

# Report of the 2013 Judges Compensation Commission

---

September 24, 2013

## Table of Contents

Executive Summary .....	3
Composition of the Commission .....	8
Mandate of the Commission .....	8
Judicial Independence and Purpose of the Commission .....	8
Commission Process .....	12
Work of the Provincial Court .....	15
Overview .....	15
Broad Jurisdiction .....	17
Criminal Jurisdiction .....	17
Family Jurisdiction .....	17
Civil Jurisdiction .....	18
New Administrative Model .....	18
Innovation and Reforms .....	18
Summary of the 2010 Commission .....	20
Salaries .....	20
Pensions: Accrual Rate .....	21
Pensions: Contribution Period .....	22
Annual Leave .....	22
Long Term Disability .....	23
Life Insurance Coverage .....	23
Medical Screening .....	23
Flexible Benefit Plan .....	24
Expansion of the Senior Judges Program .....	24
Issues before the 2013 Commission .....	24
Salaries .....	25
Puisne Judges .....	25
Administrative Judges .....	26
Pensions .....	26
Accrual Rate .....	26
Tax Deductibility of Non-registered Contributions .....	27
Deferral of Pension to Age 75 .....	28
Life Insurance .....	29
Extension of the Senior Judges Program .....	30
Factors for Consideration .....	31

Financial Position of the Government .....	31
Need to Provide Reasonable Compensation to Judges.....	35
History of Salary Increases for Provincial Court Judges .....	36
Workload of the Court.....	37
Comparison to Supreme Court Judges .....	38
Comparison to Provincial Court Judges in other Provinces .....	39
Comparison to Public Sector.....	40
Comparison to Private Sector.....	41
Need to Maintain a Strong Court by Attracting Qualified Candidates.....	42
The Laws of British Columbia .....	44
Other Factors.....	44
Consideration of Past Commission Reports .....	44
Fixed/unfixed Complement of the Court .....	45
Discussion and Recommendations .....	45
Salaries.....	45
Administrative Judges .....	45
Puisne Judges.....	46
Pensions.....	48
Accrual Rate .....	48
Tax Deductibility of Non-registered Contributions.....	49
Deferral of Pensions to Age 75.....	50
Life Insurance .....	51
Senior Judges Program .....	52
Costs.....	53
Suggestions for Future Commissions .....	54

## Executive Summary

The 2013 Judges Compensation Commission's mandate is to report to the Attorney General and Chief Judge on all matters respecting the remuneration, allowances and benefits of Provincial Court judges, and to make recommendations for the period of April 1, 2014 to March 31, 2017. The Commission's work is conducted under the *Judicial Compensation Act* and serves the purpose of protecting the financial security component of judicial independence.

As part of its work, the Commission visited and toured some of British Columbia's Provincial Courthouses. The Commission was impressed with and convinced of the quality and breadth of the Court's work—work that spans criminal, family, and civil jurisdiction. The Provincial Court is the busiest court in the province, with 107 full-time and 47 part-time (or "senior") judges hearing over 144,000 cases per year at 87 locations across British Columbia.

On June 27, 2013, the Commission received written submissions from seven participants including the Government and the Provincial Court Judges Association. It held oral hearings in Vancouver on July 2, 3, 15, and 16, 2013, during which it heard from participants' representatives and two witnesses. It also received written reply submissions from the Government and the Association. The Commission appreciates the contributions of all participants and witnesses.

Although each commission makes its assessment in its own context, the starting point is the date of the previous commission's report. The Government's response to the 2010 Commission's Report is currently before the BC Supreme Court. The Commission has therefore taken as its starting point the actual compensation that the judges received following the 2010 Commission. For the fiscal year 2013/14, Provincial Court judges receive \$234,605 in salary. The Chief Judge receives 12% more per year than puisne judges; the Associate Chief Judge receives 6% more per year than puisne judges. All Provincial Court judges have a pension accrual rate of 3%. Regardless of whether they work full-time beyond age 70, judges cease contributing to their pension at age 71, when their pension benefits crystallize. The Government agreed with the 2010 Commission's recommendation to extend life insurance benefits to judges aged 71-75 if a cost-neutral way of doing this could be found. This recommendation has not yet been implemented.

In this context, participants raised a number of issues before the 2013 Commission:

- Should the salary of puisne judges be increased, and if so, by how much?
- At what level should the salaries of administrative judges (i.e., the Chief Judge, Associate Chief Judge(s), and Regional Administrative Judge(s) be set?
- Should the accrual rate for judges' pensions be increased?
- Should the Government seek to have the non-registered portion of the judges' pension contributions considered a "Retirement Compensation Arrangement" so that the entire portion of the non-registered contributions would be tax deductible?
- Should full-time working judges be able to defer taking their pensions and continue contributing to their pensions until they reach mandatory retirement at age 75?
- Should full life insurance benefits (i.e., three-times their judicial salary) be extended to judges aged 71 to 75?
- Should the limitation on the service of a senior judge be extended?

Under the *Judicial Compensation Act*, the Commission must consider the current financial position of government, the need to provide reasonable compensation to the judges, the need to maintain a strong court by attracting qualified applicants, the laws of British Columbia, and any other matter the Commission considers relevant. The Commission considered each of these matters in turn:

- **Financial position of government**—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. There are small surpluses forecasted for each of the fiscal years ending in 2014, 2015, and 2016. Also, it appears that through prudent management, British Columbia is better positioned nationally than many of its comparators. Over the past three years, British Columbia has been through a period of restraint while the economy has been recovering, and judges have had no wage increases for 2011/12 and 2012/13, and only a very modest increase of 1.5% for the current fiscal year. Notably, judges were among a limited group of people paid from the public purse whose salaries were completely frozen throughout the 2011/12 and 2012/13 fiscal years, as public servants could increase salaries within the net zero or cooperative gains mandates, move up in pay within the salary bands for their positions, or change jobs to higher paying positions. While the Government asserts that the Province is still in a period of economic recovery and that this is a time of fiscal discipline, the

financial position of Government does not demonstrate such a dire outlook that a modest increase in compensation should not be made to members of the Court if such an increase is found by this Commission to be in the public interest. Nevertheless, the judiciary should not be immune from the cautious economic outlook for the Province during the years of the Commission's mandate.

- **Need to provide reasonable compensation**—The question for each commission is always what is fair and reasonable in the present circumstances. The Commission is impressed with the quality of the Court's work, but also notes that caseloads have declined in recent years. Various comparator groups are relevant but none are determinative of Provincial Court judges' compensation. The gulf in compensation between Provincial Court judges and Supreme Court justices (currently over \$110,000 per year of service) should not become so wide that it makes the compensation of Provincial Court judges unreasonable in the eyes of those who might seek to undertake the office. When compared to other provincial courts, BC judges' salaries now rank fifth where historically they ranked third. British Columbia's public sector, particularly upper management, has faced wage freezes, though some groups within the public sector have seen up to 2% increases under "cooperative gains" policies. Average annual compensation in the BC private sector rises at about 3% per year.
- **Need to maintain a strong court**—It is unclear if there is a link between the number of applications for judicial appointment and the salary of Provincial Court judges. 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. Nevertheless, the Commission is mindful that attracting the best candidates could become a problem if the compensation of the Court does not keep pace with the other options open to highly desirable candidates.
- **Laws of British Columbia**—The Commission has given due consideration to British Columbia's statutory laws as well as binding or persuasive case law.
- **Other factors**—The Commission has considered past judicial compensation commission reports but does not consider them binding on this Commission. The Commission has also considered the fact that the Court's complement is not currently fixed by legislation.

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

**RECOMMENDATION 1:** Effective April 1, 2014, the salaries for judges with administrative responsibilities be set as follows:

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

**RECOMMENDATION 2:** Over the course of the Commission's three-year mandate, the annual salary of puisne judges be set as follows:

- (a) Effective April 1, 2014, the salary for puisne judges be \$241,500;
- (b) Effective April 1, 2015, the salary be increased by 1.5% to \$245,122; and
- (c) Effective April 1, 2016, the salary be increased by 2% to \$250,024.

**RECOMMENDATION 3:** Effective April 1, 2014, the accrual rate for judicial pensions be 3.25%.

**RECOMMENDATION 4:** Government take reasonable steps to avoid the double taxation of judges on the non-registered component of their pension contributions.

**RECOMMENDATION 5:** Effective April 1, 2014, the Government rectify the inconsistency that requires Provincial Court judges who work full-time past the age of 71 to collect both pension and full-time pay, by doing the following:

- (a) Seek any necessary approval from the Canadian Revenue Agency;
- (b) Amend the *Judicial Compensation Act* to defer the date upon which judges retire for pension purposes until the date upon which judges retire from full-time work;
- (c) Ensure that judges are allowed to make pension contributions and that Government continues to make pension contributions until a judge's date of retirement from full-time work; and
- (d) Amend the *Judicial Compensation Act* to ensure that any judge who is receiving pension benefits and full-time salary as of April 1, 2014 has the option to elect back into the pension program on terms that are actuarially sound, placing the judge, the pension plan, and the government in the same position they would have been in had the

judge never elected to take his or her pension. Such terms would include the following:

- (i) the return of pension payments to the plan by the judge,
- (ii) the making of back-payments for contributions by both the judge and government, and
- (iii) the making of all appropriate interest payments on pension payments or contributions by the judge and government.

**RECOMMENDATION 6:** The Government implement expeditiously the 2010 Commission's recommendation to provide cost-neutral life insurance to judges age 71-75.

**RECOMMENDATION 7:** At this time, the Senior Judges Program not be extended to allow senior judges to sit for 10 years.

**RECOMMENDATION 8:** The Government pay 100% of the reasonable costs of the Provincial Court Judges Association of British Columbia, including legal fees and disbursements, and the cost of the opinions and evidence of Mr. McKinnon and Mr. Smith.

## Composition of the Commission

The 2013 Judges Compensation Commission (the “Commission”) was appointed under the provisions of the *Judicial Compensation Act*, S.B.C. 2003, c. 59, as amended (the “Act”). Section 2 of the *Act* provides that the Commission be comprised of five members: two appointed by the Attorney General of British Columbia, and two appointed by the Chief Judge of the Provincial Court in consultation with the Provincial Court Judges Association of British Columbia (the “Association”). These four members then appoint a fifth, who sits as Chair of the Commission.

The 2013 appointments to the Commission are as follows:

Commission Chair	Simon Margolis, Q.C. Vancouver, BC
Attorney General Appointments	Randal Kaardal Vancouver, BC  Kirsten Tisdale Vancouver, BC
Chief Judge Appointments	Robin McFee, Q.C. Vancouver, BC  Roy Stuart Victoria, BC

## Mandate of the Commission

Section 5(1) of the *Act* sets out the Commission's mandate to report to the Attorney General and Chief Judge on all matters respecting the remuneration, allowances and benefits of Provincial Court judges, and to make recommendations concerning those matters for the next three fiscal years. Section 5(5) lists factors that the Commission must consider in carrying out its mandate. These factors are set out and discussed further below. The 2013 Commission's recommendations cover the period of April 1, 2014 to March 31, 2017.

