

SUBMISSION OF
THE PROVINCIAL COURT
JUDGES ASSOCIATION OF
BRITISH COLUMBIA

to the

2016 JUDICIAL COMPENSATION
COMMISSION

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Submission of
The Provincial Court Judges Association of
British Columbia
to the
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INTRODUCTION

1. The mandate of this Judicial Compensation Commission (“JCC”) is to report to the Minister and the Chief Judge regarding all matters respecting the remuneration, allowances or benefits for judges and judicial justices of the Provincial Court of British Columbia (also referred to as the “Provincial Court” or the “Court”) and to make recommendations in relation to those matters for the three year period from April 1, 2017 to March 31, 2020. To assist the Commission with this task, the Provincial Court Judges Association of British Columbia (hereinafter referred to as “the Judges’ Association”) provides the following submissions on behalf of judges of the Provincial Court.

*Judicial Compensation Act, Judges’ Association Documents, **Tab 1**, section 5(1)*

2. Part I gives an overview of the role and jurisdiction of the Provincial Court of British Columbia within the court system, as well as the nature of the work performed by Provincial Court judges. Part II contains an overview of the legal and legislative framework and the role of judicial compensation commissions generally. This section also explains the importance of the Commission being clear and detailed in its recommendations and reasoning.

3. Part III of the Submission addresses the theory and principles which the Judges’ Association submits should be considered by this Commission in light of the decisions of past commissions in British Columbia, the decisions of judicial compensation commissions in other jurisdictions and the applicable legislation.

4. Part IV details the Judges’ Association’s proposals for recommendations from this Commission with respect to salary and pension.

5. Part V addresses the Judges’ Association’s legal and other costs of preparing for and appearing before this Commission.

PART I: PROVINCIAL COURT OF BRITISH COLUMBIA - A BRIEF OVERVIEW

6. The Provincial Court of British Columbia has a long and remarkable history during which the Court has transformed itself from what was essentially a lay magistrate court with very limited jurisdiction, to a highly respected and modern trial court which is the face of justice for most British Columbians. As a testament to the respect it has earned within the justice system, the Court has gradually assumed jurisdiction over 98% of criminal cases in the province and continues to expand its family and civil law jurisdiction. As detailed below, judges of the Provincial Court of British Columbia have been repeatedly recognized for their innovative efforts to improve the delivery of justice services for all British Columbians.

7. Part I begins with a brief history of the Provincial Court of British Columbia with a focus on the Court as it exists today. It goes on to describe the Court's jurisdiction and then discuss some of the many practical initiatives undertaken in recent years to create further efficiencies in the system or to better address the specific needs of particular communities.

Historical Overview

8. While its history extends back to the fur trading era and the arrival of the first European settlers, the Provincial Court of British Columbia was officially established in 1969. At that time, the Court had its own Judicial Council and was led by a Chief Judge, whose duty was to oversee the administration of the provincial judiciary and the criminal, juvenile, family, and civil matters that were under the jurisdiction of the new court.

9. Since its creation, the Provincial Court has experienced immense and transformative change in both its jurisdiction and in the skills required of the judiciary. Section 6(2) of the *Provincial Court Act* requires prospective judges to have been a member of the Law Society of British Columbia for at least 5 years, but in practice the

requirement is for many more years of experience. The Judicial Council requires applicants to have at least 10 years at the Bar, and most newly appointed judges have practiced law for approximately 20 years prior to their appointment. The average age at appointment over the last three years is 55.3, and the average age of the judicial complement is approximately 59.4 for female judges and 62.2 for male judges. Of the 25 judges appointed in the years 2013 and onward, 12 were female, including seven of the 14 judges who were appointed in 2014.

10. As of April 1, 2016, the Court had 108 full-time judges and 47 part-time judges who work in the Senior Judges program. The Senior Judges program came about as a result of a joint submission presented to and adopted by the 2001 Judicial Compensation Commission. According to the *Provincial Court Act*, a judge who has at least 10 years of full-time service and who is at least age 55, may elect to become a Senior Judge. He or she retires for pension purposes, and is paid a salary of not more than 40% of a full-time judges' salary such that his or her total compensation does not exceed that of a full-time judge. Senior Judges may continue to work in this part-time capacity for up to seven years.

Provincial Court Act, R.S.B.C. 1996, Chapter 379, s. 9.1, Judges' Association Documents, **Tab 2**

11. Provincial Court judges preside in approximately 100 locations in 88 communities throughout the Province, with facilities ranging from the modern and high security courtrooms of the Surrey Provincial Court complex to multi-use community-based facilities such as the Community Centre in Lower Post. A map showing the many communities where the Provincial Court sits can be found at page 10 in the Provincial Court's Annual Report. To put this in context, the Supreme Court of British Columbia, which is the other trial court serving British Columbia, sits in only 32 locations.

Annual Report 2014-2015, Provincial Court of British Columbia, Judges' Association Documents, **Tab 3**, page 10

12. For judges serving outside the lower mainland, travel is a “constant and rigorous” feature of their work. For example, judges who are based in Smithers travel almost daily to courts in Hazelton, Houston and Burns Lake. Judges based in Kelowna travel to Princeton, Penticton, Vernon, Salmon Arm and Revelstoke. In other locations, such as Bella Bella, court is held on several consecutive days periodically throughout the year. Many of the circuits involve year-round travel through mountain passes on routes that take four hours each way.

2010 JCC Report, Judges’ Association Documents, **Tab 9**, page 19

Broad and Comprehensive Jurisdiction

13. As the 2004 JCC noted, “The Provincial Court of British Columbia has one of the broadest and most comprehensive jurisdictions of any Provincial Court in Canada”. Indeed, the 2013 JCC recognized, “The Provincial Court has been called the “People’s Court” because most citizens who come in contact with the justice system only experience it through the Provincial Court”.

2004 JCC Report, Judges’ Association Documents, **Tab 7**, page 12

2013 JCC Report, Judges’ Association Documents, **Tab 20**, page 15

14. A majority of the Court’s work involves criminal and youth matters, with the balance relating to child protection, family and civil matters. During the 2014-2015 fiscal year for instance, 219,752 cases were initiated in the Provincial Court. Excluding the 99,369 new traffic and bylaw cases, the total number of new cases was 120,356. Of those new cases, 54% involved adult and youth criminal cases (51% adult and 3% youth), 26% involved family matters, 11% involved civil matters, and 9% involved child protection matters. While the Court’s judicial justices hear most of the traffic and bylaw matters, judges do hear these matters in remote locations. Judges also hear traffic and by-law cases which involve the application of the *Charter of Rights*.

Annual Report 2014-2015, Provincial Court of British Columbia, Judges’ Association Documents, **Tab 3**, page 22

15. The Provincial Court commenced a similar number of cases in the 2014-2015 fiscal year as in the previous year, ending a five-year trend of fewer new cases each year. New cases in the adult criminal, family, and child protection divisions increased, while new cases in the civil and youth criminal divisions declined by 10 and 11 per cent respectively. Nonetheless, in the 2014-2015 fiscal year, the average number of cases per judge rose, from 961.1 in 2013-2014 to 996.3 in 2014-2015.

Annual Report 2014-2015, Provincial Court of British Columbia, Judges' Association Documents, **Tab 3**, page 6

Criminal and Youth Jurisdiction

16. Previous commissions have commented on the fact that the Provincial Court is the *de facto* criminal trial court of the province; as noted, the Court now adjudicates 98% of the criminal charges laid in British Columbia. The only significant exceptions are cases of (adult) murder charges and the consistently diminishing number of cases where the accused elects to be tried by a Supreme Court Judge with or without a jury. If a person chooses to be tried in Supreme Court, either the Crown prosecutor or the accused person may request that a preliminary inquiry or hearing be held in Provincial Court.

17. The Provincial Court has jurisdiction and adjudicates a full range of Criminal Code and drug offences. The offences include serious personal injury offences, serious economic and drug offences including conspiracies with complex evidentiary issues including the application of the Charter of Rights and Freedoms. The Supreme Court of Canada recently affirmed the broad jurisdiction of the Provincial Court, sitting as a trial court, in *R. v. Lloyd*, 2016 SCC 13, a case which originated in the Provincial Court in Vancouver. The Provincial Court has jurisdiction and conducts hearings pursuant to the Dangerous and Long Term Offender provisions of the Criminal Code. These are

amongst the most complex proceedings provided for in the Code potentially involving the most serious sentence provided for in Canada.

18. The Provincial Court has jurisdiction over criminal matters involving young offenders by virtue of s. 13 of the *Youth Criminal Justice Act*. The youth cases that come before the Provincial Court cover all offences, from murder to mischief. The only exceptions are when a young person elects to be tried by a Supreme Court judge or a judge and jury on a very limited number of offences.

19. The *Youth Criminal Justice Act* dramatically changed the sentencing options available for youth. Provincial Court judges must be knowledgeable about community based resources when rendering their decisions. They must be willing to request involvement from a wider range of persons in the community and to work with them in formulating the most appropriate sentence for a youth.

Family Law Jurisdiction: Child Custody, Access, and Support

20. The Provincial Court has concurrent jurisdiction with the Supreme Court of British Columbia under the *Family Law Act* in all matters concerning family maintenance and child custody, guardianship, and access. The Court's jurisdiction in respect of child protection under the *Child, Family and Community Service Act* is exclusive, with the exception of protective intervention orders and restraining orders. The Court's volume of family cases is roughly equal to that of the Supreme Court, notwithstanding that the Provincial Court does not have jurisdiction to grant divorces, make orders dividing matrimonial property, or relating to the occupation of the family home (apart from ancillary orders relating to occupation under the *Family Law Act*).

21. Provincial Court judges also hear emergency *ex parte* applications for protection orders when spousal violence has taken place or is threatened. These applications are usually heard within hours of the application being made at the Court Registry and other scheduled matters will be stood down to accommodate the emergency.

22. The number of family cases initiated in the Provincial Court has increased significantly in the last 20 years. This caseload increase has caused added pressure on the Court, with only minor relief offered by new rules and processes in family and child protection matters. The emphasis now is on providing resources to families through parenting education, the involvement of Family Justice Counsellors, as well as through mediation by judges and other professionals. As a result, prior to holding a hearing on any family application, the Court may require the parties to participate in mediation, failing which it will order them to appear for a family case conference held by a judge. This focus on mediation and case conferences not only promotes negotiated solutions to family disputes, but frees up court time for only those matters that truly require it.

23. In a further effort to improve the delivery of family law services, the Court recently implemented the Surrey Family Court Project, the goal of which is to achieve efficiencies in the production of provincial family court orders, reduce the time between pronouncements and filing of the orders, and reduce the duplication of work. The Project, jointly undertaken by the Court and the Court Services Branch, is a sub-project of broader e-court initiatives that are also being jointly developed.

24. Only BC, Alberta, Quebec and the Northwest Territories have granted this wide ranging family jurisdiction to Provincial Court judges.¹

Child Protection Jurisdiction

25. The *Child, Family and Community Service Act* provides that children may be removed from their families where provincial officials have reason to believe that the children are not being adequately or properly cared for. In many cases, poverty and mental disability are contributing factors. In order to better determine where the best interests of children may lie, the Provincial Court judges have determined that all parties must first attend what is called a Family Case Conference. At this conference, the

¹ In some other jurisdictions, including Manitoba and Newfoundland, judges of the Provincial Court do exercise family law jurisdiction but only outside of the main metropolitan centres.

protection authorities and the parents, under the guidance of a judge, are often able to reach a solution which avoids the necessity of a contested hearing. In those cases where a consent solution has not been achieved, the matter will be scheduled for trial.

26. While there are less child protection cases than criminal and civil cases, the time spent on each case is, on average, many times greater than that spent on criminal or civil cases. Where the issue is whether the child should be permanently removed from the parents, the trial will typically take at least four court days.

Annual Report 2014-2015, Provincial Court of British Columbia, Judges' Association Documents, **Tab 3**, pages 22-23

Civil Jurisdiction

27. The Provincial Court’s civil jurisdiction currently extends to claims up to \$25,000 for debt recovery, damages of personal property, and specific performance of contracts. As part of its civil jurisdiction, the Court deals with all torts of negligence, including most notably personal injury and all forms of breach of contract. The monetary limit of the jurisdiction has increased over the years, and for some time it has been anticipated that it will increase again to \$50,000 (by Order in Council).

28. BC is among six other jurisdictions that have extended civil jurisdiction to their Provincial or Territorial Courts. A table of the relevant jurisdictions and the monetary limit of the civil jurisdiction exercised by Provincial or Territorial Court judges is set out below:

Newfoundland & Labrador	\$25,000
Yukon	\$25,000
Saskatchewan	\$30,000
Northwest Territories	\$35,000
Alberta	\$50,000
Quebec	Small Claims Division: \$15,000 Civil Claims: \$85,000 (excluding certain claims)

29. In 1991, the *Small Claims Act and Rules* came into force and introduced a simplified, plain-language process for litigants without a lawyer. A noteworthy feature was the provision for mandatory settlement conferences, which built elements of mediation into the Court's civil process for the first time. British Columbia's progressive civil claims procedure initiatives won the 1993 Justice Achievement Award of the National Association for Court Management.

30. There has for some time been recognition among members of the bench, bar, government, and the public that it is too costly for persons to litigate claims for less than \$100,000 in the Supreme Court of British Columbia. As a result, the nature of litigation in the civil division of the Provincial Court has changed. It is no longer a court which only deals with simple disputes among self-represented litigants, but includes more complex contractual disputes.

31. In many parts of the province, the average number of hours per trial has increased, and litigation has become more complex. To help address this issue, in most of the major centers pre-trial conferences are now mandatory for trials set to last one day or longer. During these conferences judges will make orders regarding various procedural matters such as the production of documents, exchange of witness lists and other matters with a view to increasing trial efficiency. The judge will also canvass the parties' interest in mediation and may undertake a limited form of discovery, all of which is designed to save valuable time for the Court and the parties.

32. Under the Small Claims Rules developed by the Provincial Court, every party to a civil dispute must together attend a settlement conference, presided over by a judge. Judges are well trained in mediation skills, and will assist the parties in trying to reach a settlement at this conference. This form of judge-led mediation has proven quite successful in resolving disputes at an early stage, and ensures that court time is conserved for those matters which require adjudication. The Court also continues to

expand its use of adaptive technologies as a way to keep costs down for litigants, such as by permitting out of town litigants to attend by telephone or computer-facilitated video conferencing.

33. Due to a particularly heavy caseload of civil matters entering the justice system in the Vancouver District, the Court initiated a project to streamline the process for certain of these claims in order to promote early resolution or to expedite the trial process. The Internal Audit Advisory Service Division of the Ministry of Finance conducted a review of the justice system in British Columbia in September 2011, and concluded that an estimated 1600 court hours and the equivalent of 2 judges, totalling \$0.67 million had been saved as a result of this pilot project.

34. In addition, the Provincial Court had the benefit of a Civil Mediation Program, which was operated by Mediate BC. Unfortunately, the funding for this program, which had been provided directly from the Province, has been discontinued and those services are now provided by the Court.

35. The Government is now in the process of creating a Civil Resolution Tribunal (the "CRT"), Canada's first online tribunal, the presiding officer of which will not be a judge. The CRT is not yet functioning and is not expected to be fully operational until 2017. It is anticipated the CRT will deal with strata property disputes and civil claims of \$10,000 or less. Initially, parties to a dispute would voluntarily proceed to the CRT but the intention is that the process will ultimately become mandatory for claims within its jurisdiction. If a party disputes a small claims decision of the CRT, the matter would proceed to Provincial Court, which would conduct a hearing *de novo*.

36. While the impact on the volume and type of work performed by the Provincial Court is still unknown, it may be that the CRT will reduce the number of civil claims being heard by the Provincial Court. If it functions as it is presently designed, the result may also be to broaden the jurisdiction of the Provincial Court by conferring on it an appellant function.

Continuing Judicial Education

37. The judges of the Provincial Court of British Columbia are committed to engaging in continuing judicial education in order to ensure, as the 2010 JCC put it, that “they are well-informed on the myriad of legal issues which arise in their courtrooms, and upon which they must make difficult and often instantaneous decisions.”

2010 JCC Report, Judges’ Association Documents, **Tab 9**, page 21

38. Continuing education for judges has three major components:

- (a) five days of mandatory educational programming annually, sponsored and organized by the Office of the Chief Judge and the Provincial Court Judges Association;
- (b) online updates from Office of the Chief Judge (OCJ) legal officers, including progress of federal and provincial legislation; weekly Continuing Legal Education (CLE) updates, and various bulletins and information from government and private sources such as Canada Law Book and Carswell; and
- (c) up to five days of paid educational leave annually to attend conferences and educational seminars sponsored by, among others, the National Judicial Institute (NJI). Costs and travel expenses are paid from a judge’s professional development allowance.

39. The program of five days of mandatory continuing judicial education is designed and delivered through the Judges’ Association’s Education Committee. That Committee, working in conjunction with the Office of the Chief Judge, organizes two conferences each year, held in the spring and fall. Each conference involves a two and one half day program, held from a Thursday through a Saturday morning. These

conferences consist of education and training on various aspects of the law and procedure.

40. While the continuing education conferences organized by the Judges' Association's Education Committee include presentations by lawyers, other professionals and academics, a large part of the programming is delivered by judges to judges. The conferences are designed to be intensive, with full and tightly managed agendas.

41. The Education Committee also maintains a library of past conference materials and publishes new materials for each conference, currently in hard copy and CD versions. The Committee monitors current legal developments and trends, as well as subjects previously presented, in order to ensure that upcoming programming is always relevant and current.

42. The Chief Judge formed a Criminal Law Committee in 2014 to update members of the Court on legislative and case law changes in the criminal law and to provide advice and assistance on criminal and regulatory matters in the Court's jurisdiction. Two committees with a similar advisory mandate continue to operate in other fields of law: the Family Law Committee and the Civil Law Committee.

43. In addition to their judicial work in and out of the courtrooms, Provincial Court judges volunteer in their non-sitting time to serve on such diverse committees as justice reform, pandemic and emergency planning, public legal education, judicial education reform, community outreach, and law student moot competitions. BC judges have authored important judicial resource material, such as the Impaired Driving Handbook now published by the National Judicial Institute and used by judges at both trial levels across Canada.

Innovation and Reform

44. Past JCCs have consistently recognized that the judges of the Provincial Court of British Columbia are leaders in reform and innovation in the interests of the public they serve. After reviewing a number of the recent initiatives the Court undertook to enhance its efficiency and effectiveness, the 2013 JCC Report stated:

“These initiatives demonstrate the innovation, flexibility, and hard work of BC Provincial Court judges 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.”

2013 JCC Report, Judges’ Association Documents, **Tab 20**, page 19

45. The 2010 JCC Report noted that members of the Court, “both through the Office of the Chief Judge and upon the initiative of individual judges, have shown strong leadership in making the Court more responsive to the needs of the people who appear before it, improving access to justice, increasing productivity and delivering efficiencies in the use of the Court’s time.” The 2007 JCC Report heard evidence of a variety of reforms addressing systemic inefficiencies and the development of electronic bench books. The 2004 JCC described the judges as “leaders in procedural reform”, referring to such initiatives as the Criminal Caseflow Management Rules and the implementation of mandatory mediation in family, child protection and civil cases. Similarly, the 2001 JCC described Provincial Court judges as “leaders in bringing improvements to the system of justice delivered by this Court”.

2010 JCC Report, Judges’ Association Documents, **Tab 9**, page 21

2007 JCC Report, Judges’ Association Documents, **Tab 8**, page 12

2004 JCC Report, Judges’ Association Documents, **Tab 7**, page 12

2001 JCC Report, Judges’ Association Documents, **Tab 6**, page 11

46. Indeed, over the years, the Provincial Court of British Columbia has pioneered mediation in civil, family, and child protection cases in Canada, introduced criminal

process rules, and started the first Community Court in Canada. The Provincial Court of British Columbia continues to focus on new initiatives to improve the justice system, with several initiatives progressing since the 2013 JCC made its Report.

47. Criminal reforms focused on reducing the time to trial delays, by having judges focus more time on substantive matters, have spread from a pilot in Victoria to seven other judicial districts. For the 2014-2015 fiscal year, the Court met or outdid the time-to-trial targets with respect to criminal cases in most locations throughout British Columbia. Time to trial in family law, child protection, and small claims cases continued to be above the standard in most regions of the province, as well as overall. The time to trial for lengthy trials has decreased or held steady in all categories except civil matters. The Provincial Court will continue to focus efforts to reduce the time to trial in its non-criminal divisions. Regular updates can be viewed on the *Court Reports* page of the Court's website.

Annual Report 2014-2015, Provincial Court of British Columbia, Judges' Association Documents, **Tab 3**, page 29

48. The Provincial Court Backlog Reduction Project ("BRP") was a joint effort in the 2013/14 fiscal year between the Ministry of Justice and the Office of the Chief Judge to reduce current backlogs in criminal and child protection matters before the Provincial Court. The Chief Judge of the Provincial Court and the Ministry agreed to target specific court locations with 170 additional judge sitting days, divided equally between criminal and child protection matters (i.e., 85 days each). The project showed that adding additional court days and supporting resources can have an impact in criminal cases, but that a more complex intervention is required to have a significant impact in child protection cases.

49. The Provincial Court completed the rollout of a new trial scheduling initiative to speed case management and allow more efficient scheduling. This has required and it has received the commitment of all of the judges of the Court to ensure its success. It is anticipated that the Chief Judge will address the scheduling initiative in his Submission.

50. Implementation of new processes under the *Inter-jurisdictional Support Orders Act* began, with the objective of helping parents who live in different jurisdictions reach an agreement on child support. Streamlined processes and specially trained staff will attempt to ensure that issues can be decided in a single court appearance.

51. The Court has continued to expand video links from the Justice Centre in Burnaby to other locations, allowing access to bail hearings and other matters in remote locations. In 2014/15, video technology saved almost 23,000 prisoner transports which created savings in time and cost not only for the Court but also for other participants in the justice system.

52. The Office of the Chief Judge, which is the executive and administrative headquarters of the Provincial Court system, moved from its former location in a Vancouver office building to the Robson Square Courthouse. In addition to reducing costs, the relocation allows senior managers and staff to work more closely with other levels of court and other participants in the justice system.

53. The Provincial Court also launched several initiatives in the 2014-2015 fiscal year to help meet its goals of accessibility and openness. These include:

- the redesign of the Court's website to provide simpler language and navigation as well as additional resources for users of the Court;
- an online news service, issuing short news bulletins and weekly articles at www.provincialcourt.bc.ca/eNews; and
- a Twitter feed with the username @BCProvCourt (twitter.com/BCProvCourt) to provide updates about B.C.'s justice system, recent judgments, education resources and other stories.

54. The number of visits to the Court's website totaled 250,509 in 2014-2015, including 1,114,355 page views.

55. Leaders from British Columbia's justice system created a B.C. Access to Justice Committee in 2014 to find ways to remove barriers to justice. Members from government, the bench, the bar and other justice organizations will determine priorities for action to respond to unmet legal needs and identify expertise within the sector for carrying out these priorities.

