

**Government's Proposed Response to  
the Judicial Compensation Commission 2019 Final Report  
in Respect of Provincial Court Judges  
July 6, 2020**

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This is the government's proposed Response to the *Judicial Compensation Commission 2019 Final Report* in respect of Provincial Court judges.

The 2019 Judicial Compensation Commission (the "Commission" or the "JCC") was an independent commission mandated by the *Judicial Compensation Act* to report on and make recommendations respecting Provincial Court judges' remuneration, allowances and benefits. The recommendations of the 2019 Commission cover the period from April 1, 2020 to March 31, 2023.

**Independence of the Judiciary**

The independence of the judiciary from government and private actors is a fundamental principle of the Canadian constitution. The judiciary must both be and be seen to be independent. The government re-emphasizes its respect for and its commitment to the principle of judicial independence, both in its substance and its spirit.

The Supreme Court of Canada has recognized three essential conditions for judicial independence: security of tenure, financial security and administrative independence.<sup>1</sup> Each of these components has been the subject of careful analysis by the Court.

The Supreme Court of Canada has stated that financial security embodies three requirements.<sup>2</sup> First, judicial salaries can only be changed by recourse to an independent commission. Second, there can be no negotiations between the government and the judiciary. Third, judicial salaries may not fall below a minimum level.

Judicial salaries in British Columbia are established through a process that incorporates an independent, objective and effective judicial compensation commission which every three years reports and makes recommendations on judicial remuneration to the government.<sup>3</sup>

The commission's recommendations must have a meaningful effect on the process of determining judicial remuneration. They must be considered by the government and given weight.

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<sup>1</sup> *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); et al*, [2005] 2 SCR 286 at para. 6 (commonly referred to as the "Bodner" decision)

<sup>2</sup> *Bodner* at para. 8

<sup>3</sup> *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 (hereinafter referred to as the "PEI Reference")

If the government decides to depart from the commission's recommendations, then it must justify its decision with rational reasons that are clearly and fully stated in a public response. The public response must be sufficient to inform the public, members of the legislature and the reviewing court of the facts on which the government's decision is based and to show that the process has been taken seriously. As the Supreme Court of Canada explained:

The government can reject or vary the commission's recommendations, provided that legitimate reasons are given. Reasons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality. Legitimate reasons must be compatible with the common law and the Constitution. The government must deal with the issues at stake in good faith. Bald expressions of rejection or disapproval are inadequate. Instead, the reasons must show that the commission's recommendations have been taken into account and must be based on facts and sound reasoning. They must state in what respect and to what extent they depart from the recommendations, articulating the grounds for rejection or variation. The reasons should reveal a consideration of the judicial office and an intention to deal with it appropriately. They must preclude any suggestion of attempting to manipulate the judiciary. The reasons must reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence.

The reasons must also rely upon a reasonable factual foundation. If different weights are given to relevant factors, this difference must be justified. Comparisons with public servants or with the private sector may be legitimate, but the use of a particular comparator must be explained. If a new fact or circumstance arises after the release of the commission's report, the government may rely on that fact or circumstance in its reasons for varying the commission's recommendations. It is also permissible for the government to analyse the impact of the recommendations and to verify the accuracy of information in the commission's report.<sup>4</sup>

The government's response is subject to a limited form of judicial review by the superior courts. The reviewing court is not asked to determine the adequacy of judicial remuneration but must focus on the government's response and on whether the purpose of the Commission process has been achieved: preserving judicial independence and depoliticizing the setting of judicial remuneration.

### **Provincial Court Judges**

Provincial Court judges are appointed under the *Provincial Court Act* and may hold office to age 75. The Provincial Court of British Columbia has jurisdiction over most adult criminal cases (except for matters that are reserved for the superior courts), all youth criminal matters, family law matters, child protection, and civil jurisdiction claims from \$5,001 to \$35,000.

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<sup>4</sup> *Bodner* at paras. 25-26

All Provincial Court judges are remunerated equally, except for those holding administrative posts; the Chief Judge of the Provincial Court, two Associate Chief Judges, and five Regional Administrative Judges each receive an additional stipend to reflect their added duties.