## Judicial Independence and Purpose of the Commission

The judiciary is one of three branches of government, with the other two being the legislative branch (elected members of the Legislative Assembly)



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

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

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

The Commission's purpose relates to the financial security component of judicial independence. In the *PEI Reference*, the Court established the framework for independent judicial compensation commissions to meet the constitutional requirements of financial security and judicial independence. The 2004 Commission aptly summarized that case and the purpose of compensation commissions as follows:

Although it may be obvious, this Commission affirms that a healthy and independent judiciary is the very cornerstone of democracy. Judges must be paid salaries that adequately reflect their essential importance to proper functioning of our constitutional machinery. It must be borne in mind, as well, that when making recommendations concerning judicial compensation, we are involved in no less a matter than the proper funding of a separate and independent branch of government. Judicial independence “requires objective conditions that ensure the judiciary's freedom to act without interference from any other entity. That principle finds explicit

constitutional reference in ss. 96 to 100 of the *Constitution Act 1867* and s. 11(d) of the *Canadian Charter of Rights and Freedoms*": see *Ell v. Alberta*, [2003] 1 S.C.R. 857 per Major J. at paragraph 18.

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

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

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

and make submissions to government regarding the adequacy of current levels of remuneration [paras. 186-189];

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

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

The Commission adopts the 2010 Commission's distillation of the following principles from *Bodner*:

- It is a constitutional requirement that commissions be independent, objective and effective (para. 16);
- The commission must objectively consider the submissions of all parties and any relevant factors identified in the enabling statute and recommendations. Its recommendations must result from a fair and objective hearing. Its report must explain and justify its position (para. 17); and
- The commission's recommendations must have a "meaningful effect" even though they are not binding on government (para. 17 and 20).

Overall, a commission should present "an objective and fair set of recommendations dictated by the public interest" (*PEI Reference*, para. 173). In the Commission's view, arriving at objective and fair recommendations requires a comparison with the compensation increases, or lack thereof, of others similarly situated, the current financial position of the BC Government (including the continuing restraint measures in government expenditures), the need to provide reasonable compensation to judges, and the need to maintain a strong court by attracting qualified applicants.

## Commission Process

Section 5(6) of the *Act* provides as follows:

Before preparing a report, a commission may

- (a) write and receive submissions,
- (b) hold hearings in the manner the commission may decide, and
- (c) with the approval of the minister, engage and retain consultants the commission considers necessary.

On April 11, 2013, after consultation with the Government and the Association, the Commission directed that the deadline for written submissions would be June 27, 2013, that public hearings would be held on July 2, 3, 15, and 16, 2013, and that the deadline for reply submissions from the Association and Government would be July 7, 2013. The consultation over scheduling took into account the fact that a provincial election was to be held on May 14, 2013 and that the Government would need time to be formally established, including the appointment of a new Cabinet. As a result, the hearing dates were set for later in the summer than was the case with past Commissions.

In May 2013 and early June 2013, the Commission sought submissions about judges' remuneration from the interested public. It posted information about the Commission, how to make a submission, and the hearings on the Ministry of Attorney General's website and on the Courthouse Libraries of BC website. In addition to the Association and Government, the Commission Chair and the Commission's counsel wrote to potentially interested parties, seeking submissions:

- The Judicial Council of the Provincial Court of British Columbia
- The Law Society of British Columbia
- Trial Lawyers Association of British Columbia
- The Honourable Chief Judge Thomas Crabtree
- The Canadian Bar Association, BC Branch
- The Vancouver Bar Association
- The Legal Services Society of British Columbia

Also in early June 2013, the Commissioners attended at various Provincial Courthouses to observe the workings of the Court:

- Abbotsford Provincial Court
- Duncan Provincial Court

- Kelowna Provincial Court
- Surrey Provincial Court
- Vancouver Provincial Court and Downtown Community Court

On June 17, 2013, the Government applied to the Commission to have the hearings adjourned and held later in the summer or early fall on the basis that the Government needed more time, as a result of the new Cabinet's very recent appointment, to seek instructions and to prepare fully considered submissions for the hearings. The Government proposed—if the Commission was agreeable—to seek an amendment to the *Act* allowing the Commission's final report to be due by November 30, 2013 instead of September 30, 2013. There was no guarantee that any amendment to the *Act* could be passed prior to the September 1, 2013 deadline for the Commission's filing of its preliminary report. The Association opposed the Government's application on the basis that the Government had known the schedule for two months and had taken no objection to it, and that the hearing dates were set with the scheduling concerns of many people in mind.

On June 18, 2013, the Commission refused the Government's application and directed that the hearings proceed as planned. The Commission determined it would not be in the best interests of the Commission to delay the hearings or the report schedule for several reasons:

- The dates represented the best dates for all concerned and were selected in consultation with both Government and the Association;
- The Association strongly opposed the proposed change;
- There was no identified prejudice to the Government from proceeding with the set schedule; and
- The proposed delay posed several problems to the effective working of the Commission such as further scheduling problems due to limited availability of the Commissioners; the reliance of other participants on the scheduled dates; and the potential loss of commission counsel due to an anticipated fall maternity leave.

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

- The Provincial Court Judges Association of British Columbia
- The Government of British Columbia
- The Judicial Council of the Provincial Court of British Columbia
- The Honourable Chief Judge Thomas Crabtree
- The Senior Judges Association

- The Law Society of British Columbia
- The Canadian Bar Association, BC Branch

On June 28, 2013, the Commission circulated written submissions to all participants, who were invited to make oral presentations before the Commission.

The hearings proceeded on July 2, 3, 15, and 16 in Courtroom 101 of the Robson Square Provincial Courthouse located at 800 Hornby Street in Vancouver. The Commission conducted the hearings informally. Witnesses were not required to be under oath; some participants had legal representation; and the format was one of submissions or presentations rather than questions and cross-examination. Over the course of the four days, the Commission heard from the following people:

- Susan Dawes, counsel for the Association
- Eric Harris, Q.C., counsel for the Government
- Tom Roper, Q.C., counsel for the Senior Judges Association
- Chief Judge Thomas Crabtree, on his own behalf
- Ken Walker, Q.C., on behalf of the Judicial Council of the Provincial Court of BC
- Stephen McPhee, Q.C., on behalf of the Canadian Bar Association, BC Branch
- Sabine Feulgen, Assistant Deputy Minister, Ministry of Finance, witness for the Government
- Don Smith, Western Compensation & Benefits Consultants, witness for the Association

On July 8, 2013, the Commission received written reply submissions from the Association and the Government. (The date originally set for reply submissions, July 7, 2013, was a Sunday.)

The Commission intended its process to be non-adversarial and encouraged the participants to work towards that goal. Despite the Commission's intentions, at times the process had an adversarial tone. For example, in its reply submissions the Association accused the Government of bad faith on the basis that the Government had not set out its full position at the outset of the hearings.

For its part, the Government said it needed more time to consider and develop positions based on the submissions and expert reports it received from the Association. It assured the Commission that it would put its position before the Commission by the end of the hearings, and indeed, with one

exception, did so in its Reply Submissions on July 8, 2013. (That exception was the Government's position on whether judicial pension contributions should be treated as an RCA—see discussion below. The Government's position on that issue was received in writing after the close of the hearings.)

In the Commission's view, there was no bad faith on the part of Government. Its delays in setting out its position were not a deliberate attempt to frustrate the process, but the consequence of attempting to meet deadlines it found challenging, and the inability to set out its submissions in reply to proposals advanced by the other participants until it had seen those proposals. The Government's position on all issues—except the creation of a RCA for judges' pension contributions—was fully before the Commission by the end of the hearings and the Association had an opportunity to respond in its oral reply submissions.

Despite some moments that were adversarial in nature, the Commission appreciated the general spirit of cooperation among all participants. In particular, the Commission appreciated the work of participants to answer questions and provide follow-up information when requested. The Commission thanks all participants for their contributions to the process.

## Work of the Provincial Court

### Overview

The Commission is impressed with and convinced of the quality of the work performed by judges of the BC Provincial Court. 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. In the view of this Commission, the people of British Columbia are well served by the Provincial Court Bench.

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

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

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

The Court identifies with the core values of independence, integrity, fairness, and excellence. Its goals are as follows:

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

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

As of June 30, 2013, the Provincial Court was comprised of 107 full-time judges and 47 senior judges for a full-time complement of 128.15 judges. Senior judges are judges who are 55 years of age or older, have 10 years of judicial service and elect to retire from full-time work but continue sitting on a part-time basis. (Senior judges are calculated at 0.45 of a full-time judge.) The full-time complement has decreased since March 31, 2009 when it was 139.45. There is no fixed complement for the Court, although, as described further below, this is a matter that Government is seeking to address. Approximately 10 new judges have been appointed during each of the past three years.

In addition to Provincial Court judges, the Court's services include the work of judicial justices (who deal with search warrants, bail hearings, and traffic and bylaw matters), justices of the peace (who preside over simplified trials of civil matters), and judicial case managers (who deal with matters of scheduling, initial criminal appearances, and case flow management).

The Court serves 87 locations across the Province. Travel expectations are high for those judges serving outside the lower mainland. For example, a judge based in Smithers may travel to courts in Hazelton, Houston, and Burns Lake. A judge in Kelowna may travel to Princeton, Penticton, Vernon, Salmon Arm, and Revelstoke.

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

Unrepresented litigants add to the complexity of the cases heard by the Provincial Court. While there is a lack of statistics about unrepresented litigants, available information suggests that the Court deals with more self-represented litigants than does the BC Supreme Court. In his submissions, the Chief Judge said self-represented litigants result in judges having "additional responsibilities with respect to ensuring fair trials and access to justice for self-represented litigants"; and "provincial courtrooms may be becoming more dangerous due to the increased risk of violence that may accompany self-represented proceedings."



Provincial Court judges complete five days of mandatory educational programming annually, receive online legal updates from the Office of the Chief Judge as well as other updates, and receive up to five additional days of paid educational leave annually to attend conferences and educational seminars.

## **Broad Jurisdiction**

The Provincial Court has broad jurisdiction in adult criminal, youth, civil, family, child protection, and traffic and bylaw matters. At the time of the Commission hearings, the numbers of cases were not available for the fiscal year ending 2013; however, the numbers for 2011/12 show a decline of approximately 20,000 cases over the years 2010/11 and 2011/12 for a total caseload in 2011/12 of 144,630. The Chief Judge reported that delays have been reduced over the last three years due to both the efforts of the judges and a declining number of new cases over the past 24 months.

## **Criminal Jurisdiction**

The Provincial Court hears 95% of the criminal cases by volume in the province. It conducts preliminary hearings for trials that are ultimately heard in Supreme Court. It also has exclusive jurisdiction in all summary conviction trials and indictable matters where the accused does not elect to have the matter heard in Supreme Court.