56. Vancouver's Downtown Community Court ("DCC") first opened in September 2008 as a partnership between the Court and justice, social, and health services agencies which all shared the common goals of reducing crime, improving public safety, providing integrated justice, and requiring accountability. In 2014, the Court received visits from a variety of individuals and groups interested in the innovative way in which the DCC operates. Visitors included the Chief Justice of the Supreme Court of Canada, delegations from countries such as China, Japan, Colombia and Scotland, and visits from students attending several local post-secondary institutions. The DCC continues to serve as a model from which specific innovations or programs may be adopted in other locations throughout the province.

57. The Victoria Integrated Court (the "VIC") was created in 2010 in response to the chronic demands placed on the justice, health and social systems by homeless, mentally disordered and/or substance-abusing individuals. The VIC strives to deal with criminal charges while at the same time dealing with health and social needs of offenders. In this Court, community service is often ordered as a part of an offender's sentence. It operates in a manner similar to the DCC, except that it is fully functional within the existing criminal remand court in Victoria, rather than as a separate entity.

58. In 2014-2015, the VIC continued to operate well above its capacity. Community teams supported 82 people in the court, including 13 who are developmentally delayed and five who are brain injured, similar to prior years. The high level of monitoring and support requires significant resources, including court time. As a result, the VIC has been reducing the number of case reviews to focus on those where the greatest effect

is expected. At the same time, the Court ordered a greater number of sentences (137) in 2014-2015 than in 2013 (117).

Annual Report 2014-2015, Provincial Court of British Columbia, Judges' Association Documents, **Tab 3**, page 37

59. A specialized Domestic Violence Court was originally initiated in 2010 in order to more effectively handle the disproportionate number of domestic violence cases within the community of Duncan. The Court, through the leadership of the Late Judge Josiah Wood, enlisted the cooperation of other important stakeholders, including the police, community leaders, and social service agencies, in bringing in a more efficient and consistent approach to managing issues of domestic violence.

60. Since 2010, the Domestic Violence Court has continued to innovate in order to better service the communities within which it operates. In 2012, the First Nations Domestic Violence Court was established in the Coast District, serving Whistler, Squamish and the North Shore. This Court provides support and healing to help offenders in their rehabilitation and to reduce recidivism. It also strives to repair the harm done to victims and the community and encourages the local First Nations to contribute to the proceedings. In 2013, a similar Court was established in Nanaimo through the collaborative effort of the local coordinating committee for domestic safety.

61. In 2012, the Court initiated a new process for domestic violence files in the criminal court in Kelowna and Kamloops in order to support early trial dates and ensure faster justice for affected families. That process now exists in Penticton as well.

62. Other recent reforms include a successful pilot of a First Nations court presided over by British Columbia's first female aboriginal jurist. Given the success of that pilot, First Nations courts and/or specialized dockets now operate in New Westminster, Kamloops, North Vancouver and Duncan. The First Nations courts provide a holistic and restorative approach to sentencing, incorporating aboriginal practices. The court

has the benefit of hearing about an offender's current needs for housing, health services and the views of the community toward the offence.

63. As is evident from the foregoing, the judges of the Provincial Court of British Columbia continue to explore new and innovative ways to deliver justice in a timely and cost efficient way to the citizens of this province. The Court continues to work with the other branches of government in an effort to ensure that the Government's policy objectives can be achieved in a manner that is consistent with judicial independence.

PART II: HISTORY AND OVERVIEW OF THE COMMISSION PROCESS IN BC: LEGAL AND LEGISLATIVE FRAMEWORK

Judicial Compensation Commissions: An Overview

64. Every federal, provincial and territorial jurisdiction across Canada has some form of constitutionally established administrative body responsible for making recommendations to government about what is appropriate compensation for judges for the period of that commission's mandate. In BC, that administrative body is now called a "Judicial Compensation Commission" ("JCC"), combining what was formerly the Judges' Compensation Commission with the Judicial Justices Compensation Commission. Certain jurisdictions use other terms such as "Judicial Remuneration Commission" or "Salary and Benefits Tribunal".

65. Each jurisdiction has designed its commission process slightly differently with respect to such things as the timing of the commissions, the length of their respective mandates, the persons eligible for appointment to the commission and to what degree the commission's recommendations are binding on government.

66. We refer below to some of the past circumstances and litigation that has occurred in British Columbia. Such information is important to an understanding of the proper historical context of this Commission, but it is also particularly useful in this instance given that the outcome of the 2013 JCC process remains unknown.

67. While some jurisdictions (including BC) had some form of a commission process in place prior to 1997, the processes as they now exist largely came into being as a direct result of the 1997 Supreme Court of Canada decision generally known as the *PEI Reference* case. In that decision, the Supreme Court considered cases which originated from Alberta, Manitoba and PEI, all of which concerned the independence of the judiciary. Then Chief Justice Lamer commented on the "national scope" of the issues before the Court, which demonstrated that the "proper constitutional relationship

between the executive and the provincial court judges ... has come under serious strain”.

Reference re Remuneration of Judges of The Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Ekmecic; R. v. Wickman; Manitoba Provincial Judges' Association v. Manitoba (Minister of Justice), [1997] 3 S.C.R. 3, (hereinafter referred to as “*PEI Reference*”), Judges' Association Documents, **Tab 10**, para 7

68. The Provincial Judges' Association of Manitoba challenged the constitutionality of the reduction in salary for provincial judges in Manitoba that resulted from the enactment of Bill 22, *The Public Sector Reduced Work Week and Compensation Management Act*. The judges alleged that the Bill infringed judicial independence, as protected by section 11(d) of the *Charter*, and argued that the salary reduction was unconstitutional because it effectively suspended the operation of the Judicial Compensation Committee, a body created under the then *Provincial Court Act*. The judges also alleged that the actions of the Manitoba government in ordering the withdrawal of court staff and personnel on unpaid days of leave (“*Filmon Fridays*”) interfered with judicial independence. Further, the Association alleged that the government had interfered with the independence of the judiciary by exerting improper pressure in the course of salary discussions in an effort to convince the judges not to launch the constitutional challenge.

PEI Reference, supra, Judges' Association Documents, **Tab 10**, paras 21-22

69. In Alberta, the situation was slightly different in that the cases eventually determined by the Supreme Court of Canada originated with three accused who challenged the constitutionality of their trials, alleging in essence that because of what was effectively a 5% salary reduction imposed by the government on Provincial Court of Alberta judges' salaries by *Alberta Regulation 116/94*, the Provincial Court was no longer an independent tribunal as required by section 11(d) of the *Charter*. Further, the accused challenged the constitutionality of changes to the judges' pension plan that

reduced the base salary for calculating pension benefits and limited cost of living adjustments to 60% of the annual percentage change in the Consumer Price Index. The accused also challenged the constitutionality of the Attorney General's power to designate court sitting days and judges' place of residence.

PEI Reference, supra, Judges' Association Documents, **Tab 10**, paras 16-18

70. In the background of the Alberta case, and referred to by Lamer CJC in his reasons, were the remarks of then Premier Ralph Klein who, in reference to a judge of the Provincial Court, who had declared that he would not sit in protest over his salary reduction, indicated that the judge should be "very, very quickly fired".

PEI Reference, supra, Judges' Association Documents, **Tab 10**, para 19

71. In Prince Edward Island, the case arose as a reference by the Lieutenant Governor, who referred two constitutional questions to Court after numerous accused challenged the constitutionality of the Provincial Court of Prince Edward Island following the passage of provincial legislation which reduced the pay of judges.

PEI Reference, supra, Judges' Association Documents, **Tab 10**, paras 11-13

72. The decision in *PEI Reference* was a major turning point in the history of the courts in Canada, as it underscored the importance of judicial independence and, in particular, the financial security aspect thereof. Lamer CJC outlined the three aspects of judicial independence which include financial security, administrative independence and security of tenure. According to Lamer CJC, a JCC process is necessary to ensure financial security for judges.

73. As the Supreme Court of Canada reiterated in its 2005 decision, in a case we will refer to as *Bodner*:

... financial security embodies three requirements. First, judicial salaries can be maintained or changed only by recourse to an independent commission. Second, no negotiations are permitted between the judiciary and the government. Third, salaries may not fall below a minimum level.

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, (hereinafter "Bodner"), Judges' Association Documents, **Tab 11**, para 8

74. In *PEI Reference*, as well as in *Bodner*, the Supreme Court of Canada outlined the flexible requirements for JCC processes, which must be independent, objective and effective. With respect to the requirement of independence, Lamer CJC explained in *PEI Reference*:

The rationale for independence flows from the constitutional function performed by these commissions - they serve 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. It would undermine that goal if the independent commissions were under the control of the executive or the legislature.

PEI Reference, supra, Judges' Association Documents, **Tab 10**, para 170

75. The requirement of objectivity is described as follows:

They must make recommendations on judges' remuneration by reference to objective criteria, not political expediencies. The goal is to present "an objective and fair set of recommendations dictated by the public interest" ... I recommend (but do not require) that the objectivity of the commission be ensured by including in the enabling legislation or regulations a list of relevant factors to guide the commission's deliberations. These factors need not be exhaustive. A list of relevant factors might include, for example, increases in the cost of living, the need to ensure judges' salaries remain adequate, as well as the need to attract excellent candidates to the judiciary.

PEI Reference, supra, Judges' Association Documents, **Tab 10**, para 173

76. Lamer CJC went on to discuss the requirement of effectiveness which he suggested must be guaranteed in a number of ways:

First, there is a constitutional obligation for governments not to change (either by reducing or increasing) or freeze judicial remuneration until they have received the report of the salary commission. Changes or freezes of this nature secured without going through the commission process are unconstitutional. The commission must convene to consider and report on the proposed change or freeze. Second, in order to guard against the possibility that government inaction might lead to a reduction in judges' real salaries because of inflation, and that inaction could therefore be used as a means of economic manipulation, the commission must convene if a fixed period of time has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors, and issue a recommendation in its report. Although the exact length of the period is for provincial governments to determine, I would suggest a period of three to five years. Third, the reports of the commission must have a meaningful effect on the determination of judicial salaries.

PEI Reference, supra, Judges' Association Documents, **Tab 10**, paras 174-175

77. And at paragraph 287 (2), Lamer CJC wrote:

Provinces are under a constitutional obligation to establish bodies which are independent, effective, and objective, according to the criteria that I have laid down in these reasons. Any changes to or freezes in judicial remuneration require prior recourse to the independent body, which will review the proposed reduction or increase to, or freeze in, judicial remuneration. Any changes to or freezes in judicial remuneration made without prior recourse to the independent body are unconstitutional. [emphasis and underlining added]

PEI Reference, supra, Judges' Association Documents, **Tab 10**

78. Lamer CJC explained that while the effectiveness requirement could mean that the commission's report is binding on government, a variety of models would be consistent with judicial independence. Where the JCC recommendations were not

binding, the government could refuse to implement the recommendations if it gave legitimate reasons and could justify its decision, if necessary in a court of law.

PEI Reference, supra, Judges' Association Documents, **Tab 10**, paras 180-183

79. The effectiveness of the JCCs across Canada became an issue from their creation and the meaning of the test created in the *PEI Reference* decision was debated almost from the moment the decision was released. In many jurisdictions, governments decided for various reasons not to follow the recommendations of their JCCs. The relevant judges' associations (or association of justices of the peace) then challenged those government decisions based on the principles outlined in *PEI Reference*. Indeed, litigation arose in almost every jurisdiction across Canada. Many of these cases proceeded before the relevant Court of Appeal, including in British Columbia, as is discussed further below.

80. In 2005, the Supreme Court of Canada issued its decision in *Bodner*, which involved cases from four jurisdictions, Alberta, Ontario, Quebec and New Brunswick. In all of the cases, issues had arisen from the failure of a government to implement a JCC report. The common issue in all of the cases was essentially "what is the appropriate test to be applied by a reviewing court to a government's response to the recommendations of a JCC?"

Bodner, supra, Judges' Association Documents, **Tab 11**

81. In *Bodner*, the Supreme Court of Canada reiterated that the JCC process is necessary in order to ensure the financial security of the judiciary. The Court described the focus of a JCC as being "on identifying the appropriate level of remuneration for the judicial office in question." The Court clearly enunciated that the task of a JCC is unique. As the Court emphasized, "the process is neither adjudicative interest arbitration nor judicial decision making". Rather, a JCC must focus on what is

appropriate remuneration for judges in light of all the factors identified in section 5 of the *Judicial Compensation Act*, S.B.C. c.59. We discuss those factors in much detail below.

Bodner, supra, Judges' Association Documents, **Tab 11**, para 14
Judicial Compensation Act, Judges' Association Documents, **Tab 1**

82. The Supreme Court of Canada also clarified the test to be applied by a reviewing court when a government fails to implement the recommendations of a JCC Report. According to the Court in *Bodner*, a reviewing court must consider the following questions.

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?
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?

Bodner, supra, Judges' Association Documents, **Tab 11**, para 31

83. In the years since *Bodner*, litigation has become a less frequent occurrence and, in recent years, has been focussed in only a few jurisdictions. While the timing of the JCC process is slightly different in each jurisdiction, considering the last two commission processes in each jurisdiction, there has been litigation only in British Columbia (2010 JCC - twice - and the 2013 JCC) and Manitoba (2014 JCC), although litigation is also anticipated in Newfoundland & Labrador over the recent rejection of the salary recommendations of the 2014 Salary and Benefits Tribunal.

Importance of the Report and its Reasoning

84. One lesson from the *Bodner* case and, indeed, all of the litigation across the country over the failure of governments to implement JCC reports, is that it is crucial to the effectiveness of the process for a JCC to write a detailed report which contains specific recommendations supported with strong and well-articulated reasoning. A JCC which supports each of its recommendations with full and detailed reasoning ultimately demands an equally reasoned response from government. In practice, it places a greater burden upon a government disinclined to follow the recommendations of the JCC and makes it less likely that those recommendations may be rejected on legitimate grounds.

85. In terms of the recommendations themselves, it is important that the JCC specify:

1. the effective date of the recommendation (e.g. April 1, 2017);
2. to whom it applies (e.g. all full-time Provincial Court judges as at April 1, 2017); and
3. the details of each aspect of the recommendation.

86. Many issues have arisen over the years in a number of different provinces resulting from a lack of clarity in JCC reports when JCCs have, for instance, failed to mention specific effective dates for some of the recommendations. This has led to confusion and periods of uncertainty for both the affected judges and the civil servants who are charged with implementing the report. While acknowledging that it is not always an easy task, we respectfully request that this Commission express its recommendations with precision to the greatest degree possible. The Judges' Association has attempted to set out those types of details in its submissions below.

History of Judicial Compensation in British Columbia

87. The first Judicial Compensation Committee in British Columbia was held in 1995, shortly before the decision of the Supreme Court of Canada in *PEI Reference*. From 1969, when the Provincial Court was established, until 1984, compensation for Provincial Court judges was the subject of discussion with Government. This changed somewhat in 1985, when the Government amended the *Provincial Court Act* to provide for an “Advisory Committee”. The judges, who had not been consulted about the amendments, had a number of difficulties with this approach including that Committee members were appointed by the Government and the Committee’s recommendations had no binding effect.

1998 JCC Report, Judges’ Association Documents, **Tab 5**, page 9

88. In 1992, the Compensation Advisory Committee was given an expanded mandate which included not only making recommendations about appropriate remuneration, but also recommendations about a new process for establishing judicial compensation. The Advisory Committee recommended that a five person panel (two members to be appointed by the Attorney General, two by the judges, and a chair appointed by the members) be held at three year intervals, in order to make binding recommendations about appropriate compensation. Alternatively, and “reluctantly”, the 1992 Compensation Advisory Committee recommended that the Government, as an alternative to binding recommendations, only be permitted to reject the recommendations if it deemed them “unfair and unreasonable”. This alternative was adopted and this basis for rejection of the recommendations remained in the *Judicial Compensation Act* until it was removed in a 2015 amendment to the Act. This was likely because, by that point, the test had been effectively superseded by the *Bodner* test discussed above.

1995 Judicial Compensation Committee (“1995 JCC”)

89. The 1995 JCC was the first commission to make recommendations under the new system. It recommended a salary increase for each year within its mandate culminating in a 1997 salary of \$132,000. The recommendations were made with dual objectives of accounting for increases in the cost of living and “to help reduce the differential between salary levels of judges of the Provincial Court and the Supreme Court of British Columbia”.

1995 JCC Report, Judges’ Association Documents, **Tab 4**, page 29

90. The 1995 JCC also recommended no change to the differentials paid to administrative judges, that a joint study be conducted regarding an appropriate pension for judges, and that a professional development fund should be established and administered by the Chief Judge. Finally, the 1995 JCC recommended that since judges were by that time appointed to age 70, coverage for life insurance and long term disability should be extended to age 70 from age 65.

91. The recommendations were rejected by Government as being “unfair and unreasonable”, and salaries were frozen at the 1993 level of \$118,400 throughout the years 1995, 1996 and 1997. The Judges’ Association challenged the rejection in the BC Supreme Court. The judges were unsuccessful at first instance, but the Court of Appeal ordered that the matter be reconsidered by the Legislature. The Legislature again rejected the recommendations, with the result that judicial salaries were frozen for five years (1993 to 1997).

Provincial Court Judges’ Assn of British Columbia v. British Columbia (Attorney General), [1998] B.C.J. No. 1230 (C.A.), Judges’ Association Documents, **Tab 12**

92. Judge Wallace G. Craig filed a petition with the BC Supreme Court alleging, among other things, that the Government’s failure to extend the group life insurance benefits to judges over the age of 65 up to their mandatory retirement at age 70 violated

section 15(1) of the Charter of Rights and Freedoms by imposing discrimination based on age and was not saved by section 1. That aspect of the case was successful, and Mr. Justice Parrett made a declaration to that effect. Thereafter, life insurance was extended to judges up to age 70.

Craig v. British Columbia, [1997] B.C.J. No. 1417, 40 B.C.L.R. (3d) 289, Judges' Association Documents, **Tab 13**

1998 Judicial Compensation Committee (“1998 JCC”)

93. The 1998 JCC was established after the Supreme Court of Canada issued its decision in *PEI Reference*, but before the Court of Appeal issued its decision in the challenge brought by the Judges' Association to the Government's rejection of the 1995 JCC's recommendations. The five person panel was chaired by Ted Hughes, Q.C., as he then was. The 1998 JCC delivered its report on April 28, 1998.

1998 JCC Report, Judges' Association Documents, **Tab 5**

94. In making its salary recommendations, the 1998 JCC stated that it “agrees in principle with the statement by the 1995 committee that Provincial Court judges should be paid a salary that reaches 90% of that paid to federal appointed judges but accepts that, given current economic realities in British Columbia, and given that financial obligations should not be determined by another level of government, this may not be readily achievable”. It recommended the following salary levels which were also designed to recognize “the expanded role of the Provincial court and the enhanced quality of service that it provides to British Columbia”:

Effective January 1, 1998: \$138,000
Effective January 1, 1999: \$139,000
Effective January 1, 2000: \$144,000

1998 JCC Report, Judges' Association Documents, **Tab 5**, page 22

95. The 1998 Committee recommended a professional allowance for all judges in the amount of \$2,000. Other recommendations included that miscellaneous working benefits should be consolidated into a regulation under the *Provincial Court Act* and that the Judges' Association should be reimbursed for the expense of a consultants' report on pensions.

96. In respect of its salary recommendations in particular, the 1998 Committee made a point of stating, "A decision that sets 1998 salaries at a figure less than this committee's recommendation will create serious morale problems in the court, which will inevitably impair the quality of justice delivered to British Columbians." The recommendations of the 1998 JCC were accepted by the Government, ending the five year freeze that predated that Judicial Compensation Committee.

1998 JCC Report, Judges' Association Documents, **Tab 5**, page 23

2001 Judicial Compensation Committee ("2001 JCC")

97. The third Judicial Compensation Committee (the "2001 JCC") was chaired by Charles Connaghan, C.M.. The Report was issued on April 30, 2001 and made recommendations for the period January 1, 2001 to December 31, 2003.

2001 JCC Report, Judges' Association Documents, **Tab 6**

98. The 2001 JCC did not take a position on the appropriate relationship between the salaries of provincially and federally appointed judges in British Columbia, but considered it "appropriate and useful" to make comparisons with other provinces including particularly Alberta and Ontario. The recommendations included an increase in salary to \$155,000 effective January 1, 2001, \$158,000 effective January 1, 2002 and \$161,250 on January 1, 2003.

99. The 2001 JCC recommended significant changes to the judicial pension, including the adoption of a 3% accrual rate. It also recommended increases to the long

term disability benefits for judges, gave its endorsement to the Judiciary Injury Reimbursement Program, and recommended reimbursement of the Judges' Association's expenses. It also endorsed the parties' joint proposal regarding a part-time program called the Senior Judge Program, similar in some respects to the supernumerary program for federally appointed judges.

100. The Government accepted the recommendations of the 2001 JCC.

2004 Judges Compensation Commission (“2004 JCC”)

101. A fourth Judges Compensation Commission (the “2004 JCC”) was appointed in the year 2004 and was a three-person panel, chaired by George Morfitt. The 2004 JCC issued a report on August 31, 2004 and made recommendations concerning the period January 1, 2004 to March 31, 2008. The 2004 JCC made a number of recommendations relating to changes in salary, LTD benefits, and the professional allowance.

2004 JCC Report, Judges' Association Documents, **Tab 7**

102. On the issue of salary, the 2004 JCC concluded that:

The goal must be to achieve salaries that are more in line with those paid to Provincial Court Judges in other provinces, to reduce the disparity between the salaries paid to Provincial and Supreme Court judges, and to situate our judges at an appropriate level of compensation compared to others on the provincial scene who are performing important jobs on behalf of the public.

2004 JCC Report, Judges' Association Documents, **Tab 7**, page 28

103. The recommendations included a salary of \$161,250 +CPI for the period January 1, 2004 to March 31, 2004, followed by another CPI increase, effective April 1, 2005, on top of the 2004 salary figure. Effective April 1, 2006, the salary was to be \$198,000 with

a CPI adjustment to be applied effective April 1, 2007. The 2004 JCC also recommended the adoption of percentage-based salary differentials for the Chief Judge and Associate Chief Judges of 12% and 6% respectively, and certain benefit-related recommendations. The 2004 JCC recommended that all of the Judges' Association's costs be paid by the Government.

104. The 2004 JCC also made certain recommendations that were the subject of joint recommendations by the Judges' Association and the Government, including recommendations relating to senior judges, judges' RRSP contributions, and the waiting period for extended health benefits. The parties made a joint submission to the 2004 JCC for certain changes to the pension in order to coordinate the plan with an increased retirement age from age 65 to 70.

