



**SUBMISSIONS  
OF THE  
CANADIAN BAR ASSOCIATION (BRITISH COLUMBIA BRANCH)  
TO THE  
BRITISH COLUMBIA  
2016 JUDICIAL COMPENSATION COMMISSION**

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## **PREFACE**

The Canadian Bar Association (British Columbia Branch) (the “CBA”) is pleased to provide its distinct perspective regarding judicial compensation for Provincial Court Judges and Judicial Justices to the British Columbia 2016 Judicial Compensation Commission (the “Commission”).

Formed in 1896, the purpose of the CBA is to:

- enhance the professional and commercial interests of our members;
- provide personal and professional development and support for our members;
- protect the independence of the judiciary and the Bar;
- promote access to justice;
- promote fair justice systems and practical and effective law reform; and
- promote equality in the legal profession and eliminate discrimination.

The CBA nationally represents approximately 36,000 members and the British Columbia Branch itself has over 6,800 members. Our members practice law in many different areas. The CBA has established 78 different sections to provide a focus for lawyers who practice in similar areas to participate in continuing legal education, research and law reform. The CBA has also established standing committees and special committees from time to time to deal with issues of special interest to the CBA.

In 2007, 2010 and 2013, the CBA made submissions to the Commission regarding compensation for Provincial Court Judges and Judicial Justices.

## **EXECUTIVE SUMMARY**

These Submissions provide the CBA's 8 recommendations.

First, the CBA recommends that the Commission apply the applicable constitutional principles in order to ensure an effective process characterized by government goodwill, a depoliticized judicial compensation process and judicial independence through fair and reasonable judicial compensation.

Second, the CBA recommends that the Commission consider the Provincial Court judge's as well as those of the Judicial Justices' work environments as the Province's "people's court", its heavy and complex caseload, the need for judges to travel and the unique demands imposed on Provincial Court judges in working with large numbers of unrepresented litigants.

Third, the CBA recommends that the Commission consider the Judicial Justices' work environment, that: Judicial Justices are the face of the Provincial Court, are perceived by the public as judges, are often conducting hearings with lay litigants and have considerable responsibility for the legal rights and freedoms of ordinary people.

Fourth, the CBA recommends that the Commission find that the government pay the costs incurred by the Provincial Court Judges' Association of British Columbia ("PCJA") to prepare and make its submissions to the Commission.

Fifth, the CBA recommends that the Commission consider as a starting point where BC should rank among the provinces and territories in Provincial Court judicial salaries. The CBA suggests that the Commission consider as a starting point, a principle that would act as a general guide to ensure that BC provincial puisne judges rank at a minimum higher than the much smaller Atlantic Provinces. In particular, we recommend that the Commission consider as a starting point, the principle that BC puisne judges should rank higher among the western provinces, namely Alberta, Saskatchewan and Manitoba, plus Ontario. Accordingly, we recommend the Commission consider a principled approach in addition to a numerical starting point for judicial salaries.

Sixth, the CBA recommends that the Commission approach this factor-- changes in the compensation of others paid by provincial public funds in British Columbia--cautiously and with due regard to the constitutional factors.

Seventh, the CBA recommends that the Commission, regarding this factor-- generally accepted current and expected economic conditions in British Columbia—be mindful of the applicable constitutional principles. Further, the CBA suggests that the Commission find that the current and expected economic conditions in BC permit fair and reasonable judicial compensation for both Provincial Court Judges and Judicial Justices.

Eighth, the CBA recommends that the Commission find that the current and expected financial position of the government over the 3 fiscal years that are the subject of the report permits fair and reasonable judicial compensation for both Provincial Court Judges and Judicial Justices.

## **FAIR PROCESS TO DETERMINE JUDICIAL COMPENSATION**

Under the [\*Judicial Compensation Act\*](#), S.B.C. 2003, c. 59 (the “Act”), the Commission must report to the Minister of Justice on all matters respecting the remuneration, allowances and benefits of judges or judicial justices and make recommendations with respect to those matters covering the next three fiscal years.

The Act further requires the Minister of Justice to submit the Commission’s report to the Legislative Assembly. Under the Act, the Legislative Assembly may reject one or more of the recommendations made in the report and set the remuneration, allowances or benefits to be substituted for those proposed by the rejected Commission’s recommendations.

