



# Judicial Compensation Commission 2019

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## FINAL REPORT

October 24, 2019

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# 1 Introduction

## 1.1 What is the 2019 Judicial Compensation Commission?

The 2019 Judicial Compensation Commission (“Commission”) is a five-person, independent body. Our mandate is to make recommendations on all matters respecting the remuneration, including allowances and benefits of Provincial Court

judges and judicial justices for the next three years.<sup>1</sup> We must be objective and take into account several specified factors. Overall, our task is to recommend reasonable compensation.<sup>2</sup>

## 1.2 Why is there a Judicial Compensation Commission?

*Our role as a Judicial Compensation Commission is rooted in the Constitution. Our process is meant to help maintain the proper constitutional balance between judicial independence and the role of the legislature in deciding judicial remuneration.*

The issue of judicial compensation brings into play two bedrock constitutional principles that do not sit easily together.

The first bedrock principle is well known and easy to understand. The legislature must authorize all public spending. Our elected representatives, not judges or commissioners, must decide how to spend public money. The legislature is accountable to the people for these decisions.

The second bedrock principle is also well known. But it is not as easy to understand. Judges and judicial justices<sup>3</sup> must be and be seen by the parties and the public to be independent. By independent, we mean free of any inappropriate influence from any source, including the government. This is important not only because the judiciary makes vital decisions every day that impact

our lives—who goes to jail and who remains free; who is guilty of a serious crime and who is not; who keeps custody of their children and who does not. It is also important because the government is often one of the parties to matters before the court.

British Columbians need and want highly competent people to fill this unique and important role. They also need and want those people to be as impartial and independent as it is possible to be. Our judiciary must decide cases based only on the law and the evidence, not on any outside influence, politics or personal bias. They must be free of any pressure or influence from any source. Independent and impartial judges and judicial justices are the foundation of our court system and of the rule of law.

Judicial independence is not just about the judiciary's impartial state of mind. It is also about objective guarantees that everyone can see.

Our Constitution has three such objective guarantees of judicial independence. First, there is job security so judicial officers cannot be fired if they make a decision that the government does not like. Second, there is financial security so that government cannot influence judicial officers by financial means. Finally, there is administrative independence so that the judiciary is in charge of key judicial functions such as which judicial officer hears which case. These guarantees are not a “perk” of judicial office. Rather they are in place so that everyone has justified confidence that the judiciary will decide cases according to the law and the evidence and nothing else.

These two bedrock principles—public accountability for public spending and judicial independence—can give rise to tension. On the one hand, government is often a party to a dispute before the courts. But, on the other hand, it is the government, through the legislature, that decides on judicial compensation. This tension proved too difficult to resolve for many years. And it was the need to resolve this tension that led to the creation of judicial compensation commissions.

In the late 1990s, judicial compensation issues were before the courts in four provinces. This led to a group of appeals to the Supreme Court of Canada. As the then Chief Justice of Canada observed, “the proper constitutional relationship between the executive and the provincial court judges... has come under serious strain.”<sup>4</sup>

Judicial compensation commissions like ours are a vehicle to help resolve this tension. The purpose of the commissions is to restore the

proper constitutional relationship while respecting both bedrock principles of public accountability for spending and judicial independence.<sup>5</sup>

As the Chief Justice put it, “interposing an independent body – a judicial compensation commission – between the judiciary and the other branches of government... depoliticize[s] the process for determining changes or freezes to judicial remuneration.”<sup>6</sup>

Despite this laudable purpose, the judicial compensation commission process in British Columbia has not so far been fully able to restore the appropriate constitutional relationship. For three Commission cycles, from 2010 through 2016, the Government has recommended that the Legislature reject Commission recommendations on salary and pension. This has resulted in litigation following the 2010, 2013 and 2016 Commissions.

In 2015, the Court of Appeal of British Columbia ordered the Government to implement all of the 2010 Judges Compensation Commission recommendations<sup>7</sup> and in 2017, the Court directed that the issue of judges' salary and pension arising from the 2013 Judges Compensation Commission be sent back to the Legislative Assembly for reconsideration. There was also litigation about the recommendations of both the 2010 and 2013 Judicial Justice Compensation Commissions' salary recommendations leading to the Legislature setting new salaries.

Even as we deliver this report, the judges and the Government are involved in litigation about the Government's response to the 2016 Judicial Compensation Commission salary recommendations, litigation that is unlikely to be resolved until after the Supreme Court of Canada decides the Government's appeal

concerning the release of documents related to its response to the Commission.

This history of rejected recommendations and litigation in the courts makes clear that the process has not been functioning as the Supreme Court envisioned that it should. Having judges and/or judicial justices and the Government as opponents in court is not desirable. All participants at our hearings recognized this.

Our role as a judicial compensation commission is rooted in the Constitution. Our process is meant to help maintain the proper constitutional balance between judicial independence and the role of the legislature

in deciding judicial remuneration. In carrying out our role, we must be independent and objective. Most importantly, we must also be effective.<sup>8</sup> This means that our report must have a meaningful effect on the determination of judicial salaries.<sup>9</sup>

We have done everything that we can to be independent and objective. We have also done what we can to be effective—we held our hearings, considered the evidence and submissions and are providing this report that sets out our objective advice about reasonable judicial remuneration. We hope that our process will have a meaningful impact on the decision to set judicial remuneration.