2004 JCC Report, Judges' Association Documents, **Tab 7**, page 30

105. The Government rejected the salaries recommendations for the first two years of the 2004 JCC's mandate, but did accept the salary recommendations for the fiscal years 2006 and 2007. The Government accepted the recommendation regarding the amount of the professional allowance, but limited its use to certain enumerated categories of items rather than giving full discretion to the Chief Judge as the JCC had recommended. It accepted the balance of the recommendations including those which had been the subject of joint submissions.

2007 Judges Compensation Commission ("2007 JCC")

106. The next Judges Compensation Commission (the "2007 JCC") was also a three person panel, this time chaired by H. Allan Hope, Q.C., which made recommendations for the period April 1, 2008 to March 31, 2010. The 2007 JCC made recommendations in the areas of salary, pension, extended health and life insurance benefits, and professional development allowance. The 2007 JCC also recommended an extension

of the Senior Judges program to permit engagement for seven years as a part-time judge.

2007 JCC Report, Judges' Association Documents, **Tab 8**

107. In making its salary recommendations, the 2007 JCC emphasized the need to minimize the wage disparity between provincially and federally appointed judges in British Columbia, and that the remuneration of Provincial Court judges in British Columbia “should keep pace with that of other provinces”. The salaries recommended by the 2007 JCC were \$220,000 effective April 1, 2008, \$225,500 effective April 1, 2009, and \$231,138 effective April 1, 2010, with a continuation of the percentage differentials for the Chief Judge and Associate Chief Judges.

2007 JCC Report, Judges' Association Documents, **Tab 8**, page 23

108. The recommendations of the 2007 JCC were implemented by the Government.

2010 Judges Compensation Commission (“2010 JCC”)

109. The 2010 JCC was a five person panel, chaired once again by George Morfitt. The 2010 JCC made recommendations about appropriate compensation for the period April 1, 2011 to March 31, 2014.

110. The 2010 JCC considered that the global economic downturn had a significant effect on Government finances and found, as a result, that significant enhancements to judicial salaries and benefits were not supportable for the 2011/12 and 2012/13 fiscal years. Consistent with the Judges' Association's own proposal, the 2010 JCC recommended a two-year salary freeze. However, for the third year beginning April 1, 2013, it recommended an increase equal to the cumulative increase in the BC Consumer Price Index over the preceding three fiscal years, compounded annually. In so doing, the 2010 JCC adopted the analysis of the 2007 JCC regarding the importance of continuing to attract highly qualified lawyers from both the private bar and public

service, and the need to minimize the wage disparity between the s. 96 (federal) and Provincial Courts in order to avoid the Provincial Court being overlooked by applicants for financial reasons.

111. The 2010 JCC also recommended an increase in the pension accrual rate to 3.5% effective April 1, 2013, the reasons for which recommendation are discussed in detail below. Further, as the age of mandatory retirement for judges had been increased from 70 to 75 effective April 1, 2008, the 2010 JCC recommended amendments in order to allow judges who choose to sit past age 70 to continue making pension contributions until their actual retirement from the Bench. Adjustments were also recommended to LTD and life insurance coverage in order to extend them to judges up to age 75. These three recommendations were to be effective April 1, 2011.

2010 JCC Report, Judges' Association Documents, **Tab 9**, pages 34-36

112. The 2010 JCC made certain other recommendations as well, relating to the inclusion of judges in the Flexible Benefit Plan, and the further expansion of the Senior Judges Program to permit a Senior Judge to work more than half time at the discretion of the Chief Judge, including in times of urgent and unforeseen need.

2010 JCC Report, Judges' Association Documents, **Tab 9**, pages 36-37

Court of Appeal orders Government to Implement the 2010 JCC's Recommendations

113. Two years of litigation over the Government's Responses to the 2010 JCC concluded with the denial of the Government's request for leave to appeal to the Supreme Court of Canada. As such, according to a decision of the majority of the Court of Appeal, the Government was obliged to implement all of the 2010 JCC's recommendations. Because the litigation remained on-going at the time the 2013 JCC

made its Report, which affected its recommendations, it is important to review the chronology of events.

Provincial Court Judges Association of British Columbia v. British Columbia (Attorney General), [2015] B.C.J. No. 574, Judges' Association Documents, **Tab 19**, para 88 (hereinafter "2015 Decision of the Court of Appeal")

114. In May 2011, the Government rejected the 2010 JCC's recommendations for a salary increase in 2013, a pension accrual rate of 3.5%, and the ability to make pension contributions up to age 75. The Government also rejected the recommendation which concerned the funding of the LTD benefits for judges. The recommendations regarding life insurance, the extension of LTD coverage and enrolment in the flexible benefits plan were accepted, subject to a later effective date of April 1, 2013. The recommendation regarding the expansion of the Senior Judge program was rejected, but the Government did substitute a modified version of the recommendation which limited the Chief Judge's discretion to be exercised only in times of urgent and unforeseen need.

2011 Government Response to the 2010 JCC Report, Judges' Association Documents, **Tab 14**

115. The Judges' Association challenged the legitimacy of the Government's decision in a Petition to the BC Supreme Court. Mr. Justice Macaulay issued his decision on July 11, 2012 (Judges' Association Documents, **Tab 15**). He issued the order of *certiorari* as requested and declared that the Government's 2011 Response and the Legislative Assembly's motion did not conform to the applicable constitutional principles. He ordered the matter be returned to Government and to the Legislative Assembly for reconsideration in accordance with his reasons and within the timeframe limited by s.6 of the *Judicial Compensation Act*. Macaulay J. subsequently awarded special costs against the Government: [2012] B.C.J. No. 1990 (Judges' Association Documents, **Tab 16**).

116. Following the direction of Macaulay J., the Legislative Assembly considered the matter a second time on March 12, 2013. This time, it substituted a 1.5% increase

effective April 1, 2013 in place of the 2010 JCC's recommendation which would have meant a 4.9% increase. It made the same decision as before on the other recommendations, except that it further delayed implementation of the enrolment of judges in the Flexible Benefits Program.

2013 Government Response to the 2010 JCC Report, Judges' Association Documents, **Tab 17**

Decision of Macaulay J., Judges' Association Documents, **Tab 15**

117. In May 2013, the Judges' Association filed a petition in the BC Supreme Court challenging the March 2013 Response by Government to the 2010 JCC recommendations. Mr. Justice Savage released his decision on March 3, 2014, dismissing the petition.

Decision of Savage J., Judges' Association Documents, **Tab 18**

118. The Court of Appeal overturned the decision of Savage J. on March 27, 2015 and ordered all of the 2010 JCC's recommendations to be implemented (Judges' Association Documents, **Tab 19**). The Government sought leave to appeal to the Supreme Court of Canada, which application was dismissed with costs on October 29, 2015.

2013 Judges Compensation Commission ("2013 JCC")

119. The 2013 Judges' Compensation Commission (the "2013 JCC") made recommendations about appropriate compensation for the three year period from April 1, 2014 to March 31, 2017. The five person panel was chaired by Simon Margolis, Q.C.

120. The task for the 2013 JCC was complicated by the fact that it conducted its hearings after the Legislature had responded to the 2010 JCC Report for a second time, but before the decisions of Savage J. and the Court of Appeal. Despite that one potential outcome of the 2010-related litigation was that the 2010 JCC's

recommendations would be implemented, the 2013 JCC took as its “starting point” the actual compensation that judges received at the time it conducted its hearings (i.e. the compensation substituted by Government in its 2013 Response to the 2010 JCC’s recommendations (Judges’ Association Documents, **Tab 17**)). The decision by the 2013 JCC to recommend percentage increases based on the actual compensation in place at the time (despite the possibility that the compensation would increase) created incongruent and, arguably, unintended results. As is detailed below, the results were that, even if the 2013 JCC’s recommendations had been accepted (which they were not), the result in 2014 would have been a decrease in both salary and the pension accrual rate.

2013 JCC Report, Judges’ Association Documents, **Tab 20**, page 44
Government 2013 Response to 2010 JCC Report, Judges’ Association Documents, **Tab 17**

121. On the issue of salary, the 2013 JCC 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 BC judges ought to be in the range of 3rd to 4th place amongst salaries of provincial court judges in Canada”. The 2013 JCC took into account the cautious predictions for gradual improvement in the economy and recommended that salaries for puisne judges should increase by 2.9% effective April 1, 2014. Effective April 1, 2015, it recommended a further increase of 1.5%, followed by an additional 2% increase effective April 1, 2016.

122. The 2013 JCC also recommended what it considered to be a 0.25% increase in the pension accrual rate to 3.25%. As discussed in detail below, this turned out to be a decrease from the 3.5% accrual rate implemented after completion of the 2010 JCC process.

123. The 2013 JCC also recommended two other changes relating to pension, to address concerns about double taxation and inconsistencies resulting from an increase in the retirement age from 70 to 75, and a change to provide life insurance for judges

ages 71 to 75. Finally, the 2013 JCC recommended that the Government pay 100% of the Judges' Association's reasonable legal fees including the cost of experts.

Judges' Association has sought judicial review of the Government's Response to the 2013 JCC

124. The Government rejected the most significant of the recommendations made by the 2013 JCC, including those relating to salary and the pension accrual rate. The 2013 JCC's salary recommendations and the lower salaries substituted by Government are shown below:

	Recommended	Substituted
2014	\$241,500	\$236,950
2015	\$245,122	\$240,504
2016	\$250,024	\$244,112

125. A complete copy of the Government's Response to the 2013 JCC is attached as **Tab 21** in the Judges' Association Documents. The Judges' Association filed a Petition in the BC Supreme Court and the judicial review is scheduled to be heard in June, 2016. It is not expected that the outcome will be known before this 2016 JCC issues its Report.

The Role and Jurisdiction of this 2016 Judicial Compensation Commission

126. This 2016 JCC is tasked with making recommendations for appropriate compensation for both judges and judicial justices for the three fiscal years commencing April 1, 2017. The Judges' Association was not consulted about the Government's decision to amalgamate into one what had previously been two separate commission processes. It can only assume that the Government was attempting to reduce the costs associated with two separate processes.

127. In altering the structure of the Commission process, the Government also unilaterally revised the list of factors to be considered by the JCC. The position of the Judges' Association on each of the factors that the Government identified in s. 5(5) of the Act is outlined in detail below, in light of relevant analysis from past JCCs in both BC and other jurisdictions.

128. As is detailed below, this 2016 JCC faces the same situation as the 2013 JCC in that the current compensation for judges is uncertain as the Government's Response to the 2013 JCC remains subject to an application for judicial review. As noted, that case is unlikely to be concluded before this Commission issues its Report. For that reason, the Judges' Association makes submissions below about how the uncertainty should affect this 2016 JCC's analysis and its recommendations.

129. As stated by the Supreme Court of Canada in *Bodner*:

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 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. 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 careful review, make its own recommendations on that basis.

Bodner, supra, Judges' Association Documents, **Tab 11**, para 15

130. As the outcome of the 2013 JCC process remains unknown, it is particularly important for this 2016 JCC to make its own assessment of appropriate compensation for the years within its own mandate. In the submissions below regarding each aspect of compensation, the Judges' Association refers to the reasoning of past JCC's and

their outcomes. It also addresses the impact, if any, that the 2013 JCC's recommendations, the Government's Response thereto, and the ongoing litigation, should have on the approach taken by this 2016 JCC in considering the issues raised.

PART III: FACTORS FOR CONSIDERATION

131. No Commission could be expected to make recommendations about appropriate compensation in a vacuum. Indeed, the whole concept of compensation being “appropriate” or “reasonable” means it must be related to objective criteria or compared with compensation received by other comparable groups. Accordingly, this section explores both the principles which should inform the recommendations and the comparisons which are submitted to be appropriate.

132. Following the recent amendments, the *Judicial Compensation Act* (“the Act”) provides in part:

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

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

5(5.1) The Report of the Commission must demonstrate that the Commission has considered all of the factors set out in subsection (5).

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

Judicial Compensation Act, s.5(5), Judges' Association Documents, **Tab 1**

133. Past Commissions, both for judges and judicial justices, were required to consider the following less robust list of 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;
- (e) any other matter the Commission considers relevant.

134. Despite that, past Commissions took into account many of the factors which are now expressly identified, as "other matters that the Commission considered to be relevant".

135. Section 5(5) now explicitly confirms that the guiding principle is "the need to provide reasonable compensation for judges ...". This is consistent with the Supreme Court of Canada's direction in *Bodner* that:

"The Commission's aim is neither to determine the minimum remuneration nor to achieve maximal conditions. Its role is to recommend an appropriate level of remuneration."

Bodner, supra, Judges' Association Documents, **Tab 11**, para 67

Prospective Nature of the Process

136. Before getting into a discussion of the factors, it is useful to focus on the design of the process and the impact of that on how the factors must be considered. Only British Columbia, Saskatchewan and the Northwest Territories complete their JCC processes in advance of the period under consideration. In all the other jurisdictions in Canada, the process gets underway at the outset of or part-way through the period for which recommendations are being made and is generally completed mid-way through the Commission's mandate. Therefore, in those other jurisdictions, JCCs make partially retroactive recommendations and rely on both final data for past years and forecasts for only some of the years at issue.

137. The prospective design of BC's process means that the Commission has no alternative but to rely on reasonable forecasts and predictions about all the relevant factors, including not only economic conditions and the financial position of Government but also the compensation that will be paid to judges in other jurisdictions. Each JCC must consider the factors anew based on the information available at the time it conducts its inquiry and may take into account the differences, if any, between the forecasts that were relied upon by the prior JCC and the actual facts of what occurred.

2015 Decision of the Court of Appeal, Judges' Association Documents, **Tab 19**, para 34, 37

138. Each of the factors set out in section 5(5) of the Act is discussed below in turn.

(a) The Need to Maintain Strong Court by Attracting Qualified Applicants

139. In considering the first factor identified in s. 5(5)(a) of the Act, it is submitted that the 2016 JCC should weigh five points: the relevance of the Commission process itself; the significance, if any, to be drawn from the number of applicants; the need to attract highly qualified candidates; the competition for applicants from s. 96 courts; and the need to promote legal diversity on the Bench. These points are discussed in turn.

The Relevance of the Commission Process Itself

140. First, the very existence of a Commission process contemplated by the Supreme Court of Canada as being both (a) meaningful and effective and (b) grounded on good faith on the part of government, in and of itself attracts more applicants to the Bench. In particular, ensuring that such a process exists attracts qualified applicants, and especially those who might not otherwise be attracted for financial reasons.

141. An able, qualified or competent lawyer, who is considering allowing himself or herself to be considered for appointment, does not simply look at the level of remuneration currently being paid to judges. If a potential candidate looked no further than the current level of remuneration, one would surely question the candidate's intellectual qualification, sense of reality, or motivation for appointment, all of which bear upon qualification to hold judicial office.

142. Qualified applicants consider the process in place which will from time to time review and adjust the level of judicial remuneration, and whether that process has been meaningful and effective in practice. It is not merely the level of compensation which attaches to the office of a judge at the time of appointment which will attract the qualified candidate, it is the legitimate expectation that compensation will be regularly, meaningfully, and effectively reviewed, and adjusted by Government acting in good faith.

143. The importance of the JCC process itself was recognized by the 2004 JCC, which noted that an effective process would give incumbents and applicants alike "confidence that they will be treated fairly over time". This is essential because judges are constitutionally prohibited from negotiating with Government.

2004 JCC Report, Judges' Association Documents, **Tab 7**, page 25
PEI Reference, supra, Judges' Association Documents, **Tab 10**, para 170

144. Without the assurance that this expectation will be realized on an ongoing basis, qualified applicants will not be attracted or, at best, a significantly reduced number of them will be attracted. Indeed, without that expectation there is a risk that only those lawyers whose current level of compensation is less than that of a judge will be attracted.

145. Second, that expectation explains why judges, particularly judges who an informed public would want to remain as judges of the Provincial Court of British Columbia, may be more inclined to remain on the Bench and in that Court. Other Commissions have recognized the importance of retaining qualified judges as well as attracting qualified applicants. The 2004 JCC began its consideration of this factor by stating that “This heading encompasses the need, not only to attract highly qualified candidates, but to motivate and retain judges after their appointment.”

2004 JCC Report, Judges’ Association Documents, **Tab 7**, page 24

146. Third, and most importantly, that expectation assumes that this 2016 Commission and its successors will have a meaningful effect on the determination of judicial compensation.

The Number of Applicants

147. There will always be applicants for judicial positions. There are lawyers for whom an appointment is attractive because it would result in a significant increase in their remuneration. Indeed, it may be the only prospect they realistically have of such an increase. Those lawyers will always be in the pool of applicants for appointment. That does not mean that they are qualified.

148. There are lawyers for whom the opportunity to exercise power and control makes the prospect of becoming a judge attractive. There are lawyers for whom the prestige of the office makes the prospect of becoming a judge attractive. There will always be

those lawyers in the pool of applicants for appointment. That does not mean that they are qualified.

149. Governments routinely assert at commission hearings that there are available applicants who would accept an appointment, and usually attach a number to those assertions. There will always be applicants for the reasons noted, but that does not mean that all of them, a majority of them, many of them, or even any of them are qualified. Because the identity of those applicants is and must remain confidential, one never will know. The number is just a number.

150. Governments respond that those applicants have been screened, in BC by the Judicial Council, and that each screening body has determined that those applicants are qualified. But the screening does not make them qualified, it simply establishes that they have been screened. Without knowing who has been screened and the base line for approval or recommendation, one will never know the measure of the term 'qualified'.

151. For those reasons, the mere counting of the number of applicants, screened or otherwise, is not meaningful.

152. It is important that the recommendations of this Commission put the remuneration of judges at a level that it is confident is sufficiently generous in order that the best available potential candidates will be encouraged to put their name forward for possible appointment to the Provincial Court.

This Criterion is More Rigorous than Attracting Qualified Applicants

153. The new articulation of this factor expressly recognizes the need to attract "highly" qualified applicants. Even when the earlier legislation did not include this adjective, both the Judicial Council and past JCCs had focussed on the need to attract the best possible candidates to the Bench.

154. The Judicial Council of British Columbia includes among its criteria for appointment a “superb legal reputation” (Judges’ Association Documents, **Tab 22**, page 14). As cited above, the 2004 JCC stated that the “heading encompasses the need, not only to attract highly qualified candidates...”. (Judges’ Association Documents, **Tab 7**, page 24) The 2007 JCC wrote: “The Commission recognizes the need to set salaries and benefits at a level sufficient to attract to the Provincial Court lawyers from the top ranks of the British Columbia bar.” (Judges’ Association Documents, **Tab 8**, page 18) For its part, the 2010 JCC recognized “the need to set compensation for Provincial Court Judges at a level sufficient to attract outstanding candidates from both the private bar and the public service.” (Judges’ Association Documents, **Tab 9**, page 30)

155. Most recently, the 2013 JCC wrote:

“... it is necessary to maintain a reasonable salary that is sufficient to attract exceptional candidates that meet the needs of the Court ... attracting the best candidates could become a problem if the compensation of the Court does not keep pace with other options open to highly desirable candidates.”

2013 JCC Report, Judges’ Association Documents, **Tab 20**, page 44

The Competition for Applicants

156. It is essential that the compensation be at a level that ensures that the best potential applicants are not deterred from applying for financial reasons. The Provincial Court of British Columbia competes for applicants with the British Columbia Supreme Court, the Court of Appeal for British Columbia, and the Federal Court of Canada. All of these Courts seek applications from the same pool of applicants, namely lawyers in British Columbia with at least 10 years at the Bar.²

² While section 6(2) of the *Provincial Court Act* (Judges’ Association Documents, **Tab 2**) requires that a prospective judge have a minimum of 5 years of membership in the Law Society of British Columbia, the Judicial Council requires at least 10 years in the practice of law among its criteria. (Judges’ Association Documents, **Tab 22**, page 14) In practice, successful applicants have approximately 20 years in practice.

157. It is the applicant and only the applicant who decides to which court he or she will seek an appointment. Self-exclusion from potential for appointment to the Provincial Court is a real risk if the gap in remuneration between provincial and federal appointees is significant.

2013 JCC Report, Judges' Association Documents, **Tab 20**, page 44
2010 JCC Report, Judges' Association Documents, **Tab 9**, page 33
2007 JCC Report, Judges' Association Documents, **Tab 8**, page 23

158. The gap is most apparent in the levels of salary and annuity / pension, and would be reasonably apparent to potential highly qualified applicants for appointment.

159. BC's Provincial Court judges are currently paid a salary equal to 77.7% of the salary paid to federally appointed judges working in British Columbia (\$244,112 versus \$314,100), a dollar gap of almost \$70,000 in salary alone. If the 2013 JCC's recommendation for 2016 is implemented, the salary would become \$250,024, which is 79.6% of the federal salary. As detailed in the salary section below, the Judges' Association's proposed salary of \$285,000 would restore the base salary to within the range of what past Commissions have found to be an appropriate relationship with federal salaries in order to avoid creating a financial disincentive for potential applicants to the Provincial Court. Its proposal for 2% salary adjustments each year thereafter would ensure that the salary gap does not widen significantly throughout this JCC's mandate.

160. The gap apparent to potential judicial appointees between the federal judicial annuity and the British Columbia judicial pension is also significant because of several more generous features to the judicial annuity available to federally appointed judges:

- (a) A federally appointed judge accumulates a full judicial annuity (pension) after only 15 years of service with an effective accrual rate of 4.67% per annum. By contrast, with an accrual rate of 3% (or 3.25% as recommended by the 2013 JCC), the current judicial pension in British

Columbia requires 23.3 (or 21.54) years of service before a judge reaches maximum pension. (The Judges' Association proposes below that the accrual rate be increased to 3.5%, consistent with the rate that was implemented for the year beginning April 1, 2013, as per the 2010 JCC's recommendation. Even at that accrual rate, a disparity is apparent in that it takes 20 years to accrue a full pension, as opposed to 15 years.)

- (b) A federally appointed judge's annuity is calculated based on a higher salary than the salary paid to a Provincial Court judge.
- (c) A federally appointed judge's annuity is calculated based on the salary paid at the moment of retirement. By contrast, the pensionable salary used to calculate the pension for Provincial Court judges is the average of the three highest consecutive years of salary.
- (d) Once a federally appointed judge's annuity benefits have been determined upon retirement and have commenced, they are *guaranteed* to be fully indexed against the eroding effects of inflation. While 100% indexing has been provided in the past for British Columbia's judicial pension benefits, the provision of indexing is discretionary and is not guaranteed.

161. Successive JCCs have acknowledged that the greater the gap in remuneration between provincially and federally appointed judges, the greater the likelihood highly qualified applicants will refrain from applying for a provincial appointment. The reality is that in the eyes of members of the legal profession, higher compensation is often equated with greater prestige, which in turn affects the relative attractiveness of the various courts. For many potential applicants, it would be more attractive to hold out for a federal appointment with a significantly higher level of remuneration in both salary and the value of the judicial annuity.