Government reaffirms its recognition of the invaluable work of the Provincial Court and Provincial Court judges. The Provincial Court, including its judges, have continually adapted processes to improve its level of service to the public and meet the needs of the justice system. Government especially commends the Provincial Court on its efforts during the Covid-19 pandemic to ensure the court functions as effectively and efficiently as possible in these unprecedented times. Government is dedicated to ensuring that Provincial Court judges are supported to continue to demonstrate their innovation, flexibility and hard work when carrying out their important work of dispensing justice.

### **Determining Judicial Compensation in British Columbia**

The process for setting the remuneration, allowances and benefits of Provincial Court judges is governed by both the common law referred to above and by statute.

The British Columbia *Judicial Compensation Act* (“the Act”) sets out requirements for the Commissions’ consideration of compensation for the judiciary, including:

**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.

(5.1) The report of the commission must demonstrate that the commission has considered all of the factors set out in subsection (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.

The Act requires the Attorney General to table the report of a Commission before the Legislative Assembly within a legislated timeline and advise the Assembly of its statutory obligations respecting the acceptance or rejection of the Commission’s recommendations.

Section 6(2) of the Act authorizes the Legislative Assembly to:

- (a) reject one or more of the recommendations made in the report, and
- (b) set the remuneration, allowances or benefits that are to be substituted for the remuneration, allowances or benefits proposed by the rejected recommendations.

If a recommendation is not rejected by the Legislative Assembly within the timeline, the Act specifies that the judges are entitled to receive, beginning on the date recommended by the Commission, the remuneration, allowances and benefits proposed by that recommendation. Substituted recommendations by the Legislative Assembly take effect on the date stipulated in the resolution.

The Legislative Assembly must consider the Commission's Report in the context of the principle of judicial independence, the Act and the Legislature's responsibility to deal with matters of public interest broadly understood. This includes responsible fiscal management of public funds. It is government's task to balance the competing interests and demands for public funds, to set policy and priorities having regard to government's financial commitments, and to present its spending proposals to the Legislative Assembly for approval.

#### **The 2019 Judicial Compensation Commission**

In accordance with section 2 of the Act, the members of the Commission were appointed on or before March 1, 2019. The 2019 Commissioners were the Honourable Thomas A. Cromwell C.C (Chairperson); Vern Blair FCPA, FCA, FCBV, FRICS; Michael Marchbank; Robin McFee Q.C.; and Lisa Southern.

The Commission's responsibility pursuant to section 5 of the Act was to report on and make recommendations respecting the remuneration, allowances and benefits of Provincial Court judges and judicial justices for the fiscal years 2020/21, 2021/22, and 2022/23. The recommendations of the Commission are contained in the *Judicial Compensation Commission 2019 Final Report* (the "Commission Report").

#### **2016 Judges Compensation Commission: Judicial Review**

Litigation over the response to the 2016 Judicial Compensation Commission's recommendations is still ongoing. An issue respecting production of the Cabinet Submission developed in 2016 was heard in the Supreme Court of Canada on December 9, 2019 with a decision expected in 2020. The BC Supreme Court decision on the legitimacy of the Legislative Assembly's response to the 2016 Judicial Compensation Commission is not expected until after the Supreme Court of Canada decision.

Because of the ongoing litigation, the 2019 Commission was required to hear submissions and make recommendations while the 2016 response is being challenged before the courts. Government's view is that the ongoing judicial review proceedings arising from the Legislative Assembly's response to the 2016 Judicial Compensation Commission recommendations should not impact the assessment of the statutory factors, as outlined in the Act, to determine what is appropriate compensation for judges for

the fiscal years 2020/21, 2021/22, and 2022/23. In any event, the result of the challenge is unknown at this time.

### **Commission Recommendations and Government's Proposed Response**

The Commission Report makes nine recommendations concerning the remuneration, allowances and benefits of Provincial Court judges.

Six of the Commission's recommendations, respecting Provincial Court judges' pensions, professional development allowance, per diem travel allowances, flexible benefits plan, and salaries of administrative judges were the result of joint submissions or were uncontested issues. As set out in the motion accompanying this response, government proposes that all these recommendations be accepted.

The Commission Report makes a recommendation respecting Provincial Court judges' salaries. As set out in the motion accompanying this response, government proposes that this recommendation be rejected.