## 2 What do we recommend?

We are making recommendations on a number of matters that were raised before us. Our rationale for, and the details of, our recommendations are set out in the following pages.

We conclude that judicial salaries in British Columbia are out of step with those in the most appropriately comparable jurisdictions in Canada. In the case of judicial justices, the current salary is so unreasonably low that it is putting the effective working of the Provincial Court in jeopardy because there are not enough highly qualified people willing to do the work. Based on the objective evidence and taking into account the factors

that our mandate requires us to consider, we conclude that the Government's proposed salaries for judges and judicial justices are not reasonable remuneration for those offices. We also conclude, however, that the salaries proposed by the Provincial Court judges exceed what is required to assure reasonable remuneration as do certain other remuneration proposals made by the judicial justices.

In brief summary, our recommendations include those listed below. We also make recommendations on a number of other matters that we will set out in detail in the following pages.

- *Judges' salaries be increased by approximately 6.3% effective April 1, 2020 and by approximately 3% in each of the two following years resulting in salaries for those years of \$287,000, \$297,000 and \$307,000, respectively;*
- *Full-time judicial justices' salaries be increased by approximately 13% effective April 1, 2020 and by 3.0% and 2.8% in the two following years resulting in salaries for those years of \$138,000, \$142,000 and \$146,000, respectively;*
- *Judicial justices working on any of 10 statutory holidays receive an additional payment of \$245 for each of those days;*
- *There be no change in the pension plan for full time judicial justices; and*
- *Judges and judicial justices receive the same travel per diem as Members of the Legislative Assembly.*

### 3 Who are we and what did we do?

The Commission has 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 (“PCJABC”) and the Judicial Justices Association of British Columbia (“JJABC”). These four members then appoint a fifth, who sits as Chair of the Commission.<sup>10</sup>

The 2019 Commissioners are as follows:

1. Vern Blair, FCPA, FCA, FCBV, FRICS – Mr. Blair is a Chartered Professional Accountant and a Chartered Business Valuator. He negotiates for and advises owners and management and is an arbitrator and mediator.
2. The Honourable Thomas A. Cromwell, C.C. (Chair) – Mr. Cromwell is a retired judge of the Supreme Court of Canada and currently is senior counsel at Borden Ladner Gervais LLP.
3. Michael Marchbank – Mr. Marchbank is now a consultant after retiring as President and Chief Executive Officer of the Fraser Health Authority in the fall of 2018.
4. Robin McFee, Q.C. – Mr. McFee is a founding partner of Sugden, McFee & Roos. His practice focuses on large, complex litigation matters in a wide variety of areas.

5. Lisa Southern<sup>11</sup> - Ms. Southern is a partner in Southern Butler Price a firm dedicated to workplace investigations, mediation and arbitration. She is a former Registrar and Vice Chair of the British Columbia Labour Relations Board.

Maia Tsurumi is counsel to the Commission.

We received written submissions from a number of groups and individuals, and these were posted on the Commission’s page of the Ministry of Justice’s website.<sup>12</sup> We held four days of oral hearings in Vancouver in early July. We greatly appreciated the spirit of cooperation among participants. The Commission also very much appreciated the work participants did to prepare for the hearings and to provide information when requested. Thank you to all participants and witnesses for their contributions to our process.

Before the hearings, members of the Commission visited several Provincial Court locations. These site visits were informative and gave us a glimpse of the wide-ranging and important work done by the Provincial Court. In Prince George, Commissioners attended the Indigenous Court and also sat in on some criminal cases. In Vancouver, Commissioners met with judges and staff of the Provincial Court, the Vancouver Downtown Community Court and the Vancouver Drug Treatment Court and observed proceedings in those courts. On a Saturday, the Commission saw judicial justices at the Justice Centre hearing bail and

search warrant applications from all over the province. The Commission also sat in packed court rooms with bylaw and traffic matters at the Robson Square Courthouse. We thank the Chief Judge and all of the judges, judicial

justices and Provincial Court staff who took time out of their busy schedules to host the Commission and Government representatives.