Section 5(5) of the Act lists the factors the Commission must consider in recommending judicial compensation. Section 5(5) was amended in 2015 by section 24(c) of the [Justice Statutes Amendment Act, 2015](#), S.B.C. 2015, c. 6 (Bill 6).<sup>1</sup> The factors as stated in the amended section are:

- 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 new section 5.1 provides that the Commission's report must demonstrate that the Commission has considered all of the factors set out in section 5(5).

The new section 5(5.2) allows that the Commission may consider factors it considers relevant that are not set out in section 5(5), but if the Commission relies on another factor, the Commission's report must explain the relevance of the factor.

Sections 5, 5.1 and 5.2 do not give priority to any of these 6 factors. It is submitted that the first of the listed factors – the need to maintain a strong court – together with the important factors underlying judicial independence (as set out in the next section of this submission) will be key factors and may be given more weight.

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<sup>1</sup> Bill 6 is in force December 18, 2015 (B.C. Reg. 251/2015).

## ***Constitutional Principles Applied to the Function of Judicial Compensation Commissions for Provincial Court Judges***

As a matter of constitutional law, certain additional legal principles have been established to provide key guidance for any judicial compensation commission. In [Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island](#), [1997] 3 SCR 3 (“*PEI Reference*”) (a case in which the CBA intervened), the Supreme Court of Canada considered the manner and extent to which provincial governments and legislatures can reduce the salaries of provincial court judges. Chief Justice Lamer described the Court’s task as “explain[ing] the proper constitutional relationship between provincial court judges and provincial executives” (para. 8). He noted at paras. 9-10 the connection between financial security and judicial independence and the goals served by judicial independence:

One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule.

Having considered applicable constitutional principles, Chief Justice Lamer set out the following principles to be followed in setting judicial compensation:

- a) salaries of Provincial Court judges may be reduced, increased or frozen, but any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective and objective, for determining judicial remuneration (para. 133);
- b) 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);
- c) any reduction to judicial remuneration, including *de facto* reductions through the erosion of salaries by inflation, cannot take those salaries below a basic

minimum level of remuneration which is required for the office of a judge (para. 135);

- d) the commissions charged with the responsibility of dealing with the issue of judicial remuneration must meet three general criteria: they must be independent, objective and effective (para. 169);
- e) with respect to the question of the commission being “effective”, while this does not mandate that a commission report be binding (paras. 178):

The fact that the report need not be binding does not mean that the executive and the legislature should be free to ignore it. On the contrary, for collective or institutional financial security to have any meaning at all, and to be taken seriously, the commission process must have a meaningful impact on the decision to set judges’ salaries.

- f) financial security is a means to the end of judicial independence, and is therefore for the benefit of the public (para. 193);
- g) the same principles that apply to salaries for judges apply equally to judicial pensions and other benefits (para. 136);
- h) 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);
- i) if a government rejects the recommendations of a judicial compensation commission, the government must “articulate a legitimate reason” why it has chosen to depart from the recommendations of the commission (para. 183);
- j) 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 (para. 183);



- k) there should be no negotiation for remuneration between the judiciary and the executive and legislature because negotiations for remuneration from the public purse are “indelibly political”, but it is proper for Provincial Court judges to convey their concerns and make submissions to government regarding the adequacy of current levels of remuneration (para. 134); and
- l) judges’ salaries must not fall below the basic minimum level of remuneration for the office of a judge (para. 135) that is “adequate, commensurate with the status, dignity and responsibility of their office” (para. 194).

These constitutional principles also apply to the Act to inform the factors listed in section 5(5) of the Act.

### ***Constitutional Principles Applied Since The PEI Reference for Provincial Court Judges***

In 2005, the Supreme Court of Canada reaffirmed the constitutional principles from the *PEI Reference* in [\*Provincial Court Judges' Assn. of New Brunswick v. New Brunswick \(Minister of Justice\)\*](#); [\*Ontario Judges' Assn. v. Ontario \(Management Board\)\*](#); [\*Bodner v. Alberta\*](#); [\*Conférence des juges du Québec v. Québec \(Attorney General\)\*](#); [\*Minc v. Québec \(Attorney General\)\*](#), 2005 SCC 44, [2005] 2 S.C.R. 286 (“*Bodner*”) (another case in which the CBA intervened).