The Commission Report also makes a recommendation respecting the costs payable to the Provincial Court Judges' Association in connection with their participation in the JCC process. Government proposes, as set out in the motion accompanying this response, that that recommendation be rejected.

Further, the Commission Report makes a recommendation respecting interest on retroactive salary adjustments. Government proposes that this recommendation be accepted.

In accordance with section 6(2) of the Act and the common law respecting judicial independence, where government proposes that a recommendation of the Commission be rejected, reasons specific to the rejected recommendation and a proposed substitute recommendation are provided.

#### **Recommendations concerning matters that were either joint submissions or not the subject of dispute**

The Commission made the following recommendations with respect to Provincial Court judges:

Recommendation 1: The Chief Judge of the Provincial Court, the Associate Chief Judges and the Regional Administrative Judges continue to receive percentage differentials of 112%, 108% and 106% respectively of the salary of a judge over the next three fiscal years.

Recommendation 3: No change to the current 3% accrual rate for judges' pensions.

Recommendation 4: An increase in the professional development allowance for judges to \$4,500 as of April 1, 2020 with the ability to carry over any unused amounts for one year.

Recommendation 6: Judges receive the same per diem travel reimbursement as Members of the Legislative Assembly.

Recommendation 7: An increase in the health and wellness-related expenditures allowed under the judges' professional development allowance to \$750 per year.

Recommendation 8: The following changes to the judges' flexible benefits plan:

1. Remove MSP credit as premiums will no longer be levied;
2. Increase the lifetime maximum for extended health benefits and out of province / country emergencies from \$250,000 to \$3 million;
3. Add qualified social workers to the list of eligible providers of counselling services;
4. Increase employer life insurance flex credits from \$80,000 to \$100,000;
5. Change physiotherapy limits as follows:
  - 5.1. For Option 3, change to a \$1,500 annual limit from an unlimited annual limit; and
  - 5.2. For Options 4 and 5, change to a \$2,000 annual limit from a \$500 annual limit for each paramedical service; and
6. Increase the maximum amount for eye examination from \$75 to \$100 and remove maximum age limit of 65.

**Response to Recommendations concerning matters that were either joint submissions or not the subject of dispute with respect to Provincial Court Judges**

Government proposes that Recommendations 1, 3, 4, 6, 7 and 8 concerning matters that were either joint submissions or not the subject of dispute, with respect to Provincial Court judges, be accepted.

**Recommendations concerning Provincial Court Judges' salaries**

The Commission made the following recommendation:

Recommendation 9: The annual salaries of judges be set at:

- (a) \$287,000 effective April 1, 2020;
- (b) \$297,000 effective April 1, 2021;
- (c) \$307,000 effective April 1, 2022.

**Response to Recommendations concerning Provincial Court Judges**

Government proposes that Recommendation 9 be rejected, and the following salaries be substituted:

- (a) Effective April 1, 2020, that the salary for puisne judges be \$276,000;
- (b) Effective April 1, 2021, that the salary for puisne judges be \$282,250;

(c) Effective April 1, 2022, that the salary for puisne judges be \$288,500.

Judges' salaries in 2019/20 are \$270,000. If the Legislature accepts government's proposed response to the 2019 Commission Report, the proposed substituted salaries would represent a total three-year increase of 6.85% above the 2019/20 judges' salaries. The recommendation of the JCC would result in a total three-year increase of 13.7%. The total three year estimated fiscal impact of the JCC's salary recommendations would be \$14.341 million compared to \$6.521 million for the proposed substituted salaries.

Government's view is that the ongoing judicial review proceedings arising from the Legislature's response to the 2016 JCC recommendations should not impact the assessment of what is appropriate compensation for judges. Although the 2019/20 salary recommended by the 2016 Commission was \$281,251, and government's proposed 2020/21 salary is lower than that, the Legislative Assembly passed a resolution for a salary of \$270,000 for 2019/20 which accordingly is in effect.