2013 JCC Report, Judges' Association Documents, **Tab 20**, page 44
2010 JCC Report, Judges' Association Documents, **Tab 9**, page 33
2007 JCC Report, Judges' Association Documents, **Tab 8**, page 23

162. Even among those who apply and are appointed to the Provincial Court, many also apply for a s. 96 appointment and leave if offered such an appointment. The Chief Judge advised the 2013 JCC that his experience is that a significant proportion of those who are appointed to the Provincial Bench also applied for a s. 96 appointment (either before or after their appointment). In its Report, the 2013 JCC referred to the Chief Judge's Submission as stating that:

"... in the past three and a half years alone, eight provincial court judges have been appointed to the Supreme Court. He also said he is aware that a number of his colleagues have applied for appointment to the Supreme Court. The Chief Justice [sic] said the Provincial and Supreme Courts seek qualified candidates from the same pool of potential candidates and from a remuneration perspective, the "playing field" is "tilted in favour of the Supreme Court". He said that appropriate remuneration is critical to attract and retain hard-working members to the Court and he saw no reason in principle "why the salary of a Provincial Court of British Columbia judge should not be the same as that of a Supreme Court Justice"."

2013 JCC Report, Judges' Association Documents, **Tab 20**, pages 42-43

163. The Judicial Council echoed these points in its submission to the 2013 JCC, wherein it submitted that "remuneration levels must not be a deterrent to successful lawyers taking appointments". The Judicial Council pointed out that the number and quality of applications would suffer, "especially in the southern areas of the province where the cost of living is high, if remuneration falls significantly below historical comparisons". This point was consistent with information provided by the Chief Judge that showed that the number of applications from Victoria and Vancouver to Chilliwack compared with from the rest of the province had decreased since 2010.

2013 JCC Report, Judges' Association Documents, **Tab 20**, page 43

164. The 2013 JCC Report noted that the Judicial Council:

“perceives it to be likely’ that the Provincial Court is losing applicants to the Supreme Court due to the following:

- Lower remuneration [at the Provincial Court],
- Shorter pension accrual period [at the Supreme Court],
- The greater prestige associated with the Supreme Court in traditional legal circles, or
- Because the candidate is attracted to the different legal work at the Supreme Court.”

2013 JCC Report, Judges’ Association Documents, **Tab 20**, page 43

165. For its part, the 2013 JCC ultimately concluded that it was “unclear if there is a link between the number of applications and the salary of Provincial Court judges”. Nonetheless, it continued:

“In any event, it is necessary to maintain a reasonable salary that is sufficient to attract exceptional candidates that meet the needs of the Court. Currently, the Court does not seem to have a problem attracting a sufficient number of qualified candidates to do its work. The Commission is mindful, however, 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.”

2013 JCC Report, Judges’ Association Documents, **Tab 20**, page 44

166. As one can reasonably infer that the gap in remuneration is one (if not the main) factor for potential applicants or, indeed, British Columbia Provincial Court judges seeking a different judicial appointment, it is important for this Commission to minimize the disparity for the purpose of maintaining a strong court.

Legal Diversity

167. It goes without saying that in our pluralistic society, it is well recognized that a Bench consisting of members of diverse backgrounds - racial, ethnic, cultural, linguistic,

and gender is not merely desirable, it is essential to the community's confidence in the courts. There is risk that a court, whose composition lacks diversity, will lose credibility with the general public or a significant portion of that general public.

168. Diversity in the characteristics of judges on a court will only be maintained or achieved if there is diversity in the applicants for appointment.

169. A fundamentally requisite diversity characteristic required in a criminal court, particularly the Provincial Court of British Columbia where its judges preside in all criminal matters and conclude more than 98% of them, is the diversity of legal experience. Diversity of legal experience is also essential because of the Court's broad civil and family jurisdiction.

170. There will only be legal diversity on the Bench if those from the private bar apply to be appointed. There will only be highly qualified applicants from the private bar if the level of remuneration is comparatively adequate to what one might reasonably be expected to earn in practice.

171. If the pool of applicants fails to include highly qualified applicants from the private bar, there is substantial risk that the Provincial Court of British Columbia will have a disproportionate number of judges who practiced as Crown attorneys prior to their appointment. If the Government wants to risk that its only appointees create an impression of a 'Crown court' with the negative connotations that are capable of accompanying that impression, that will be a decision made, and properly made, by the Government. Quite apart from that issue, as the 2013 JCC recognized in its Report, "... a lack of diversity can exacerbate the needs in other areas, especially civil and family law" (2013 JCC Report, Judges' Association Documents, **Tab 20**, page 44).

172. If this Commission does not recommend a level of remuneration which will attract highly qualified applicants from the private bar, those prepared to accept an appointment could consist only of applicants from the Crown or Government bar; and the Government will be effectively foreclosed from making any other choices.

173. The concern about the lack of diversity in the applicants was raised by the Judicial Council before the 2010 JCC, which noted that the Judicial Council had identified:

...a need for the Provincial Court to attract experienced private practitioners with a breadth of experience, particularly in civil litigation. This sector of the Bar is not well represented in the Provincial Court application pool.

2010 JCC Report, Judges' Association Documents, **Tab 9**, page 31

174. The most recent information available suggests the need continues. The Judicial Council's 2014 Annual Report contains the following data regarding the number and area of practice of applicants to the Provincial Court.³

Year	Private	Crown Counsel	Other Areas	Total	Applicants Recommended	Applicants Appointed
2014	28 (56%)	18 (36%)	4 (8%)	50	21	6
2013	34 (74%)	8 (17%)	4 (9%)	46	11	10
2012	19 (56%)	10 (29%)	5 (15%)	34	12	11
2011	27 (61%)	12 (27%)	5 (11%)	44	12	6
2010	30 (63%)	10 (21%)	7 (15%)	47	17	8
2009	32 (54%)	10 (17%)	17 (29%)	59	7	4
2008	34 (63%)	14 (26%)	6 (11%)	54	13	5

Judicial Council of British Columbia, Annual Report 2014, Judges' Association Documents, **Tab 22**, pages 34-35

175. The Judges' Association obtained 2015 data from the Office of the Chief Judge, although the 2015 Annual Report is not yet available. In 2015, only 26 applications were received, a number that the Chief Judge advised is significantly lower than the 10 year average. While in the past, applications from private practice had tended on average to form about two-thirds of the total number, in 2015, the percentage of private

³ We are advised the "Crown" includes only prosecutors. Lawyers employed, for instance, by the Legal Services Society, the Legal Services Branch or the Canadian Armed Forces, would be included in the "other" category.

bar applicants dropped to 46%. Crown counsel submitted 35% of the applications and applications from other areas made up 19%. While some of those who were interviewed had submitted their applications in earlier years, the total number recommended in 2015 was 16, and 14 judges were appointed.

176. The Judges' Association asked the Law Society of British Columbia in 2013 to advise of the number of lawyers in the province by practice area. While the Law Society tracks the information in a slightly different way than the Judicial Council, it advised at that time that of approximately 10,369 practicing lawyers, there are 8,100 in private practice, 419 working as Crown counsel (prosecution only), and 1,850 working as in-house counsel for either government or corporations. While the numbers may not be identical today, there is no reason to expect the proportions have changed significantly.

177. While 78% of practicing lawyers are private practitioners, these lawyers represented only 46% of applicants in 2015. By contrast, only 4% of practicing lawyers are Crown prosecutors, yet they represented almost 35% of applicants to the Provincial Bench. There has been a significant change since 2001, when the 2001 JCC noted:

Information from the Law Society of British Columbia shows that the numbers of Crown Counsel and lawyers in general practice who apply for appointment to the Provincial Court are in relative proportion to the numbers of Crown Counsel and lawyers in general practice in the province.

2001 JCC Report, Judges' Association Documents, **Tab 6**, page 23

178. When the backgrounds of applicants are seen within the context of the profession as a whole, the concern about a lack of legal diversity becomes readily apparent.

179. Of the 25 judges who have been appointed since the beginning of 2013, twelve (48%) were from the private sector, eleven (44%) were from government (including Crown, Crown agencies, the Office of the Chief Judge and the Lieutenant Governor),

and one (4%) was from the Law Society of BC. Clearly Crown lawyers are overrepresented on the Bench, as well as among those lawyers who choose to apply. Further, as only 46% of applicants in 2015 were private practitioners, the proportion of private practitioners appears on track to decrease even further in the future.

180. The Judicial Council has made it its business to encourage applications from lawyers with a diversity of backgrounds. As set out in its 2014 Annual Report, "... the Council considered ways to encourage applicants from diverse backgrounds to apply for judicial office, reporting to the public on such efforts, formulating a submission to the Judicial Compensation Commission and attending to minor amendments to the Judicial Council's Procedural Bylaw".

Judicial Council of British Columbia, Annual Report 2014, Judges' Association Documents, **Tab 22**, page 13

181. The Report of the 2003 Federal Commission which makes recommendations regarding compensation for s. 96 judges, known as the Second Quadrennial Judicial Compensation & Benefits Commission explained:

"There are two parts to the quest of securing a judiciary of high quality and this Commission can influence only one part. We expect that our recommendations, if implemented, will result in a salary level that will attract the best and the brightest to make themselves available for judicial appointment, or at least not discourage them from doing so. The goal will be attained when the second part of the quest is properly fulfilled, which is the selection, from the pool of candidates available, of the most qualified of those prepared to accept judicial office. That will continue to be the challenge of the government."

2003 Report of Second Quadrennial Judicial Compensation & Benefits Commission, Judges' Association Documents, **Tab 23**, page 13

182. The importance of judicial remuneration to the recruitment of highly qualified applicants in private practice was commented on in Ontario's Fourth (1999) Triennial

Report of the Provincial Judges Remuneration Commission (the “Beck Report”) on May 20, 1999:

“Another factor that we think is important is the attraction of the Provincial bench to a cross section of the best of the men and women practising at the criminal bar, or with some experience at the criminal bar. For many, appointment to the Provincial Division would see little, if any, increase in salary. For others, such an appointment would constitute a fall, in some cases a very sharp fall, in remuneration. What is absolutely essential is that the level of remuneration (including pension, which will be dealt with below), be set at such a level that it will be attractive, or at least not a disincentive, to the ablest men and women at the bar. We are of the opinion that the current level of \$130,810 is a disincentive, and a substantial increase is justified.”

Ontario’s Fourth (1999) Triennial Report of the Provincial Judges Remuneration Commission (“Beck Report”), Judges’ Association Documents, **Tab 24**, page 46

183. The importance of giving consideration to the remuneration received by those in private practice in order to attract highly qualified applicants was also recognized in the federal McLennan Report where the Commission said:

“... [I]t is necessary, to the extent possible, in order to address the requirement of attracting outstanding candidates to the bench, to have regard to the income of private practitioners, since that remains the pool from which most of the appointees, and presumably most of the recommended applicants, come.”

McLennan Report, Judges’ Association Documents, **Tab 23**, page 31

184. The McLennan Report also observed with respect to earlier federal compensation commissions:

“The triennial commissions dealt with the relationship between the incomes of lawyers in private practice and the salaries of judges. The Scott Commission, in particular, was of the view that the commission process in the *Judges Act* was “a statutory mechanism for ensuring that there will be, to the extent possible, a constant relationship, in terms of

degree, between judges' salaries and the incomes of those members of the Bar most suited in experience and ability for appointment to the Bench."

The rationale, of course, is that it is in the public interest that senior members of the Bar should be attracted to the bench, and senior members of the Bar are, as a general rule, among the highest earners in private practice. While not all the "outstanding" candidates contemplated by s. 26(1.1)(c) of the *Judges Act* will be senior lawyers in the higher earning brackets, many will, and they should not be discouraged from applying to the bench because of inadequate compensation."

McLennan Report, Judges' Association Documents, **Tab 23**, page 32

185. The comparative importance of this aspect was stressed in the McLennan Report at page 41 where, after noting the extensive data which had been provided on the income of self-employed lawyers, and the inadequacies of that data, the Commission stated:

"While we deplore the deficiencies in the material put before us with respect to the 2000 and 2001 income data of self-employed lawyers, we remain of the view that the income of self-employed lawyers in Canada is an important, and perhaps the most important, comparator for our work, and that we must do the best we can with the data available."

McLennan Report, Judges' Association Documents, **Tab 23**, page 41

186. Absent the fact that the prospective federal appointees are drawn from the same pool of candidates in British Columbia, those observations would equally apply to the pool of provincial appointees. Given the fact that the federal and provincial courts compete for candidates, the income of self-employed lawyers is subsumed to some extent in the remuneration of federally appointed judges and how it is more attractive than that of provincially appointed judges. On this point, the 2013 JCC was "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".

2013 JCC Report, Judges' Association Documents, **Tab 20**, page 44

187. As there are, indeed, significant deficiencies in the reliability of the data available concerning the incomes of private lawyers, the Judges' Association does not rely on those data in this process. Instead, it focuses on the other options open to highly desirable candidates, namely federal appointments. As noted, the Government will have the ability to choose to ensure legal diversity only if this Commission ensures that the level of remuneration is sufficient to attract and retain highly qualified applicants from all areas of practice, including lawyers in private practice.

(b) Changes to the Jurisdiction of Judges

188. Section 5(5)(b) mandates consideration of changes to the jurisdiction of judges (or judicial justices, as the case may be). As outlined in Part I of the Submission, the jurisdiction of judges has not changed significantly since the 2013 JCC issued its Report. To the extent changes now under consideration materialize during the years within this JCC's mandate, their impact on the determination of appropriate compensation, if any, can be considered by the next JCC.

(c) Compensation Provided in Respect of Similar Judicial Positions in Canada

189. The Judges' Association submits that the comparison with the compensation of other judges in Canada is among the most significant of all the factors to be considered. This is because of the uniqueness of the judicial role in terms of not only the work performed but the manner in which their compensation must be determined.

190. The 2010 JCC described in its Report the important and unique role of judges within our society:

Judges occupy a unique role in our society, and shoulder unique burdens. Without the courts, and the rule of law applied by judges, the power of the state over the individual would be unbridled. Essentially, judges stand between the power of the state and the liberty of the individual.

191. Both the 2010 and 2007 JCCs quoted the following observations of the 1998 JCC:

We entrust to judges a unique and weighty responsibility. We ask them to sit in judgement on any one of us –from the highest to the lower rank –and fairly and impartially apply the law to our deeds.

But what would be reasonable compensation for the burden of deciding which of two loving parents, now separated, will have the privilege of putting their children to bed each night and seeing them at breakfast in the morning?

What would be reasonable compensation for the judge who must face a man who was brutalized as a boy and has now injured another, and decide how long he will spend behind bars, potentially to be victimized again?

There is no simple definition of `reasonable compensation' just as there is no easy answer to the questions judges must face every day.

2010 JCC Report, Judges' Association Documents, **Tab 9**, page 26
2007 JCC Report, Judges' Association Documents, **Tab 8**, page 14

192. The type of work performed by Provincial Court judges is indeed unique and as such, is most comparable to that of other judges. As discussed in Part I above, the majority of the cases presided over by British Columbia's Provincial Court judges involve criminal matters where the stakes are high for both accused persons and complainants. Many other cases involve family law issues such as child protection matters. As a result, judges are often exposed to very tense and emotional circumstances. The subject matter of some cases can be quite disturbing and traumatic to the parties but also to the judge.

193. Judges of the Provincial Court are also subject to considerable scrutiny from the public and the media because of the types of criminal cases they adjudicate. The outcomes of judicial interim release applications and sentencing for crimes are often

reported on by the media, and not all of this coverage is favourable to the judge, or even neutral. This is not to suggest that the courts, and by extension the judges of the Provincial Court, should not be subject to both public scrutiny and criticism. Rather, it is to note that this scrutiny can have a significant impact on judges, both professionally and personally. Moreover, judges are not in a position to respond publicly to the media scrutiny.

194. Another unique aspect of judges, both individually and collectively, is that they are precluded from negotiating their own compensation. Lamer CJC stated plainly in *PEI Reference*:

For the judiciary to engage in salary negotiations would undermine public confidence in the impartiality and independence of the judiciary, and thereby frustrate a major purpose of s. 11(d).

PEI Reference, supra, Judges' Association Documents, **Tab 10**, para 186

195. The 1998 JCC emphasized that the Supreme Court of Canada had declared that appropriate compensation must be assessed in light of "objective criteria, not political expediencies". It noted the importance of establishing salaries which not only attract applicants, but retain "a complement of judges who remain energetic and committed throughout the remainder of their professional lives".

1998 JCC Report, Judges' Association Documents, **Tab 5**, page 14

196. In summary, the judiciary is unique both in constitutional status and job function. It is a "job" not easily compared with others in the British Columbia economy, and certainly not with jobs within the public service. The uniqueness of the role of judges in our society underscores the importance and ultimately the fairness of comparisons with the compensation paid to judges in other jurisdictions including federally-appointed judges who work in British Columbia.

Comparison with Federally Appointed Judges in British Columbia

197. While the compensation paid to federally appointed judges is relevant under the attraction of applicants factor, it is also relevant under s. 5(5)(c) of the Act as federally appointed judges in British Columbia occupy “similar judicial positions” in Canada (indeed within BC itself).

198. In *Bodner*, the Supreme Court determined that a JCC would be misdirecting itself if it focused on a comparison with so-called “s.96 judges” to the exclusion or virtual exclusion of other relevant factors. Indeed, the 2013 JCC considered that the disparity in compensation is an “important factor in determining reasonable compensation for Provincial Court judges, but it is not an overriding one”. To be clear, the Judges’ Association does not propose that the salary for British Columbia’s provincially appointed judges be determined based on the salary of federally appointed judges, but rather that the compensation paid to that group is a relevant and important consideration for reasons accepted by past JCCs in British Columbia.

Bodner, supra, Judges’ Association Documents, **Tab 11**, para 72
2013 JCC Report, Judges’ Association Documents, **Tab 20**, page 38

199. Consistent with the reasoning of past JCCs, consideration must be given to the fact that the nature and function of judicial work shows great similarities among the various levels of courts. While one level is purely appellate in nature, and another deals with jury trials as opposed to sitting and deciding as a judge alone, the same qualities of judicial temperament, legal knowledge, and an abiding sense of fairness are required of all judges. It is necessary that judges at all levels of court have the ability to make decisions that will greatly affect people’s lives, including the potential loss of freedom, without bending to improper influence, the pressure of public demands and expectations, or a consideration of inadmissible material. The key factor is that judicial decision-making is common to all judges.

200. The 2010 JCC concluded: "... while there are differences between the types of cases and functions of the Provincial Court and the Supreme Court, each plays a very important role in the administration of justice in British Columbia". The 2013 JCC concluded that "... federally appointed judges are an important comparator group for Provincial Court judges, but they are not the only relevant comparator group".

2010 JCC Report, Judges' Association Documents, **Tab 9**, page 29

2013 JCC Report, Judges' Association Documents, **Tab 20**, page 38

Comparison with other Provincial Court Judges

201. Because of the unique role of judges within our society, past JCCs have also compared the remuneration paid to Provincial Court judges in British Columbia with that paid to Provincial Court Judges in other jurisdictions. Alberta and Ontario have been considered the best comparators, likely due to the fact that historically these provinces have accompanied BC in its leadership role among the provinces from an economic perspective. Another basis for the comparison is the broad jurisdiction of the Provincial Courts in each of these jurisdictions, which was mentioned in Part I above.

202. The 2001 JCC stated that it believed it to be "appropriate and useful to make comparisons with other provinces", and focused on Alberta and Ontario as being the most relevant. The 2004 JCC agreed with the Judges' Association's contention that judges' compensation in BC should be more in line with the salaries paid to judges in the "upper end" of tables showing salaries in the other jurisdictions.

2001 JCC Report, Judges' Association Documents, **Tab 6**, page 27

2004 JCC Report, Judges' Association Documents, **Tab 7**, page 18

203. The 2007 JCC declared:

Further, the remuneration of Provincial Court Judges in British Columbia should keep pace with that of other provinces. Given British Columbia's healthy financially [sic] outlook, the Commission sees no reason why the

judges of this Province should not receive salaries in keeping with our relative economic position within the country.

2007 JCC Report, Judges' Association Documents, **Tab 8**, page 23

204. Most recently, the 2013 JCC 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 or 4th place amongst the salaries of provincial court judges in Canada."

2013 JCC Report, Judges' Association Documents, **Tab 20**, page 47

205. Cited above are comments of past JCCs which relate to salary in particular. The factor set out in s. 5(5)(c) refers more broadly to "compensation", which imports consideration of all aspects of the total compensation package.

206. By far the most significant aspects of judicial compensation are salary and pension. Judicial salaries are compared in the chart that forms page 93(a) in this submission. A chart comparing the key features of the judicial pension in each jurisdiction across Canada forms **Tab 25** in the Judges' Association Documents.

207. In addition, all Provincial and Territorial Court Judges (and federally appointed judges for that matter) receive other benefits such as health, dental and life insurance coverage, as well as other items such as professional allowances. Quite apart from the fact that it is cost prohibitive for the Judges' Association to obtain a total compensation comparison of the judicial compensation packages across Canada, it is submitted that such is not necessary for the Commission's purposes. JCCs in other jurisdictions, including those which employ similar language in the factors which their JCCs are mandated to consider, do not demand such an analysis. Rather, they routinely engage in comparisons of each aspect of compensation largely independently, taking into account total compensation in fairly broad terms. For instance, the pension section

below includes approximations of the differences in total compensation received by BC's provincial and federal judges. There the focus is only on salary and pension as, again, these are by far the most significant items of compensation (see pages 118 to 120).

208. This factor also demands that the JCC have regard to the "differences between those jurisdictions and British Columbia". This requires consideration of differences such as the breadth of the jurisdiction exercised by BC Provincial Court judges as compared with their counterparts but, perhaps most significantly, the differences in the economic conditions and the fiscal position of the governments across the jurisdictions. The latter points are addressed in some detail below, beginning at page 68.

(d) Changes in the Compensation of Others Paid by Provincial Public Funds in British Columbia

209. Subsection 5(5)(d) of the *Judicial Compensation Act* obliges this 2016 JCC to consider "changes in the compensation of others paid by provincial public funds in British Columbia". This factor does not reference the actual salary levels of public servants, but rather only the *changes* in compensation of others paid by provincial public funds. It is well understood that judges are not civil servants. Accordingly, and given the uniqueness of the judicial role, comparisons with the actual salaries received by civil servants are of no, or little, value.

Judicial Compensation Act, Judges' Association Documents, **Tab 1**, ss 5(5)(d)

210. Depending on the timing of negotiations or decisions, the level of increases negotiated with or provided to public sector groups can be a useful indicator of the Government's own assessment of its ability to pay. However, beyond that, the information is of limited value for the reasons set out below.

211. Firstly, a government's decision regarding pay for public sector employees is inherently political. The level of increases will depend on the government's political

objectives and, in the case of unionized employees, on the strength of the particular bargaining unit. Pay for civil servants is not required to be determined based on the factors identified in s. 5(5) of the *Judicial Compensation Act*, never mind that it is not determined in the context of a process that provides for the structural separation that is necessary to guarantee financial security. Judges, on the other hand, are precluded from engaging in negotiations and their compensation must be determined based on “objective criteria, not political expediencies”. As Lamer CJC clearly articulated in *PEI Reference*, decisions about the use of public funds are inherently political and the purpose of the JCC is to act as an institutional sieve to depoliticize, to the greatest extent possible, the setting of judicial compensation.