Having confirmed that the principles stated in the *PEI Reference* remain valid (para. 13), the Court went on to emphasize the importance of judicial independence within Canada, stating that:

- a) judicial independence is “the lifeblood of constitutionalism in democratic societies” (para. 4);
- b) judicial independence is “necessary because of the judiciary’s role as protector of the Constitution and the fundamental values embodied in it, including the rule of

law, fundamental justice, equality and preservation of the democratic process” (para. 4);

- c) judicial independence has two dimensions: first, the individual dimension, which relates to the independence of a particular judge and the second, the institutional dimension, which relates to the independence of the court the judge sits on; “Both dimensions depend upon objective standards that protect the judiciary’s role” (para. 5);
- d) the “judiciary must both be and be seen to be independent” (para. 6);
- e) “[j]udicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice” (para. 6); and
- f) key components of judicial independence are: security of tenure, administrative independence and financial security (para. 7).

The Supreme Court of Canada stated in *Bodner* that a commission must focus on identifying the appropriate level of remuneration for the judicial office in question and address all relevant issues in a flexible manner (para. 14).

The *Bodner* decision requires a government to give weight to the commission’s recommendations, and provide a complete response to them (para. 23). A government may depart from a commission’s recommendations, if the government provides complete and legitimate reasons and that deal with a commission’s recommendations in a meaningful way that will meet the standard of rationality (para. 25).

On judicial review of a government’s refusal to follow a commission’s recommendations, *Bodner* provides that the court must focus on the government’s response and on whether the purpose of the commission process has been achieved. Further, the reviewing court should apply a threestage test for determining the rationality of the government’s response:

1. Has the government articulated a legitimate reason for departing from the commission's recommendations?
2. Do the government's reasons rely upon a reasonable factual foundation? and
3. Viewed globally, has the commission process been respected and have the purposes of the commission — preserving judicial independence and depoliticizing the setting of judicial remuneration — been achieved? (para. 31).

### ***Constitutional Principles Applied to the Function of Judicial Compensation Commissions for Judicial Justices***

In 2003, the Supreme Court of Canada released its decision in [Ell v. Alberta](#), [2003] 1 SCR 857, 2003 SCC 35 (CanLII)(*Ell*). In *Ell*, the Supreme Court held that the principles of judicial independence that apply to Provincial Court Judges apply equally to Judicial Justices. Specifically, in *Ell*, the Supreme Court of Canada held that:

- a) principles of judicial independence apply to judicial justices as a result of their authority to exercise judicial functions (para. 17);
- b) Judicial justices serve on the front line of the criminal justice process, and perform numerous judicial functions that significantly affect the rights and liberties of individuals (para. 24);
- c) Judicial justices are included in the definition of “justice” under s. 2 of the *Criminal Code*, R.S.C. 1985, c. C-46, and are authorized to determine judicial interim release (bail) pursuant to s. 515 of the *Code* (para. 24).

Further, in *Ell*, the Supreme Court of Canada acknowledged that:

[j]ustices of the peace have played an important role in Canada's administration of justice since the adoption of the position from England in the 18th century... [t]he administration of justice could not be carried on in the Provinces effectually without the appointment of justices of the peace and police magistrates” (para. 4).

The Supreme Court of Canada further held that the principles of judicial independence that apply to judges apply equally to Judicial Justices. More specifically, the Supreme Court of Canada determined that Judicial justices:

- a) exercise an important judicial role;
- b) have had their functions expanded over the years; and
- c) require constitutional protection (para. 24).

### ***Recent Application of these Principles in British Columbia***

In 2012, *Bodner* was applied by the BC Supreme Court in the [\*Provincial Court Judges' Association of British Columbia v. British Columbia \(Attorney General\)\*](#), 2012 BCSC 1022 (CanLII). The PCJA obtained an order quashing the BC Legislative Assembly's 2011 resolution rejecting many of the recommendations of the 2010 British Columbia Judges Compensation Commission (the "2010 Commission"). The PCJA also obtained a declaration that the government's response to the 2010 Commission did not conform to the standards set out in the Act.

In applying the *Bodner* test, the BC Supreme Court found that the government did not have empirical evidence to support a legitimate reason for departing from the 2010 Commission's recommendations regarding pensions (paras. 91 and 92). Further, the court found that the government's "net zero" public sector compensation mandate as a basis of refusal of the 2010 Commission's recommendation for a salary increase for judges was not a rational reason and violated *Bodner* (paras. 106 and 107).

