada. The judicial compensation commission process plays a role in ensuring that the judiciary can continue this precious work secure in their independence.

The Commission makes some suggestions that may assist the process of future commissions:

- Combining the judges and judicial justices' compensation commissions into one commission did result in efficiencies: hearing and commission meeting days were reduced and the duplication of expert evidence and submissions were avoided to some extent. These efficiencies were significant, although not complete. Combining the two commission processes is not a "two for the price of one";
- The assignment of a person from the Attorney General's Office to assist with administrative matters such as organizing site visits, hearing logistics and other administrative matters would be a better use of resources rather than having commission counsel perform these duties; and
- A briefing for new commissioners by the Attorney General's Office at the outset of the process would assist the commission in doing its work in the very short time frame allocated.


ALL OF WHICH IS RESPECTFULLY SUBMITTED,



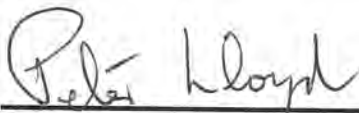
The Honourable Frank Iacobucci, C.C., Q.C., Chair



Brenda Eaton



Randal Kaaralal, Q.C.



Peter Lloyd



Robin McFee, Q.C.

List of submissions

1. Provincial Court Judges Association of British Columbia, dated May 30, 2016 and with Documents 1 through 49;
2. Judicial Justices Association of British Columbia, dated June 1, 2016 and with Documents 1 through 24;
3. Government of British Columbia, dated June 14, 2016, and with Documents 1 through 12;
4. Judicial Justice A.-M. Brown, dated June 20, 2016;
5. Government of British Columbia, Supplemental Submission and Response, dated June 23, 2016;
6. Judicial Justices Association of British Columbia, Reply Submissions, dated June 30, 2016;
7. Judicial Justices J. Chellappan and S. Joseph-Tiwary, dated June 19, 2016;
8. Judicial Justice G. Hayes, dated June 19, 2016;
9. The Chief Judge of the Provincial Court of British Columbia, dated June 27, 2016;
10. The Judicial Council of British Columbia, dated June 27, 2016;
11. Canadian Bar Association, BC Branch, dated June 27, 2016;
12. The Law Society of British Columbia, dated June 27, 2016; and
13. Provincial Court Judges Association of British Columbia, Reply Submissions, dated June 29, 2016 and with Documents 50 to 54.

Hearing exhibit list

1. Resume of Ian McKinnon;
2. PowerPoint Presentation of Ian McKinnon;
3. PowerPoint Presentation of Ken Peacock;
4. PowerPoint Presentation of David Galbraith;
5. Resume of Donald Smith;
6. BC Public Sector Bargaining Overview – as of June 29, 2016;
7. PowerPoint Presentation of Angie Sorrell;
8. Government of Saskatchewan, “Provincial Court Commission’s Recommendations Take Effect”, dated January 30, 2015;
9. Table submitted by the Provincial Court Judges’ Association of British Columbia, “Judicial Pension Comparison – some key features”;
10. Letter dated June 24, 2016 from Lance Finch, Q.C. to Andrew Gay and Tom Roper, Q.C.;
11. Tables of judge, justice of the peace, public service – strategic leadership, teacher and nurse salaries in different jurisdictions and graph with average pension payments for British Columbia for 2015;
12. Judicial Council of British Columbia 2015 Annual Report;
13. Resume of Ken Peacock;
14. Resume of David Galbraith; and
15. Resume of Angie Sorrell.