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

## **Family Jurisdiction**

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

Under the *Family Law Act*, the Court has concurrent jurisdiction with the Supreme Court on issues of guardianship, parenting, and child and spousal maintenance. (The Court does not have jurisdiction over divorces or the division of matrimonial property.) There were 36,000 new cases and applications in this area in 2011/12.

## Civil Jurisdiction

The Court has jurisdiction over civil matters with a \$25,000 monetary limit. These cases include debt recovery, damages related to personal property, specific performance of contracts, personal injury matters, and all forms of breach of contract. Every party to a civil dispute in Provincial Court must attend a settlement conference presided over by a judge.

## New Administrative Model

In April 2013, the Court began implementing a new administrative structure, with a period of transition to June 2014. The new structure is expected to result in increased transparency, simplified administrative structure, and meaningful input of judges into the decision-making process of the Court.

Under the new structure, the province is divided into five administrative regions, each of which is administered by a Regional Administrative Judge. The Chief Judge chairs the Governance Committee, and an Associate Chief Judge chairs the Administrative Committee. The Regional Administrative Judges sit on both of these committees and have more administrative duties than puisne judges—such as ensuring compliance with standards and policies, acting as an information link between judges and the Chief Judge, and liaising with stakeholders in the justice system. They must travel more extensively within their regions to fulfill this role. A local liaison judge may assist a Regional Administrative Judge, but performs his or her duties in the course of a regular sitting schedule.

## Innovation and Reforms

The Court has undertaken a number of initiatives in recent years to enhance its efficiency and effectiveness:

- **Provincial Court Scheduling Project**—Started in the spring of 2012, this project seeks to simplify the Criminal Caseflow Management Rules to reduce the number of criminal appearances, and make changes to the way judges are assigned to cases and trial are assigned to courtrooms to increase scheduling flexibility.
- **Management Information System**—The Court is replacing antiquated software for scheduling judges and creating new computer programs to support scheduling.
- **The Balanced Rota Template**—Work began in the summer of 2010 to design a template for scheduling judges to cases and cases to courtrooms; these balanced Rota templates will be in place throughout the province by June 2013.
- **The Backlog Reduction Project**—This project is a joint effort of the Ministry of Justice and the Chief Judge to reduce current backlogs in criminal and child protection matters.

- **Vancouver’s Downtown Community Court**—This court opened in September 2008 as a partnership between the Court and justice, social, and health services agencies with the goals of reducing crime, improving public safety, and providing integrated justice, health, and social services to offenders in a timely way while holding them accountable for their actions.
- **Victoria’s Integrated Court**—This court takes an integrated approach to improve access to health, social, and economic services for offenders, to improve public safety, and to hold offenders accountable for their actions in a timely manner.
- **First Nations Court**—This court, with the input of Elders and others, provides support and healing to assist offenders in their rehabilitation and to reduce recidivism.
- **Vancouver Drug Treatment Court**—Created in 2001, this program is one of the busiest in Vancouver; it provides an alternative to the regular criminal court process for individuals who commit drug offences or other minor criminal offences arising out of their addiction to cocaine, heroin, or other controlled substances.
- **Cowichan Valley Domestic Violence Court Project**—This is the first dedicated court in British Columbia to address issues of domestic violence and has been in operation since 2009.
- **Video Bail and Remote Hearings**—The Court uses video technology from the Justice Centre in Burnaby to accommodate bail and other hearings in remote parts of the province.
- **Bail Reform Project**—Initiated in December 2007, this project allows bail hearings to be scheduled before a Judicial Justice at the Justice Centre in Burnaby by way of video conferences.
- **Reforms in Civil Division**—The Court began piloting civil reforms in November 2007 by streaming small claims cases into “under \$5000,” “institutional debts,” and “over \$5,000” streams.

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.

## Summary of the 2010 Commission

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

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

Following the 2010 Commission's recommendations, in May 2011 the Government issued its response, which was adopted by the Legislative Assembly. The Association applied to the BC Supreme Court for a judicial review of the Government's response. The Court released the reasons for judgment of Mr. Justice Macaulay on July 11, 2012. Macaulay J. concluded that the Government's response as adopted by the Legislative Assembly did not meet the constitutional and administrative law standards set by the Supreme Court of Canada: *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022 at para. 19. In March 2013, the Government issued a new response to the 2010 Commission (the "Second Response"). The Second Response is now before the BC Supreme Court as part of a second judicial review application by the Association.

The 2010 Commission's recommendations and rationale along with the current state of the Government's responses on these issues is summarized below.

### Salaries

The 2010 Commission determined that the financial condition of the Government did not support a salary increase for judges in 2011/12 and 2012/13. However, the 2010 Commission did recommend a salary increase for judges in 2013/14 "equal to the accumulated increase in the B.C. Consumer Price Index over the preceding three fiscal years, compounded annually." It expressed the view that Provincial Court judges' salaries should

be protected against the eroding effects of inflation in a manner similar to the protection that federally appointed judges receive.

The Government rejected the recommendation for a salary increase in 2013/14 as "unfair and unreasonable." It said the recommendation "to take into account accumulated inflation, contradicts [the 2010 Commission's] rationale for recommending no salary increases in 2011/12 and 2012/13." It also said that a pay increase to protect judges against inflation is not consistent with its policy to limit compensation increases paid by public funds. It said that judges have received a 43.3% increase in salary since 2004, and that maintaining judges' salaries at \$231,138 would not result in a salary below the level necessary to attract high-quality candidates to the provincial bench.

In the Second Response, the Government continued to reject the recommended salary increase in 2013/14 as "unfair and unreasonable" but instead implemented an increase of 1.5% for the 2013/14 fiscal year. The Government said the 2010 Commission concluded on unsupported evidence that salaries for Provincial Court judges should be set as closely as possible to those of the superior courts, and its decision rested upon an overly optimistic fiscal forecast. It said an increase of 1.5% was "reasonable given the financial position of the government and the evidentiary findings of the Commission. It provides the judiciary with an increase that should be equal or close to the estimated increase in CPI for the coming fiscal year."

#### **Pensions: Accrual Rate**

The 2010 Commission recommended an increase in the judge's pension accrual rate from 3% to 3.5% per year, effective April 1, 2013. It said this change would allow judges, who are on average appointed at age 53.3, to accrue the maximum pension benefit of 70% after 20 years of service. The 2010 Commission noted that "It does not serve the public interest to have judges continue to sit on a fulltime 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." The 2010 Commission said the cost was reasonable and that the increase in the accrual rate would narrow the disparity between the compensation packages of Supreme Court justices and Provincial Court judges. It further recommended no change to the statutory contribution ratio of 24:76 (judges to Government percentage contribution).

The Government accepted the recommendation to not change the contribution ratio, but rejected the increase in the pension accrual rate as unfair and unreasonable. It said the 3% accrual rate is already 50% higher than that for most members of the public service, and that the intent of the pension plan is not to necessarily guarantee that its members may achieve the maximum benefit possible. The Government said it is "reasonable to

expect that judges will have prudently saved for retirement during their careers as lawyers, in the expectation that they will have to rely to a large degree on their own retirement savings," and that judges appointed from the public sector bring accumulated public service pension with them.

In its Second Response, the Government said there is no evidence that judges are sitting beyond their capacity to do so; there is no compelling evidence requiring Provincial Court judges' compensation to be "as close as possible" to that of the superior courts; and the 2010 Commission erred in assuming the pension plan should be configured to ensure maximum accrual.

#### Pensions: Contribution Period

The 2010 Commission recommended that the Government make the necessary statutory amendments to allow a Provincial Court judge who chooses to sit past the age of 70 to continue making pension contributions until he or she retires, and that these amendments become effective as of April 1, 2011. The 2010 Commission accepted the Association's assertion that this change was necessary given the 2008 amendment to the *Provincial Court Act* that increased the age of mandatory retirement from 70 to 75 years.

The Government rejected this recommendation as unfair and unreasonable, saying if the federal Minister of Customs and Revenue granted a request for the change, the form of the pension arrangement would have to be on a "non-registered" basis, meaning that "either judges' individual pension contributions would no longer be tax-deductible [making the change of nominal benefit to judges] or government would be required to fund 100% of the necessary contributions for these judges. The latter outcome is both unfair and unreasonable."

In its Second Response, the Government said the recommendation was rejected because it "would not be to the financial benefit of most judges on the court; that it would impose an additional financial burden on the government in the form of extra pension contributions for full-time judges over the age of 71; and that its implementation is outside the control of government and may result in additional costs beyond normal pension contributions."

#### Annual Leave

The Association sought an increase from 30 to 40 days of annual leave. The 2010 Commission recommended no increase in the period of annual leave, stating that 30 days of annual leave is sufficient for Provincial Court judges, "taking into account the annual leave provisions made for their counterparts in other provinces."

The Government accepted this recommendation.

### Long Term Disability

The 2010 Commission recommended that long-term disability coverage be extended for judges up to age 75, effective April 1, 2011, and that the Office of the Chief Judge should deliver this benefit. It further recommended that the Government separately fund the cost of long-term disability benefits outside the budget of the Office of the Chief Judge.

The Government accepted the first recommendation (to extend coverage) but rejected the commencement date, saying that it is fair and reasonable to defer the implementation date to April 1, 2013. This deferral, it said, was in keeping with the period that the Government was restricting all increases in compensation to the public sector. In its Second Response, the Government accepted this recommendation in full, commencing April 1, 2011.

The Government rejected the recommendation for a separate fund for long-term disability benefits because it is "outside the jurisdiction of the Commission," and it sought to "alter the administrative relationship between government and the Office of the Chief Judge." The Second Response expanded on this rationale, stating that this issue impacts upon the size of the judicial complement (something that is currently not fixed) and that this recommendation misconstrues how judges are "hired" and paid.

### Life Insurance Coverage

The 2010 Commission recommended that the level of life insurance coverage for judges aged 65-69 "be adjusted in order to extend coverage to the age 70-75 cohort in a manner that is cost-neutral to Government." The rationale was that "as a result of the *Craig* decision, the Government is constitutionally required to provide life insurance benefits to judges aged 71 to 75 years, as it does to judges up to the age of 70 years." However, the 2010 Commission found the cost of extending benefits to the age 71-75 cohort to be "extremely expensive." It noted there was "ample precedent" for declined levels of coverage for the 65-75 age group in other jurisdictions and that "There are no comparators that would support the maintenance of full life insurance coverage (three times salary) past the age of 70 years."

The Government accepted this recommendation.

### Medical Screening

The 2010 Commission rejected the Association's request and recommended that no medical screening benefits be provided to Provincial Court judges. It said there was "very little before the Commission to establish the details and benefits of such a program."

The Government accepted this recommendation.

### **Flexible Benefit Plan**

The 2010 Commission recommended that Provincial Court judges be included in the Flexible Benefit Plan of certain categories of senior public servants. It would have entailed a minimal cost to Government, and the 2010 Commission said that, but for the requirement that remuneration of Provincial Court judges come before this commission, the judges would already be in the program.