## 4 What do Provincial Court judges and judicial justices do?

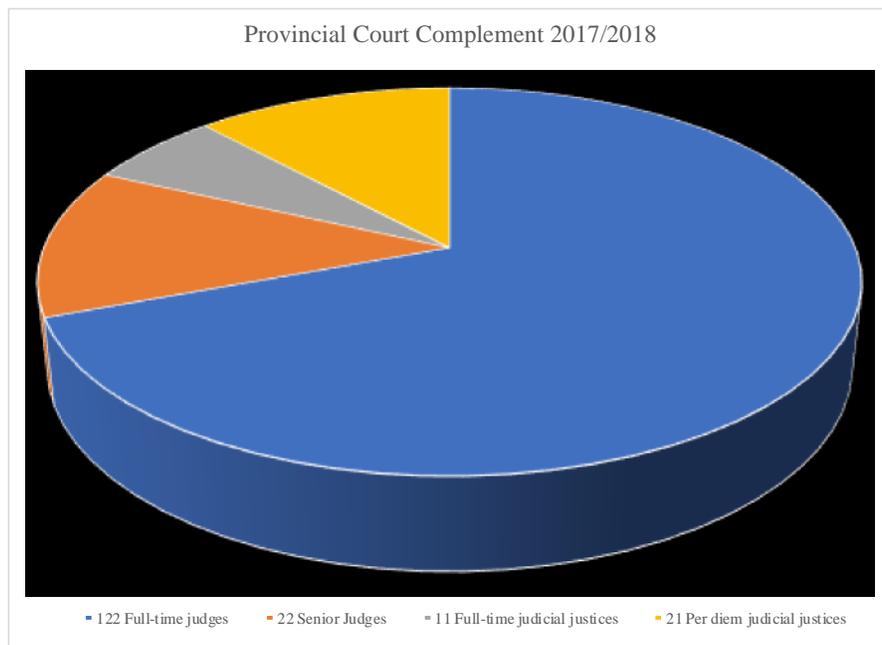
### 4.1 Introduction

Provincial Court judges and judicial justices preside over matters in the Provincial Court, often called the “People’s Court”. Most people who come in contact with the justice system in some way do so through the Provincial Court. British Columbia’s Provincial Court has one of the broadest and

most comprehensive jurisdictions of any provincial or territorial court in Canada. The Court’s work spans criminal, family, bylaw, traffic and civil jurisdictions. It is a busy court, with 84 court locations within 5 administrative regions.<sup>13</sup>

*British Columbia’s Provincial Court has one of the broadest and most comprehensive jurisdictions of any provincial or territorial court in Canada. The Court’s work spans criminal, family, bylaw, traffic and civil jurisdictions.*

The complement of Provincial Court judges and judicial justices was as set out in the chart below.



## 4.2 Work of the Court

The Provincial Court heard over 200,000 new matters in fiscal year 2017/2018.

The Provincial Court has jurisdiction over most (98%) of adult criminal cases in the province<sup>14</sup> and handles all youth criminal matters. Even when a trial is held in the Supreme Court of British Columbia, preliminary hearings can occur in Provincial Court.

The Provincial Court shares jurisdiction with the Supreme Court of British Columbia for family maintenance, child custody, parenting arrangements, guardianship and access and emergency *ex parte* (one party) applications for protection orders.<sup>15</sup>

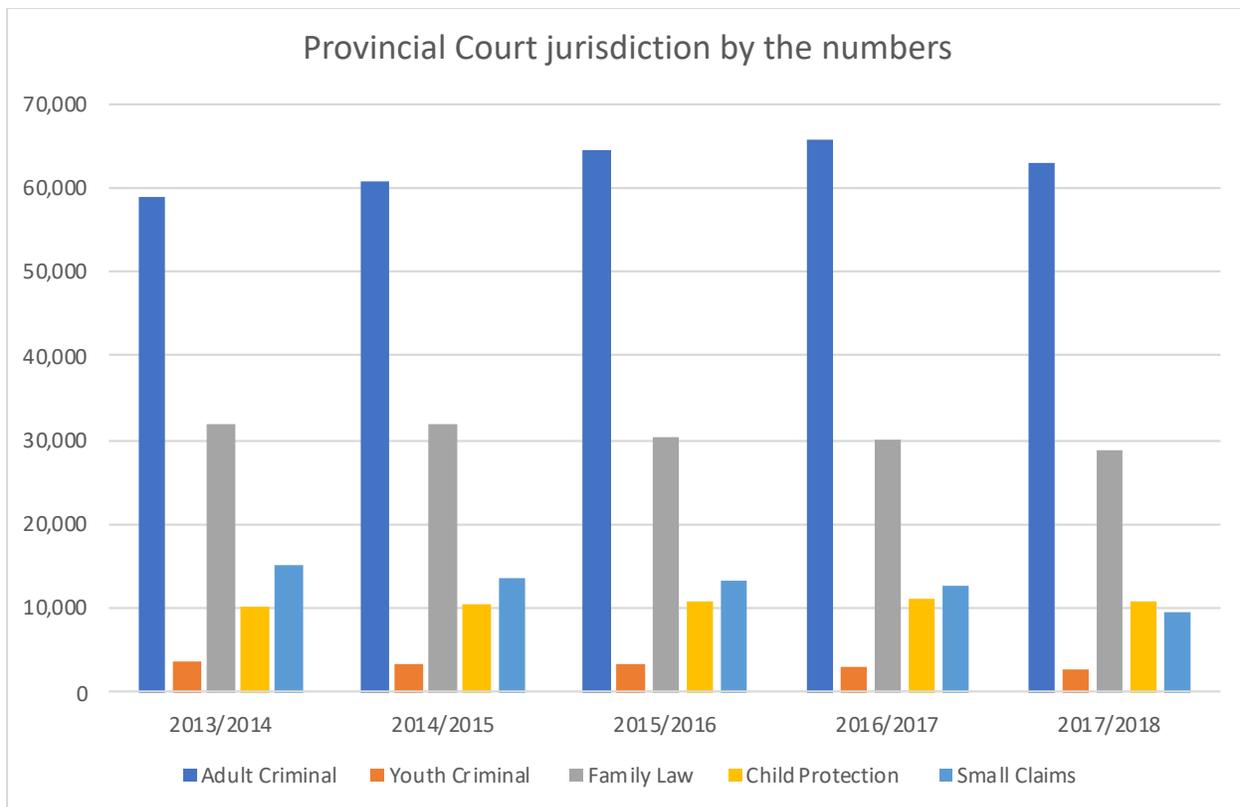
Only Provincial Court judges in Alberta, Québec and the Northwest Territories have as

wide-ranging a jurisdiction in family law matters as British Columbian judges.