In [\*Provincial Court Judges' Association of British Columbia v. British Columbia \(Attorney General\)\*](#), 2012 BCSC 1420 (CanLII), the BC Supreme Court ordered special costs against the government for the government's failure to adhere in good faith to the constitutional principles underlying the judicial compensation process. Macaulay, J. held:

[15] In my view, the government's conduct relating to the important constitutional process of setting judicial remuneration as well as its conduct during the judicial review proceeding deserve judicial rebuke. I reach this conclusion reluctantly but have kept in mind that the effectiveness of the process necessarily depends on the goodwill of government. The secretive resort to unconstitutional considerations during the framing of the government response is entirely inconsistent with the obligation of government as was its failure to be forthright during the proceeding.

[16] In the result, the Legislative Assembly made its decision not understanding how Cabinet arrived at its decision. The public, the PCJA and the court are all entitled to more from the AG and the government.

In 2014, *Bodner* was considered by the BC Supreme Court in [Provincial Court Judges' Association of British Columbia v. British Columbia \(Attorney General\)](#), 2014 BCSC 336 (CanLII). The PCJA sought judicial review of the BC Legislative Assembly's 2013 response to Macaulay, J.'s decision regarding the 2010 Commission for judge's: (1) salary, (2) pension accrual rate and (3) pension contribution period.

In applying the *Bodner* test to these 3 issues, Savage J. held that the government articulated a legitimate reason for departing from the commission's recommendations and that the government's reasons for this departure rely upon a reasonable factual foundation for rejecting the 2010 Commission's recommended salary (para. 143), the increased pension accrual rate (para. 168) but not for the pension contribution period (paras. 181-182). Applying the final part of the *Bodner* test, Savage, J. held that, viewed globally, the 2010 Commission process was respected by the government and that the 2010 Commission's purposes —preserving judicial independence and depoliticizing the setting of judicial remuneration — had been achieved so that the 2013 Response met the required standard of rationality (paras. 183-189). Consequently, Savage, J. dismissed the PCJA's petition.

That judgment was overturned in 2015 in the [Provincial Court Judges' Association of British Columbia v. British Columbia \(Attorney General\)](#), 2015 BCCA 136 (CanLII). On appeal by the PCJA from the judgment of Savage J., the BC Court of Appeal

considered 3 matters: (1) salary (2) pension accrual rate and (3) pension contribution period. A majority of the BC Court of Appeal allowed the PCJA's appeal:

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

The majority of the BC Court of Appeal did not refer the matter to the BC Legislative Assembly but instead ordered that the PCJA was entitled to the 2010 Commission's recommendations.<sup>2</sup>

The 2013 Judicial Compensation Commission Report was delivered in August, 2013. At the time, litigation surrounding the 2010 report was still before the courts. In March 2015, the Legislative Assembly rejected the recommendations of that report related to salary increases and pension accrual. A legal challenge to this decision has been filed but not yet determined by the BC Supreme Court.

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<sup>2</sup> The BC government applied for leave to appeal the Court of Appeal's decision but leave was not granted: [Attorney General of British Columbia v. Provincial Court Judges' Association of British Columbia](#), 2015 CanLII 69435 (SCC).

## **Meaningful Effect**

In 2016, *Bodner* was considered by the Ontario Superior Court Of Justice in [Association of Justices of the Peace of Ontario v Ontario](#), 2016 ONSC 2187 (CanLII). The Ontario Superior Court Of Justice granted an interim order staying implementation of changes to benefits regarding Ontario judicial justices, in favor of the justices association. In that case, considering *Bodner*, the Ontario Superior Court of Justice held that:

[20] The applicable principles governing government responses to judicial compensation Commission reports have also been set out in a series of decisions of the Supreme Court of Canada which has stressed that the work of judicial compensation Commissions must be given “meaningful effect”. This does not mean that the recommendations of Commissions must be binding, as they are not binding absent specific legislation requiring them to be so. Rather, governments are permitted to depart from recommendations in a report, but only for a “rational” reason. A government’s response “must be complete, must respond to the recommendations themselves and must not simply reiterate earlier submissions that were made to and substantively addressed by the commission” (*Bodner*, supra). I understand that statement to mean that a “reason” may be found to not be adequately “rational” as required by the constitutional process and therefore a government’s response may not pass constitutional muster.