The Government said this recommendation was acceptable in principle, but rejected the immediate implementation of any increase in benefits during a period when the Government had decided to restrict all public sector compensation increases. In its Second Response, the Government accepted the recommendation but delayed implementation to September 1, 2013, citing administrative difficulties in retroactively implementing a benefits plan.

### **Expansion of the Senior Judges Program**

The 2010 Commission recommended that the Senior Judges Program be expanded by an amendment to the *Act* that allowed the "Chief Judge to increase the number of a participant's sitting days if, in his discretion, it is necessary to do so to ensure the normal operation of the Court." This change would allow the Chief Judge to better utilize the resources available to him to meet unexpected short-term demands for additional judges. The 2010 Commission also recommended that any statutory amendment have a sunset clause requiring a review of this expansion three years after implementation.

The Government rejected this recommendation but substituted a change that is consistent in part with the recommendation. The Government agreed that amendments to the *Act* should be introduced that would "permit part-time judges to exceed the existing remuneration caps" but that the Chief Judge should "be authorized to exercise his or her discretion only in urgent and unforeseen circumstances." The Second Response maintained the Government's position.

### **Issues before the 2013 Commission**

One of the challenges in establishing the starting point for the 2013 Commission is that the results of the 2010 Commission are still a matter of dispute between the Association and the Government and are before the BC Supreme Court by way of judicial review. The Commission has therefore taken as its starting point, the actual compensation that the judges received—that is, the levels of remuneration set by the Government after



receiving the report of the 2010 Commission. During the hearings, the Commission raised the issue of the appropriate starting position for its deliberations, and both the Government and the Association agreed that the current compensation is the appropriate starting point.

Currently, for the fiscal year 2013/14, Provincial Court judges receive \$234,605 per year in salary. The Chief Judge receives 12% more per year than puisne judges; the Associate Chief Judge receives 6% more per year than puisne judges. All Provincial Court judges have a pension accrual rate of 3%. Regardless of whether they work full-time beyond age 70, judges cease contributing to their pension at age 71, when their pension benefits crystallize. The Government agreed with the 2010 Commission's recommendation to extend life insurance benefits to judges aged 71-75 if a cost-neutral way of doing this could be found. This recommendation has not yet been implemented.

In this context, a number of issues were raised before the 2013 Commission.

## Salaries

### Puisne Judges

Both the Association and the Government sought recommendations from the Commission related to judges' salaries.

The Association sought an increase in the salary of Provincial Court judges to \$260,000 starting April 1, 2014, and further increases on April 1, 2015 and April 1, 2016 equal to the percentage change in the Consumer Price Index ("CPI") for British Columbia over the preceding calendar year. The Association said this would be a "modest" increase in judicial salary. It said its salary proposal "addresses the attraction and retention factor by ensuring that the salary for British Columbia judges remains in a reasonable relationship with the salary for s. 96 judges." The proposal also situates BC judges' salaries within the group of provinces with the highest judicial salaries (Alberta, Saskatchewan, and Ontario), consistent with the relative strength of British Columbia's financial position within Canada as set out in the Report of Ian McKinnon (described below). The Association said British Columbia's "solid" financial position and abundant fiscal capacity" support its ability to pay appropriate compensation to judges in light of the other factors. Finally, its proposal follows the most common approach for setting judicial salaries: setting an amount for the first year based on a consideration of all relevant factors, and then recommending adjustments for the remaining years based on cost of living indexes.

In contrast, the Government proposed no increase in judges' salaries for the 2014/15 and 2015/16 fiscal years, and an increase equal to the percentage by which the province exceeds the current real Gross Domestic Product

("GDP") forecast for the previous year. It said the judges' current compensation is reasonable when viewed in historical perspective, in terms of their work on the bench, and in terms of the financial position of the Government. The Government noted that in past years judges' compensation has risen more than any other group in the public sector.

In response to the Government's proposal, the Association said the Government's proposal would erode judicial salaries because it does not consider cost of living increases.

#### Administrative Judges

The Chief Judge sought a recommendation related to the salaries of administrative judges. Administrative judges have historically been compensated with a percentage amount above the salary of a puisne judge.

As a result of the reorganization of the Court's administrative structure implemented on April 1, 2013 (discussed above), the Chief Judge proposed that the salaries for the administrative positions, once fully implemented, be set as follows: the Chief Judge 12% above puisne judges; the Associate Chief Judge(s) 8% above puisne judges; and Regional Administrative Judges 6% above puisne judges. Implementing this proposal would mean no change in compensation for the Chief Judge and an increase of 2% for the Associate Chief Judge(s). The Regional Administrative Judges are new positions.

The Chief Judge explained that the new administrative model places more responsibilities and duties on the Regional Administrative Judges including ensuring compliance with standards and policies, acting as an informational link between judges and the Chief Judge, and liaising with stakeholders in the justice system. He also said the proposed percentages are less than in Ontario (chief judge 12.44%, associate chief 10.57%, regional judge 7.76%) and slightly more than in Alberta (chief judge 10%, deputy chief 7.5%, assistant chief 5%). The proposed remuneration is "fully supportable within the Court's existing budget." Also, the additional remuneration is limited to the term of office and does not continue once the administrative responsibilities have ceased.

Both the Government and the Association indicated support for the Chief Judge's proposal.

#### Pensions

##### Accrual Rate

The Association sought a recommendation that the Commission raise the accrual rate on judges' pensions from 3% to 3.5% per annum. This recommendation had been sought and obtained from the 2010 Commission, but as explained above, was not implemented by Government.

The Association's main argument in favour of the increase was that it would enable judges who are appointed at the average age of 53.3 to accrue the maximum pension by age 73.3. It said this is important because the purpose of judicial pensions is to ensure financial security for judges in retirement to ensure their independence while on the bench. The uncontested expert evidence of Don Smith was that an increase in accrual rate to 3.5% would result in an additional cost to Government of \$1,307,800 per year (in 2013 dollars) for the first 15 years and less thereafter. The additional cost to judges collectively is about \$412,000 for the first 15 years and less thereafter. The Association urged the Commission to adopt the 2010 Commission's view that the cost is reasonable. Further, the Association said the 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." At the average age of appointment, most private bar members are at the highest earning points in their careers, meaning an attractive pension becomes more important to recruiting judges from the private bar. Also, a higher pension accrual rate combined with an increased base salary would reduce but not eliminate the wage disparity between BC Provincial Court judges and federally appointed judges.

The Government opposed the proposed increase in the accrual rate, saying it is unreasonable. It said judges who are appointed at age 53 should have saved for retirement throughout their careers and that increasing the rate would encourage earlier retirement, especially among those judges coming from the public bar who bring their years of accumulated public service pension with them to the bench. The Government said fairness to judges does not require the opportunity to reach a full pension: "The pension arrangements have been in place since 2002 and are clear to prospective judges." Further, it said there is no threat to the financial security of judges or judicial independence from the current accrual rate.

The Association and Government jointly submitted that the Commission should make no change to the relative contribution rates of Government and judges to the judicial pensions.

#### **Tax Deductibility of Non-registered Contributions**

The Association raised the issue that part of the judges' non-registered portion of their pension contributions is not tax deductible—or at least is not being treated as such by the pension administrators. The result is that judges are taxed twice on a portion of their contributions: in the year they earn the income and in the year they withdraw the income from their pensions.

Based on the evidence of Don Smith, the Association took the view that the non-registered portion of the judges' pension can and should be considered a Retirement Compensation Arrangement ("RCA") under section 248(1) of the *Income Tax Act*. RCAs are commonly administered so that no fund

accumulates within the RCA and therefore no tax is payable within the RCA. Mr. Smith said it was not clear why the pension administrators are not treating the nonregistered portion of judges' pensions as a RCA. Based on his evidence, the Association said the fix is simple: the non-registered portion should be considered an RCA.

However, the Government said the situation is not this simple. The cap on tax deductibility of pension premiums applies to all members of the plan earning more than \$135,000 per year, and the current plan administration and structure is more efficient and more beneficial to high-income earners than creating a RCA. Moreover, it said creating a RCA would be an expensive process entailing considerable work, as the public pension plan does not currently administer RCAs. If it were to be done, a separate plan would have to be created for judges, with unknown costs to judges and government.

#### **Deferral of Pension to Age 75**

The Association sought a recommendation for legislative changes and for the Government to seek approval from the Canada Revenue Agency ("CRA") to enable full-time judges to defer collection of their pensions and remain in the pension plan until mandatory retirement at age 75. The Association said this would remove an inconsistency and ensure that all full-time judges are compensated in the same manner. It noted, "there are no distinctions in pay for judges based on age, seniority or indeed, a judge's place of residence. All full-time judges should be eligible to accrue pension benefits throughout their years in office or until they reach maximum pension." Further, the Association said it is "unseemly" that full-time judges over 71 receive pension benefits in addition to a full salary. When the retirement age was extended from 69 to 70, the same issue arose. The 2004 Commission recommended that judges be able to accrue pension to age 70. Government accepted that recommendation, thereby remedying the situation.

The Association noted that there is a cost to Government in terms of paying pension contributions for judges aged 71 and over, but says that the Government currently enjoys a "windfall in that it is not required to make contributions for certain judges simply due to their having reached age 71." It said any suggestion that paying these contributions is an unfair cost to Government is "wrong-headed." While the details vary among provinces, in all jurisdictions except New Brunswick, judges continue to accrue pensionable service until their actual retirement.

Mr. Smith's report discussed the results of the status quo. He said judges who continue to work full-time after age 71 experience a windfall gain during their term (due to collecting both pension and salary), but may suffer a financial loss during retirement. Shorter-term judges experience a net loss; longer-term judges experience a net gain. The Government gets a windfall in contribution savings for judges working over age 71, which it would lose if

judges were allowed to defer their pensions until 75. The inconsistency between retirement age and pension age could be fixed by a request to the CRA and an amendment to the *Judicial Compensation Act*. Currently, two judges (Judges Romilly and Wood) are over 71 years of age and work full-time, collecting both salary and pension. Any changes would have to address their situation.

The 2010 Commission recommended making the necessary changes. As set out above, the Government did not accept that recommendation.

The Government maintained its opposition to seeking a waiver from the CRA. It said it would be more appropriate for the fund administrators to make such a request, and that the change would result in added costs to government through employer contributions.

### Life Insurance

The Association asked the Commission to reconsider a proposal that was before the 2010 Commission to extend full life insurance benefits to all judges regardless of their age up to the mandatory retirement age of 75. The 2010 Commission recommended an extension of coverage up to age 75, but declined to make a recommendation on the extent of that coverage, noting that the cost of full coverage (amounting to three-times the full salary of a judge) was extremely expensive. The 2010 Commission recommended that the extension of coverage be done in a manner that is cost-neutral to Government. The Association said information has come to light since the 2010 Commission that shows the cost of full coverage for the judges over age 70 is not significant. Indeed, it says the information provided to the 2010 Commission was “erroneous and/or grossly overstated.” It relies on Mr. Smith’s evidence that extension of life insurance to judges up to age 75 would not affect insurance premiums for plan members. More specifically, the affect on premiums for the current situation (i.e., two full-time judges over age 70) would likely be about 0.03 of a cent. This amount could be absorbed within the current monthly premium of 17 cents per \$1,000 of coverage. Mr. Smith says the additional premium cost to Government would be \$1,306 per year.