The Provincial Court has exclusive jurisdiction over child protection, except for protective intervention orders and restraining orders.<sup>16</sup>

The Provincial Court has civil jurisdiction for claims for debt recovery, damages for personal property or personal injury and breach of contract from \$5,001 to \$35,000. Only six other provinces have provincial courts with civil law jurisdiction.<sup>17</sup>

Excluding traffic and bylaw cases, for 2017/2018, 57.4% of cases heard in Provincial Court were criminal<sup>18</sup>, 25.0% of cases heard were family, 9.3% of cases heard involved child protection and 8.3% of cases heard were civil.

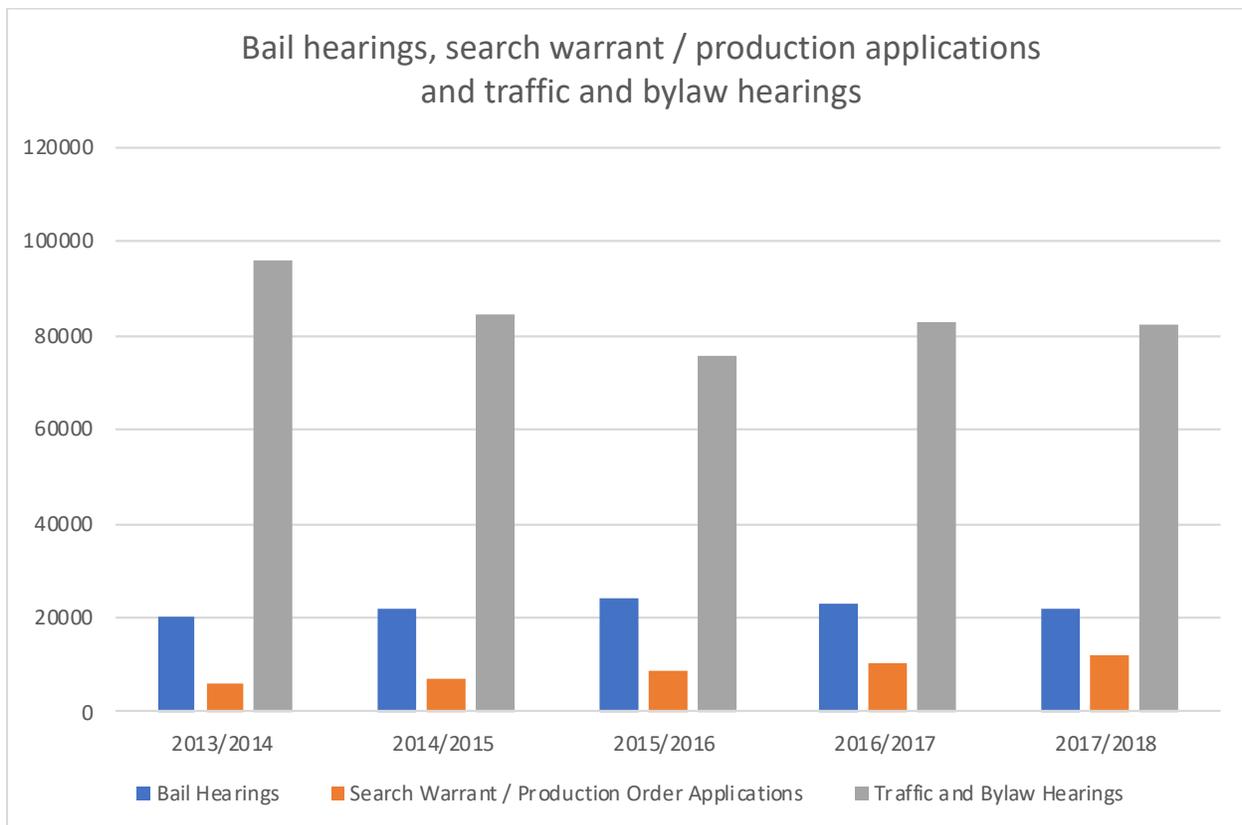


Judicial interim release (bail) hearings as well as applications for search warrants and production orders are heard 24-hours-a-day, 7-days-a-week.<sup>19</sup> Many of the bail hearings are by video, but some hearings are still done over the telephone. In 2017/2018, the Justice Centre conducted 21,740 bail hearings and almost 12,000 search warrant and production order applications.

The *Provincial Court Act* sets out a few matters that only a judge can hear,<sup>20</sup> but otherwise, the Chief Judge can assign duties to judicial justices.<sup>21</sup> Matters currently assigned to judicial justices include deciding the liberty of a person taken into custody (other than matters assigned only to, or under the exclusive jurisdiction of, Provincial Court

judges), applications for search warrants and production orders or authorizations, Small Claims payment hearings,<sup>22</sup> hearings for traffic-related offences,<sup>23</sup> hearings for all provincial offences<sup>24</sup> and hearings for some federal offences.<sup>25</sup> Judicial justices can also hear matters assigned to Court Services Branch justices of the peace and judicial case managers.