The JCC's rationale for its judges' salary recommendations is found on pages 15-26 of its Final Report, with a summary on pages 29-30. In summary, the JCC concluded that:

- The Provincial Court is currently able to attract enough highly qualified applicants to maintain a strong court, but it is important to keep remuneration at a level that encourages highly qualified lawyers to apply for appointment, as there were reasons to be concerned regarding recruitment. This factor militates in favour of a salary increase which keeps current salaries stable in real terms – i.e. about 2% per year. However, the JCC also noted that Crown Counsel and legal aid lawyers recently received salary increases of greater than 2% which militates in favour of a greater than 2% increase because these categories of lawyers are sources of applicants for the Provincial Court.
- It is too early to tell if changes to the jurisdiction of the Provincial Court (Small Claims of up to \$5,000 were transferred to the Civil Resolution Tribunal in 2017; Provincial Court Small Claims limit increased to \$35,000; changes to a number of hybrid offences in the *Criminal Code*) have had an impact on the work of Provincial Court judges, and therefore, this factor does not support any change beyond an inflationary adjustment of remuneration.
- There is sufficient resemblance between Provincial Court and Supreme Court of BC judges to consider the remuneration of Supreme Court of BC judges but there should be no fixed correlation between the remuneration of these two positions. The JCC's recommendations would put Provincial Court judges' salaries at about 85% of the salaries of B.C. Supreme Court justices, whose salaries are set federally. This percentage of Supreme Court salaries is fourth or fifth highest in Canada, behind Alberta, Saskatchewan and Ontario.
- Attention should be paid to how BC Provincial Court judges' salaries compare to the salaries of Provincial Court judges in other jurisdictions (ranking eighth out of the twelve jurisdictions for which data is available). The 2019 recommendations would place BC judges fourth amongst the provinces (tied for fifth if territories are included in the comparison) in the first year. The JCC

held that Alberta, Saskatchewan and Ontario are the most appropriate comparators given the performance of their respective economies, relative debt levels, populations, budgets and jurisdiction. Judges in each of these three Provinces are paid more than judges in British Columbia.

- The JCC noted that there are no positions among those paid out of public funds with duties that are truly comparable to judges. Judges constitute a small, highly trained and highly skilled group with enormous power over their fellow citizens. Further, the JCC noted that judges are unique in constitutional status and job function and are not equivalent to civil servants, and they cannot negotiate their terms of employment. Unlike some who are paid from the public purse, judges are not eligible for step increases, bonuses or promotions, and judges cannot supplement their earnings from other sources.
- Government has given wage increases to some groups paid from Provincial public funds that exceed the *Sustainable Services Negotiating Mandate* of 2% per year, including to physicians, legal aid lawyers, and “the most obvious comparator group” Crown Counsel. Under the mandate, an additional 0.25% can be available per year.
- BC’s current and expected economic conditions, and government’s current and expected financial position (at the time the 2019 JCC Report was prepared), are “sound” and are expected to remain so over the next three fiscal years.

Government proposes that the Commission’s recommendation for judges’ salaries be rejected for the following reasons:

1. ***The economic condition and financial position – factors 5(5)(e) and 5(5)(f) - of British Columbia have changed significantly since the Commission issued its final report and recommendations.***

The Commission’s conclusions, concerning factors 5(5)(e) and (f), that the province’s economic and financial position is sound, and will remain sound over the next three years, must be considered in light of the worsening of the province’s economic position. The Covid-19 pandemic is an unanticipated public health emergency that arose after the Commission issued its final report. Accordingly, the Commission’s final report and recommendations were not able to account for the significant impact Covid-19 is having on British Columbia’s current and expected economic and fiscal position.

The Commission’s Report concluded that judicial remuneration should not be out of step with the generally accepted current and expected economic conditions in British Columbia or the financial position of the Government. Due to the fluidity of the Covid-19 situation, detailed economic forecasting is not available at this time. However, the impacts of the economic slowdown due to the Covid-19 crisis are expected to be significant and unprecedented.

The impacts of the pandemic on the province’s budget result from increased spending and reduced revenues. Spending is forecasted to increase by \$5 billion to provide relief to people and businesses in

British Columbia. The Covid-19 Action Plan, approved by the Legislature, dedicates \$2.8 billion to fund the services to help British Columbians weather the crisis and \$2.2 billion to provide relief to businesses and help them recover after the outbreak.

