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Issue No. 43

THE HONOURABLE DARRYL PLECAS, SPEAKER

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Leave granted.

Third Reading of Bills

BILL 5 — CONSTITUTION AMENDMENT ACT, 2017

Bill 5, Constitution Amendment Act, 2017, read a third time and passed on division.

Hon. D. Eby: I call Motion 8, government reconsidered response to 2013 Judges Compensation Commission.

Government Motions on Notice

MOTION 8 — JUDGES COMPENSATION COMMISSION REPORT RECOMMENDATIONS

Hon. D. Eby: I move Motion 8 standing in my name on the orders of the day:

[Be it resolved that pursuant to section 6 (2) of the *Judicial Compensation Act*, the Legislative Assembly:

- a. reject the following recommendations of the *Report of the 2013 Judges Compensation Commission* as laid before this Assembly on September 18, 2017 as unfair and/or unreasonable for the reasons outlined in *Government's Proposed Reconsidered Response to the Report of the 2013 Judges Compensation Commission* filed in this House; and
- b. set the remuneration, allowances or benefits that are to be substituted for the rejected recommendations;

as follows:

1. The recommended salary for puisne judges for April 1, 2014 to March 31, 2015 of \$241,500 is rejected. The salary for April 1, 2014 to March 31, 2015 is set at \$244,889.
2. The recommended salary for puisne judges for April 1, 2015 to March 31, 2016 of \$245,122, an increase of 1.5%, is rejected. The salary for April 1, 2015 to March 31, 2016 is set at \$248,562, which is a 1.5% increase on the substituted salary for fiscal year 2014/15.
3. The recommended salary for puisne judges for April 1, 2016 to March 31, 2017 of \$250,024, an increase of 2.0%, is rejected. The salary for April 1, 2016 to March 31, 2017 is set at \$252,290, which is a 1.5% increase on the substituted salary for fiscal year 2015/16.
4. The recommended increase in the pension accrual rate for judges from 3% to 3.25% effective April 1, 2014 is rejected. The pension accrual rate is set at 3%.
5. Recommendation 5 that, effective April 1, 2014, government take steps to continue judges as active members in the Public Service Pension Plan to age 75 is accepted in part. Recommendation 5(d), to the extent that it applies to any retroactive measures, including return of pension payments, making back-contributions, or making interest payments, is rejected.

That the Legislative Assembly accept the remaining recommendations contained in the report.]

I would like to take a few moments to speak to this motion respecting the compensation that is paid to the province's Provincial Court judges. As members may know, the process that is followed to determine judges' compensation is necessarily different from collective bargaining. The reason for this is the need to ensure that judges are and are seen to be independent of government.

Judicial independence is a cornerstone of our justice sys-

tem. It is a cornerstone of our democracy and the rule of law: namely, that anyone who is accused of a crime or challenges government before the courts can be sure that their case will be decided by an impartial judge. So government and the judiciary do not negotiate over judges' compensation.

[3:10 p.m.]

Instead, there is a process governed by the Judicial Compensation Act under which government and representatives of the judiciary make submissions to independent commissions every three years. These commissions, in turn, make recommendations to government setting out what the commissions believe would be the appropriate salaries and benefits for judges.

The government and this assembly are not bound to accept the commission's recommendations, but if we wish to depart from them, we must give reasons that satisfy a constitutional test that has been developed in case law over the years. Rejection of the commission recommendation must be based upon a rational reason that rests upon a factual foundation. Overall, the response must respect the commission process and ensure that the process has been effective.

In British Columbia, there was additional language in the Judicial Compensation Act that the Legislative Assembly must find a recommendation to be unfair or unreasonable before it can be rejected. Well, that language was removed from the act by amendments made in 2015, and nonetheless, applies to this particular reconsideration since we are required to revisit the 2013 commission's report through the lens of the time period in which the commission functioned and the Legislature first considered the commission's report. I will have more to say about that in a moment.

Before I address the reconsidered response government is proposing, let me say a few words about the judges of the Provincial Court. Although I have been Attorney General for only a short time, I can certainly say I'm impressed with the expertise and the commitment that our Provincial Court judges devote to their work and to the British Columbians who appear before them. The Provincial Court hears most of the criminal cases in this province, as well as a majority of family law matters. The court also adjudicates small claims matters. Although some of that work will now be expected to be handled by the civil resolution tribunal.

In all, some 120,000 cases proceed through Provincial Court each year and are adjudicated by approximately 140 judges. Aside from hearing the matters that come before them, the judiciary is an active participant in justice reform efforts. Major strides have been and continue to be made in addressing some of the difficult challenges faced by the justice system. Government is doing its part to meet those challenges and so is the judiciary.