In 2017/2018, judicial justices heard 85,990 new traffic and bylaw cases, which is 14% more than for the previous year. Judicial justices typically hear these cases without the help of support staff, a court clerk or a sheriff. Courts lists can be as long as 60 matters per day.



The minimum requirement to be a judge is membership in the Law Society of British Columbia for at least five years, but the Judicial Council of British Columbia requires

at least 10 years at the Bar and most judges practice law for approximately 20 years before appointment.<sup>26</sup>

Full-time judicial justices were appointed before 2007 when a law degree was not required, although some have law degrees. Before they became judicial justices, many full-time judicial justices worked with the Court Services Branch or the Provincial Court. All judicial justices appointed from 2007 onwards have been lawyers paid on a *per diem* basis. *Per diem* judicial justices (also called part-time judicial justices) can now be appointed for a 12-year term. They must be offered at least 40 working days per year, but many of them in fact work full-time.

The Judicial Council of British Columbia requires all applicants for a judicial justice appointment to have been a member in good standing of the Law Society of British Columbia for at least five years or to have other legal or judicial experience satisfactory to the Judicial Council.

The work done by judges and judicial justices is performed in “real time” in a fast-paced environment with high expectations for timely and fair decisions and sometimes without assistance from counsel.

Judges who serve outside the Lower Mainland and some judicial justices have to travel a great deal. 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. A judicial justice based in

Vancouver may sit in Vancouver, Burnaby and various locations on Vancouver Island.

As at every level of court, unrepresented litigants are common in Provincial Court. Unrepresented litigants increase the complexity of the matters heard because judicial officers must ensure access to justice for all, represented or not. There were 126,271 self-represented appearances<sup>27</sup> during the 2017/2018 fiscal year, 73% of these were criminal matters and 19% were family matters. The remaining cases were small claims.

We heard evidence at the hearings about, and saw first-hand through our site visits, some of the Provincial Court’s initiatives and innovations that have been making the administration of justice in our Province more effective and efficient and are improving access to justice. The Court has embraced innovation and change for almost two decades. For example, in 2012, the Court started judicial scheduling and data management system initiatives that have helped the Court keep pace with the workload in all its divisions (family, criminal and civil) and increased the effective use of judicial resources.

One of the important innovations is the development of specialised courts. As noted above, the Commission was able to see some of these in action.<sup>28</sup>

- The Vancouver Downtown Community Court, opened in 2008, was the first of its kind in Canada. It coordinates with multiple agencies in an attempt to effectively address the root causes of crime in the community such as mental illness, addiction and poverty.
- Victoria’s Integrated Court focuses on addressing the health, social and economic needs of chronic offenders with mental health and addiction issues in order to improve public safety and outcomes for non-violent, chronic offenders.

- The Drug Treatment Court of Vancouver is an alternative to the regular court process for some individuals who commit drug offences or minor *Criminal Code* offences because of their addictions. The Court has a fully integrated drug treatment program.
- There are six First Nations, or Indigenous, Courts in British Columbia. The approach of these Courts is holistic. They focus on restorative justice and recognise the unique circumstances of Indigenous offenders within the framework of existing laws.
- Other specialised courts include the Aboriginal Family Healing Court Conference<sup>29</sup>, Domestic Violence Courts<sup>30</sup> and the Victoria Early Resolution Prototype.<sup>31</sup>

The Provincial Court has created regional hubs, also called “Hub Courts”, located in each of the five judicial regions. Four courtrooms now run on Saturdays and Sundays during the day to manage the large number of bail hearings on weekends. Before creating these virtual courtrooms on the weekend, duty counsel assistance was unavailable to most people who were in custody charged with criminal offences in locations outside of the Lower Mainland. Also, under the old system, bail hearings were only heard between 8:00 a.m. and 11:00 p.m. for all locations outside of the Lower Mainland. The Hub Courts improve access to justice, as fewer people remain in custody awaiting a Monday bail hearing and

are not transported from remote locations to regional correctional facilities to await a bail hearing.

The Provincial Court is using video technology in many court locations to accommodate preliminary matters, remand appearances and bail hearings. Sentencing and family and civil hearings are also done by video where appropriate. In 2017/2018, the use of video technology meant 34,731 prisoner transports were avoided. The Court and the Ministry of Attorney General are also piloting a videoconferencing suite that would allow remote access to interpretation services.

## 5 What factors have we considered?

We have considered the six factors that we must consider under the *Judicial Compensation Act*. We are also permitted to consider other factors provided that we explain why we think they are relevant.<sup>32</sup> No one factor is necessarily more important than the other, but as each Commission must look at what is reasonable on the unique facts and context before it, the importance of each statutory factor will vary from Commission

to Commission. We must consider reasonable *total* compensation and not just individual items of compensation.

Consideration of these factors led the parties to markedly different positions as to what would constitute reasonable remuneration for the next three years. The following tables set out the positions of the parties and our recommendations concerning salary.