Because of the Covid-19 public health emergency, almost all of the revenue streams of the Province are expected to be significantly impacted with the exception of federal government contributions, including taxation revenue, natural resources revenue, fees and other revenue, and Crown corporations' net income. Notably, this significant revenue decline, the full extent of which cannot be determined at this time, is occurring in a fiscal period that required the BC government, both in fiscal year 2019-20 and in *Budget 2020*, to undertake expenditure management measures to keep the budget balanced as housing markets cooled, revenues declined, economic growth slowed, and global financial risk increased.

The first quarterly report for 2019/20 showed an operating surplus \$95 million lower than projected in *Budget 2019*, and a revenue forecast which decreased by \$153 million. The second quarterly outlook for 2019/20 showed an operating surplus \$31 million lower than the projection in the *First Quarterly Report*, reflecting a \$30 million reduction in the revenue forecast. To keep the budget balanced, all government ministries were asked to examine the discretionary spending in their budgets to look for savings that could be put into contingencies. The goal was to recover \$300 million that could be used for critical programs and services, and unexpected issues in the remainder of fiscal year 2019/20.

*Budget 2020*, as it was tabled in February 2020, continued expenditure management through restrictions on spending, prioritization of resources and finding efficiencies as part of prudent financial management. In *Budget 2020*, government redirected a modest amount of previously planned ministry budget allocations to core programs and services. These adjustments represented less than one percent of government's annual operating expenses and enabled new investments towards the growing demand for health care, education, social and family support services, and community safety and justice services.

As discussed above, the Covid-19 crisis will require substantial changes to the 2020 B.C. budget that was tabled in February. The extent of the revenue decline, and required spending, resultant of Covid-19, cannot be fully determined at this time, except to say it will be significant. The extent to which further expenditure management measures are required as a result of Covid-19 will be assessed as the impact of Covid-19 is better established.

The 2019 JCC also cited BC's real gross domestic product and unemployment rate as factors supporting the conclusion that British Columbia's economic condition is stable. While it is too early for government to forecast the precise impact of Covid-19 on British Columbia's real gross domestic product and B.C.'s unemployment rate, some preliminary information and projections have been made available by some organizations.

The BC Business Council released an economic projection that assessed the impacts and implications of Covid-19 for the BC economy over hypothetical time periods where segments of the economy remain in shutdown and social distancing remains in place. In their projections, shutdown for eight weeks is

projected to cost the B.C economy \$18.3 billion and to shrink the province's real gross domestic product by 6-8%.

Statistics Canada Labour Force data revealed that employment fell by nearly two million in April, bringing the total employment decline since the start of the Covid-19 economic shutdown to three million. The unemployment rate rose from 7.8% in March to 13.0% in April. In addition, the number of people who were employed but worked less than half their usual hours because of the pandemic increased by 2.5 million from February to April. The data showed that in April, 36.7% of Canada's potential labour force did not work or worked less than half of their usual hours. As of April 13, 2020 figures from the Employment Minister's office show that nearly six million people have applied for Covid-19 emergency aid benefits. This includes the 3.5 million applications for Canada's Emergency Response Benefit that were received since April 6<sup>th</sup>.

According to Statistics Canada data accumulated from March 15-21, 2020, BC saw a loss of over 132,000 jobs in this one week period. This data does not include temporary layoffs or those put on a leave of absence. This raised the province's unemployment rate to 7.2%. In April, BC lost 264,100 jobs and the unemployment rate rose to 11.5%. The unemployment rate in British Columbia was 13.4% in May. BC's Finance Minister stated on May 8, 2020 that approximately 400,000 British Columbians had applied for the province's Covid-19 emergency employment benefit since May 1, 2020. The Minister cautioned that at this time it was not possible to know if the impacts of the public health emergency would worsen or improve in coming months.

Government believes that the impacts of the Covid-19 crisis render the recommended increase for judges' salary as out of step with the current and expected economic and financial position of BC.

The BC government has provided guidance to public sector employers regarding staffing plans to allow them to ensure business continuity as much as possible within the current financial and operational environment. It is expected that some employers will reduce their workforce to respond to the impacts of the Covid-19 crisis. Because more than 90% of collective agreements have already been signed, Government has not indicated any changes at this time to the *Sustainable Services Negotiating Mandate*. The impact of the pandemic may necessitate austerity measures in the near term.

An increase for judges' salary of 6.85% over the three fiscal years avoids the prospect of judges being singled out for worse treatment than others paid from Provincial public funds, and is an appropriate response to the JCC recommendations having regard to the factors set out above.