Turning now to government's proposed reconsideration of the 2013 Judges Compensation Commission, let me first express my thanks for the commission members whose task was not an easy one and who undertook their responsibilities faithfully — Simon Margolis, Queen's Counsel, who's the chair; Robin McFee, Queen's Counsel; Randy Kaardal,

Queen's Counsel; Kirsten Tisdale; and Roy Stuart.

Responding to reports of this kind often involves making difficult decisions. The circumstances of this reconsideration are quite unique. I ask members to bear with me as I summarize the events that have led us to this point.

The Legislature first dealt with the commission's report in March 2014. In that response, the Legislature unanimously adopted government's proposed response which rejected the commission's salary and pension accrual rate recommendations. That response was litigated by the Provincial Court Judges Association, and the matter was heard first in B.C.'s Supreme Court, then in the B.C. Court of Appeal.

The decision the Court of Appeal handed down this past February requires us to reconsider the commission's report in accordance with the court's reasons. The primary concern of the court was that litigation respecting the previous 2010 commission process, which did not conclude until after the 2013 commission process, resulted in retroactive salary and pension accrual rate increases for Provincial Court judges for the fiscal year 2013-14.

This sequence of events meant that the 2013 commission was unaware of that salary level when it undertook its work. The commission's recommendations followed by the Legislature's response then resulted in an actual reduction of salary for the first two years of the commission's mandate — an outcome that was not intended.

Specifically, the litigation over the 2010 commission resulted in an increase in judges' salaries for 2013-14 from \$236,504 to \$242,464. As this change was made retroactively, the 2013 commission and the Legislature had no knowledge of it and could not take it into account. Similarly, the pension accrual rate in effect at the time of the 2013 commission was 3 percent, not the 3½ percent that resulted from the litigation of the Legislature's response to the 2010 commission's recommendations.

As the Court of Appeal said in its most recent decision, the retroactive effective litigation "so altered the legal foundation for the Legislative Assembly's resolution that, without fault to the parties or the Legislative Assembly, the resolution is fatally flawed as being based on an incorrect legal premise of the salaries and benefits applicable at the time the resolution was passed. In that circumstance and the Legislative Assembly never having had the opportunity to consider the issue of Provincial Court judges emoluments in the context of that court-ordered framework.... The situation calls for an order remitting the matter to the Legislative Assembly for fresh consideration."

We have, therefore, reconsidered the commission's report and recommendations with the Court of Appeals decisions in mind. As the Court of Appeal also clarified in its earlier decision respecting the 2010 commission process, on a reconsideration such as this, we are required to approach the commission's report and recommendations in light of the facts and circumstances known to the commission and the Legislature at the time the commission process and the Legislature's initial consideration occurred.

[3:15 p.m.]

In this case, it means the facts and circumstances, as they were in 2013 and 2014, altered only by the changed legal landscape of the court's decisions.

As I said, we are guided by the need to respect the commission process in order to ensure that judicial independence is preserved. We must also recognize that it is government's task to analyze the cost of the commission's recommendations and responsibly balance the competing interests and demands on public resources. We are the ones who are accountable for the expenditure of public funds.

The commission's report makes eight recommendations respecting judges' remuneration, benefits and allowances. As set out in the motion, we propose that the commission's salary recommendations be rejected, that one pension recommendation be rejected and that one pension recommendation be accepted in part.

In making this proposal, I can assure all members of the House that we have again looked carefully at what the commission recommended. Detailed reasons are contained in the government's response document, which I tabled in the House a few days ago. I'd like to highlight some general principles that underlie those reasons.

First, members will note that the salaries we are proposing are actually higher than those recommended by the commission. This is necessary to address the overriding concern of the Court of Appeal that the result of the commission process, following the prior litigation over the 2010 process, was an unintended reduction in judges' salaries.

I emphasize, as the Court of Appeal did, that this state of affairs occurred through no fault of the 2013 commission. We do not know what the commission might have recommended if the prior litigation had concluded before the commission undertook its work, but as it stands, simply adopting the commission's salary recommendations would not properly address the issue identified by the court. Instead, we are proposing salaries that would result in modest increases above the higher 2013-14 salary that resulted from the prior litigation.

In doing so, government agrees with the 2013 commission when it found that a modest increase in the salary of judges for the period covered by the commission's report is justified. At the time of the 2013 commission process and the Legislature's first response to its report, significant fiscal restraint measures were in place across government, including limits on compensation increases paid by public funds.