<b><u>Provincial Court Judges</u></b>	<b><u>2020 -2021</u></b>	<b><u>2021 - 2022</u></b>	<b><u>2022 - 2023</u></b>
Government	\$275,400	\$280,908	\$286,526
PCJABC	\$310,000	\$316,200	\$322,524
Our recommendation	\$287,000	\$297,000	\$307,000

<b><u>Judicial Justices</u></b>	<b><u>2020 – 2021</u></b>	<b><u>2021 – 2022</u></b>	<b><u>2022 - 2023</u></b>
Government	\$124, 440	\$126,929	\$129,467
JJABC	\$138,000	\$141,000	\$144,500
Our recommendation <sup>33</sup>	\$138,000	\$142,000	\$146,000

We will now set out each factor and explain how we have considered it. We will not exhaustively repeat all of the written and oral

submissions that we received. But we have carefully considered all of them.

## 5.1 First factor: The need to maintain a strong Court by attracting highly qualified applicants<sup>34</sup>

### *Introduction*

*We believe that all British Columbians want only highly qualified people making important judicial decisions on our behalf. And having highly qualified judges and judicial justices requires that those kinds of people apply for the positions.*

The importance of this factor is, we hope, obvious. As we outlined in the Introduction, the decisions that judges and judicial justices make day in and day out dramatically and often radically affect the lives of the people before the Court, their families, victims of crime and the wider community. The rights of accused persons and others before the

Court and the safety of the community are often in play. We believe that all British Columbians want only highly qualified people making these important decisions on their behalf. And having highly qualified judges and judicial justices requires that those kinds of people apply for the positions.

### *Provincial Court judges*

*It is critically important to keep the remuneration of Provincial Court judges at a level that encourages highly qualified people to apply for appointment to the Court.*

Turning first to applicants for Provincial Court judgeships, the PCJABC, Chief Judge Gillespie and the Judicial Council of British Columbia all express concern that the number of highly qualified applicants is not sufficient to maintain a strong Court. They note that the number of applications has decreased from 63 (2016) to 43 (2017) to 27 (2018) to 16 (to July 2019), but the need for appointments will remain high in the next few years. They also say that many court locations are not represented by candidates from those areas and many applicants are not willing to move. Also, the 2007, 2010 and 2013 Judges Compensation Commissions all commented on the risk of not attracting highly qualified applicants associated with the widening disparity in salaries between judges and federally appointed judges, with the 2016 Judicial Compensation Commission basing its salary recommendations on the idea that

the gap between Provincial Court judges' salaries and the salaries of federally appointed judges would be closed somewhat.

The Government submits that there are enough highly qualified applicants to provide an adequate pool of approved candidates. The complement of the Provincial Court has remained stable over the past five years at an average of 125.47 full-time judges. The average number of recommended applications is higher than the average number of appointments. From 2008 to 2017, there were on average 13.5 applicants recommended for appointment per year and 8.6 appointments made per year.

The PCJABC is concerned that there is a need to attract applicants from more diverse legal backgrounds and in particular from the private bar. Our attention was drawn to the

fact that about 33% of applicants were formerly Crown Counsel, although only 4% of practising lawyers in the province are Crown Counsel. The Government does not see this as a concern. It says that given the high volume of criminal cases heard in Provincial Court, it is not surprising or concerning that the proportion of Crown Counsel applying is disproportionate to the number of private bar applicants.

The PCJABC and Chief Judge also raise the fact that applicants may be more attracted to the Supreme Court of British Columbia given the similarity in the qualifications and the work and the significantly higher salary and pension. They note that 12 Provincial Court judges were appointed to the Supreme Court over the past decade, including 3 in 2016. And, of course, these appointments do not tell us anything about the number of highly qualified people who may have chosen to apply for appointment to the Supreme Court rather than the Provincial Court.

The Government sees this consideration as less significant. It notes that people apply to the Bench for many reasons of which compensation is only one. A formulaic relationship with federally appointed judges is inappropriate and would defeat the requirement of considering all the sub-section 5(5) factors. Also, Government says that there is no apparent correlation between the two salary levels and either the number of approved candidates to Provincial Court or the number of judges who have left for the Supreme Court of British Columbia.

We conclude that while there are reasons to be concerned, there is at this time no clear evidence that the Provincial Court is not attracting a sufficient number of highly qualified applicants for appointment. The dip in applicants in 2018 and the fact that by early July 2019 there were only 16 applicants are somewhat worrisome. But the experience

over the past decade has been that the number of recommended applicants has remained significantly greater than the average number of judges appointed.

The number of appointments from the Provincial Court to the Supreme Court also does not justify a conclusion that the Provincial Court is not attracting sufficient numbers of highly qualified applicants.

Similarly, there is at this point no clear evidence that the salary of Provincial Court judges is a disincentive to highly qualified lawyers in private practice applying for appointment. We agree with the Government that given the large number of criminal cases heard in Provincial Court, it is not surprising that disproportionately more Crown Counsel apply to the Court.