PEI Reference, supra, Judges’ Association Documents, **Tab 10**, paras 146, 173
Judicial Compensation Act, Judges’ Association Documents, **Tab 1**, s. 5(5)

212. Secondly, unlike public sector employees, all judges are paid the same salary regardless of years of service. Depending on their classification, government employees are generally eligible for periodic seniority or merit-based step increases. As such, even with a “general wage freeze” in a particular year, the salaries of most individual employees are not frozen since the individual can progress up the salary scale within his or her classification. Employees who have reached the top of the scale for their particular classification may be able to seek a promotion to a new classification or a transfer. Judges are the only group for which a salary freeze is most certainly a freeze.

Newfoundland Association of Provincial Court Judges v. Newfoundland, [2000]
N.J. No. 258 (excerpt only), Judges’ Association Documents, **Tab 26**, para 191

213. Thirdly, in the case of unionized employees, it is important to consider that the level of general wage increases is a product of negotiation about total compensation. For example, it may be that lower general wage increases are accepted in exchange for guarantees against layoffs. Without knowing all of the trade-offs that occurred in collective bargaining, which are often purposefully difficult to discern from the face of a

collective agreement, any comparison to the level of general wage increases must be approached with caution.

Report of the 2011 Manitoba Judicial Compensation Committee (excerpt only),
Association's Documents, **Tab 27**, page 73

214. Fourthly, upon appointment, judges give up opportunities enjoyed by employees and professionals to increase their earnings by working longer hours, engaging in consulting work, or through attaining further educational achievements.

1998 JCC Report, Judges' Association Documents, **Tab 5**, page 14-15
Provincial Court Act, Judges' Association Documents, **Tab 2**, s. 14(1)

215. Finally, when considering the relevance of public sector pay increases, it should be noted that the increases received by a certain proportion of the public sector are tied to the increases received by judges. Through collective bargaining or otherwise, the Government has chosen to link the increases in compensation for the following groups to the salary increases received by judges: Crown and legal counsel, who receive the judges' salary increase plus 1.27%; Officers of the Legislature, whose salaries are tied to those of the Chief Judge; and Masters of the Supreme Court whose remuneration is equal to that of Provincial Court judges.

See discussion in the decision of Macaulay J., Judges' Association Documents,
Tab 15, para 58 and following

216. The relevance of these linkages in the JCC process has been the subject of significant controversy in recent years. In 2007, the parties agreed that the matter of the linkage with certain public sector or Masters' salaries was not to be considered by the JCC. In the view of the Judges' Association, this is the only proper approach since judges' compensation is the only compensation in BC paid from the public purse which is required to be determined through a JCC process based on objective criteria and absent the pressures exerted during collective bargaining. The fact that the Government chose to link the compensation of judges to that of others is a political

choice. The Government's decision for these categories of employees (and for Masters) must not be allowed to be used by Government to politicize the setting of judges' compensation.

217. In 2010, the parties again agreed that the 2010 JCC was to be specifically advised that the impact of the linkage on the overall costs of the recommendations was not a factor to be considered by the JCC. Despite this, the Government did in fact consider the broader impact to the public sector in responding to the 2010 JCC's recommendations in March, 2011. Given the shocking conduct of the Government in its first response to the 2010 JCC, it is imperative that this 2016 JCC clearly state in its decision that the existence of the linkage, and the fact that there may be cost implications arising therefrom, were known to the JCC but are not properly a consideration in determining judicial compensation.

Prov. Ct Judges' Assn of British Columbia v. British Columbia (Attorney General), [2012] B.C.J. No. 1990, Judges' Association Documents, **Tab 16**, paras 12-14

Letter of April 10, 2012 to Joseph Arvay, Q.C. from Jonathan Penner, with attachments, Judges' Association Documents, **Tab 28**

218. For its part, the 2013 JCC expressed concern about the Government's practice of pegging certain public sector salaries (such as those of Crown Counsel) to the salaries of Provincial Court judges. Declaring that these considerations formed no part of the Commission's deliberations, the 2013 JCC explained:

"Indeed, reducing and minimizing such linkages between provincial court judges' salaries and other public sector salaries in the future is necessary and would assist in achieving the constitutionally mandated depoliticization of the relationship between the judiciary and other branches of government. The current practice shifts the Government's focus away from what is reasonable compensation for judges --an independent branch of government --and towards the implications of any increases in judge's compensation on the Government's negotiations with other public sector employees, especially where the increase for Provincial Court judges automatically increases other public sector

salaries. In the Commission's view, this is not a proper factor in the consideration of reasonable compensation for judges."

2013 JCC Report, Judges' Association Documents, **Tab 20**, page 36

219. Once again, what may or may not be appropriate for certain government employees or Masters of the Supreme Court is not within the mandate of this 2016 JCC. The Government's decision to create these linkages must not impact the JCC's analysis about what is appropriate compensation for judges.

220. For all these reasons, data regarding changes in the compensation of others paid by public funds must be carefully interpreted and understood, and is likely to be of limited, if any, value.

(e) **Generally accepted current and expected economic conditions in British Columbia**

221. In short, British Columbia's economy is thriving both compared with the recent experience in BC but also in relation to other jurisdictions. As discussed in detail below, British Columbia has been leading the nation in economic growth and is expected to continue to do so over the years covered by this JCC. Accordingly, the current and predicted economic conditions of the British Columbia economy are positive and support the Judges' Association's requests for increased compensation.

222. Government leaders have been touting the strength of the provincial economy in recent months. In the Speech from the Throne, delivered on February 9, 2016, it was declared that "British Columbia's economy leads Canada" and that "in 2015, we led Canada by creating more than 50,000 jobs." Lieutenant-Governor Guichon went so far as to conclude that British Columbia is in many ways "the envy of the world" and that "British Columbia is entering Canada's 150th birthday as leaders in Confederation."

British Columbia Throne Speech 2016, **Tab 29** , pages 2, 9

223. Shortly thereafter, in the 2016 Budget Speech delivered on February 17, 2016, the Honourable Michael de Jong, Minister of Finance, declared:

“Like all jurisdictions, we are being tested by the dual challenges of rapid change and unpredictability. Unlike most jurisdictions, we are not only passing that test but we are scoring top marks, and British Columbians deserve to be proud for having earned our way to the top of the class!”

224. Minister de Jong quoted from a number of independent economic forecasters regarding the current and short term outlook for the British Columbia economy:

“Here’s what the Conference Board of Canada said in their January Report Card:

British Columbia’s economy is forecast to maintain the momentum gained over the last year and continue to make impressive gains.

... After leading the provinces in growth this year, British Columbia will be the top performer in 2016.

At the same time, CIBC World Markets issued their November report card and predicted that B.C. is “likely to top the charts on GDP and employment growth” in 2016.

And from the senior economist at BMO the following commentary:

... B.C. is on track to cruise into year-end as the envy of the Canadian provinces. The budget is balanced; net debt is low and stabilizing at around 16.5% of GDP; economic growth is atop the leader board, and the province’s relative tax competitiveness is steadily improving (especially versus its neighbour to the east).”

Budget Speech 2016, **Tab 30**, page 2 (emphasis added)

225. Premier Christy Clark also boasted about the health of the Provincial economy when announcing an increase to minimum wage on May 4, 2016. Premier Clark stated in her news conference:

“We are leading Canada. We are number one in economic growth. We are targeted to grow at twice the national average. We have had four consecutive balanced budgets. British Columbia created 72,000 jobs in the last year. And we’ve had record infrastructure investments without going into deficit.....”

Transcript of the Minimum Wage Increase Announcement, Judges’ Association Documents, **Tab 31**

226. The Provincial Government’s Budget and Fiscal Plan 2016/17-2018/19 reviews a number of key statistics and indicators that, almost without exception, reveal that British Columbia’s economy is currently well-positioned. Some key points from the Budget and Fiscal Plan include:

- **Annual Real GDP growth** in British Columbia has consistently outpaced the Canadian average. An average of six private forecasters estimate that British Columbia experienced the strongest growth in real GDP among provinces in 2015. The same forecasters predict that BC’s economic growth will rank first amongst provinces in 2016 and will tie for first in 2017 (alongside Ontario). Economic growth is expected to continue over the years to be considered by this JCC. (page 68)
- The **employment rate** increased 1.2% in 2015, including a gain of 42,100 full-time jobs. The Government forecasts employment in the Province to increase by 1.2% in 2016 (approximately 27,000 jobs), and to continue increasing by 1.2% in each year from 2017 to 2020. (pages 68- 69)
- The **unemployment rate** averaged 6.2% in 2015, up from 2014. The Province’s labour force increased 1.3% in 2015, its fastest annual rate of growth since 2010. The unemployment rate is expected to average 6.2% in 2016 and 2017, and to then edge up to 6.4% in subsequent years. (pages 68-69)
- **Retail sales** grew by 6.8% in 2015 after growing by 5.6% in 2014. Retail sales were supported by steady employment growth, increased tourism, and high levels of interprovincial migration to the Province in 2015. A gain of 4.3% is forecast for 2016, followed by 3.6%-3.7% increases annually from 2017-2020. (pages 69-70)
- **Housing starts** grew by 10.9% in 2015. A slight moderation is projected over the next few years as interest rates eventually rise, but will average

29,000 in 2016 and about 27,000 or 28,000 units between 2017 and 2020. (pages 69-70)

- **Home sales** grew by a staggering 22% in 2015 compared to 2014 a result of steady employment and population growth amid low interest rates. (page 70)
- **Real household consumption of goods** grew 4.1% in 2015. The rate is forecasted to increase by 3% in 2016 and 2.7% in 2017, followed by 2.6% gains in subsequent years. (page 70)
- **Real business investment** is estimated to have grown 5.2% in 2015 as a result of solid increases in residential investment and gains in other sectors. Total business investments are projected to rise by 3.8% in 2016, followed by increases of 3.8% in 2017 and 3.3% in subsequent years. (page 71)
- **Real export of goods and services** increased 0.3% in 2015. Exports are forecast to rise by 1.5% in 2016, followed by a rise to 2.2% in 2017 and 2.5% in subsequent years. (page 72)
- **Consumer price inflation** increased 1.1% in 2015. The rate is forecasted to increase 1.9% in 2016, followed by 2.0% increases in 2017-2020. (page 73)
- British Columbia experienced **population growth** of 1.0%. During the first three quarters of 2015, the Province saw a net increase of 30,018 people. The population is forecasted to increase 1.2% in 2016, followed by 1.3% increases in subsequent years. (page 73)

Budget and Fiscal Plan 2016/17-2018/19, Judges' Association Documents, **Tab 32**

227. In the 2016 Budget Speech, Minister de Jong provided economic projections for the Province for the years 2016 through 2020. He explained that these forecasts were created using predictions from the 13-member Economic Forecast Council, which includes some of the most respected independent economic forecasters in Canada. Those forecasts were then compared with the Provincial Government's own budgetary forecasts (the Government's custom is to use a forecast which is approximately 0.3%

below the forecasts made by the Economic Forecast Council). Minister de Jong announced the following:

“The Economic Forecast Council is projecting growth for B.C. as follows:

2016:	2.7%
2017:	2.6%
2018-2020:	2.4%

For the purpose of the fiscal plan I am tabling today, the government is projecting B.C. economic growth of:

2016:	2.4%
2017:	2.3%
2018-2020:	2.3%

As usual our projections are slightly lower than the outlook provided by the Council, and that is one of the levels of prudence that helps keep spending within our means.”

Budget Speech 2016, Judges’ Association Documents, **Tab 30**, page 6

228. Even applying the Government’s slightly lower projections, it is clear that British Columbia is projected to continue leading the nation in economic growth over the period covered by this 2016 JCC.

229. The Conference Board of Canada shares in the Government’s positive outlook for British Columbia. The Board’s most recent economic forecast reveals that the Province posted the strongest economic growth in Canada in 2015 and is expected to continue to outpace all other provinces in economic growth in 2016 and 2017. Like the Economic Forecast Council, the Conference Board predicts that British Columbia will post Real GDP growth of 2.7% in 2016. As a result, British Columbia is expected to be one of only four provinces in Canada who will see its economy grow by more than 2% in 2016 (the others being Ontario, Manitoba, and Nova Scotia).

Conference Board of Canada News Release - March 8, 2016, Judges’ Association Documents, **Tab 33**

230. TD Economics' "Provincial Economic Forecast" most recent forecast makes a similar prediction. Its forecast, dated April 5, 2016, states that:

"British Columbia is expected to sit at the top of the economic growth charts in both 2016 and 2017."

TD Economics Provincial Economy Forecast, April 5, 2016, Judges' Association Documents, **Tab 34**

231. TD Economics explains that certain factors, such as the low Canadian dollar and solid U.S. growth, have attracted more visitors to the Province. In addition, net interprovincial migration reached a decade high in 2015, largely due to people leaving Alberta and Saskatchewan for better employment opportunities. TD Economics explains that this has caused BC's economy to see rising retail sales and surging housing activity.

TD Economics Provincial Economy Forecast, April 5, 2016, Judges' Association Documents, **Tab 34**

232. TD Economics forecasts that this trend will continue. As a result, it forecasts higher economic growth than the Government or the Economic Forecast Council for 2016, predicting growth of 3.0%, followed by 2.5% growth in 2017.

TD Economics Provincial Economy Forecast, April 5, 2016, Judges' Association Documents, **Tab 34**

233. RBC Economics also ranks British Columbia at the top of its provincial growth rankings in 2016, citing its belief that hot housing market conditions, competitively priced exports and a healthy labour market will continue to fuel incomes and household spending. RBC forecasts Real GDP growth of 2.9% in 2016 and 2.7% in 2017. This appears to be the highest of the available forecasts.

RBC Provincial Outlook, March 2016, Judges' Association Documents, **Tab 35**

234. As it did for past JCCs, the Judges' Association retained economist Ian McKinnon of Pacific Issues Partners to provide expert evidence on its behalf. His report, entitled "*The Current and Expected Economic Conditions in British Columbia and the Financial Position of the Government of British Columbia*", dated May 2016 (hereinafter "the McKinnon Report"), is attached as **Tab 36** in the Judges' Association Documents. The analysis in the McKinnon Report is consistent with the Government's projections. It also affirms that the province's approach to forecasting, and its track record in that regard, supports that its forecasts can be reasonably relied upon.

235. The McKinnon Report begins with a broader international and Canadian perspective before turning its attention to British Columbia. McKinnon compares Canada with other advanced economies and opines that Canada "stands out" internationally with its comparatively low debt levels. The focus is then on key indicators such as real GDP, employment rates, and net debt as a percentage of GDP and McKinnon concludes that Canada has fared well in comparison with other countries:

"Overall, these economic data show the relative strength of the Canadian economy. Debt levels remain laudably low, GDP has grown significantly past pre-recession levels, and employment continues to advance above the pre-recession level. Even in the face of a major decrease in resource prices, the Canadian economy has not suffered a sharp reversal."

McKinnon Report, Judges' Association Documents, **Tab 36**, pages 8,10

236. The McKinnon Report describes the state of the British Columbia economy with a focus on the years at issue for this 2016 JCC. He remarks that a review of Annual Real GDP growth shows that British Columbia's economy has tended to outperform the Canadian economy, and that the Province's 2016 Budget forecasts growth that continues to exceed that of the Canadian economy.

McKinnon Report, Judges' Association Documents, **Tab 36**, page 10

237. The McKinnon Report reflects on the structure of the provincial economy and considers whether that structure exposes the Province to “boom and bust cycles.” He compares the diversification of British Columbia with the oil and gas producing provinces of Alberta, Saskatchewan, and Newfoundland, as well as Ontario and Quebec. McKinnon opines that the lack of diversification in the oil and gas producing provinces “tends to create volatility - when the principal industry does well, so too do the province’s finances; when that sector does poorly, the provincial government’s finances suffer.” For BC, in contrast, McKinnon remarks:

“...we see that BC’s economy is diversified and can, therefore, conclude that the economy is less likely to be deeply affected by an exogenous economic shock that affects a specific sector of the economy. In considering the current and expected economic conditions in BC, this means that there is lower risk to forecasts than would be the case in a less diversified economy. Similarly, the current and expected financial position of the province is not as likely to be as volatile and uncertain as that of provinces more dependent on a narrower range of basic economic drivers.”

McKinnon Report, Judges’ Association Documents, **Tab 36**, page 15

238. The Report concludes:

“Overall, the government’s own forecasts of surpluses and steady economic growth, especially when one considers the government’s record of caution in forecasting, can give the Commission confidence that their recommendations should not be hindered by concern for risks posed by the economy’s prospects or the government’s likely financial position.”

McKinnon Report, Judges’ Association Documents, **Tab 36**, page 34

239. In short, the current and predicted strength of the provincial economy over the period mandated by this 2016 JCC is overwhelmingly positive and supports the Association’s requests for increased compensation.

(f) **The Current and Expected Financial Position of Government Over the Three Fiscal Years that are the Subject of the Report**

240. Section 5(5)(f) of the Act requires this 2016 JCC to consider the current and expected financial position of the Government over the three fiscal years that are the subject of its Report. A review of the Government's current and projected financial position reveals that its position is solid.

241. As a starting point, British Columbia has had three successive balanced budgets. From a comparative perspective, no other province in Canada can make this claim over the same time period.

242. These successive balanced budgets have resulted in considerable surpluses for the Province. As noted in the document entitled "Balanced Budget 2016 Highlights", the Province expects to end the 2015-2016 budget year with a surplus of \$377 million dollars. That same document notes that the Province has reduced its operating debt by \$2.2 billion dollars since 2013-2014. Minister de Jong is quoted in that document as declaring:

"With a track record of successive balanced budgets and steady economic growth, B.C. remains in a fiscal position envied by many jurisdictions around the world."

"Strong Fiscal Management Pays Dividends." Balanced Budget 2016 Highlights, Judges' Association Documents, **Tab 37**, page 1

243. In the 2016 Budget Speech, Minister de Jong announced that the Province was tabling a 4th straight balanced budget for 2016-2017. He proudly announced:

"Last year, I referred to the fiscal hat trick... this year I will congratulate British Columbians on scoring a budgetary grand slam."

In 2016-17, for the fourth year in a row, the government is tabling and will deliver a balanced budget."

Budget Speech 2016, Judges' Association Documents, **Tab 30**, page 3

244. This trend of achieving balanced budgets is predicted to continue. In fact, the Government not only projects the continuation of balanced budgets over the next three years, but also anticipates the persistence of considerable surpluses. In the 2016 Budget Speech, Minister de Jong predicted the following surpluses for the years 2016 to 2020:

2016-17: \$264 million surplus
2017-18: \$287 million surplus
2018-2019: \$373 million surplus

Budget Speech 2016, Judges' Association Documents, **Tab 30**, page 6

245. In fact, the 2016 Budget Speech went to so far as to predict that, if British Columbia remains on track, the Government has the opportunity to completely eliminate its operating debt by as early as 2020 and operate debt free for the first time in 45 years.

Budget Speech 2016, Judges' Association Documents, **Tab 30**, page 8

246. British Columbia's solid fiscal position is further reinforced through the maintenance of its credit rating. In the Budget Speech, Minister de Jong noted that while other provinces (namely Alberta and Saskatchewan) have experienced credit rating downgrades, British Columbia has maintained its triple A credit rating. Minister de Jong stated:

"Alone among all of the provinces, B.C. is the only jurisdiction to garner top marks of "Triple-A Stable" from both international rating agencies. The exclusive club I referred to last year has now truly become a lonely triple hearts club of one.

Our positive standing is a reflection of the disciplined fiscal management that British Columbians have demanded of their government and the solid

economic growth that British Columbians have achieved through enterprising ingenuity.”

Budget Speech 2016, Judges’ Association Documents, **Tab 30**, page 3

247. The McKinnon Report confirms the health and ongoing strength of the Government’s fiscal position. McKinnon’s analysis of the BC Government’s finances begins at page 15 of his Report. He considers the Government’s finances and fiscal situation from two perspectives: historically within British Columbia and in comparison with the situation in other provinces.

248. McKinnon provides a table demonstrating the surplus/deficit in each year dating back to 2004. That table indicates that, aside from the years after the global recession, the Government has primarily enjoyed surpluses in each year. McKinnon states that this table “displays the strength of the government’s financial position and its success at responding to economic shocks.”

McKinnon Report, Judges’ Association Documents, s, **Tab 36**, page 17

249. McKinnon then reviews the considerable changes in the fiscal position of Government from the recession until current. He notes that while the 2.5% decline in provincial GDP in 2009 (caused by the recession) led to four successive deficits, those deficits were gradually reduced and were eventually replaced by three successive surpluses. McKinnon opines that this bodes well for future projections:

“This stands in sharp contrast to the experience of earlier decades when long series of deficits were run, even as the economy improved.

The effective responses of the government in restoring strong budget balances even following downturns gives us confidence that the projections of surpluses for the coming three fiscal years will be realized.”

McKinnon Report, Judges’ Association Documents, **Tab 36**, page 17

250. McKinnon also considers trends in capital expenditures in the Province, noting that governments often tend to defer or reduce capital investments when it is trying to improve its finances (as is the case in British Columbia). McKinnon notes that throughout the fiscal difficulties caused by the global economic recession, the Government nevertheless continued to invest in capital assets, which led McKinnon to conclude that “the government of BC has chosen to and clearly feels it has the fiscal room to carry on high levels of government investment.”

McKinnon Report, Judges’ Association Documents, **Tab 36**, page 18

251. McKinnon goes on to note that capital investment was not halted in order to improve provincial finances:

“Further, the improvement in the current balance statements did not come through reductions in capital spending. Similarly, the projected surpluses are not being created by cutting back dramatically on capital expenditures.

Looking at the trends in capital investment confirms the healthy position of the government’s finances.”

McKinnon Report, Judges’ Association Documents, **Tab 36**, page 19

252. McKinnon also considers the Government’s ability to generate revenue. McKinnon notes that the Liberal Government implemented an economic strategy that encouraged economic growth through tax reductions, which had the effect of reducing revenues by over \$2 billion dollars in the first full year and incrementally more over time. As a result, McKinnon notes that British Columbia has some of the lowest tax rates in Canada.

253. Nevertheless, the McKinnon Report considers British Columbia’s fiscal capacity by reviewing the fiscal capacity calculations used in the federal equalization program.

McKinnon explains that those figures demonstrate that British Columbia nevertheless has fiscal capacity that exceeds the national average.

McKinnon Report, Judges' Association Documents, **Tab 36**, page 20

254. Overall, with respect to British Columbia's fiscal capacity, McKinnon concludes:

"First, this does not mean that the province needs to raise taxes- the tax reductions a decade ago went hand in hand with increased capital spending and reductions in the debt to GDP ratios.