While the Government accepted the 2010 Commission’s recommendation to extend insurance coverage for judges up to age 75 on a cost neutral basis, it opposes the extension of full insurance coverage up to age 75. It asks the Commission not to make any change to life insurance. It says that even a few claims by judges in the 71-75 age category at the full rate of three-times salary (i.e., around \$700,000) could expose the plan to significant costs. Also, the Government notes that while there are only two full-time judges over age 70, there are nine senior judges in this age category and the benefit would extend to them as well. It says the insurer would require Government to increase its callback fund by approximately \$500,000 to cover the associated risk. It noted there is ample precedent for declining benefits with age from

other jurisdictions that reduce life insurance after age 65. Overall, the Government said it does not believe that the full level of life insurance is necessary for judges over 70.

### Extension of the Senior Judges Program

The Senior Judges Association (“SJA”) sought a recommendation extending the limitation on the term of service of a senior judge from the current seven years to 10 years. The SJA said this would bring the term of service of senior judges in line with senior judges at the federal level and in several other provinces, where they may serve up to 10-year terms. It also said extending the program would provide cost savings to government of \$56,515 per judge for each additional year of service. (The SJA based this number on a senior judge full-time equivalent being approximately two senior judges. Since the two judges are each paid at 40% of a full-time salary, cost the government less in benefits, and require no pension contributions from government, each senior judge full-time equivalent saves the government \$113,030 per year.) Also, it said the extension of the program would provide more flexibility for the Chief Judge who relies on senior judges to cover sitting assignments for colleagues afflicted with unforeseen illnesses. Without the sought recommendation, 21 judges will be forced into retirement by April 1, 2017.

In oral submissions, the Chief Judge said he was of the view that “it’s somewhat premature to address the question of whether or not the term should be extended from seven to ten years.” While he noted that nothing in principle says the term should not be 10 years, it requires study and consideration to determine what effect such a change would have on the complement and composition of the Court. The Government has released a White Paper that suggests the complement of the court will be fixed by March 2014. The Chief Judge has requested that the complement should be set with full-time judges—with senior judges being in addition to the complement. Until the uncertainty is resolved, it cannot be determined what impact an extension of the Senior Judge’s Program will have on the complement and composition of the Court. Once the complement issue is resolved, the Chief Judge will be able to study the impact and report back to a future commission.

The Association and Government concurred with the submissions of the Chief Judge that it is premature to extend the term limit for senior judges from seven to ten years. The Canadian Bar Association, BC Branch expressed concerns that extension of the Senior Judges Program could lead to scheduling problems and the Court becoming a “part-time” court in some areas of the province.

## Factors for Consideration

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

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

So, the overriding principles of objectivity and fairness guide the Commission. Factors for the Commission’s consideration are set out in section 5(5) of the *Act*:

- (5) In preparing a report, a commission must consider all of the following:
- (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.

The Commission assesses each of these factors in turn.

### Financial Position of the Government

In its submissions, the Association emphasized that viewing British Columbia in a 30-year context shows the Province to be in a good financial position. It said the Province has significant unused fiscal capacity to generate tax revenue. Also, the Association noted the Government has predicted budgetary surpluses within the Commission’s mandate. Nationally, the BC GDP is behind that of only Alberta and Saskatchewan. British Columbia has a good credit rating, and is economically strong nationally.

The Association’s submissions referred to the expert evidence of Mr. Ian McKinnon, an economist from Pacific Issues Partners who has given evidence before previous commissions. Mr. McKinnon provided a written report to the Commission but was not able to give oral evidence due to illness.

Mr. McKinnon's report made the following main points:

- It is a time of "cautious economic optimism." Internationally, the risks that were widespread a few years ago have abated. Canada has fared better than other nations because of its relatively low debt levels and has "fully restored the lost economic activity due to the recession and has added a further 4%." The Canadian GDP has grown past pre-recession levels and employment continues to advance above the pre-recession level.
- British Columbia is in a good economic position. While the deficits of the past few years have been significant, they are similar (and smaller) to a string of deficits in 2001-2004. The Government predicts budget surpluses for the fiscal years ending 2014, 2015, and 2016. Government has generally done a good job of annual forecasting; the forecasts are very prudent.
- While taxpayer-supported debt has risen in the last few years, it is below the levels of taxpayer-supported debt at the beginning of the last decade. Debt levels have stabilized.
- The Government has significantly increased its capital spending; it has not cut back radically on capital investment—this fact signals that the Province can meet its fiscal targets while maintaining high levels of investment.
- The Government has significant fiscal capacity in the ability to raise taxes if it chooses.
- British Columbia has one of the lowest provincial debt-to-GDP ratios in the Country, behind only Alberta and Saskatchewan.
- Bond rating agencies place British Columbia and Alberta in the best economic positions among provinces.

In its submissions, the Government said Mr. McKinnon underestimated the risks to the Province's ongoing recovery from the global economic crisis and slowdown. It said the Province has seen modest improvement, but recent indicators (since February 2013) show a domestic slowdown and continued volatility. It also noted that debt rating agencies have warned that if British Columbia's debt affordability were to deteriorate due to higher than expected increases in debt levels, there could be downward pressure on the Province's credit rating. Also, it noted that while the Government's real per capita spending has increased since 2008/09, it is projected to decrease in 2014/15 and 2015/16.



The Government acknowledged that the Ministry of Finance forecasts the BC economy to grow by 1.4% in 2013, 2.2% in 2014, and 2.5% in the “medium-term.” It is a prudent forecast that incorporates risks of a further domestic economic slowdown, and renewed weakness or ongoing economic problems in the United States, Europe, and Asia. Despite forecasts of growth, the Government emphasized that this is a time of restraint and fiscal discipline for the Province; it is not a time for increasing compensation to Provincial Court judges. There is “no additional funding in the ministry’s budget for judicial compensation in the current fiscal plan.”

The Government relied on the evidence of Ms. Sabine Feulgen, Assistant Deputy Minister and Deputy Secretary of the Treasury Board in the Ministry of Finance. Ms. Feulgen gave evidence by way of an oral presentation and a paper power-point presentation. Her presentation was based on the Provincial Budget tabled June 27, 2013, so her data was somewhat more up-to-date than Mr. McKinnon’s. In her evidence, Ms. Feulgen made the following main points:

- The gradual economic recovery since 2008 has slowed in 2012: the percent change in real GDP is below 2011; employment growth is slower than was expected in the February 2013 budget; retail sales have been trending flat since 2012; and there is a lot of volatility in the housing market. Accordingly, the Province is building a fiscal plan that is “tight.” There are still significant risks, though British Columbia has seen “modest improvement.”
- The June 2013 updates to the fiscal plan still show surpluses for 2013/14, 2014/15, and 2015/16, but less than in the February 2013 budget. Indeed, the surplus for this year is “very, very skinny,” and “It’s a day-by-day exercise of discipline and fiscal management to hit that target.”
- The Government is employing various strategies to fill the deficit gap. Even forecasting out to 2016/17, economic growth does not fill the gap; surplus asset sales, expenditure growth management, and a core review as well as tax measures are employed to achieve a surplus.
- Expenditure growth management includes a hiring freeze, a management salary freeze, 2010’s “net zero” compensation mandate, 2012’s “cooperative gains” mandate, and there are no additional funds planned for 2014. The Government is imposing additional expenditure restraints in 2013. The impact of expenditure growth management in next three years is expected to be an average annual growth of 1.6%.

- The taxpayer supported debt-to-GDP ratio, which is currently 17%, is expected to be 18.4 to 18.5 % over next three years. The BC debt-to-GDP ratio supports a AAA credit rating, but rating agencies are still cautious about British Columbia.
- British Columbia must stay on a path of “discipline and sustained fiscal restraint” until “the global economy shows meaningful improvement and more sustainable signs of recovery.”

The Commission has considered the Government's position on compensation for the public service and acknowledges its policy of expenditure growth management that extends to the compensation of public servants. However, the consideration relevant to the Commission is the financial position of the Government as a whole, not just its public sector salary policies. The Commission needs to look at the financial position and economy of British Columbia to see if the Government's policies of restraint are reasonably applied to hold back an independent branch of government from increases in compensation.

The jurisprudence about judicial salaries affirms that judges should not be immune from legitimate and reasonable restraint measures that apply across the public sector. In fact, to insulate judges from such measures might lead the public to view the judiciary as less independent, as was noted in the *PEI Reference* (at para. 158) where the majority cited Professor Renkes as follows:

[I]f judges were spared compensation decreases affecting other public sector groups, a reasonable person might well conclude that the judges had engaged in some behind-the-scenes lobbying. The judges' exemption could be thought to be the result of secret deals, or secret commitments to favour the government. An exemption of judges from across-the-board pay cuts is as likely to generate suspicions concerning judicial independence as the reduction of judicial compensation in the context of general public sector reductions.

As a result, the Court concluded (at para. 196) as follows:

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

On all the evidence before it, the Commission 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. There are small surpluses forecasted for each of the fiscal years ending in 2014, 2015, and 2016. Also, it would appear that through prudent management, British Columbia is better positioned nationally than many of its comparators. Over the past three years, the Province has been through a period of restraint while the economy has been recovering, and judges have had no wage increases for 2011/12 and 2012/13, and only a very modest increase of 1.5% for the current fiscal year. Notably, judges were among a limited group of people paid from the public purse whose salaries were completely frozen throughout the entire 2011/12 and 2012/13 fiscal years, as public servants could increase salaries within the net zero or cooperative gains mandates, move up in pay within the salary bands for their positions, or change jobs to higher paying positions. While the Government asserts that British Columbia is still in a period of economic recovery and that this is a time of fiscal discipline, the financial position of Government does not demonstrate such a dire outlook that a modest increase in compensation should not be made to the members of the Court if such an increase is found by this Commission to be in the public interest. 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.

### **Need to Provide Reasonable Compensation to Judges**

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

Counsel for both the Association and the Government told the Commission that "reasonable compensation" is not about looking for the minimum compensation that would secure judicial independence. The compensation available to Provincial Court judges already meets the bare minimum to satisfy the financial security component of judicial independence. So, when the Commission turns its mind to "reasonable compensation," it must look to more than judicial independence, though that important societal goal remains the driving force behind the setting of judicial remuneration.

An important consideration in determining reasonable compensation is the fact that, in order to preserve judicial independence, judges cannot negotiate with the executive branch of government over their salaries. Reasonableness

cannot be determined by what the “market” for judges will bear. In the absence of the parties being able to bargain over what constitutes a reasonable salary, the Commission needs to look to other objective markers of reasonableness. It does so by looking at comparator groups. It has considered the salaries and wage growth/decline of a number of comparator groups including federally appointed judges, provincial court judges of other provinces, BC public sector executives (deputy ministers and assistant deputy ministers), and private sector wages within British Columbia.