## **2. The Commission Misapplied section 5 (5) (d)**

Government's position is that the JCC misapplied section 5 (5) (d) of the Act, "changes in the compensation of others paid by the provincial public funds in British Columbia" when making recommendations concerning the remuneration of judges. In its final report, the 2019 JCC concluded that this factor does not support the government's position of a 2% increase as strongly as government submits that it does. Several reasons were given:

- Judges are unique in constitutional status and job function and are not equivalent to civil servants. They constitute a small, highly trained and highly skilled group with enormous power over their fellow citizens.
- Judges cannot negotiate their terms of employment and do not receive bonuses, step increases or promotions. Further, judges cannot supplement their earnings from other sources.
- Others paid from provincial public funds received increases that are not in fact limited to 2%, such as Crown Counsel. Government has given wage increases that in some cases exceed the mandate and has given greater than 2% increases to some groups who are not subject to the mandate such as physicians and legal aid lawyers.

a) *Judges are unique in constitutional status and job function and are not equivalent to civil servants*

The unique constitutional status and job function of judges, and the fact that they are not equivalent to civil servants, was well-established legal context when the Legislature amended the Act in 2015 to require the Commission to consider “changes in the compensation of others paid by provincial public funds”.

The unique constitutional status of judges is what requires a unique process for the setting of judicial remuneration, involving an independent commission which makes recommendations to Government: *PEI Reference*. The unique constitutional status and job function of judges are factors which militate in favour of judges having high salaries relative to most others paid from provincial public funds but they do not militate in favour of treating them differently from others paid from provincial public funds when it comes to the magnitude of salary increases. Judges need not receive identical raises to those received by others paid from provincial public funds, but if others paid from public funds are being held to raises of a certain level on account of government expenditure management policies, salary increases for judges should account for this context.

In the present case, a three year salary increase of 13.7% is out of proportion with the increases being received by others who are paid from provincial public funds.

b) *Judges cannot negotiate their terms of employment and cannot receive bonuses, step increases or promotions.*

Again, when the Legislature amended the Act in 2015 to require the Commission to consider “changes in the compensation of others paid by provincial public funds” it was well established that judges cannot negotiate their terms of employment with government. Accordingly, that cannot militate in favour of giving s. 5(5)(d) less weight.

The Supreme Court of Canada in the *PEI Reference* held that judges cannot negotiate their salaries with Government, but did not suggest that this militates in favour of higher salary increases for judges than for others paid from public funds.

It is appropriate for the Commission to note that others paid from provincial public funds have, in some instances, not been held to the limits of a negotiating mandate. This is addressed in the next section. However, Government does not view the inability of judges to receive bonuses, step increases or promotions as a basis for limiting the weight given to s. 5(5)(d) of the Act or the weight given to the government's submission on this factor.

No party put evidence before the Commission as to what percentage of those paid from provincial public funds in British Columbia receive step increases, or how frequently. While Provincial Court judges do not receive step increases, their salaries are reviewed every three years as a matter of law, and each review typically leads to annual salary increases which take into consideration a range of factors.

As for promotions, when a public servant is paid more on account of a promotion, it is because they have undertaken a job with greater responsibility and difficulty. This is not applicable amongst puisne judges. When a puisne judge is promoted to Chief Judge or Associate Chief Judge, there is a salary increase reflecting the increased responsibility of the position.

As for bonuses, there was no evidence before the Commission on who receives them, how often, or how large they can be. Bonuses are rare amongst persons paid from provincial public funds and the few existing bonus programs that remain are part of legacy contracts in Crown corporations and research universities. A small number of senior executive level public servants have salary holdback plans subject to performance standards and Treasury Board approval.

*c) The salary increases of others paid from provincial public funds are not in fact limited to 2%.*

The 2019 JCC found that government has "on a fairly regular basis" given wage increases greater than 2%, and that while the government tries to achieve consistency with the *Sustainable Services Negotiating Mandate*, the salary increases paid to persons from provincial public funds are "often higher".

While some groups received higher increases, it is not accurate to say this happened "often" or was "fairly regular". There are over 330,000 unionized employees working in British Columbia's core public service. As of April 2020 approximately 290,000 of these public sector employees are covered by tentative or ratified agreements reached under the *Sustainable Services Negotiating Mandate*.