That said, it is important to remember that the group of people who need to be attracted for appointment is a small, unique group of British Columbian lawyers. They must have excellent legal skills and the sound judgment, temperament, people skills and commitment to public service that are essential for judging. Judges are often deciding serious and complex cases and have to get to a just decision quickly. They must be knowledgeable in all areas of Provincial Court jurisdiction. They hear cases in all divisions and for the past couple of years have increasingly been required to hear bail and other matters such as search warrant applications because of a shortage of judicial justices.

While to date, the Court has not had a problem attracting enough highly qualified candidates, we are aware that this could become a problem if compensation does not keep pace with other options open to this unique and highly qualified group.

To conclude on this factor with respect to Provincial Court judges: It is critically important to keep the remuneration of Provincial Court judges at a level that encourages highly qualified people to apply for appointment to the Court. However, at this point, we do not think that this factor

favours a significant increase in real terms over the current remuneration. It does however support maintaining the salary at least at its current levels, which means that there must be at least inflationary increases for the three years under review.

### ***Judicial justices***

*There is a pressing problem in judicial justice recruitment and this factor shows a need for salary increases.*

This factor applies very differently in the case of judicial justices.

The evidence indicates that there is a recruitment problem for highly qualified applicants for judicial justice positions, which the Government acknowledged at the hearings. From 2010 through to the hearings, there were only 11 applicants and 5 judicial justices appointed. Provincial Court judges are increasingly needed to cover shifts at the Justice Centre. In 2018, judges were called in to work 10% of weekend shifts and 3% of midnight shifts. The Chief Judge herself worked on Christmas Day because of unfilled shifts. This situation is not sustainable and is a very inefficient use of judicial resources. The cost of a Provincial Court judge filling a Justice Centre shift greatly exceeds the cost of a judicial justice filling that shift.

In addition, the inability to attract a sufficient number of highly qualified candidates has meant that both Judicial Council and Government have had to find ways to retain serving judicial justices. To do so,

Government has extended *per diem* terms from 10 to 12 years, Judicial Council has considered applications from outside of British Columbia, Government has introduced legislation that would allow *per diem* judicial justices to serve for a subsequent part-time 10-year term<sup>35</sup> and Government is considering allowing full-time judicial justices who are set to retire to become *per diem* judicial justices.

We agree that there is a pressing problem in recruitment and that this factor shows a need for salary increases. Current remuneration is not sufficient to attract enough highly qualified applicants to maintain a strong contingent of judicial justices who are, in turn, a key element of a strong Provincial Court.

We conclude that this factor supports a significant increase in remuneration for judicial justices because the current level of remuneration is not sufficient to maintain an essential element of a strong Provincial Court.

## **5.2 Second factor: Changes, if any, to the jurisdiction of judges<sup>36</sup>**

### ***Provincial Court judges***

The main changes in jurisdiction of the Provincial Court were that Small Claims of up to \$5,000 were transferred to the Civil Resolution Tribunal in 2017 and there was at about the same time an increase in the Provincial Court Small Claims limit to \$35,000. It is too early to tell if these changes in jurisdiction will have any significant impact on the work of Provincial Court

### ***Judicial justices***

There has been no change to the jurisdiction of judicial justices and therefore this factor

judges. Similarly, while we heard about changes to the number of hybrid offences in the *Criminal Code*, at the date of our hearings these had not come into effect and so their impact on the work of judges is at this point unknown. This factor does not support any change beyond an inflationary adjustment of remuneration.

does not support any change beyond an inflationary adjustment of remuneration.

## **5.3 Third factor: Compensation provided in respect of similar judicial positions in Canada, having regard to the differences between those jurisdictions and British Columbia<sup>37</sup>**

### ***Introduction***

Which judicial positions in Canada are “similar” and therefore should be considered under this factor? “Similar” means, among other things, “having a resemblance”.<sup>38</sup> To decide whether judicial positions are “similar”, one looks at the qualifications for the position, the core qualities required for it

and the nature of the judicial work, including jurisdiction.

To the extent that the evidence permits, differences between similar judicial positions and British Columbia Provincial Court judges must be considered.

### ***Provincial Court judges***

*British Columbia Provincial Court judges’ salaries are low having regard to similar judicial positions in Canada and taking into account the differences between those jurisdictions and British Columbia.*

There is a difference between the PCJABC and the Government concerning whether judicial positions of the judges of the Supreme Court of British Columbia are “similar” to those of judges on the Provincial Court and should therefore be considered.

Court jurisdiction is fundamentally different from Provincial Court jurisdiction.

The PCJABC has a different perspective. Its position is that the roles of the judges of each court are sufficiently similar to justify taking Supreme Court compensation into account.

The Government’s view is that the positions are not “similar” mainly because Supreme

We looked at the markers of similarity: the qualifications for the positions, the core qualities required for them and the nature of

the judicial work, including jurisdiction. When we look at these markers, we see that there is clearly some similarity between these two positions. Candidates who are highly qualified for appointment to the Provincial Court would also be eligible for appointment to the Supreme Court. While the jurisdictions of the two courts are significantly different, many of the same core qualities are necessary in both positions and there are some areas of concurrent jurisdiction.

We conclude that there is sufficient resemblance between the positions to find that they are “similar” and so we consider the remuneration of Supreme Court of British Columbia judges under this factor. That said, we agree with the PCJABC and the Government that there should be no fixed correlation between the remuneration of these two positions.