On the other hand, BC has substantial fiscal room to use if it so chooses. Recent budgets have brought in some targeted tax hikes and yet there seems not to have been concerns that this threatens investment or economic activity in the province. This is abundantly not a case where the government has run out of 'tax room' or is at the limits of 'tax effort' in terms of the competitive position of the province. It has fiscal capacity.

Turning to the "current and expected financial position of the government" having comparative fiscal capacity means that the government gives additional assurance that the government will be able to deal better with unexpected economic events, confirming the solid financial position of the government."

McKinnon Report, Judges' Association Documents, **Tab 36**, page 21

255. The McKinnon Report also considers the Province's debt in some detail beginning at page 21. McKinnon summarizes the various ways debt is considered and concludes that "debt levels are stable having only increased marginally after the recent economic uncertainty and decline in the GDP, and while capital expenditures increased."

McKinnon Report, Judges' Association Documents, **Tab 36**, page 22

256. The McKinnon Report also considers future obligations and pressures on the Province. McKinnon considers the negative impact that public sector pension plan obligations can have on a province and provides a table of pension obligations for each

province. As McKinnon concludes, BC is in a remarkably good position as compared with its counterparts. He wrote:

“the Funding Ratios calculated in this table show the generally high levels of preparation that provincial governments have made to ensure that they do not face huge ‘lurking expenditures’ through their pension obligations. In the specific case of BC, the current level of pension assets almost entirely covers their future obligations.

... while public pension obligations may cause serious future financial problems elsewhere, the situation in Canada generally and in BC in particular should not be a source of concern for the government’s future financial position.... The BC government is careful about ensuring that future obligations are not left unmet as current balanced budgets are pursued. First with capital expenditures and now with pensions, we see the provincial government ensuring that future needs are managed and financed now. The province does not appear to defer needed investment, either material or financial, to make their current finances look better.”

McKinnon Report, Judges’ Association Documents, **Tab 36**, page 26

Comparison with Other Jurisdictions

257. The McKinnon Report confirms the Government’s Throne Speech pronouncement that British Columbia is in an enviable financial position as compared with many jurisdictions around the world.

“Strong Fiscal Management Pays Dividends.” Balanced Budget 2016 Highlights, Judges’ Association Documents, **Tab 37**, page 1

258. The McKinnon Report considers British Columbia’s fiscal capacity by reviewing the fiscal capacity calculations used in the federal equalization program. McKinnon notes that a review of those figures demonstrates that British Columbia has a fiscal capacity that exceeds the national average. While Alberta, Saskatchewan and Newfoundland have greater fiscal capacity than British Columbia this year, he opines that the downturn in oil prices will result in rapid decline for those provinces. In contrast,

McKinnon notes that British Columbia will be able to maintain its fiscal capacity because of its diversified economy.

McKinnon Report, Judges' Association Documents, **Tab 36**, pages 20-21

259. The McKinnon Report puts the Province's debt in context by making comparisons with debt levels in other provinces. On page 24, McKinnon provides a table which shows that British Columbia has the fourth lowest debt in the country, trailing only Alberta, Saskatchewan and Newfoundland (provinces that enjoyed substantial oil revenues until recently) and enjoys considerably lower debt levels than Ontario (24% lower) and Quebec (32% lower). McKinnon concludes:

“Overall, this again clearly demonstrates the strong fiscal position of the province.”

McKinnon Report, Judges' Association Documents, **Tab 36**, page 24

260. Clearly, the financial position of the Government is strong compared with the financial positions of most other governments in Canada. It is also strong relative to past years, including in particular the difficult time at which the 2010 JCC considered its recommendations, and the cautious optimism that prevailed in 2013.

261. Of particular note, given the prospective nature of this JCC process, is McKinnon's analysis regarding the accuracy and reliability of the Government's own projections about its future fiscal position. McKinnon notes that in past decades, the Government had provided overly optimistic financial forecasts, including forecasted balanced budgets two or three years into the future that never materialized. According to McKinnon, the current Liberal Government has taken a far more cautious and conservative approach in its budget estimations and reporting practices. The Province has taken two key steps aimed at securing external validation of the Government's forecasts.

262. The first step is the use of the 13-member Economic Forecast Council to advise the Government on its own economic forecasts for British Columbia prior to the release of the annual Budget (which is used as a ceiling in creating the Budget), which prevents the Government from making overly optimistic forecasts. The second step is the Government's willingness to have external specialists advise on specifics of budget forecasting. As an example, McKinnon notes that the Government brought in Dr. Tim O'Neill, a well-respected economist, to review the Government's revenue forecast models in the past and that overly optimistic assumptions about natural gas pricing led to changes in the subsequent Budget.

263. On these steps, McKinnon remarks:

"This is a consistent pattern of prudence. The government's forecasts have been cautious and, in the face of all but the most jarring of economic events, have been consistently and significantly conservative. Further, the government has used respected independent professionals to give external forecasts and evaluations, ensuring that the Budget does not fall prey to overly optimistic macro-economic or revenue forecasts. When BC forecasts surpluses, as it has for each of the three years that are the subject of the Commission's report, we can be very confident that those forecasts are the result of a prudent, sophisticated and cautious process undertaken by the Ministry of Finance."

McKinnon Report, Judges' Association Documents, **Tab 36**, page 29

264. McKinnon acknowledges that the Budget forecasts that are relied on in his Report and by the Government in its Budget were developed and published in early 2016. For that reason, he examines whether there have been any significant changes in the economy since that time which might "temper the optimism apparent in the province's Budget." To that end, McKinnon considers the Government's Labour Force Survey, a statistic that is available monthly and is the most up-to-date information available at present. McKinnon quotes the Government's statement in the Labour Force Survey that was released on May 6, 2016:

The unemployment rate in British Columbia was 5.6% in April, down from 6.5% in March, as employment increased by 13,000 ... Compared to April 2015, the unemployment rate was down 0.5 percentage points from 6.3%

...

On a monthly basis, there were more full-time (+21,400) jobs in April. However, there was a decrease in part-time (-8,400) jobs.

In April, employment growth was concentrated in the private sector (+19,000) with a decrease in the public sector (-2,800). The number of self-employed people also decreased (-3,100).

For the first time since comparable data became available in 1976, the unemployment rate in BC was the lowest among the provinces at 5.8%.

McKinnon Report, Judges' Association Documents, **Tab 36**, page 30

265. McKinnon remarks that while this strong showing does not ensure that this rate of progress will continue over the next three years, "it does, however, assure us that the economic outlook has certainly not deteriorated since the publication of the Budget and the associated forecasts on which this submission is based."

McKinnon Report, Judges' Association Documents, **Tab 36**, page 30

266. Lastly, the McKinnon Report reviews the credit rating agencies' assessments of the Province's capacity to carry and service its debt levels. McKinnon reviews those ratings and remarks that, with one exception, the credit rating agencies "puts the province of BC in their highest ranking, denoting the strongest current financial position" and that "overall, BC has one of the strongest ratings of any province."

McKinnon Report, Judges' Association Documents, **Tab 36**, page 30

267. McKinnon quotes from a Ministry of Finance press release from April respecting Moody's rating for the Province. McKinnon opines that Moody's comments "could well summarize the findings and conclusions of this report to the Commission." The press release stated:

“In affirming the Aaa-stable rating-the highest possible- Moody’s writes: “The Aaa issuer and debt ratings assigned to British Columbia reflect the diverse and relatively strong provincial economy, track record of prudent fiscal management and a high degree of flexibility to accommodate revenue and expenditure pressures. These positive elements helped the province return to balanced budgets faster than most other Canadian provinces following the 2009 recession and the province has posted a plan of continued balanced budgets across its rating horizon.”

McKinnon Report, Judges’ Association Documents, **Tab 36**, page 32

268. McKinnon concludes his Report with the following remarks:

“Whether using historical comparisons, cross-jurisdictional comparisons or the ratings of neutral, expert observers, BC’s financial position is solid.”

McKinnon Report, Judges’ Association Documents, **Tab 36**, page 35

269. The Government’s strong fiscal capacity and solid financial position support the Judges’ Association’s proposals for compensation that is fair and appropriate in light of this and all the other factors.

Other Relevant Factors

270. Subsection 5(5.2) of the *Judicial Compensation Act* also directs this 2016 JCC to consider other “factors it considers relevant”, but requires that if it does so, it must explain the relevance of those factors in its report. No other factors are proposed by the Judges’ Association for consideration by this 2016 JCC.

Judicial Compensation Act, Judges’ Association Documents, **Tab 1**

PART IV: RECOMMENDATIONS

1. Salary

Recommendation Sought:

- That effective April 1, 2017, the annual salary for *puisne* judges shall be increased to \$285,000; and
- That effective on each of April 1, 2018 and April 1, 2019, the salaries for *puisne* judges shall be further increased by two percent (2%) per annum.

271. Judicial salaries have fallen to 11th place among the thirteen jurisdictions across Canada. Consideration of all of the relevant factors supports a significant increase for the year 2017, which would restore the salary to a level that is fair and reasonable in light of traditional comparators and which reflects the relative strength of BC's economy and financial position both historically and within the Canadian federation.

272. The analysis below begins with an explanation of the recent history on judicial salaries in BC and then examines how the relevant factors support the Judges' Association's proposal.

Current Salary

273. Based on the salaries substituted by the Government for those recommended by the 2013 JCC, *puisne* judges are currently paid a salary of \$244,112, which was effective April 1, 2016. If the recommendations of the 2013 JCC are eventually implemented, the 2016 salary will rise to \$250,024.

274. The Chief Judge, Associate Chief Judges and Regional Administrative Judges receive differentials on top of the *puisne* judge salary equal to 112%, 108% and 106% respectively. To be clear, the Judges' Association is proposing no change to the

percentage differentials that would continue to apply to the increased *puisne* judge salaries.

2013 Government Response to 2010 JCC Report, Judges' Association Documents, **Tab 17**, page 5

2013 JCC Report, Judges' Association Documents, **Tab 20**, page 45

Salary History 2011-2016

275. As detailed below, judges' salaries in British Columbia have fallen far behind their traditional comparators in recent years, to an extent that is not justified based on the relevant factors. The history of judicial salaries in BC in recent years is complex, given the Government's rejection of the salary recommendations of two successive JCCs and the ensuing litigation. The following table summarizes the recommendations and outcomes of the 2010 and 2013 JCCs:

Year	JCC Recommendation	Government's Response 2011 / 2013	Final Outcome
2011	\$231,138	\$231,138 / \$231,138	\$231,138
2012	\$231,138	\$231,138 / \$231,138	\$231,138
2013	\$242,464	\$231,138 / \$234,605	\$242,464
2014	\$241,500	\$236,950	Unknown
2015	\$245,122	\$240,504	Unknown
2016	\$250,024	\$244,112	Unknown

276. As set out in Part II above, the 2010 JCC recommended a two-year freeze in salaries for 2011 and 2012, followed by an increase in 2013 equal to the compounded percentage increase in the Consumer Price Index for BC over the preceding three fiscal years. The recommended increase for 2013 was twice rejected by Government, but was eventually implemented following a decision of the Court of Appeal in 2015. Once the 2010 JCC's recommendations were finally implemented, the 2013 salary was \$242,464.

277. Before the 2013 salary was finalized, the 2013 JCC made its recommendations for the years 2014, 2015 and 2016. As noted in Part II, the 2013 JCC took as its starting point the 2013 salary figure implemented by the Government in its 2013 Response to the 2010 JCC (i.e. \$234,605). The 2013 JCC worked from that figure and recommended percentage increases of 2.9%, 1.5% and 2.0% in each of 2014, 2015 and 2016 respectively.

2013 JCC Report, Judges' Association Documents, **Tab 20**, pages 46-48

278. The difficulty of this approach is that the starting point turned out to be wrong. When the 2013 salary increased to \$242,464 following the Court of Appeal's decision, the increase that appears to have been intended by the 2013 JCC for 2014 ended up being a decrease. This is because a 2.9% increase on \$234,605 amounted to only \$241,500 for 2014, which was less than the finalized 2013 salary of \$242,464.

279. To complicate things further, the Government rejected the salary recommendations of the 2013 JCC and substituted lower salaries. Judicial salaries were reduced from \$242,464 in 2013 down to \$236,950 for 2014. The Government's Response imposed lower salaries than had been recommended in each of the later years as well, with an increase to \$240,504 in 2015 and a 2016 salary of \$244,112. As it stands currently, judges have received only a 0.68% increase over the three year period from 2014-2016.

280. As noted, the Judges' Association has challenged the legitimacy of the Government's reasons for rejecting the salary (among other) recommendations of the 2013 JCC. As such, the outcome of that process remains unknown at this point. Despite the uncertainty, the outside parameters of the 2016 salary are clear. The lowest possible 2016 salary is that which was imposed by Government: \$244,112. The highest is that recommended by the 2013 JCC: \$250,024.

281. The role of this 2016 JCC is not to determine what percentage increase is appropriate for judges. Rather, its task is to determine what compensation is

appropriate for the three years within its mandate. For that reason, the Judges' Association urges the JCC to recommend an appropriate salary figure for each year within its mandate, rather than a percentage increase from the current salary.

282. For the reasons set out below, the uncertainty over the 2016 salary is largely beside the point and should not cause this 2016 JCC any practical difficulty. This is because consideration of the relevant factors identified in the *Judicial Compensation Act*, and the reasoning of past JCCs, justifies the proposal by the Judges' Association for a salary that exceeds any of the potential final salaries for 2016.

2017 Salary

283. The Judges' Association submits that a salary of \$285,000 effective April 1, 2017 is reasonable as it appropriately takes into account all of the factors that must be considered by this 2016 JCC pursuant to section 5(5) of the *Judicial Compensation Act*. In making its salary proposal, the Judges' Association has specifically taken into account the other proposal it is making: the request for a return to the 3.5% pension accrual rate.

284. The discussion below outlines how the relevant factors support the Judges' Association's salary proposal. As outlined below, the proposal is consistent with the reasoning of past JCCs and the Government's own argument to the 2007 JCC.

Attraction of Highly Qualified Applicants

285. Section 5(5)(a) of the *Judicial Compensation Act* requires consideration of "the need to maintain a strong court by attracting highly qualified applicants". As discussed above, because the Provincial Court and the Supreme Court compete for applicants from the same population of BC lawyers, this factor supports the need to minimize the disparity with the compensation paid to federally appointed judges in BC. The Judges' Association's proposal would achieve this by restoring the difference in salaries to what is reasonable, taking into account the reasoning of past JCCs.

286. The 2007 JCC’s recommendations resulted in a dollar disparity between the two courts of roughly \$40,000 per annum for each of 2008, 2009 and 2010. When its recommendations are considered in relation the federal salaries that were predicted at the time by Mr. McKinnon (given his predictions of the expected increase in the IAI for Canada), it can be shown that the 2007 JCC effectively considered a percentage relationship of approximately 85% to be a reasonable disparity:

Year	BC Judges’ Salaries	s. 96 Judges	Origin of s.96 judge salary figures	% Relationship	\$ Difference
2008	\$220,000	\$257,370	as predicted by McKinnon	85.5%	\$37,370
	\$220,000	\$260,000	actual salaries	84.6%	\$40,000
2009	\$225,500	\$262,845	as predicted by McKinnon	85.8%	\$37,345
	\$225,500	\$267,200	actual salaries	84.4%	\$41,700
2010	\$231,138	\$268,436	as predicted by McKinnon	86.1%	\$37,298
	\$231,138	\$271,400	actual salaries	85.6%	\$40,262

2007 JCC Report, Judges’ Association Documents, **Tab 8**, pages 15 and 23

287. At the time the 2010 JCC adopted the analysis of the 2007 JCC on this point, the dollar difference in salary for judges on the two courts was \$40,262, and Provincial Court judges were paid a salary equal to 85% of what their federally appointed colleagues were paid. However, as detailed in its decision, the 2010 JCC agreed with the Judges’ Association’s own proposal that a salary freeze was appropriate for each of 2011 and 2012 because of difficult fiscal circumstances within the province. Taking into account that salaries for s.96 judges are indexed based on the percentage change in the Industrial Aggregate Index (“IAI”) for Canada, the 2010 JCC recommended an increase effective April 1, 2013 for Provincial Court judges based on the cumulative percentage increase in the BC Consumer Price Index over the preceding three fiscal years.

2010 JCC Report, Judges’ Association Documents, **Tab 9**, pages 27-33

288. Once the 2010 JCC's recommendations were eventually implemented, BC Provincial Court judges were paid a salary of \$242,464 for 2013, or 82% of the 2013 salary paid to federally appointed judges.

289. The reasoning of the 2013 JCC was similar to that of the 2007 and 2010 JCCs on the risk associated with a widening disparity in salaries. It wrote about the difficulty of finding the "tipping point" where the Court loses its ability to recruit highly qualified candidates, but concluded that letting the gap widen could be dangerous:

Also, the gap in salaries between BC Provincial Court judges and BC Supreme Court justices should not become so great that the ability to recruit highly desirable candidates is compromised in the future. The difficulty, of course, is that no one can predict where that tipping point might be. The evidence before the Commission does not suggest that the gap between Provincial Court judges and Supreme Court justices needs to be closed; but there is sufficient evidence to show that letting the gap widen could be dangerous.

2013 JCC Report, Judges' Association Documents, **Tab 20**, page 47

290. Nonetheless, the recommendations of the 2013 JCC resulted in a widening of the disparity down to 80% for 2014. The 2013 JCC commented that its 2014 salary recommendation "would place BC Provincial Court judges' salaries ...at roughly 81.7% of the salary of a Supreme Court justice." That is true if one compares the 2014 recommendation with the 2013 Supreme Court salary (which was \$295,500). However, the 2014 recommendation for BC Provincial Court judges amounted to only 80% of the 2014 federal salary.

291. As noted above, the Government rejected the 2013 JCC's salary recommendations. The salaries imposed by the Government widened the dollar differential to roughly \$70,000 such that BC judges are paid a salary that is only 78% of the amount paid to their federal counterparts. If the 2013 JCC's recommendations are eventually implemented, the differential would reduce slightly to \$65,000 or 79.6%.

Whatever the outcome of the judicial review process, the differential has increased significantly from the \$40,000 dollar difference and 85% relationship that prevailed in earlier years.

2013 JCC Report, Judges' Association Documents, **Tab 20**, pages 47-48

292. The 2016 salary for federally appointed judges includes only the annual increase that was made pursuant to s. 25 of the *Judges Act*, R.S.C., 1985, c. J-1, Their 2016 salary could rise higher following the recommendations by the 2016 Quadrennial Commission, which will, among other things, consider whether any increase is appropriate beyond the statutory increase. The Quadrennial Commission will also consider what salaries are appropriate for the fiscal years 2017-2019. Because the 2017 figure is unknown, we have prepared a reasonable forecast of the 2017 salary, assuming only the statutory IAI-based increase.

293. The estimated 2017 federal salary is \$321,010. This was calculated based on the average of the percentage changes in the IAI for Canada in each of 2014 and 2015. As set out in the Statistics Canada chart appended as **Tab 38** in the Judges' Association Documents, the percentage changes in the IAI for Canada in the 2014 and 2015 calendar years were 2.63% and 1.77% respectively, the average of which is 2.2%. As such, we have estimated that federal salaries will increase by 2.2% in 2017 to \$321,010.

294. The Judges' Association's salary proposal seeks to ensure that highly qualified applicants are not deterred from applying to the Provincial Court for financial reasons. It also seeks to retain and motivate existing judges.

295. The proposed salary of \$285,000 is 88.7% of the estimated salary of \$321,010 for federal judges. This is generally in line with the percentage relationship considered to be reasonable by the 2007 and 2010 JCCs, and would mean a dollar difference in salary of approximately \$36,000 in 2017. While it is a slightly higher proportion than in

some of the past years, this is justifiable given the strong financial position of the Government and the solid economic forecasts for the years within this JCC's mandate.

296. Because the salaries of federally appointed judges are adjusted annually based on the IAI for Canada and the Judges' Association is proposing fixed adjustments of 2% in each of 2018 and 2019, the salaries for BC judges will not increase at the same rate as the salaries of federal judges. However, they will remain within a range that past JCCs have considered reasonable throughout the mandate of this 2016 JCC.

Comparison with Other Provincial Court Judges

297. The chart which forms page 93(a) of this Submission compares the salaries of judges in each of the provincial and territorial jurisdictions across Canada, as well as the salaries of federally-appointed judges.

298. Even as of 2015, the last year for which almost all judges' salaries are known,⁴ BC judges' salaries had fallen to 10th place among Provincial and Territorial judicial salaries in Canada (with only Nova Scotia and Newfoundland & Labrador paying less). Leaving out Yukon and the Northwest Territories, the BC salary ranked 8th among the provinces in 2015. The Judges' Association's proposed salary of \$285,000 for 2017 would restore British Columbia's judicial salary to fourth place among its provincial counterparts, consistent with a reasonable assessment of BC's relative economic position among the provinces.

299. In reviewing the chart of judicial salaries which forms pages 93(a) and (b) of this Submission, it is important to note that:

- None of the jurisdictions has established a 2017 salary. A binding recommendation has been made by the 2016 JRC for the NWT, although

⁴ BC's 2015 salary is subject to the outcome of the judicial review. In NL, the Government recently rejected the salary recommendations of the 2014 Salary and Benefits Tribunal. The Association is expected to seek judicial review of that decision.

the salary figures remain confidential pending the tabling of the Report in the Legislature. That is expected to happen in June 2016.

- The chart provides reasonable estimates of 2017 salaries for the Federal Jurisdiction, as well as for Alberta, Saskatchewan and Ontario, highlighted in green colour. The basis for the estimates is discussed below at paragraphs 292 to 293 and 308 to 311.
- Nine of the 13 jurisdictions have yet to establish a 2016 salary. Only Alberta, Saskatchewan, Manitoba and the federal jurisdiction have established their 2016 salary. Other jurisdictions await the:
 - availability of data to permit the calculation to be made (Nova Scotia, Ontario);
 - outcome of a judicial review over the Government's rejection of the salaries recommended by a JCC (BC and likely NL);
 - tabling of a JCC Report in the Legislature such that the recommendations become public (NWT);
 - calculation of the "national average" in the case of Prince Edward Island; and/or
 - recommendations of the next JCC (Federal, Ontario, Quebec, New Brunswick).

300. As detailed in Part III above, successive JCCs have considered that BC judges' salaries should be in the top tier among their provincial counterparts. After considering all of the factors, the 2013 JCC 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 the salaries of provincial court judges in Canada.

2013 JCC Report, Judges' Association Documents, **Tab 20** page 47

301. According to the Government's public statements and the McKinnon Report, BC's economic circumstances are positive and it is apparent that they are significantly

improved as compared with when the 2013 JCC made its recommendations. Given the particularly positive economic and fiscal outlooks for BC relative to those of the main comparator jurisdictions, the Judges' Association's proposal for a salary that ranks 4th among the jurisdictions is entirely reasonable.