## **Conclusion**

The judgments in the *PEI Reference* and in *Bodner* reflect the ongoing tension between the need to protect judicial independence, and the need for the judicial compensation commission process to be effective, with the ability of the government to properly manage the public’s finances. Determining whether such commission reports have been given “meaningful effect”, which is the key manifestation of the constitutional requirement that such commissions be “effective”, has led to recent litigation in British Columbia.

British Columbia’s judicial compensation commissions have attempted to balance the various statutory factors and constitutional imperatives within which they work. While

the recommendations of a commission are not binding, they are to be accorded respect and the circumstances in which they are not implemented should be few and far between. The fact that the past two Commission reports have both been rejected by the legislature raises questions as to whether the commission process has been effective as required by the *PEI Reference* and by *Bodner*.

## **WORK OF PROVINCIAL COURT JUDGES AND JUDICIAL JUSTICES**

The work of the Provincial Court Judges and Judicial Justices is challenging and essential for the proper administration of justice and access to justice in BC.

### ***Provincial Court Judges***

Past commissions have all acknowledged the extensive and comprehensive work of Provincial Court judges.

The 2001 Commission called the Provincial Court, the “people’s court”; that “name reflects the high volume of cases it hears and the fact that the Provincial Court is the only court many residents of the province will ever deal with directly.”<sup>3</sup>

The 2004 Commission observed that many judges “travel extensively to provide the full range of criminal, civil and family justice in a great many locations throughout the province”.<sup>4</sup>

The 2007 Commission identified that, “the work of the Provincial Court is such that its judges are the personification of justice for the vast majority of British Columbians”.<sup>5</sup>

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<sup>3</sup> [Page 10.](#)

<sup>4</sup> [Page 13.](#)

<sup>5</sup> [Page 10.](#)



The 2010 Commission found that working with the large number of unrepresented litigants “demands that Provincial Court judges possess the qualities of patience, humility and compassion, and a keen understanding of human nature.”<sup>6</sup>

The 2013 Commission found that the “Court’s work is impressive and that British Columbians are well served by their Provincial Court judges.”<sup>7</sup>

The CBA recommends that the Commission consider the Provincial Court judges’ 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 Provincial Court judges in working with large numbers of unrepresented litigants.

### ***Judicial Justices***

Like Provincial Court Judges, past commissions have all recognized the work that Judicial Justices do.

The first 2002 British Columbia Judicial Justices Of The Peace Compensation Commission found that Judicial Justices, are for many British Columbians, “the face” of the Provincial Court.”<sup>8</sup>

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<sup>6</sup> [Page 19.](#)

<sup>7</sup> [Page 19.](#)

<sup>8</sup> [Page v.](#)

The 2004 British Columbia Judicial Justices Of The Peace Compensation Commission observed that:

The absence of lawyers—both to defend and to prosecute the majority of cases heard in this court—places a burden on the JJPs. The defendant is often experiencing the court system for the first time, is usually anxious and may be uncomfortable in the English language. With no lawyers to explain the procedures and relevant law to the defendant, that job falls to the JJP, who must take special care to maintain both the reality and the appearance of impartiality.<sup>9</sup>

The 2007 British Columbia Judicial Justices Of The Peace Compensation Commission identified that:

When presiding in court, JJPs are attired and conduct themselves as judges in the ordinary sense, and are seen as such by thousands of people who appear before them each year. To such persons there is no more important judge than the one before whom they appear. Judicial justices are expected to demonstrate the care and patience, courteous consideration and impartial judicial deportment that is required of judges.<sup>10</sup>

The 2010 British Columbia Judicial Justices Of The Peace Compensation Commission found that:

Judicial Justices deal with judicial interim releases at the Justice Centre by teleconference or by videoconference. In conducting these hearings they are frequently dealing with unrepresented litigants and inexperienced police officers. As in court, these hearings are conducted without the benefit of additional support staff. The responsibility of the JJs is considerable as the outcome of these hearings could result in the incarceration of an individual until the conclusion of their trial – regardless of whether the individual is ultimately found guilty of the offence charged.<sup>11</sup>

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<sup>9</sup> [Page 7.](#)