The Commission cited Crown Counsel as an example of a group which received increases over 2%. While Crown Counsel have received greater increases than provided for under the Mandate, this is the product of a historical agreement, pre-dating the Mandate, under which Crown Counsel are entitled to receive salary increases that are 1.27% higher than the increases received by Provincial Court judges. This historical linkage with Provincial Court judges does not reflect a current decision by government to depart from the Mandate.

In its submissions to the JCC, the PCJA stated that the linkage between the increases given to Crown Counsel and the increases given to Provincial Court judges should not be considered by the JCC (pp. 58-60, PCJA Submission). It was the PCJA's view that this was 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 (p. 58, PCJA Submission). In its reply, the government agreed with the PCJA's submission on this point (p. 10, Government's Reply Submission).

Despite these submissions, the JCC considered the increases given to Crown Counsel in concluding that this factor supported an increase of greater than 2% for Provincial Court judges. Government is of the view that the JCC did not provide reasonable justification for departing from the request of both parties to not consider Crown Counsel's increases, which resulted in the JCC concluding that a higher than justified increase for Provincial Court judges was warranted.

The JCC also concluded that the fact that Crown Counsel have received salary increases in excess of 2% supports an increase in judges' salaries above 2% because this practice area is a source of applicants to the Provincial Court. The JCC's conclusion appears at odds with the Commission's earlier conclusion that the Provincial Court is able to attract suitable candidates. If the concern is that fewer Crown Counsel will apply to the bench because the salary gap between them and judges is declining, government notes that the higher percentage salary increase given to Crown Counsel does not significantly reduce the salary gap, in real dollar terms, between judges and most Crown counsel. 86.9% of Crown Counsel currently make \$185,603 or less annually and the salary gap between judges and these counsel will either not decrease or will decrease only marginally. Further, this concern can be addressed by a future JCC if, as matter of fact, the problem of recruitment arises or appears likely to arise in the near term. Moreover, as the salaries of Crown Counsel are linked to the salaries of judges, increasing judges' salaries will not change the fact that Crown Counsel will receive an increase that is 1.27% greater than any increase received by the judges.

The JCC also noted that government has given increases higher than the *Sustainable Services Negotiating Mandate* to certain categories of people paid from provincial public funds and cited the recent increases in salary for physicians and legal aid lawyers. However, the Commission did not consider that while legal aid lawyers did receive an increase in their tariff rates as the result of an agreement between government, the Association of Legal Aid Lawyers and the Legal Services Society, tariff rates for legal aid lawyers had only been raised once before this since 1991. The tariff rate increase in this year was the first increase to the tariff rate since 2006. Comparatively, judges have received a total of 30.2% in salary increases since the 2007 Commission salaries were implemented.

The Commission also did not consider the remuneration context for physicians in BC. Physicians are independent contractors performing work in a unique context. Physician Master Agreements have typically provided operational commitments in addition to compensation commitments - namely for facility/supply (business overhead), costs, service volume growth, and costs relating to new services to achieve Government policy objectives. In general, collective agreements do not include these types of

costs, and the Employers Guide to Collective Bargaining for the 2019 *Sustainable Services Negotiating Mandate* distinguishes these operational costs from negotiated compensatory commitments.

Physician Master Agreements are unique in that some of these operational factors of service delivery commitments are included in the negotiated agreements. This recognizes that, for example, physicians run businesses within the health system and most of these businesses include the provision of physician offices. If business costs were to exceed negotiated increases, the difference erodes physician income. The 2019 PMA includes increases that help to mitigate inflationary costs such as rising rent.

The factors outlined above, which must be taken into account when determining Physician Master Agreements, explain why the increases have limited value as a comparable when considering salary increases for judges.

To conclude, it is government's view that the Commission did not appropriately weigh the changes in compensation of others paid by provincial public funds. The Legislature is entitled to re-weigh this factor alongside the others and it is proposed that the Legislature do this. In government's view, giving greater weight than the JCC did to changes in compensation of others paid from provincial public funds is appropriate and militates in favour of lower salary increases than were recommended by the Commission. Others paid from provincial public funds are generally being held to raises of 2% per year, and in some cases 2.25%, on account of government expenditure management policies, and the size of judges' salary increases should take into account this context and the emerging economic and financial consequences of the Covid-19 pandemic.