302. Of particular note is the analysis in the McKinnon Report to the effect that the diversification of BC's economy "means there is lower risk to forecasts than would be the case in a less diversified economy [such as that of Alberta or Saskatchewan]".

McKinnon Report, Judges' Association Documents, **Tab 36**, page 15

Comparison with Alberta, Saskatchewan and Ontario

303. As set out in the chart, the highest judicial salaries are paid in Alberta, Saskatchewan and Ontario, a fact which accords with the relative economic strength of those jurisdictions. The Judges' Association's proposal would properly and appropriately restore the salaries of BC judges to within the range of judicial salaries in Alberta, Saskatchewan and Ontario, albeit to a figure lower than that in all three provinces. This is consistent with the reasoning of past JCCs, the Government's own argument to the 2007 JCC and the relative strength of BC's financial position among the other provinces as described in the McKinnon Report. The strong economic prospects for British Columbia and the Government's solid financial position are such that it is not reasonable for judicial salaries to depart from the relative standing that has been acknowledged to be reasonable in the past.

304. The 2001 JCC considered the Provincial Courts of Alberta and Ontario to be "the most relevant comparisons". While the 2001 JCC did not express its reasons for making this determination, like BC, Alberta and Ontario are both sizeable provinces from an economic perspective and judges in Alberta exercise similarly broad criminal, family and civil jurisdiction.

2001 JCC Report, Judges' Association Documents, **Tab 6**, page 27

305. The 2007 JCC determined that the remuneration of BC judges “should keep pace with that of other provinces” in keeping with BC’s “relative economic position within the country”. The 2007 JCC described the Government’s argument about the relevance of Ontario and Alberta as comparators:

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.

2007 JCC Report, Judges’ Association Documents, **Tab 8**, page 17

306. As noted above, the 2013 JCC considered that BC judges “ought to be in the range of 3rd to 4th place among salaries of provincial court judges in Canada”. Indeed, in rejecting the proposal made by the Government at that time, the 2013 JCC explained:

The proposal of Government would have Provincial Court judges falling far behind their comparators on other courts. Indeed, the salary position of BC Provincial Court judges in comparison to the salaries in other provinces would cease to have any relation to the relative economic strengths of the provinces. It would also contradict the Government’s policy of setting itself “3rd to 5th nationally amongst the provincial and federal governments” in relation to executive compensation.

307. The Government’s Executive Compensation policy continues to be in effect today. The Judges’ Association’s proposal is consistent with that policy as judges salaries would rank 5th nationally amongst the provincial and federal governments.

Executive Compensation, BC Public Service, Judges’ Association Documents, **Tab 39**, page 2

308. Because of the particular relevance of Alberta, Saskatchewan and Ontario as comparators for British Columbia, and because salaries for relevant years have yet to be established in those jurisdictions, we have made certain reasonable predictions about future judicial salaries in those provinces to facilitate a comparison going forward. The estimated salaries are shown in the comparison chart below:

	2017	2018	2019
Judges' Proposal for BC	\$285,000	\$290,700	\$296,514
Alberta	\$298,401	\$303,474	\$309,847
Saskatchewan	\$293,471	\$299,341	\$305,328
Ontario	\$296,348	\$301,978	\$307,716

309. For Alberta, it is assumed that in the three years commencing April 1, 2017, judges' salaries will increase only by the annual percentage changes in the Consumer Price Index ("CPI") for Alberta. As we set out in **Tab 40** of the Judges' Association Documents, the Government of Alberta predicted in its 2016 Budget that the CPI would increase 1.5%, 1.7% and 2.1% in each of 2016, 2017 and 2018. With CPI-based adjustments, the salaries for each of 2017, 2018 and 2019 would be \$298,401, \$303,474 and \$309,847 respectively.

Alberta Fiscal Plan and Economic Outlook, Budget 2016 (excerpt only), Judges' Association Documents, **Tab 40**

310. Saskatchewan is also a comparator jurisdiction. The 2014 Saskatchewan JCC recommended (and the Government accepted) a *puisne* judge salary of \$260,819 for the fiscal year 2015, followed by percentage increases in each of 2016 and 2017 equal to the percentage change in the Saskatchewan CPI plus an additional 2%. The Saskatchewan 2016 Budget, released February 29, 2016, predicts growth in the Consumer Price Index at 2% per annum in the years 2016-2020. As such, we have assumed that Saskatchewan salaries will increase by 4% effective April 1, 2017 to \$293,471. Assuming the next JCC recommended that only CPI-based adjustments

should be made in the years 2018 and 2019, the salaries in those years are likely to be \$299,341 and \$305,328 respectively.

Saskatchewan 2015/16 Budget Update and Four Year Forecasts (excerpt only),
Judges' Association Documents, **Tab 41**

311. Ontario judges' salaries for April 1, 2016 to March 31, 2019 await the binding determinations of the next Ontario JCC, which is expected to hold hearings in the fall of 2016. In the meantime, Ontario judges' salaries are required by statute to be indexed on April 1 of each year based on the percentage change in the IAI for Canada during the preceding fiscal year (April 1 to March 31). The statutory increase for 2016 is yet to be confirmed but based on the information from Cansim Table 281-0026 (Judges' Association Documents, **Tab 42**) the increase will be 1.21%, resulting in a 2016 salary of \$290,822. If it is assumed that the increase in subsequent years will approximate the average of the increases in the last two (i.e. 1.9%), the salaries for 2017, 2018 and 2019 would be \$296,348, \$301,978, \$307,716. It could be, however, that the 2016 Ontario JCC will find that increases beyond the statutory increases are appropriate for the years 2016 and following.

Changes in the Compensation of Others Paid by Provincial Public Funds in British Columbia

312. With reference to s.5(5)(d) of the *Judicial Compensation Act*, the Judges' Association's position on salary is also supported by the fact that increases have been granted to or negotiated with public sector groups in recent years. That said, for the reasons that follow, it would be inappropriate to make any linkage between the appropriate adjustments for judges and the general wage increases that have been received by public sector groups.

313. As set out above, while the actual salaries of the public servants are of very limited relevance given the unique nature of a judge's role, the increases granted to

these groups of employees have some relevance as they reveal the Government's own assessment that it has an ability to pay.

314. The general wage increases which the Government negotiated with or granted to public sector employees vary considerably, depending on the bargaining unit or group of employees. As discussed above, Crown lawyers and government legal counsel, for example, are contractually entitled to any increase (but not decrease) received by judges, plus an additional 1.27%. Since 2013, Crown lawyers have therefore received a cumulative increase of 12.07%, leaving aside that individual Crown lawyers may have also received step increases within their classification, or promotions to higher classifications. By contrast, judges have so far received a total of 5.6% over the same four years. It is unknown to the Judges' Association what, if any, other financial incentives apart from wage increases were negotiated by those government lawyers.

315. It was recently announced that the Government concluded negotiations with the BC Nurses' Union and that union members ratified a five year contract. While there is no comprehensive public source of detailed information, that which is available in the various news accounts underscores the multitude of other financial incentives that go beyond the general wage increases. Some of the notable features include:

- a \$4 million investment into programs to target workplace violence and rural recruitment of nurses;
- provisions to address "major issues" of staffing and workload;
- greatly improved access to prescription drugs with an expansion of the list of covered drugs;
- new funds for nurses' education; and
- key job security provisions.

News Articles re BC Nurses' Collective Agreement, Judges' Association Documents, **Tab 43**

316. In addition to the increased cost to Government associated with these endeavours, nurses received a 5.5% general wage increase, with the possibility of further increases that are contingent on the province's economic performance (this is discussed below in relation to the BCGEU collective agreement). Those increases are of course only the starting point in terms of potential pay increases for individual nurses, who may move up the scale within their classification or apply for promotion to increase their pay.

317. The Government also negotiated percentage increases for members of the British Columbia Government Employees Union in each of 2013, 2015 and 2016, as well as in each of 2017, 2018 and 2019. However, those employees are also entitled, in 2016, 2018 and 2019, to a general wage increase equal to one-half of any percentage gain in real Gross Domestic Product above the forecast of the Economic Forecast Council for the relevant calendar year (which amount is referred to as the "Economic Stability Dividend"). Again, the general wage increases are only the starting point for individual employees who may also receive step or merit increases, or promotions to other classifications with a higher rate of pay.

http://www2.gov.bc.ca/local/myhr/tools/salary_lookup_tool/salary_admin/BCGEU_Wage_Increases.pdf

318. The 2013 JCC specifically rejected the Government's then proposal that a similar type of "Economic Stability Dividend" should be provided to judges. The 2013 JCC wrote:

Additionally, the Government's proposal to tie an increase in judges' salaries in 2016/17 to an amount equal to the percentage by which the Province exceeds the current real GDP forecast for the previous year is highly unusual and potentially problematic. In the *PEI Reference*, the Supreme Court of Canada noted that one of the purposes of objective commissions is to "guard against the possibility that government inaction could be used as a means of economic manipulation by allowing judges' real salaries to fall because of inflation" (para 147). Accordingly, commissions, and in some provinces, governments, have indexed or related judges' salaries to inflation, CPI or other measures that reflect the cost of living. A measure like real GDP, which effectively ties a judge's

salary to the success of a government's economic policies, is potentially improper in that it may lead to the perception that judges have an interest in supporting government economic initiatives that have the potential to boost GDP, which may affect the way cases are decided. The perception that judges have any influence over the success of economic policies that could affect their compensation should be avoided to better preserve judicial independence. Accordingly, it is the Commission's view that cost-of-living indexes are more applicable to the problem of protecting judicial salaries from being improperly eroded.

2013 JCC Report, Judges' Association Documents, **Tab 20**, pages 46-47

319. Adopting the Government's Economic Stability Dividend approach does indeed have the potential to compromise judicial independence and, moreover, fails to take into account all of the factors identified in the *Judicial Compensation Act*.

320. JCCs in other jurisdictions have exercised significant caution in considering information put forth by governments about the general wage increases paid to public sector employees. In rejecting the Manitoba Government's proposal to apply the same general wage increases to judges that it maintained had been paid to employees in the public sector, the 2011 Manitoba JCC wrote:

"The Province argued that 0%, 0% and 2.9% increases were the norm for the public sector in Manitoba. While the Committee received some information on these settlements, we did not see all the financial terms of the comprehensive agreements.

Also, we have to be mindful that in some, if not all, of these agreements, employees are entitled to step increases in their compensation based on years of service in a classification. Judges, of course, are not entitled to receive such increases based on years of service. Furthermore, certain unions bargained for and received guarantees of no layoffs. This has no relevance for judges, but it is a benefit that is difficult to put a dollar value on."

2011 Manitoba JCC Report (excerpt), Judges' Association Documents, **Tab 27**, page 73

321. In the absence of a complete understanding of “the financial terms of the comprehensive agreements”, information about general wage increases negotiated or granted in the public sector can be considered only in the very general sense of being an indicator that the Government itself considered that it can afford to increase compensation. Beyond that, the specific increases that are appropriate for judges must be considered in light of the factors that are uniquely applicable to the determination of judicial compensation. Indeed, unlike for judges, there is no requirement that public sector compensation be “reasonable”.

322. Of much greater significance for the Commission’s purposes are the Government’s own policies regarding how it sets compensation for its employees, particularly executive employees. As discussed above, the 2013 JCC considered it to be significant, and contradictory of the Government’s proposal on judges’ salaries, that the Government’s policy on Executive Compensation declares:

The province’s target position for executive compensation in the public sector market is to be 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.

Executive Compensation, BC Public Service, Judges’ Association Documents, **Tab 39**, page 2

2013 JCC Report, Judges’ Association Documents, **Tab 20**, page 46

323. As detailed above, the judges’ salary proposal is consistent with the Government’s Executive Compensation policy, in terms of how the proposed salary relates to the salaries of those who perform similar work in the other jurisdictions.

Economic Conditions in BC and the Current and Expected Financial Position of the Government over the 3 fiscal years that are the subject of the Report

324. Significant detail regarding these factors is set out beginning at page 68 and will not be repeated here. British Columbia's solid financial position and abundant fiscal capacity support its ability to pay what is considered to be appropriate compensation for judges in light of the other factors.

325. Economic conditions are positive, both relative to the recent past in BC and with the conditions in the other jurisdictions. As a result of its diversification, the reliability of the forecasted growth for BC is protected from volatility to a much greater degree than that for Alberta and Saskatchewan, which are among its most appropriate comparators. Not only is consistent economic growth forecasted for BC, but the McKinnon Report demonstrates that it is reasonable to have confidence in those forecasts because of both the forecasting method and the Government's track record. As for the financial picture, it is clear that BC's fiscal position is solid and that BC enjoys a strong fiscal capacity.

326. The current circumstances are significantly improved from those which existed at the time of both the 2010 and 2013 JCCs. The economic conditions and financial position of the Government support a recommendation that would restore judges' salaries to a relationship with their comparators that is consistent with BC's relative economic position in Canada.

2007 JCC Report, Judges' Association Documents, **Tab 8**, page 23

2010 JCC Report, Judges' Association Documents, **Tab 9**, page 26

2013 JCC Report, Judges' Association Documents, **Tab 20**, page 35

2018 and 2019 Adjustments

327. Beyond the increase proposed for 2017, the Judges' Association proposes that salaries be adjusted by a further 2% per annum on each of April 1, 2018 and April 1, 2019 to \$290,700 and \$296,514 respectively. It proposes a fixed percentage rather

than a CPI-based adjustment on the understanding that certainty for budgeting purposes was a determining factor in the Government adopting a prospective JCC process. The 2% per annum figure reflects the forecasts set out in the Budget and Fiscal Plan 2016/17 - 2018/19 for increases in the Consumer Price Index for BC for the years 2017 and 2018.

Budget and Fiscal Plan 2016/17 - 2018/19, Judges' Association Documents, **Tab 32**, page 84

328. Judicial Compensation Commissions across Canada, including those in British Columbia, have taken a number of different approaches when it comes to assessing appropriate salaries for each of the years within their respective mandates. The approach taken in the vast majority of jurisdictions is to recommend a salary that is viewed as appropriate for the first year of the JCC's mandate based on a consideration of all of the relevant factors, and then to recommend upward adjustments for the remaining years based on the changes that are related in some way to changes in the CPI or the IAI. The judges' proposal adopts this approach but fixes the figures to promote certainty.

329. Some JCCs have chosen to recommend different specific salaries for each of the years within their mandate, and in some cases this was done to stagger the impact of a fairly significant increase it felt was appropriate over some retroactive period of time. In other cases, it may have been done to anticipate inflation over the term of the JCC's mandate. Still other JCCs have recommended one salary for the duration of that JCC's mandate.

330. Under the Association's proposal, BC judges' salaries will not increase at the same rate as the salaries of federally appointed judges in BC or the provincial and territorial comparators. However, judges will be protected against erosion of their purchasing power during the period of this JCC's mandate and will stay within a reasonable range of their traditional comparators.

PEI Reference, supra, Judges' Association Documents, **Tab 10**, para 195

331. In summary, the 2017 salary of \$285,000 that is proposed by the Judges' Association is consistent with the reasoning of past JCC's and the Government's own argument to the 2007 JCC that the salaries for Provincial Court judges in BC should compare with the salaries of judges in other jurisdictions in a manner that is consistent with the relative economic strength of BC among the jurisdictions. Consistent with the Government's relative economic position, the Judges' Association's proposed 2017 salary would rank 4th among the provinces, and lower than that received by judges in Alberta, Saskatchewan and Ontario. The proposal for 2% adjustments in each of 2018 and 2019 would protect judges' salaries against erosion due to expected increases in the cost of living in BC and would ensure that their salaries keep pace with those of their traditional comparators.

2. 3.5% Accrual Rate for Pension

Recommendation Sought:

- That, effective April 1, 2017, the accrual rate for the pension available to judges shall be restored to 3.5% per annum. The improvement would apply to judicial service after the effective date of the change.
- That there should be no change to the 24:76 cost-sharing formula set out in s. 18 of the *Judicial Compensation Act*.

332. The 2010 JCC recommended the adoption of a 3.5% accrual rate effective April 1, 2013. As discussed above, the Government rejected that recommendation in both its May 2011 (Judges' Association Documents, **Tab 14**) and March 2013 (Judges' Association Documents, **Tab 17**) Responses to the 2010 JCC Report and determined that the accrual rate should remain at 3% per annum. The first Response was quashed by Macaulay J. (Judges' Association Documents, **Tab 15**). The March 2013 rejection of the pension accrual recommendation was ultimately quashed by the Court of Appeal (Judges' Association Documents, **Tab 19**), which ordered implementation of all of the 2010 JCC's recommendations. As a result, and while the implementation remains to

be completed in full, it must be considered that the accrual rate was increased to 3.5% per annum effective April 1, 2013.

333. Because the litigation over the 2010 JCC had not been resolved at the time the 2013 JCC conducted its hearings, the Judges' Association asked that JCC to repeat the recommendation for a 3.5% accrual rate. As detailed below, the 2013 JCC considered that the financial picture had changed from what had been expected by the 2010 JCC and recommended only "an increase" to a 3.25% accrual rate, effective April 1, 2014. However, once the 2010 JCC's recommendations were ordered to be implemented, the intended "increase" became, in fact, a decrease down from 3.5%.

334. The Government rejected the 2013 JCC's recommendation for the 3.25% pension accrual rate and declared the accrual rate to be 3% effective April 1, 2014. The legitimacy of its reasons for so doing are subject to challenge in a judicial review, the outcome of which will not be known by the time this 2016 JCC issues its Report.

335. With that complex background, the Judges' Association seeks to restore the 3.5% pension accrual rate that was implemented following the 2010 JCC process. Before discussing the reasoning of the two previous JCCs and the Government's concerns as expressed in its 2011, 2013 and 2015 Responses to those JCC Reports, it is useful to review the key features of the current plan, some considerations unique to judicial pensions, and the cost of the proposed change.

Features of BC's Existing Judicial Pension Plan

336. The following are some significant features of the pension available to judges in British Columbia:

- Accrual rate of 3% (for judicial service after January 1, 2001- March 31, 2013 and for judicial service after April 1, 2014) and 3.5% for service April 1, 2013 to March 31, 2014;
- Maximum pension is 70% of pensionable salary;

- Pensionable salary is calculated based on average of best 3 years of salary;
- Contribution rate for judges is 8.87% of salary (24% of total contributions as determined by the Public Service Pension Board of Trustees)
- An unreduced pension is available to judges at:
 - Age 55 and after at least 5 years contributory service,
 - Age 60 and after at least 2 years of contributory service, or
 - Age 65

The Importance of Pensions for Judges

337. Proper pensions have their own unique importance as an aspect of judicial independence in that pensions are an integral part of judicial independence and judicial security. As Professor Friedland pointed out, it is in society's interest to err on the side of pensions being more generous, rather than not being generous enough:

Pensions are a crucial part of judicial security. If a judge's pension is inadequate or insecure, there is a danger that the judge will not be fully independent while sitting on the bench. Section 100 of the Constitution states that salaries, allowances, and pensions "shall be fixed and provided by the Parliament of Canada". If the pension is not adequate and secure, the judge may be inclined to favour a side that may be important in the judge's future, in particular, the government that may be looked to for a pension. Worse, the judge may be tempted to accept favours or bribes from litigants while on the bench. Prime Minister Sir Wilfrid Laurier brought in legislation in 1903 providing for pensions at full salary (later reduced to two-thirds of salary), stating that the object was "to put judges above temptation, to ensure their dignity and independence, and to make them what they should be, the impartial arbiters of all differences in the community". So it is in society's interest to ensure that pension arrangements are good ones. It is better, in my view, to err on the side of being generous than of not being generous enough -- for the sake of society, not for the sake of the judges. [footnotes omitted]

Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Ottawa: Canadian Judicial Council, 1995 (excerpt only), Judges' Association Documents, **Tab 44**, page 66 [emphasis added]

338. Other JCC's have made comments concerning the importance of pensions for judges. The 1995 Federal Triennial Commission Report commented on how adequate pensions respond to the unique working conditions of judges. The Report made the following points at pages 16-17 (Judges' Association Documents, **Tab 45**):

- The unique role of a judge is demanding and "requires a mental discipline of a kind which in most human beings has its limitations" (p. 16);
- There is a need for "rejuvenation" of the Bench by younger persons (p. 16);
- As a result of this, one cannot look for candidates who are at "the end of their careers" (p. 16);

339. In Saskatchewan, the 1993 Commission noted at page 16-17:

When the existing plan of the Judges is compared with similar public and private pension plans, it appears that their plan does not adequately recognize the unique conditions that face the provincial bench. Judges are susceptible to the problem of "burn out" which occurs from the stress of many years dealing with the wretchedness of the human condition, often seeing people at their worst with the most vulnerable in our society exploited, and coping with the frustration of recognizing the law to be a very blunt instrument in resolving the ills of society.

Report of the 1993 Provincial Court Commission (Saskatchewan), Judges' Association Documents, **Tab 46**

340. It is important to consider the Judges' Association's request in the context of these comments about the unique factors which influence the design of judicial pension plans. The improved accrual rate sought by the Judges' Association is an important feature that would ensure the financial security of judges following their retirement from the Bench.

Cost of the Proposed Change

341. The Judges' Association retained Donald Smith of Smith Pension & Actuarial Consultants Inc. to prepare an expert report concerning the cost of implementing the proposed increase in the accrual rate. It also understands that the British Columbia Pension Corporation is preparing its own costing, which should be available in early June, 2016. With a view to presenting the JCC with an agreed upon costing, the Judges' Association will await that information before presenting the Report from Mr. Smith. Accordingly, the details of the costs involved in the proposal will be outlined in due course.

342. After reviewing the comparable costing prepared by Smith in 2010 for its consideration, the 2010 JCC stated:

The Commission is satisfied that this is a reasonable cost for the Government to bear. An increase in the pension accrual rate to 3.5% will also serve to narrow the disparity between Supreme Court Justices' and Provincial Court Judges' compensation packages.

2010 JCC Report, Judges' Association Documents, **Tab 9**, page 34

343. As noted, the 3.5% accrual rate was ordered to be implemented effective April 1, 2013, but this occurred *after* the 2013 JCC made its recommendations from what it considered to be the starting point of 3.0%.

344. The 2013 JCC was also provided with an expert report from Mr. Smith on the cost of an increase to 3.5%. It concluded that an "increase" in cost to 3.25% was reasonable in relation to the then, and then anticipated, financial position of Government. While the eventual implementation of the 2013 JCC's recommendation depends on the outcome of the judicial review process, the Government has in effect, enjoyed a cost saving through the lowering of the accrual rate (to either 3.0% or 3.25%, as the case may turn out to be). This is because, in the absence of any

recommendation by the 2013 JCC, the accrual rate would have remained at 3.5% after April 1, 2013.

345. Taking into account this effective cost saving, the solid financial position of the Government, and the strong economic position of the province since the 2013 JCC made its recommendations, it is submitted that a return to a 3.5% accrual rate effective April 1, 2017 is reasonable and appropriate in light of all the factors.