<sup>10</sup> [Page 7.](#)

<sup>11</sup> [Page 10.](#)

The 2013 British Columbia Judicial Justices Of The Peace Compensation Commission concluded that:

Without exception, the members of the Commission were impressed by the work done by the JJPs and we have no doubt that the residents of British Columbia are very well served by those that hold the office of Judicial Justice.<sup>12</sup>

The CBA recommends that the Commission consider the Judicial Justice' work environment, that:

- a) Judicial Justice are the face of the Provincial Court;
- b) Are perceived by the public as judges;
- c) Are often conducting hearings with lay litigants; and
- d) Have considerable responsibility for the legal rights and freedoms of ordinary people.

## **REMUNERATION, ALLOWANCES AND BENEFITS OF JUDGES OR JUDICIAL JUSTICES**

Section 5(1)(a) of the Act requires the Commission to report on all matters respecting the remuneration, allowances and benefits of judges or judicial justices.

Costs of the PCJA's to make its submissions to the Commission come under the section 5(1)(a)'s purview. The CBA supports a recommendation by the Commission that the government pay the costs incurred by the PCJA to prepare and make its submissions to the Commission. In its submissions, the Judicial Justices Association of British Columbia did not request the Commission to have the government pay its costs.

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<sup>12</sup> [Page 16.](#)

## **THE NEED TO MAINTAIN STRONG COURT BY ATTRACTING QUALIFIED APPLICANTS**

Judicial salaries should be sufficient so as to attract the most exceptional and capable applicants for appointment. The proper and efficient operation of the judicial system depends on a high level of judicial competence. In order to attract qualified applicants, judicial compensation must be comparable. It is submitted that this factor is key both within the context of the statutory mandate of the Commission as well as in the way it reflects the constitutional imperatives highlighted in the *PEI Reference* and *Bodner*.

We note that if the Commission were to choose the existing judicial salaries as a starting point, that it may find itself in the same position as the 2013 JCC. In *Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2015 BCCA 136 at paragraph 39, Mr. Justice Chiasson explained the difficulty:

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

As the 2013 Commission's recommendations for Provincial Court puisne judges are currently being judicially reviewed, it is not known today what salaries they are entitled for the years 2014-2017. It is not disputed that the median salary across Canada for Provincial Court judges is \$250,050 in 2015 and the average salary is \$259,055 in salary. That means that the current BC Provincial Court puisne salaries of \$240,504 are below both the median and the average salary across Canada in 2015.

Listed below is a copy of the Table for Judges' Annual Salaries — Effective April 1, 2015, that is found in para. 138 of the Government of British Columbia's Submission and Response to the Judicial Compensation Commission (June 14, 2016):

<b>Judges' Annual Salaries — Effective April 1, 2015</b>	
	<b>Amount</b>
FEDS	\$306,600
YK	\$268,013
NWT	\$260,302
BC	\$240,504
AB	\$286,821
SK	\$272,295
MB	\$249,277
ON	\$287,345
QC	\$241,955
NB	\$246,880
NS	\$240,297
PEI	\$250,050
NFLD	\$215,372

We recommend that the Commission consider as a starting point where BC should rank among the provinces and territories in Provincial Court judicial salaries. In the past, it has been suggested that “the salary of BC judges ought to be in the range of 3rd to 4th place amongst salaries of provincial court judges in Canada.”<sup>13</sup> We note that the current data, at paragraph 138 of the Government’s submission, demonstrates that BC puisne judges’ salaries rank below Yukon, Northwest Territories, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Prince Edward Island. Only Nova Scotia and Newfoundland puisne judges are paid less than British Columbia puisne judges.

Based on current data, BC puisne judges have fallen below both the average and the median of provincial court judicial salaries across Canada. Given the geographic size and population of BC, not only do BC judges rank below all the other western provinces, but they also rank below the much smaller in geographic size and scope of New Brunswick and Prince Edward Island. We suggest that the Commission consider as a starting point, a principle that would act as a general guide to ensure that BC provincial puisne judges rank at a minimum higher than the much smaller Atlantic Provinces. In particular, we recommend that the Commission consider as a starting point, the principle that BC puisne judges should rank higher among the western provinces, namely Alberta, Saskatchewan and Manitoba, plus Ontario. Accordingly, we recommend the Commission consider a principled approach in addition to a numerical starting point for judicial salaries. This type of approach may promote a more meaningful “big picture” approach that may discourage disputes and further litigation.