Government's proposed salary substitutions take into account the following:

- The Covid-19 crisis has had, and will have, a significant negative impact on the Province's economy and the government's financial position, including forecasted \$5 billion spending for the Covid-19 Action Plan, and revenue losses in almost all of the revenue streams of the Province, including taxation revenue, natural resources revenue, fees, and Crown corporations' net income.
- The estimated fiscal impact of the Commission's salary recommendations for judges is \$14,341,555, whereas the estimated fiscal impact of the proposed increases is \$6,521,062 which the Government regards as a significant savings.
- The substituted salary, as best estimated based on available salaries for 2019 and 2020, puts BC fifth amongst provinces.
- The Commission concluded that to date, the Provincial Court has not had a problem attracting enough highly qualified candidates. If in future that occurs or is likely to, it can be addressed in a future JCC process.
- The Commission did not appropriately weigh the changes in compensation of others paid by provincial public funds.

***Recommendations concerning costs and interests***

Recommendation 13: That government pay 100% of the reasonable costs of the legal fees and disbursements of Provincial Court Judges' Association, including the costs of experts.

Recommendation 14: That interest be paid to judicial officers if litigation occurs over a response to a JCC report and higher salaries are ultimately implemented retroactively.

***Response to Recommendations concerning costs and interest***

Government proposes that Recommendation 13 be rejected.

Government proposes that Recommendation 14 be accepted.

Government proposes that the Commission's recommendation that Cabinet seek to enact a regulation to cover 100% of the reasonable costs of legal fees and disbursements of the Provincial Court Judges' Association ("PCJA") be rejected for the following reasons:

In 2015 the Act was amended to stipulate the maximum amount that the government may pay out of the consolidated revenue fund to cover the reasonable costs incurred by the PCJA of participating in the commission process. The maximum amount that may be paid by government to the PCJA is as follows:

- 100% of costs up to \$30,000; and
- two-thirds of costs between \$30,000 and \$150,000.

The legislative amendment provides certainty over costs in advance of the JCC for both government and the PCJA, rather than leaving the ultimate resolution up to a JCC recommendation which may or may not be accepted by the Legislature. It also addresses the fact that government has no control over what costs the PCJA might incur.

The legislative amendment provides, however, that the Lieutenant Governor in Council ("LGIC") may, by regulation, set higher amounts than those stipulated in the Act which can be paid to the PCJA to cover its costs. That regulation-making authority reflects the possibility that the nature and cost of the process might evolve over time and the formula may need to change in the future.

The full participation of judges in the Commission process can be achieved notwithstanding the amendment to the Act. The amendment to the Act reflects a legislative perspective that it is not unreasonable for parties to bear a modest amount of their costs for participating in the process. Costs for the PCJA up to 2015 averaged around \$90,000 to \$120,000. For the 2016 JCC, the costs submitted were approximately \$93,000 for the PCJA, of which \$65,500 or 70% was reimbursed. For the 2019 JCC, the PCJA's costs were \$83,250, and PCJA was reimbursed approximately \$66,978.19. There are 137 Provincial Court judges in the Province and this would result in a cost of \$129 per judge for the outstanding cost.

In government's view, the JCC's reasoning and recommendation does not sufficiently account for the amendment to the legislation. The Act now provides that the "maximum" amount that government

may pay is in accordance with the formula above. The LGIC's regulation-making power represents an exception to the statutory norm. The Act does not contemplate that 100% reimbursement should be the norm. Whether to enact a regulation involves a consideration of whether circumstances have changed such that government should depart from what the Legislature specified. Government does not view that such circumstances presently exist.

The JCC has not explained why there is a basis for enacting a regulation to depart from what the Legislature established as the norm. It is not sufficient to state why full indemnity for judges would generally be a good idea. The Legislature has enacted a law on the matter which does not contemplate full indemnity. It is not sufficient to note that the claimed costs are "reasonable" as the Legislature has identified norms for reimbursement that apply notwithstanding the reasonableness of the amounts expended or claimed in excess of the statutory maximum. The JCC has not identified any circumstances which are new, such as a materially different Commission process, since the Legislature amended the Act.