All of these comparator groups are relevant, but none should be determinative of Provincial Court judges’ salaries. It is not appropriate to specifically link Provincial Court judges’ compensation to any one of these groups. While each say something about what is reasonable compensation for Provincial Court judges, each of these comparators have had salaries set in the unique circumstances of its job, workplace, and respective economy. Moreover, while BC Provincial Court judges have much in common in their job environments with federally appointed judges and provincial court judges in other provinces, they also share regional economic conditions with public sector executives and the private sector in British Columbia.

Although the Government made no direct submissions on this point, the Commission is concerned about the Government’s practice of pegging certain public sector salaries (such as those of Crown counsel) to the salaries of Provincial Court judges. 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. Accordingly, these considerations formed no part of the Commission’s deliberations.

In addition to looking at relevant comparators, the Commission heard submissions about the history of salary increases for Provincial Court judges, and the workload of the Court. The submissions and evidence on issues related to reasonable compensation are summarized below.

#### History of Salary Increases for Provincial Court Judges

The Government pointed out that judges have made significant progress in their salaries over the last several years. Judges have had a 54.1% increase in their salaries since 2001, while the BC CPI has increased by only 21%. The

Government also pointed out that this has occurred when caseloads for Provincial Court judges have decreased to below 2007/08 levels.

However, it cannot reasonably be said that, because past commissions have recommended and Government has agreed to pay significant increases in judicial compensation, the judges have been overpaid. In the past, the compensation of BC Provincial Court judges may have fallen well below that of their comparator groups, resulting in a period of “catch-up.” Also, the Government agreed to those past increases because it thought them to be fair and reasonable in the circumstances. Similarly, past increases do not mean that future increases are not warranted. For each commission, the question is always what is fair and reasonable in the current circumstances including the current financial forecasts, the relative position of comparator groups, the total compensation package of judges, the need to maintain a strong court, the laws of British Columbia, and other relevant factors.

#### Workload of the Court

In the Chief Judge’s written submission he summarized the work situation of Provincial Court judges as follows:

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

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

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

The Court has lost its flexibility to cover for a sudden illness or other contingency. This, in turn, has made administration far more complex and has reduced the available flexibility to accommodate judges’ requests for leave. Judges must commit to annual leave or education a year or more in advance.

The Canadian Bar Association, BC Branch, encouraged the Commission to “consider the Provincial Court judge’s work environment as the Province’s

‘people’s court’, its heavy caseload, the need to for [sic] judges to travel and the unique demands imposed on Provincial Court judges in working with large numbers of unrepresented litigants.” The Government pointed out that the number of cases in Provincial Court dropped significantly in 2011/12 such that it is now at the level it was in the early 1990s. This recent drop in cases was largely due to the diversion of impaired drivers out of the criminal system and into the Immediate Roadside Prohibition program. However the Government acknowledged that the Provincial Court is a “high volume” court with many cases taking less than one day of court time. It characterized the Court as less of a “paper court” than the BC Supreme Court, given that the majority of reasons are given orally. However, the Chief Judge told the commission that many of the judges spend considerable time preparing their oral judgments; those judgments may never be formally put down in writing and published unless a litigant appeals or requests a written copy.

As noted above, the Commission is very impressed with the work of the Court and the talent and skills of the judges in managing difficult caseloads.

#### Comparison to Supreme Court Judges

The Association urged the Commission to consider federally appointed BC Supreme Court judges as the historical and most appropriate comparator to Provincial Court judges in terms of the work performed. The Commission agrees that federally appointed judges are an important comparator group for Provincial Court judges, but they are not the only relevant comparator group.

The disparity in compensation between justices of the BC Supreme Court and judges of the BC Provincial Court is an important factor in determining reasonable compensation for Provincial Court judges, but it is not an overriding one. For reasons discussed further below, the gulf should not become so wide that it makes the compensation of the Provincial Court judges unreasonable in the eyes of those who might seek to undertake the office. Yet, the compensation for Provincial Court judges should not be rigidly held at a specific target in relation to federally appointed judges, as these positions are different.

Both the Provincial and Supreme Courts require excellent candidates and they compete for the same senior members of the criminal defence bar, the best from the Crown counsel ranks, and for many of the best civil litigators in family law, personal injury, and insurance defence. However, while there is significant overlap in the needs of two courts, the needs are not identical. The Supreme Court has broader jurisdiction in civil matters, and a greater need of candidates with experience in complex corporate commercial matters. Also, federal court judges are compensated by a different government, which faces varied financial and other considerations.

Federally appointed judges currently are paid \$295,500 per year compared to BC Provincial Court judges who receive \$234,605. The pension accrual rate for federally appointed judges is 4.67% per year up to a maximum of 67% of salary in comparison to the BC judges' pension accrual rate of 3% per year up to a maximum of 70% of salary. According to Don Smith, while structured differently, the pensions of federally appointed judges are more generous.

The Association provided a comparison of two "average" judges: one Provincial Court judge and one federally appointed judge and assumed that the salaries of the two judges remained at current levels, they were appointed at age 53, they retired from full-time work after 15 years, they worked part-time for seven years until mandatory retirement, and they died at age 85. Comparing the 32 years of income of both judges (accumulated salary to age 68, part time income age 69-75, and pension income age 75-85), the total compensation value per year of judicial service for the federally appointed judge would be \$385,493 and for the BC Provincial Court judge would be \$275,128—a difference of \$110,365 per year of service.

The Government stressed that "the similarity of judicial function should not override other factors the commission should consider in determining reasonable compensation for judges," and stated its opposition to "fixing provincial judicial compensation by reference to compensation processes fashioned and operating in any other jurisdiction, whether provincial or federal." It said doing so is inconsistent with the mandate of this Commission. Still, the Government noted that "to the extent that the Commission wishes to take the relationship into account" Provincial Court judges' salaries have improved over the last several years when expressed as a percentage of the salaries of federally appointed judges. Prior to 2006/07, Provincial Court judges' salaries ranged from 68-76% of federal salaries. That increased to a high of 85% from 2008/09 to 2010/2011. Since then it has dropped back to 79%.

#### Comparison to Provincial Court Judges in other Provinces

The Association suggested that, in terms of working conditions, judges in other provinces make good comparators to BC Provincial Court judges. It also said that, historically, BC judges' salaries have ranked third highest among provinces, reflecting British Columbia's relative economic position within Canada. The Association noted that the salaries of BC judges have slipped to seventh place in Canada. The BC position is fifth if only provinces, not territories, are considered.

The Association compiled the following information on provincial/territorial court judge salaries across Canada, where known, for recent years:

<b>Province</b>	<b>2011/12</b>	<b>2012/13</b>	<b>2013/14</b>
British Columbia	\$231,138	\$231,138	\$234,605
Alberta	\$257,550	\$263,731	Not established
Saskatchewan	\$238,943	\$248,010	\$254,458
Manitoba	\$218,000	\$224,104	\$230,155
Ontario	\$262,113	\$267,355	\$274,868*
Quebec	\$227,488	\$230,723	Not established
New Brunswick	\$204,700	\$204,700	Not established
Nova Scotia	\$214,000	\$216,182	Not established
Prince Edward Island	\$223,774	\$235,080	Not established (national average)
Newfoundland	\$209,448	\$215,732	Not established
Northwest Territories	\$233,255	\$249,582	Not established
Yukon Territory	\$242,819	\$249,582	Not established

\*Subject to change following recommendations of independent commission.

The Association also provided a comparison of the various judicial pension plans across Canada. British Columbia has one of the highest contribution rates for judges at 8.77%. Its accrual rate of 3% is comparable to most of the other provinces, which also have a 3% accrual rate. The exceptions are Saskatchewan where the accrual rate is 3% up to age 65 and then 3.9% thereafter; Ontario where the rate varies from 2 to 6%; and Nova Scotia and Newfoundland and Labrador where the rate is 3.5%.

The Government urged caution in comparing the salaries of BC judges to other provinces as each province faces unique financial circumstances. However, in other circumstances—such as the compensation of executives—the Government admitted it considers the relative position of BC compensation to that of other provinces.

#### **Comparison to Public Sector**

The Government noted that over the past few years, there have been some gains in public sector compensation (up to 2% for some groups), but those gains have been achieved within “net zero” and “cooperative gains” policies. Neither of those policies is applicable to judges, as judges do not negotiate with the Government over their compensation. The Government submitted that within the public sector, deputy ministers are the most appropriate



comparator group and that this group is a more important comparator than other judges because the pay of deputy ministers is dependent upon the financial position of the BC Government and the economic conditions within British Columbia. It proposed a mid-level deputy minister as the best comparator to Provincial Court judges. It also noted that deputy minister positions have been subject to management salary freezes for the past four years, and that they are subject to holdbacks for specific performance-related measures.

The Government also submitted that, “it is appropriate and fair to examine judicial compensation within the broader context of public compensation in the province generally.” It rejected the Association’s contention that government decisions respecting public compensation are inherently political and therefore not an objective consideration. It is the Commission that must be objective and not the motives behind every contextual consideration. In short, the Government’s view was that “restraint in compensation increases in the broad public sector has been a key component of achieving a balanced budget and ensuring that British Columbia’s overall economic outlook remains positive.”

The Association agreed with the Government that the policies of net zero and cooperative gains do not apply to judges. However, it pointed out that, compared to the public sector, judges are the only group that has truly received “zero” compensation increases in last few years. Also, the Association noted that, unlike with federally appointed judges, there is no historical relationship to compare the compensation of Provincial Court judges to that of deputy ministers. Also, unlike judges who are all paid the same regardless of experience, deputy ministers are paid based on their experience, role, tasks, and performance.

Evidence before the Commission showed a range in pay for deputy ministers as of June 1, 2013 from \$190,000 to \$250,000, with the average salary being \$230,475. The range for assistant deputy ministers was \$130,000 to \$195,000.

#### **Comparison to Private Sector**

Private sector wages in British Columbia, while relatively low in comparison to other provinces, have been rising in recent years. Annual compensation per capita has grown by approximately 3% per year since 1997, compared to the national average of 3.8%. BC average wages per capita in December 2012 (\$2,047) were below the Canadian average of \$2,244. However, the “compensation per capita” measures assume that everyone in the population is working and do not account for retired populations.

The Government pointed out that British Columbia ranks 5<sup>th</sup> amongst provinces (8<sup>th</sup> if the territories are included) in average weekly wages. The

Government also noted that gains in private sector wages have been related to cost of living increases, mostly in the mining sector. Municipal governments have also contributed to the rise in BC wages by giving municipal employees a 3% increase.