346. Quite apart from the reasonable cost and the need to narrow the disparity with the compensation packages of federally appointed judges, the 2010 JCC also referred to the following points in its analysis:

- (a) The average age of appointment has risen to 53.3 years, with the result that at the current accrual rate of 3%, “most judges will not reach maximum pension before mandatory retirement at age 75 years”.
- (b) There is a significant value to the public in maintaining a vibrant and energetic Bench.
- (c) The public interest is not served by having judges continue to sit on a full-time basis “past the point at which their capacity to do so may be compromised by age”, simply to accrue the maximum pension benefit of 70% of salary.
- (d) A 3.5% accrual would allow the average judge, appointed at age 53.3, to accrue the maximum 70% pension by age 73.3.

2010 JCC Report, Judges’ Association Documents, **Tab 9**, page 34

347. While those reasons continue to support the Judges’ Association’s request, the average age of appointment has crept even higher since the 2010 JCC Report, at least for judges appointed within the last three years. As set out in Part I, the average age of

appointment for those judges is 55.3. A judge appointed at age 55.3 could not reach full pension, even with a 3.5% accrual, even if he or she worked until age 75. The reality is also that working to age 75 is not an option for all, or even for many, particularly in the areas where judges must endure rigorous circuit travel.

348. In May 2011, the Government rejected the 2010 JCC's recommendation for a 3.5% accrual rate, taking the position that the recommendation was "unfair and unreasonable". The Government offered the following reasons:

- (a) The Commission appeared to implicitly accept that the intent of the Public Service Pension Plan is to ensure that judges retire with the maximum pension benefit, an approach that is unreasonable. The intent is only "to ensure a reasonable retirement benefit for members given their length of service, and contribution to the plan".
- (b) Given that the average age at appointment is 53 (and the average age of the judicial complement is 58), "it is reasonable to expect that judges will have prudently saved for retirement during their careers." Public service lawyers will have significant accumulated service within the PSPP which they bring with them.
- (c) The burden of the added contributions necessary to fund a higher accrual rate would fall "disproportionately, and unreasonably" on the public purse. There was no evidence that the Commission had considered the Government's proposal to rebalance the contribution rates so that the effect would be cost-neutral to Government.

May 2011 Government Response to the 2010 JCC Report, Judges' Association Documents, **Tab 14**, pages 8-9

349. The Government's 2011 Response was quashed by Macaulay J. On the issue of the pension accrual rate, Macaulay J. found that the Government's response

“mischaracterizes the reasoning of the JCC”, was “nothing more than a reiteration of a submission made to and rejected by the JCC”, and that the JCC had in fact addressed the Government’s suggestion of “re-balancing” the contribution ratio.

Decision of Macaulay J., Judges’ Association Documents, **Tab 15**, paras 91-92

350. As noted above, Macaulay J. ordered the matter returned to the Legislature for reconsideration. A majority of the Court of Appeal considered that the Government’s 2013 Response (**Tab 17**) essentially repeated positions advanced to and rejected by the 2010 JCC and therefore did not meet the *Bodner* test (Court of Appeal, Judges’ Association Documents, **Tab 11**, para 63).

351. In its 2013 Response, the Government argued that evidence that the 3% accrual rate is sufficient can be found in the number of judges who retire before age 70 and enter the Senior Judges Part-time Program. This echoed its earlier argument that the objective of a judicial plan is not for judges to retire with a maximum pension, and that judges appointed at age 53 should be presumed to have “prudently” saved for retirement. With all due respect, all of these arguments are beside the point.

Government’s 2013 Response to the 2010 JCC, Judges’ Association Documents, **Tab 17**

352. According to section 9.1(1) of the *Provincial Court Act* (Judges’ Association Documents, **Tab 2**), on or after reaching age 55, judges with at least 10 years of judicial service can elect to hold office part-time and thereby become “Senior Judges”. By so doing, they commence receipt of their pension, and continue to receive salary in accordance with section 8 of the *Judicial Compensation Act* (Judges’ Association Documents, **Tab 1**). In essence, a Senior Judge is required to work roughly half the time but can continue to take home full pay, through a combination of pension and salary.

353. The Senior Judge program is particularly attractive to judges who were employed as Crown or Government counsel prior to their appointment. This is because, generally speaking, those judges have already accrued significant service in the *Public Service Pension Plan* prior to their judicial appointment. It may also be attractive to other judges who are financially secure and decide that they prefer to work less often.

354. While there will always be judges for whom the Senior Judges' Program is attractive based on their personal circumstances, the purpose of a judicial pension is to ensure financial security for all judges in retirement in order to ensure their independence while on the Bench. Even with a 3.5% accrual rate, those appointed from a private bar background later than age 55 could not achieve full pension. They would, however, achieve a greater pension than is currently available. In addition to the goal of minimizing the compensation disparity with federally appointed judges, the proposal is designed to ensure that all full-time judges have access to a reasonable pension in retirement. In the Judges' Association's view, a reasonable pension is one that is at or close to the maximum.

355. An increased accrual rate is of particular concern for judges from the private bar, precisely those whom the Judicial Council is having difficulty attracting to the Bench. With an average age of appointment of 53 (or 55.3 for judges appointed within the last three years), it is apparent that many judges are appointed at the point of likely their highest career earnings, just when their personal expenses (including expenditures related to mortgages and children) are reducing and their savings are likely to increase.

356. Of the twelve judges who left the Provincial Court since 2005, nine were in private practice prior to appointment. A tenth came from the Crown's office but had previously been in private practice. The proposal for an increased accrual rate is aimed at attracting but also retaining private practitioners, by reducing the wage disparity between the two Courts. The stark reality is that, savings or no retirement savings, compensation on the federal bench is significantly more attractive.

Retention Chart, June 2013, Judges' Association Documents, **Tab 47**

357. Further, the article referred to by the Government in its 2013 Response (**Tab 17**) as “evidence ...that lawyers are saving for their retirement”, in fact suggests that the opposite is true. The author states:

... [A]ll of the research I have reviewed when it comes to the retirement preparations of lawyers says that the profession is woefully unprepared.

Bartalk, December 2011 (appended to Government’s 2013 Response to 2010 JCC Report), Judges’ Association Documents, **Tab 17**

358. The author goes on to describe her own survey of 80 CBA members who were “within the age of considering retirement” as well as “a small number already retired”. While a relatively high proportion of these were “fairly confident or very confident of their financial preparedness for retirement”, these are not the lawyers who the Court is seeking to attract. A vibrant and innovative Bench does not seek to attract lawyers who are considering retirement or who are already retired.

Bartalk, December 2011 (appended to Government’s 2013 Response to 2010 JCC Report), Judges’ Association Documents, **Tab 17**

359. The 1998 Manitoba JCC rejected a similar argument advanced by the Government of Manitoba against the proposal of the Provincial Judges’ Association of Manitoba to extend supplementary pension benefits to judges for all years of judicial service, including those prior to the plan’s creation in 1992. The 1998 Manitoba JCC stated:

In its submission, the Province’s primary argument against extending the supplemental pension to cover years of service prior to July 1, 1992 was:

It assumes that judges have made no personal pension arrangements prior to their appointment to the judiciary. With respect, no other group of Manitoba workers could expect to make no personal pension arrangements before age 42 (the average age of appointment) and then have a

new employer (in this case the citizens of Manitoba) make up for their failure to make appropriate arrangements.

This is really an argument against providing Judges with any extra pension benefit. But, the Government decided several years ago that a supplemental pension benefit for Manitoba judges was warranted either because of the late average age of appointment or because virtually all other Canadian jurisdictions offer such plans to their Judges. The Government should not be arguing today that the supplemental plan should not exist.

1998 Manitoba JCC Report (excerpt only), Judges' Association Documents, **Tab 48**, page 21

360. The 2010 and 2013 JCCs properly considered the goal of minimizing the disparity between the total compensation received by federally and provincially appointed judges in recommending an increased accrual rate. To the extent any presumption about pre-retirement savings is appropriate, which the Judges' Association denies, it applies equally to applicants to the section 96 courts.

2010 JCC Report, Judges' Association Documents, **Tab 9**
2013 JCC Report, Judges' Association Documents, **Tab 20**

361. The 2013 JCC noted the reasoning of the 2010 JCC on the merits of the proposed increase in the accrual rate but declined to make precisely the same recommendation for the following reasons:

- (a) The economic recovery had not been as robust as predicted in 2010;
- (b) Judges pensions, while similar in structure to close comparator groups, are quite distinct, and quite generous, when compared to the pension situations of most British Columbians;
- (c) The 2010 JCC did not appear to consider the effect that extending the contribution period for judicial pensions up to age 75 would have on the

opportunity for judges to earn a maximum pension if they chose to work full-time right up to the mandatory retirement; and

- (d) The 2013 JCC was not convinced that the disparity in pensions between Provincial Court judges and Supreme Court justices was so great that it is currently affecting the quality of applications for judicial appointment.

2013 JCC Report, Judges' Association Documents, **Tab 20**, pages 48-49

362. As noted, the 2013 JCC ultimately recommended what turned out to be a decrease from an accrual rate of 3.5% to a rate of 3.25% per annum in part because it considered that the financial position of Government had changed since 2010. With regard to the economic outlook, the 2013 JCC concluded in its Report:

“On all the evidence before it, the Commission has determined that British Columbia’s economic outlook for the years of the Commission’s mandate is for gradual improvement that is vulnerable to downside risks, both domestically and globally ... In reaching conclusions about fair compensation, the Commission recognizes that the judiciary should not be immune from the cautious economic outlook for the province during the years of the Commission’s mandate.”

2013 JCC Report, Judges' Association Documents, **Tab 20**, pages 35 and 48

363. As detailed in the McKinnon Report, the economic and fiscal circumstances of the province have improved significantly since the 2013 JCC issued its Report.

364. While the 2013 JCC concluded that the recovery predicted in 2010 had not materialized as quickly as was predicted in the material relied upon by the 2010 JCC, it has certainly improved more than the 2013 JCC itself predicted. Indeed, the 2013 JCC’s assessment of the economic and fiscal circumstances before it are a far cry from the current situation as depicted in the Government’s statements that “British Columbia is entering Canada’s 150th birthday as leaders in Confederation”. Less prone to such colourful exultations, the McKinnon Report concludes that:

Overall, the government's own forecasts of surpluses and steady economic growth, especially when one considers the government's record of caution in forecasting, can give the Commission confidence that their recommendations should not be hindered by concern for risks posed by the economy's prospects or the government's likely financial position.

Whether using historical comparisons, cross jurisdictional comparisons or the ratings of neutral, expert observers, BC's financial position is solid.

British Columbia Throne Speech 2016, Judges' Association Documents, **Tab 29**, page 9

McKinnon Report, Judges' Association Documents, **Tab 36**, pages 34-35

365. Of particular note is that BC is so well positioned when it comes to its public sector pensions, in that "the current level of pension assets almost entirely covers their future obligations" (with a funding ratio of 95.6%). That BC is in a dramatically different position than most other provinces (and certainly as compared with Alberta, one of its traditional comparators) when it comes to the funding ratio of public sector pensions, provides further support for a return to the 3.5% accrual rate recommended by the 2010 JCC.

McKinnon Report, Judges' Association Documents, **Tab 36**, pages 25-26

366. The 2013 also relied on the fact that, at the time, the "average age of appointment to the Court is relatively stable at 53" which, with a 3.25% accrual rate, would enable judges appointed at age 53 to attain their full pension by working to age 75 if they so choose." The increase in the average age to 55.3 for judges appointed within the last three years, coupled with the reality that working to age 75 is not practicable for many, provides further support for a restoration of the 3.5% accrual rate.

367. As noted, the 2013 JCC also favoured a 3.25% accrual rate over 3.5% because it was "not convinced" that the disparity in pension was such that it was affecting the quality of applications. As outlined below, the disparity has increased even more now such that, at a minimum, there is a very real risk that the quality of applications is

affected. As he articulated to the 2013 JCC, the Chief Judge's assessment was that remuneration was a factor that was "tilted in favour of the Supreme Court" (2013 JCC Report, Judges' Association Documents, **Tab 20**, page 43). This is even more true today.

Comparison with Other Judges

368. As set out above, a significant reason offered by the 2010 and 2013 JCCs for their recommendations to increase the pension accrual rate was in order to minimize the disparity in compensation between BC's provincially and federally appointed judges. As explained below, even with the 3.5% accrual rate, a significant, albeit lesser, disparity would remain.

369. Federal judges receive an annuity that provides them with retirement earnings of up to 67% of final salary. In ordinary circumstances, this level of benefit is reached after fifteen years of service and in accordance with the "rule of 80". The maximum annuity will be provided with less than fifteen years of service where a judge has served more than ten but less than fifteen years, and has reached the age of mandatory retirement. Under the federal plan, judges contribute 7% of salary towards the annuity cost.

Judges Act, R.S.C, 1985, c. J-1

370. The accrual rate for federally appointed judges is effectively 4.67%, calculated by dividing the maximum benefit by the number of years of service required to reach that benefit level.

371. In 2013, the Judges' Association asked Mr. Smith to compare the total value of the salary and judicial annuity/pension of provincially and federally appointed judges in order to illustrate both the existing difference and that which would continue to exist even with the 3.5% accrual rate (see letter from D. Smith to S. Dawes dated June 25, 2013, Judges' Association Documents, **Tab 49**).

372. Mr. Smith's results revealed that, in 2013, Provincial Court judges received approximately \$100,000 less in total compensation on an annual basis as compared with their federal counterparts. With the widening of the gap in salaries over the years 2014-2016, that difference has increased. Using Mr. Smith's table entitled "Net Pension Value as a % of Salary"⁵, the following are differences in total earnings based on the current 2016 salaries and the 3.0% accrual rate:

- for a judge appointed at age 55 who retires at age 70 earning \$244,112: \$153,162 less per year. This differential would be reduced to \$144,130 with a 3.5% accrual rate.
- for a judge appointed at age 50 who retires at age 70: \$113,931 less per year. This differential would be reduced to \$105,632 per year with a 3.5% accrual rate.
- for a judge appointed at age 45 who retires at age 65: \$118,823 less per year. This differential would be reduced to \$109,059 with a 3.5% accrual rate.

373. The same table can be used to calculate the difference in earnings that would remain even with the Judges' Association's proposed 2017 salary and its proposal for a 3.5% accrual rate. Assuming:

- the Provincial Court judges' salary is increased to \$285,000;
- the Provincial Court judges' pension accrual rate is returned to 3.5%; and
- the salary for federally appointed judges is adjusted by 2.2% for a 2017 salary of \$321,010;

the following differences would remain in the total compensation per annum:

- for a judge appointed at age 55, retiring at age 70: \$102,371 (\$462,896 per annum for a federally appointed judge minus \$360,525 per annum for a BC judge);

⁵ While we understand that this table can be validly used to approximate the differences in total compensation based on any two salaries, the Judges' Association will ask Mr. Smith to prepare an updated report should the Government or the Commission so request.

- for a judge appointed at age 50, retiring at age 70: \$63,913 (\$417,313 per annum for a federally appointed judge minus \$353,400 per annum for a BC judge);
- for a judge appointed at age 45, retiring at age 65: \$65,995 (\$430,795 per annum for a federally appointed judge minus \$364,800 per annum for a BC judge).

374. While the difference in total compensation varies depending on the age of a given judge at appointment and retirement, it is apparent that the 3.5% accrual rate combined with the proposed increase in base salary would reduce but by no means eliminate the wage disparity between provincially and federally appointed judges in British Columbia.

375. For all of the foregoing reasons, it is submitted that a return to the 3.5% accrual rate recommended by the 2010 JCC is fair and reasonable in light of all of the relevant factors.

PART V: COSTS

Recommendation Sought:

- That the Government shall pay 100% of the Judges' Association's reasonable legal fees and disbursements, including 100% of the cost of any expert evidence

376. The Judges' Association takes the position that its reasonable costs, including legal fees and disbursements, should be fully paid by the Government.

377. A recommendation concerning costs is within the 2016 JCC's jurisdiction according to section 5(1) of the *Judicial Compensation Act*, which requires the Commission to report and make recommendations on "all matters respecting the remuneration, allowances and benefits of judges...". As we set out below, while in BC the matter of costs has usually been agreed to between the Government and the Judges' Association prior to the JCC's oral hearings, it is routine for JCCs across Canada to make recommendations regarding payment by the Government of costs incurred by Provincial Court judges in preparing for and appearing at the JCC.

2013 JCC Report, Judges' Association Documents, **Tab 20**, page 53
Judicial Compensation Act, Judges' Association Documents, **Tab 1**

378. The 2004 JCC recommended that "all of the Judges' Association's costs attendant upon their involvement in the processes of the Commission should be paid by the government", including legal fees and disbursements, as well as the costs of experts and other disbursements. In both 2007 and 2010, it was agreed between the parties that the Government would pay the full reasonable costs incurred by the Judges' Association, without the need for a recommendation from the JCC.

2004 JCC Report, Judges' Association Documents, **Tab 7**, pages 29-30
2007 JCC Report, Judges' Association Documents, **Tab 8**, page 23
2010 JCC Report, Judges' Association Documents, **Tab 9**, page 32

379. The 2013 JCC found that the issue of costs fell within its “broad jurisdiction” under section 5 of the *Judicial Compensation Act* and recommended that the Government pay 100% of the Judges’ Association’s reasonable costs. It wrote:

- (a) “There is a history in British Columbia of the Government paying 100% of the reasonable costs of the Judges’ Association”;
- (b) “In this situation, where the participation of the judiciary is required for an objective and fair process, and where the executive branch of government has access to government resources and is represented by external counsel, it would be unfair to expect individual judges to personally fund the Judges’ Association’s participation.”
- (c) “The Commission found the Judges’ Association’s participation in this Commission to be helpful and appropriate and, most importantly, necessary to an effective and objective process.”

380. The 2013 JCC also proposed to rule on the reasonableness of the costs incurred, in the event the parties could not agree. The recommendation was accepted by the Government and, as there was no dispute about the reasonableness, taxation by the JCC proved unnecessary.

Amendments to the Act should Have no Impact on Continuation of Past Practice

381. In amending the Act to consolidate the two Commissions, the Government included the following provision:

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).

382. As section 7.1 does not purport to preclude continuation of the lengthy past practice between the parties, the Judges' Association seeks a recommendation that notwithstanding section 7.1 the Government should once again pay 100% of the reasonable legal fees and disbursements incurred by the Judges' Association, including the cost of experts.

Rationale for Recommending Costs

383. The rationale for payment by Government of the costs incurred by the Judges' Association in participating in the JCC process is rooted in the fact that this is a constitutionally mandated process that is required by virtue of the Constitution of Canada in order to protect the judicial independence and in particular the financial security of judges. It has been recognized by many JCCs that the participation of both the judiciary and Government is important, indeed often essential, in order for the process to be objective and effective in depoliticizing the setting of judicial compensation. It is crucial that both participate in the process, and accordingly it is reasonable that the costs of both branches of government are fully paid.

384. 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. Accordingly, it is manifestly unfair that the judiciary should be burdened by personally funding its participation in the process. It is the Judges' Association's position that, in these circumstances, its full

reasonable costs, including both legal fees and disbursements (including the costs of experts) should be paid by Government.

385. While the Judges' Association does not suggest that a constitutional rule exists that *requires* its costs to be paid, it does maintain that to the extent that this 2013 JCC is of the view that the participation of the Judges' Association was reasonably necessary to enable the Commission to fulfil its constitutional mandate, it should recommend that Government pay the Judges' Association's full reasonable costs. Given the complexity of the history in British Columbia, including the specific circumstances surrounding the 2010 and 2013 JCCs and their outcomes, the Judges' Association is confident that this 2016 JCC will conclude that the participation of the judiciary was of significant assistance to the Commission in understanding the scope and implications of the issues and in thereby enabling it to be objective and effective. For those reasons, a recommendation that the Government should pay the full reasonable costs of the Judges' Association is appropriate.

386. This reasoning is consistent with the majority decision in *Newfoundland Assn. of Provincial Court Judges v. Newfoundland*, [2000] N.J. No. 258 (C.A.), para 277 and following (excerpt at **Tab 26** of the Judges' Association Documents).

Other JCCs have Recommended Significant Costs

387. For many of the reasons outlined above, JCCs across the country have accepted that governments should pay the vast majority of representational costs of judges, including most often 100% of disbursements including the cost of using experts.

388. In some jurisdictions, the government is either required by legislation or there have been recommendations by JCCs that governments pay 100% of the costs incurred by judges in relation to a JCC. In Northwest Territories, the Government pays the reasonable expenses that are incurred by the territorial judges in the preparation of their submissions to the Judicial Remuneration Commission. Most recently, the Government

paid 100% of the legal fees and disbursements, including the cost of experts, incurred by the Judges of the Territorial Court for the 2016 JCC.

389. In Alberta, pursuant to the Regulation and Ministerial Order that will govern the 2017 JCC, the Government is required to pay 100% of the reasonable costs incurred by the Judges' Association up to a maximum of \$150,000.00.

390. In several other jurisdictions, JCCs have recommended that governments pay a significant proportion of legal fees and 100% of disbursement costs. In Manitoba, the 2014 JCC recommended that government pay 75% of the Judges' Association's reasonable legal costs to a maximum aggregate payment of \$45,000 and 100% of the Judges' Association's disbursements, including the costs of experts to a maximum of \$22,500. That recommendation was accepted by the Government.

391. In Newfoundland and Labrador the 2014 JCC made recommendations for the years 2013 to 2017. It recommended that the government pay 2/3 of the Judges' Association's reasonable legal fees and 100% of its reasonable disbursements including, but not limited to, expert witness fees. The reasonableness of fees were to be taxable by the Tribunal at the government's request. This recommendation was accepted by the government.


392. In New Brunswick, the 2012 JCC, which reported in 2015, recommended that government pay 75% of Judges' Association's general representation costs incurred to participate in the Commission process, and 100% of the fees associated with a pension change proposal plus the expert witness fees. This recommendation was accepted by the Government.

393. In Saskatchewan, the parties most recently agreed that the government would contribute \$49,900 towards the costs the Judges' Association incurred in relation the JCC proceedings.

394. In Ontario, the judges' association has received very significant contributions to their costs. They received \$410,000 out of a total of \$670,000 in costs in respect of their 1998-2001 Commission, and \$420,000 out of \$750,000 in costs for the 2001-2004 Commission. For the 2010-2013 Commission, the parties jointly agreed that the government would pay disbursement costs (including actuarial fees and disbursements, other expert advice, lawyer disbursements, and HST on all fees and disbursements) up to \$85,401.32, and legal fees up to \$405,000.00 plus HST of 13%.

395. For all of the foregoing reasons, the Judges' Association urges this 2016 JCC to recommend that the Government follow the consistent practice in British Columbia of paying the entirety of the Judges' Association's reasonable legal fees and disbursements, including the cost of experts.

All of which is respectfully submitted this 30th day of May, 2016.



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