For example, all managerial salaries in government were frozen and public service hiring was severely restricted to meet government's fiscal targets. In addition, various spending controls had been implemented on travel, administration and other discretionary spending such as grants. These expenditure management initiatives were necessary in order to meet spending projections over the fiscal planned period by the then government.

The proposed salaries, in our view, appropriately reflect the recommendations of the commission, the reasons of the

Court of Appeal and the government's program of restraint as it stood at the time.

In regard to the pension accrual rate, we depart from the commission's recommendation that it should be set at 3.25 percent. Instead, government proposes it be set at 3 percent. At the time the 2013 commission made its recommendations, it believed that the 3.25 percent accrual rate represented an increase. That is because the rate was then at 3 percent and was only retroactively changed to 3½ percent following the Court of Appeal's 2015 decision.

The 2013 commission, nevertheless, considered and rejected the idea of a 3.5 percent accrual rate. The government agrees with the commission that 3½ percent is not an appropriate rate, but disagrees that 3¼ percent is the rate that should be implemented.

The government has analyzed the cost of a 3¼ percent accrual rate as compared to the government's recommended rate of 3 percent. Adopting a 3 percent accrual rate results in savings to government of approximately \$2 million over the three years covered by the report, which the government views as an important amount in view of the program of restraint as it stood at the time.

Government does not agree with the commission that a 3¼ percent accrual rate is necessary to maintain a strong court, and notes that 3 percent is the rate used in a number of other provinces. In government's view, the accrual rate of 3 percent sufficiently takes into account the fact that most judges are appointed relatively late in their working lives. Additional reasoning for the government's proposal is found in the accompanying detailed reasons.

Government also recommends that the assembly accept the commission's recommendation to make other adjustments to judges' pensions. Those adjustments include taking steps to seek an exemption from the federal Minister of National Revenue so that judges who continue to sit full-time to age 75 would continue to remain members of the pension plan.

We do not believe, however, that retroactive steps should be taken in respect to a small number of judges over age 71 who have already begun receiving their pensions. It would require changes to pension legislation specifically for the affected judges, and it would also officially change the individual incomes of those judges for past taxation years, which we understand is not permitted under the federal Income Tax Act.

That concludes my remarks on the motion. I recommend the proposed response to the House, and I look forward to hearing from other members.

A. Wilkinson: This is a fairly regular occurrence in this House — that the Attorney General is called upon to sort out the compensation of Provincial Court judges and judicial justices.

[3:20 p.m.]

It's an awkward topic because, as the Attorney General has noted, the compensation of these individuals, who are

responsible for our judicial system....

[Interruption.]

A. Wilkinson: Well, now that we're back on track here.

There's bound to be a level of public scrutiny of this, and of course, there's the intrinsic conflict of interest that is involved with judicial figures who may be involved in adjudicating the role of government and the actions of government. So as the Attorney General has pointed out, this has been, in recent years, referred out to an outside body that provides recommendations. Then, of course, it comes back to this body, the Legislature, to make the final decision on the process going forward in terms of compensation for judges and judicial justices.

These individuals are public servants, and they, of course, deserve the usual treatment for members of the public service in terms of an orderly resolution of their compensation. In the role of judges, they may receive compensation that seems to be fairly substantial, from the eyes of the members of the general public and even, for that matter, the eyes of other members of the public service. The concern, of course, is that there is competition for individuals of this calibre, in that they can earn substantially more in some law firms in this province, although that's not uniformly the case.

Nonetheless, the positions that are available for Provincial Court judges and judicial justices normally receive an excess of applications over available positions. It is a desirable position at a certain stage in life for lawyers, and so the positions are generally filled without too much difficulty, which is, of course, a downward market pressure on compensation. This results in the bind that the Legislature finds itself in, in determining the compensation of these individuals in a semi-market scenario.

What we have heard from the Attorney General is a compromise position, as has been the case in the past, and the opposition is prepared to accept the recommendations made by the Attorney General on this issue.

The Provincial Court, of course, is where the hard-nosed part of the judicial system meets the public expectations. It is a very real and very tangible kind of judicial system involving, usually, middle to minor criminal offences, where there is what one can call the necessity for reasonably fast justice, but it also has to be justice. So this is not an easy task for Provincial Court judges.

They deal with a large volume of case law and claims and prosecutions. They, of course, service not only the criminal justice function but also the family court and small claims divisions — although we're seeing the transition from small claims into the civil resolution tribunal, which is going slowly and, one would hope, successfully.

Nonetheless, being a Provincial Court judge is not a small task. It requires suitable compensation. They expect to be paid for what they do. And as I said, it's a position of high esteem in our society and needs to stay that way and be compensated accordingly.