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<sup>13</sup> Page 47 in the 2013 Report of the Judges Compensation Commission.

## **CHANGES IN THE COMPENSATION OF OTHERS PAID BY PROVINCIAL PUBLIC FUNDS IN BRITISH COLUMBIA**

This factor requires the Commission to consider changes in the compensation of others paid by provincial public funds in British Columbia. While not defined in the Act, these are civil servants employed by the public service. Civil servants in British Columbia regularly engage in negotiations with the BC government for remuneration, pensions and benefits.

The CBA recommends that the Commission approach this factor cautiously and with due regard to the constitutional factors discussed earlier in this submission. The *PEI Reference*, noted above, sets out several differences between judges (and judicial justices) and civil servants.

First, unlike civil servants, Provincial Court Judges and Judicial Justices are legally barred from collective bargaining with the BC government (para. 134).

Second, unlike civil servants, any reduction to judicial remuneration made by the BC government, including *de facto* reductions through the erosion of salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge or judicial justice (para. 135).

Third, the same principles that apply to salaries for judges and judicial justices apply equally to judicial pensions and other benefits (para. 136).

Fourth, judges and judicial justices, although they must ultimately be paid from the public purse, are not civil servants since civil servants are part of the executive, and judges and judicial justices, by definition, are independent of the executive (para. 143).

Fifth, judicial salaries must not fall below the basic minimum level of remuneration for the office of a judge or judicial justice (para. 135) that is “adequate, commensurate with the status, dignity and responsibility of their office” (para. 194).

It is noteworthy as well that in the *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)* (2012), *supra*, the BC government's "net zero" public sector compensation mandate as a basis of refusal of the 2010 Commission's recommendation for a salary increase for judges was not a rational reason and violated *Bodner* (paras. 106 and 107).

Unlike others paid by provincial public funds, judges are constitutionally guaranteed a minimum acceptable level of judicial remuneration. This is because judges ensure that the rule of law protects citizens against the arbitrary exercise of power and resolve disputes among citizens. Although sometimes referred to as a third level of government, judges are independent from government. In making these points, we wish to underscore the unique and important role the judiciary occupies in our democratic society requiring caution when comparing to civil servants.

One anomaly that should be noted is the linkage between legal counsel salary increases with Provincial Court judges' salary increases. Crown counsel and legal counsel are entitled to the equivalent of any Provincial Court judges' salary increase plus 1.27%. If, indeed the changes in the compensation of others paid by provincial public funds in British Columbia are to be sufficiently factored in, then the Provincial Judges salary increases will always and consistently fall behind salary increases paid to the Provincial Crown and legal counsel salaries. In our view, this linkage underscores a cautious approach to considering this factor.

While consideration of this factor is required by legislation, the existing constitutional jurisprudence mandates a cautious approach and suggests that in these circumstances, less weight be given to this factor.



## GENERALLY ACCEPTED CURRENT AND EXPECTED ECONOMIC CONDITIONS IN BRITISH COLUMBIA

The generally accepted current and expected economic conditions in British Columbia is a relevant factor for the Commission to consider.

The CBA recommends that the Commission be mindful of the constitutional principles at work as set out by the Federal Court of Canada in [Aalto v. Canada \(Attorney General\)](#), [2010] 3 FCR 312, 2009 FC 861 (CanLII) (affd. 2010 FCA 195) (“*Aalto*”). In *Aalto*, the Federal Court accepted the federal government’s evidence that the existence of extraordinary economic circumstances justified the federal government in not providing judicial compensation as required by *Bodner*; but the Federal Court elaborated that governments should only use extraordinary circumstances as a limited, short-term rationale to defer their constitutional duties to provide proper judicial compensation.

Currently in BC, there are no extraordinary economic circumstances that justify the BC government from not providing proper judicial compensation to Provincial Court Judges and Judicial Justices as required by *Bodner*.

The BC government currently has a balanced budget.<sup>14</sup> In April 2016, the [Dominion Bond Rating Service](#) confirmed BC’s AA (high) credit rating and [Standard and Poor’s](#) affirmed BC’s AAA credit rating and stable outlook.