Another way to compare judges to the private sector is to look at the options that lawyers, who may apply to become judges, have in terms of compensation in the private sector. Unfortunately, there are no reliable statistics for the earnings of lawyers in the private sector. Anecdotally, some lawyers in private civil litigation practices, particularly those who undertake commercial work, may earn more in salary than a Provincial Court judge. For those lawyers in private criminal practices, there is also likely a range with some earning more and some earning less than Provincial Court judges. The Canadian Bar Association, BC Branch, pointed out that many of the lawyers appointed from the private bar are business owners who lose flexibility and choice in their work environments, as well as the ability to engage in any other business, once they are appointed to the bench.

In relation to pensions, judges are able to accumulate more savings for retirement through pension contributions that would be possible for someone in the private sector who is limited in the amount he or she can contribute to a Registered Retirement Savings Plan.

### **Need to Maintain a Strong Court by Attracting Qualified Candidates**

The Association told the Commission that maintaining a strong court is not just about attracting qualified candidates, but also about retaining them. Some Provincial Court judges may be lured away from the Provincial Court by a more lucrative appointment to the BC Supreme Court. Also, compensation affects the legal diversity on the Provincial Court, with less legal diversity resulting from lower compensation. The Association said the Commission could remove any disincentive for exceptional candidates to apply for appointment to the Provincial Court by ensuring that the salary is comparable to that of federally appointed judges. While there is no way of knowing with certainty what effect the compensation differential has on potential applications, the difference of over \$100,000 in compensation between the two courts (when considering both salary and pension) “gets one’s attention.” Even if the Commission adopted the Association’s proposed recommendations for an increase in salary to \$260,000 and a 3.5% pension accrual rate, the gap in compensation would still be in the \$70,000 to \$100,000 range.

The Chief Judge’s submission emphasized that the Provincial Court loses judges to the BC Supreme Court, noting 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 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.”

The Judicial Council of the Provincial Court—the independent statutory body that receives and considers applications from lawyers seeking appointment to the Provincial Court bench—said that, “Remuneration levels must not be a deterrent to successful lawyers taking appointments.” It 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. Information provided by the Chief Judge shows that the number of applications from Victoria and Vancouver to Chilliwack compared to the rest of the province has decreased since 2010. In 2010, 72% of the applications came from Victoria or the Vancouver to Chilliwack region; that number was 56% for 2012 and 48% for the first half of 2013.

The Judicial Council noted in its submissions that in 2007—the year in which a significant salary increase was recommended for 2009—applications to the Court reached their all-time high at 89 applications. The second highest year for applications (59) was in 2009—the year the increase took effect. Applications have declined since then to 34 in 2012. The 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.

However, despite the decline in applications, the Judicial Council had a pool of 24 qualified applicants ready for appointment throughout 2010, 2011, and 2012.

The Government said the Provincial Court is able to attract good candidates with the current salary; that there are currently 17 approved candidates waiting for appointment demonstrates this fact. Also, remuneration is only one factor that goes into an applicant’s decision to apply for appointment to the Provincial Court. The nature of the work at the two courts is different. Indeed, when the salary gap between the two courts was the widest (roughly

2003 to 2006), there was the least migration of judges from the Provincial Court to the Supreme Court.

In the Commission's view, based on the current data, it is unclear if there is a link between the number of applications and the salary of Provincial Court judges. 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.

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

### The Laws of British Columbia

The Commission has given due consideration to the laws of British Columbia. In particular, it has considered the *Provincial Court Act*, R.S.B.C. 1996, c. 379 and the *Judicial Compensation Act*, S.B.C. 2003, c. 59 as well as case law that is considered binding or persuasive in the courts of this province. The Commission also notes the relevance of the *Balanced Budget and Ministerial Accountability Act*, S.B.C. 2001, c. 28 and the *Budget Transparency and Accountability Act*, S.B.C. 2000, c. 23, which provide context for the financial position of British Columbia.

### Other Factors

#### Consideration of Past Commission Reports

As noted above, in *Bodner*, the Supreme Court of Canada said, "The reports of previous commissions and their outcomes form part of the background and context that a new compensation committee should consider." This Commission has reviewed past reports of BC Judges Compensation Commissions and finds the discussion of case law and the approach to reasonable compensation useful and instructive. However, each commission must look at what is reasonable in the unique facts and context before it. While the Commission has considered past reports and takes as its starting point the report of the 2010 Commission and the Government's responses to that report, it need not reach the same conclusions or recommendations as its predecessor. Past reports have no binding precedent on this Commission. Three years have passed since the last commission; the global, national, and

international contexts have changed. Moreover, the economic forecasts relied upon in that commission process have not come to fruition with the result that the BC economy is in a different position than was forecast in 2010.

#### Fixed/unfixed Complement of the Court

The Provincial Court complement—specifically whether it is fixed or not—is an issue that is not before this Commission but that impacts upon some issues that are before the Commission. The Government and the Chief Judge advised the Commission that work is underway to fix the Court's complement, but this is not complete. Because the complement has not been fixed by legislation, participants appearing before the Commission could not say whether a fixed complement, were it to be legislated, would include within its number the judges in the Senior Judges' Program (i.e., the part-time judges). This uncertainty affects issues such as the Senior Judges Association's proposal to extend the length of time that a Senior Judge may sit from 7 to 10 years. If senior judges were included within the fixed complement, an extension of the program such that senior judges were sitting longer could result in the ratio of part-time to full-time judges increasing.

## Discussion and Recommendations

### Salaries

#### Administrative Judges

Participants agreed that the salary for the Chief Judge should remain unchanged at 112% of that of a puisne judge. Participants also agreed that the Associate Chief Judge(s) should get a raise of 2% so that they would receive 108% of the salary of a puisne judge, and that the new positions of Regional Administrative Judge should be paid at a rate of 106% of the salary of a puisne judge. The Commission accepts that these salaries for judges with administrative responsibilities provide reasonable and fair compensation for the work and extra responsibilities that these judges undertake.

**RECOMMENDATION 1: Effective April 1, 2014, the salaries for judges with administrative responsibilities be set as follows:**

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

### Puisne Judges

The Commission has considered the Association's proposal that the salary of a puisne judge be increased to \$260,000 beginning April 1, 2014, with further increases equal to the percentage change in the BC CPI on April 1, 2015 and April 1, 2016. It has also considered the Government's position that no increases are warranted for the 2014/15 and 2015/16 fiscal years, and an increase equal to the percentage by which the province exceeds the current real GDP forecast for the previous year would be appropriate for the 2016/17 fiscal year. In the Commission's view, neither of these proposals would provide reasonable and fair compensation to BC Provincial Court judges.

The salary sought by the Association is too high; it is out of step with wage growth generally in the BC economy. It is based too heavily on closing the salary gap between Provincial Court and Supreme Court judges. Also, it fails to reflect the financial realities of the Province. While there are predicted surpluses over the course of the Commission's mandate, they are small surpluses; also those surpluses depend in part on the successful implementation of the Government's policies of fiscal restraint. The increases sought by the Association would not on their own jeopardize the financial position of the Government, yet the 10.8% increase sought by the Association in the first year of the Commission's mandate does not reflect the moderate gains in the economy, nor the reasonable compensation needs of judges. Although it may attract more qualified candidates, the evidence before the Commission does not indicate that such a large increase in pay is necessary to achieve that end.

On the other side of the coin, the salary sought by the Government (i.e., no increase for the first two years) also does not sufficiently reflect the true financial position of British Columbia. It is based too heavily on the Government's policies of fiscal restraint and wage freezes in the public sector. It ignores the fact that judges are not public servants but a distinct branch of government. 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 "3<sup>rd</sup> to 5<sup>th</sup> nationally amongst the provincial and federal governments" in relation to executive compensation.

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.

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

The Commission recognizes that judge's salaries were frozen in 2011/12 and 2012/13 and that, unlike the majority of public servants, this was a "true freeze" in that judges cannot move up in pay grades or change positions within government in order to achieve a higher rate of pay. The financial outlook for British Columbia looks better in the next few years than it has in the past few years. A modest increase in salary is appropriate to the dignity of the position of Provincial Court Judge, and in keeping with judges' reasonable compensation and the need to ensure a strong court.

Accordingly, the Commission is recommending an increase starting April 1, 2014 that amounts to a 2.9% increase on the current salary of \$234,605. The increases recommended for the subsequent two years are cautious and equal to or below the average annual 2% inflation rate of recent years, and in keeping with the modest economic growth predicted for British Columbia. The recommendation set out below would place BC Provincial Court judges' salaries 4<sup>th</sup> among provinces (6<sup>th</sup> if the territories are included), and at roughly 81.7% of the salary of a Supreme Court justice. It also situates the salaries of BC judges at the top end of the current pay for BC deputy ministers. Moreover, the recommended increase reflects that the judiciary

should not be immune from the cautious economic outlook for the Province during the course of the Commission's mandate.

**RECOMMENDATION 2: Over the course of the Commission's three-year mandate, the annual salary of puisne judges be set as follows:**

**(a) Effective April 1, 2014, the salary for puisne judges be \$241,500;**

**(b) Effective April 1, 2015, the salary be increased by 1.5% to \$245,122; and**

**(c) Effective April 1, 2016, the salary be increased by 2% to \$250,024.**

## Pensions

### Accrual Rate

The Commission acknowledges that the current accrual rate of 3% for judicial pensions is generous when compared to the accrual rate of 2% for public sector pensions (excluding Members of the Legislature who receive 3.5%). It is similar to the accrual rates for pensions of provincial court judges in other provinces (many of which are also set at 3%, though some are higher), but not as generous as the rate for federally appointed judges (4.67%). The pension as a whole is greater than what could be created in the private sector.

The 2010 Commission recommended an increase in the pension accrual rate from 3% to 3.5% on the basis that the change would allow more judges to accrue the maximum pension without the pressure to sit longer than they would otherwise choose to; the cost to Government was reasonable; and the change would narrow the disparity in compensation between Provincial Court judges and Supreme Court justices.

However, both the financial position of Government and the pension climate has changed since 2010. The economic recovery has not been as robust as predicted in 2010. In the changing landscape of pension plans, most people no longer enjoy "defined benefit" pension plans, and the segment of the population that does is decreasing. 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.

Further, the 2010 Commission 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 mandatory retirement (see Recommendation 5 below). Additionally, the Commission is not convinced that the disparity in pensions between Provincial Court judges and Supreme Court justices is so



great that it is currently affecting the quality of applications for judicial appointment. As noted above, this could become a problem in the future and it is appropriate to be mindful of the gap in total compensation.

In light of all these considerations, the Commission finds that a moderate increase in the accrual rate of the judicial pension is warranted, but not to the extent sought by the Association. The Commission recommends an increase to 3.25%. Given that the average age of appointment to the Court is relatively stable at 53, a pension accrual rate of 3.25% would enable judges appointed at age 53 to attain their full pension by working to age 75 if they so choose. The cost of the increase is reasonable in relation to the financial position of Government. Overall, a rate of 3.25% is reasonable considering the close comparators of other judges and the need to maintain a strong court.