Of course, part of their compensation is a fairly substantial pension plan, which is attractive to many lawyers at a certain stage in life, as they look forward to a predictable future in terms of income and pension income, and also in terms of their role in society and seeking to be in perhaps a more esteemed role than they have been in the past — given that lawyers, politicians and a few other callings in life tend to be at the bottom of a pile, whereas being a judge or a pharmacist is generally at the top of the pile, along with Clerk of the Legislature.

These judges perform this very valuable function all over the province of British Columbia. Unlike the superior courts, the Supreme Court and the Court of Appeal, they're in every community of significant size so that justice can be delivered on a local basis. And of course, there's a substantial amount of homework in what they do. The sitting hours of a judge do not comprise their entire workload in that they have to do a great deal of reading and review of materials outside of their sitting hours so that they can stay on top of the law and maintain their credibility when they're in the courtroom.

I think it's fair for us to proceed and for me to conclude by saying that we thank the Provincial Court bench and the judicial justices for the work that they do. We acknowledge their service to the province of British Columbia and the people of British Columbia and their important role in the overall judicial system.

With all of these factors taken into account, the opposition is prepared to support the position taken by the Attorney General on compensation of these two categories.

[3:25 p.m.]

Hon. D. Eby: I thank the member opposite for sharing the views of the opposition with us and for the support for this motion.

With that, I move Motion 8.

Motion approved.

Hon. D. Eby: I call Motion 9, government response to 2016 Judicial Compensation Commission in respect of Provincial Court judicial justices.

MOTION 9 — JUDICIAL COMPENSATION COMMISSION REPORT RECOMMENDATIONS FOR JUDICIAL JUSTICES

Hon. D. Eby: I move Motion 9 standing in my name on the orders of the day.

[Be it resolved that pursuant to section 6 (2) of the *Judicial Compensation Act*, the Legislative Assembly:

- a. reject the following recommendations of the *Report of the 2016 Judicial Compensation Commission* as laid before this Assembly on September 18, 2017 for the reasons outlined in *Government's Proposed Response to the Report of the 2016 Judicial Compensation Commission in Respect of Provincial Court Judicial Justices* filed in this House; and
- b. set the remuneration, allowances or benefits that are to be

substituted for the rejected recommendations;

as follows:

1. The recommended salary for April 1, 2017 to March 31, 2018 of \$125,000 is rejected. The salary for April 1, 2017 to March 31, 2018 is set at \$118,000.
2. The recommended salary for April 1, 2018 to March 31, 2019 of \$126,875 is rejected. The salary for April 1, 2018 to March 31, 2019 is set at \$120,000.
3. The recommended salary for April 1, 2019 to March 31, 2020 of \$128,778 is rejected. The salary for April 1, 2019 to March 31, 2020 is set at \$122,000.
4. The recommended reimbursement of 100% of participation costs incurred by the Judicial Justices Association of British Columbia is rejected. The Association will be reimbursed according to the formula established in the *Judicial Compensation Act*, which is 100% of costs up to \$30,000 and two-thirds of costs between \$30,000 and \$150,000. That the Legislative Assembly accept the remaining recommendations contained in the report.]

Mr. Speaker, in speaking to this motion, let me state that the process for setting compensation for judicial justices is the same as for Provincial Court judges. Judicial justices attract similar considerations of judicial independence due to the jurisdiction they hold. They hear provincial offence matters, local government bylaw matters, and conduct small claims payment hearings. They also conduct bail hearing applications and issue search warrants 24 hours a day, seven days a week, from the justice centre.

While judicial justices' jurisdiction is more limited than that of Provincial Court judges, they are important components of the operation of the justice system in British Columbia. They are required to dispense with the matters before them quickly, often with unrepresented litigants, while ensuring that their decisions are fair and just.

When addressing the 2016 commission's recommendations concerning Provincial Court judges, I noted that the 2016 commission process is the first to occur following amendments to the *Judicial Compensation Act* in 2015, which included updating the factors that the compensation commission must consider, as well as merging the two separate commissions for judges and judicial justices into a single commission.

While we now have a single commission issuing a single report, there are now separate recommendations respecting each group of judicial officers, and they should be considered independently. That is why government is bringing forward different motions for judges and for judicial justices.

The 2016 commission's report makes seven recommendations respecting judicial justices remuneration, benefits and allowances. As set out in the motion, we propose that the commission's salary recommendations be rejected, along with the commission's recommendation respecting participation costs for the Judicial Justices Association.

Government has carefully reviewed the commission's report, including the analysis and findings that underlie its recommendations. Detailed reasons are contained in the response document appended to the notice accompanying this motion.

In regard to salaries, the commission's recommendation is to adopt the proposals made by the Judicial Justices Asso-