As a result, the CBA suggests that the Commission find that the current and expected economic conditions in BC permit fair and reasonable judicial compensation for both Provincial Court Judges and Judicial Justices.

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<sup>14</sup> BC Balanced Budget 2016, [Budget Highlights](#) (February 16, 2016).

## **THE CURRENT AND EXPECTED FINANCIAL POSITION OF GOVERNMENT OVER THE THREE FISCAL YEARS THAT ARE THE SUBJECT OF THE REPORT**

The current and expected financial position of the government over the 3 fiscal years that are the subject of the report is a factor that focuses on the government's own current and projected financial condition.

Currently, the government of BC does not appear to be experiencing either budget constraints or financial emergencies. In addition to having a balanced budget, the BC government forecasts a strong financial position for the next 3 years and beyond:

Following an estimated increase of 2.4 per cent in 2015, the Ministry of Finance forecasts British Columbia's economy to grow by 2.4 per cent in 2016 and by 2.3 per cent annually from 2017 to 2020.<sup>15</sup>

As a result, the CBA recommends that the Commission find that the current and expected financial position of the government over the 3 fiscal years that are the subject of the report permits fair and reasonable judicial compensation for both Provincial Court Judges and Judicial Justices.

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<sup>15</sup> BC Balanced Budget 2016, [Budget and Fiscal Plan 2016/17 – 2018/19](#) (February 16, 2016) at page 67.

## **SUMMARY OF RECOMMENDATIONS**

In these Submissions, the CBA has made the following recommendations:

### **RECOMMENDATION #1:**

The CBA recommends that the Commission apply the applicable constitutional principles in order to ensure an effective process characterized by government goodwill, a depoliticized judicial compensation process and judicial independence through fair and reasonable judicial compensation.

### **RECOMMENDATION #2:**

The CBA recommends that the Commission consider the Provincial Court judge's as well as those of the Judicial Justices' work environments as the Province's "people's court", its heavy and complex caseload, the need for judges to travel and the unique demands imposed on Provincial Court judges in working with large numbers of unrepresented litigants.

### **RECOMMENDATION #3:**

The CBA recommends that the Commission consider the Judicial Justice' work environment, that, Judicial Justice are the face of the Provincial Court, are perceived by the public as judges, are often conducting hearings with lay litigants and have considerable responsibility for the legal rights and freedoms of ordinary people.

### **RECOMMENDATION #4:**

The CBA recommends that the Commission find that the government pay the costs incurred by the PCJA to prepare and make its submissions to the Commission.

**RECOMMENDATION #5:**

The CBA recommends that the Commission consider as a starting point where BC should rank among the provinces and territories in Provincial Court judicial salaries. The CBA suggests that the Commission consider as a starting point, a principle that would act as a general guide to ensure that BC provincial puisne judges rank at a minimum higher than the much smaller Atlantic Provinces. In particular, we recommend that the Commission consider as a starting point, the principle that BC puisne judges should rank higher among the western provinces, namely Alberta, Saskatchewan and Manitoba, plus Ontario. Accordingly, we recommend the Commission consider a principled approach in addition to a numerical starting point for judicial salaries.

**RECOMMENDATION #6:**

The CBA recommends that the Commission approach this factor-- changes in the compensation of others paid by provincial public funds in British Columbia--cautiously and with due regard to the constitutional factors.

**RECOMMENDATION #7:**

The CBA recommends that the Commission, regarding this factor-- generally accepted current and expected economic conditions in British Columbia—be mindful of the applicable constitutional principles. Further, the CBA suggests that the Commission find that the current and expected economic conditions in BC permit fair and reasonable judicial compensation for both Provincial Court Judges and Judicial Justices.

**RECOMMENDATION #8:**

The CBA recommends that the Commission find that the current and expected financial position of the government over the 3 fiscal years that are the subject of the report permits fair and reasonable judicial compensation for both Provincial Court Judges and Judicial Justices.

**CONCLUSION**

The CBA has a proud tradition of speaking out and protecting the independence of the judiciary.

Consequently, we urge this Commission to recommend to the government that the Provincial Court Judges be fairly and reasonably compensated in order to uphold, preserve and protect the independence of the judiciary in British Columbia.

All of which is respectfully submitted this 27<sup>th</sup> day of June 2016.

**ORIGINAL SIGNED BY**

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**Jennifer Chow**

President

Canadian Bar Association BC Branch