**RECOMMENDATION 3: Effective April 1, 2014, the accrual rate for judicial pensions be 3.25%.**

#### **Tax Deductibility of Non-registered Contributions**

Currently, part of the non-registered component of a judge's pension contribution is not tax deductible. This anomaly creates a situation where judges are double taxed on these contributions: they pay tax during the year in which they earn the money and contribute it to the pension plan, and in the year in which they draw the money from the pension. While the Association asserted that the non-registered portion of the pensions could be administered as a RCA, which would make the non-registered contributions tax deductible, the Government said that the public service pension plan does not currently administer RCAs. If the non-registered portions were to be administered as such, a RCA would have to be created for judges separately from public service employees.

The Commission agrees with the Association that double taxation ought to be avoided. However, it recognizes that complications and costs may ensue from creating a RCA for judges alone—impacting not just judges, but also the Government and potentially other members of the public service pension plan. The Commission has no evidence before it about these impacts.

Given the unfairness of double taxation, the Commission recommends the Government take reasonable steps to avoid the double taxation currently experienced by judges contributing to their pensions. Taking “reasonable steps” does not mean that the Government must change the system, but it does mean that the Government should consider all the options and implications of administering a RCA for judges (or other solutions) to avoid the double taxation problem, and implement any reasonable solutions.

**RECOMMENDATION 4: Government take reasonable steps to avoid the double taxation of judges on the non-registered component of their pension contributions.**

**Deferral of Pensions to Age 75**

The Commission finds it anomalous that in an era where the mandatory retirement age for judges is 75, judges who work full-time past the age of 71 collect both full-time salaries and their judicial pensions.

Allowing judges who choose to work full-time past age 71 to defer the collection of their pensions and continue to contribute to their pensions until they retire would require the Government to make up to an additional four years' worth of contributions on behalf of such judges. However, this is not properly conceived as an additional cost to Government; these judges are working full-time and do not need to be replaced until such time as they retire. If they chose to retire at age 71 and were replaced with younger judges, there would be no change in cost to the Government, as the Government would have to pay pension contributions for these younger judges. Such a change would however, eliminate a benefit that the Government currently receives when a judge elects to continue working past age 71: the Government effectively benefits financially from an older judge continuing to work past age 71 because it does not have to pay pension contributions once the judge is collecting pension. But the Government has no guarantee that it will receive this benefit; judges may retire at any time.

Deferring the pension up to mandatory retirement age would allow judges to keep accruing pension past the age of age 71—something that may be significant for judges who were appointed after age 50 because it would allow them more time to accrue a full pension. Also, there is a benefit to the pension plan: pension payouts would be deferred for up to an additional four years and paid-out over a shorter period.

The Commission agrees with the 2010 Commission that the mandatory commencement of pensions at age 71 should be deferred for full-time judges until such time as they retire from full-time work. Judges should be allowed to contribute to their pensions, and Government should similarly continue to contribute to their pensions, until such time as the judge retires from full-time work. Judges who elect to take early retirement and collect their pensions, but also participate in the Senior Judges Program would have their pensions crystallize and their contributions cease at the time they retire from full-time work.

Making this change would involve the Government writing to the CRA and requesting that the Minister of National Revenue approve the changes sought under s. 8502(3) of *The Income Tax Regulations*. It would also require that

the Government amend section 16 of the *Judicial Compensation Act* to change the definition of “latest retirement age.”

There are currently two full-time judges who are older than 71 and who are receiving both full-time salaries and collecting their pensions. These two judges should be considered as exceptions to the rule. They should be allowed to elect whether to (1) continue being effectively retired for pension purposes and collect both pension and full-time salary while they work full-time; or (2) cease collecting pension benefits, re-enroll in the pension program, and repay any pension benefits collected to date. This change would involve the Government including a new provision in the *Judicial Compensation Act* to allow for this election.

**RECOMMENDATION 5:** Effective April 1, 2014, the Government rectify the inconsistency that requires Provincial Court judges who work full-time past the age of 71 to collect both pension and full-time pay, by doing the following:

(a) Seek any necessary approval from the Canadian Revenue Agency;

(b) Amend the *Judicial Compensation Act* to defer the date upon which judges retire for pension purposes until the date upon which judges retire from full-time work;

(c) Ensure that judges are allowed to make pension contributions and that Government continues to make pension contributions until a judge’s date of retirement from full-time work; and

(d) Amend the *Judicial Compensation Act* to ensure that any judge who is receiving pension benefits and full-time salary as of April 1, 2014 has the option to elect back into the pension program on terms that are actuarially sound, placing the judge, the pension plan, and the government in the same position they would have been in had the judge never elected to take his or her pension. Such terms would include the following:

(i) the return of pension payments to the plan by the judge,

(ii) the making of back-payments for contributions by both the judge and government, and

(iii) the making of all appropriate interest payments on pension payments or contributions by the judge and government.

## Life Insurance

The Association sought reconsideration of a proposal that was before the 2010 Commission: that the Commission extend the same life insurance benefits to all judges regardless of age, up to the age of mandatory retirement

at age 75. The Association sought this reconsideration on the basis that the 2010 Commission did not have full information before it and was therefore misled into thinking that the cost of this proposal was much greater than it actually was.

The Commission has considered the information and submission of the Association that the cost is not significant. It has also considered the Government's submission that relatively few claims at the full amount in the 71-75 age category could expose the life insurance plan to risk, and that the Government would have to contribute to stabilize the plan.

It appears that the information before the 2010 Commission was not an accurate depiction of the cost of the proposal. However, after considering the new information submitted by the Association, the Commission is not convinced that the extension of full, three-times-salary life insurance to members of the court over age 71 would be entirely cost neutral. In the Commission's view, cost-neutral insurance on a declining basis from age 71 to age 75 is reasonable. Taking into account the new information provided by the Association, this Commission adopts and reaffirms the analysis of the 2010 Commission on this issue.

**RECOMMENDATION 6: The Government implement expeditiously the 2010 Commission's recommendation to provide cost-neutral life insurance to judges age 71-75.**

### Senior Judges Program

The Commission is of the view that it is premature to recommend an extension of the Senior Judges Program from seven to 10 years. While it recognizes the benefits of senior judges and that many senior judges, if allowed to sit longer, would continue to bring valuable experience and flexibility to the court, the Commission is mindful of the cautions expressed by the Association, the Chief Judge, and the Government. Until the issue of fixing the complement of judges for the court is resolved by the Legislature, the impact of extending the Senior Judges' Program cannot be adequately evaluated. As it stands now, the program is operating in a way that meets the needs of the Court and this Commission does not find any basis to recommend a change to the program. This issue should be brought before a future commission once the fixed complement issue has been resolved.

**RECOMMENDATION 7: At this time, the Senior Judges Program not be extended to allow senior judges to sit for 10 years.**

## Costs

The issue of costs falls under the Commission's broad jurisdiction to report and make recommendations on "all matters respecting the remuneration, allowances and benefits of judges" (s. 5(1) of the *Act*). The Association seeks 100% of its reasonable legal fees and disbursements including 100% of the cost of its expert evidence (i.e., the reports of Mr. McKinnon and Mr. Smith and the oral evidence of Mr. Smith).

The Government's initial position on costs was that it would agree to pay the Association's reasonable costs up to a maximum of \$25,000. In a written submission following the Commission hearings, the Government changed its position stating that,

[T]he Government is prepared to agree to pay 50% of the reasonable legal fees incurred by the Association as well as the costs of obtaining the opinions and evidence of Mr. McKinnon and Mr. Smith. The Government considers that the Association has made choices on how to proceed for which they should bear a reasonable proportion.

It is not clear whether the "50%" in the Government's submission applies to both legal fees and the expert evidence, or whether the Government's submission should be read to mean it is prepared to pay 50% of the legal fees *in addition to* all (i.e., 100%) of the costs associated with Mr. McKinnon and Mr. Smith. However, in light of the Commission's view of costs, this distinction is not important.

The Commission notes there is a history in British Columbia of the Government paying 100% of the reasonable costs of the Association. (For example, see: 2004 Commission Report, pp. 29-30; 2007 Commission Report, p. 23; 2010 Commission Report, p. 32.) While no rule states that Government must pay the Association's costs, the constitutionally mandated process for the setting of judicial remuneration is best achieved by the participation of both the judiciary and other branches of the Government in order for the Commission process to be objective and effective: *PEI Reference*, para. 173.

Also, as noted by the Association, "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." The judiciary is the third branch of government, yet does not have the executive branch's access to the government's resources. In this situation, where the participation of the judiciary is required for an objective and fair process, 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 Association's participation.

The matter of costs for judges' participation in commissions has been the subject of comment in a number of leading decisions on judicial independence and salary commissions. The Newfoundland Court of Appeal reviewed the case law in *Newfoundland Assn. of Provincial Court Judges v. Newfoundland*, 2000 NFCA 46, and determined that a commission may, upon a review of the circumstances, order all or a portion of an association's representation costs to be paid by government where the commission is of the view that the participation of the judges or their association was necessary to enable the commission to fulfill its constitutional mandate.

The Commission found the Association's participation in this Commission to be helpful and appropriate and, most importantly, necessary to an effective and objective process. Accordingly, the Commission recommends that the Government pay 100% of all the reasonable costs of the Association, including the legal fees and the costs of the opinions and evidence of Mr. McKinnon and Mr. Smith.

If the Government and the Association cannot agree on what is "reasonable" then they are to submit the Association's actual costs to the Commission, along with any written submissions on the reasonableness of those actual costs, before September 20, 2013. On September 19, 2013, following receipt of our preliminary report, the Commission was advised by counsel that the Government would not be challenging the reasonableness of the Association's actual legal fees, disbursements, and costs of experts.

**RECOMMENDATION 8: The Government pay 100% of the reasonable costs of the Association, including legal fees and disbursements, and the cost of the opinions and evidence of Mr. McKinnon and Mr. Smith.**

## Suggestions for Future Commissions

The Commission makes two suggestions that may assist the process of future commissions.

First, given that provincial elections are set by statute to occur every four years, and the Judges Compensation Commission is set by statute to occur every three years, once in every 12 years, the Government may find itself in a situation where it is attempting to prepare submissions to a commission during an election period or shortly thereafter. In order to avoid any conflict or problem in scheduling, the Commission suggests that the *Act* be amended to provide for later appointment of Commissioners and later report deadlines during election years. For example, if Commissioners were appointed by June 30 of an election year, and the preliminary report were due November 30 (final report due December 31), hearings could be scheduled to occur in September, once the new government is established in

office. This may facilitate the Executive's ability to participate in the process during election years.

Second, the Commission sees benefit in keeping the commission process inquisitorial rather than adversarial. Towards that end, it suggests that appearances continue to proceed by way of submissions and that any "witnesses" make presentations and be questioned by the commissioners. Participants should not expect a court-like proceeding in which they lead evidence and then cross-examine another party's witness. Having said that, participants should also be encouraged to seek leave from the Commission to ask questions of clarification or provide the Commission with suggested questions for participants or witnesses.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



Simon Margolis, Q.C., Chair



Randa Kaarda



Kirsten Tisdale



Robin McFee, Q.C.



Roy Stuart