There is no difference of view concerning the relevance of the remuneration of other Provincial Court judges in Canada. But there are different perspectives on which jurisdictions are most apt for comparison and about how much weight should be given to this factor.

According to the PCJABC, the most similar judicial positions, and therefore the comparators that should be given the most weight, are in provinces with economies similar to British Columbia’s. That would lead us to look at provincial court judges in Alberta, Saskatchewan and Ontario.

The Government’s perspective is that British Columbian judges’ salaries are not out of step with other jurisdictions. Most jurisdictions have salaries within plus or minus 10%. Also, if economy is determinative of the best comparators, then Québec is a better comparator than Ontario. Québec’s economy is outperforming Ontario’s, Québec has a balanced budget and similar economic

growth to British Columbia and Québec has low unemployment with general wage rates ranking in the middle of the provinces.

The Government also cautions us against giving undue weight to this factor. There are many differences between British Columbia and other jurisdictions. Each jurisdiction has its own legislature, its own economic conditions and its own policies about the expenditure of public funds. These factors argue against simplistic and selective comparisons.

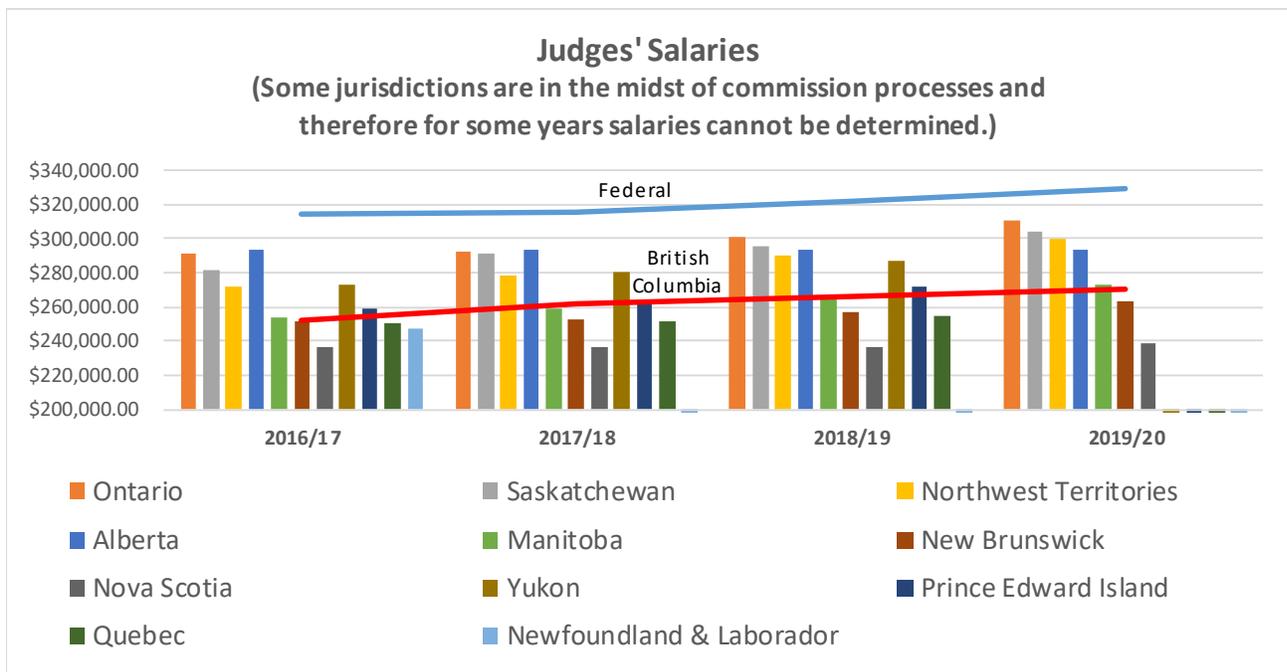
We emphasize that the legislation requires us to consider this factor. This means that our task is different than, for example, examining comparative markets in Canada in the context of collective bargaining and considering the relevance of those markets from a recruitment and/or retention perspective. The legislation sets out—as an independent criterion—consideration of remuneration of similar positions in other jurisdictions having regard to differences separate and apart from consideration of issues connected to recruitment, which we have discussed in relation to the first factor above.

While remuneration of Provincial Court judges in all jurisdictions is important context, we agree with the PCJABC that Alberta, Saskatchewan and Ontario are the most appropriate comparators overall for British Columbian judges in 2019 given the performance of their respective economies and relative debt levels, populations, budgets and jurisdiction. The salary of judges in Québec appears to be an outlier when considered against the compensation provided in respect of similar judicial positions in Canada, particularly when considered in relation to provinces that have a comparable economic situation to British Columbia and are similar in other respects.

Given the multitude of possible differences between other jurisdictions and British Columbia, comparisons will never be perfect. But we are required to consider this factor and apply it as best we can. Judges' salaries in British Columbia are well below the salaries of judges in Alberta, Saskatchewan and Ontario. They also lag behind the salaries of judges in Manitoba, Prince Edward Island, the Northwest Territories and the Yukon and

rank eighth out of the twelve jurisdictions for which data were available.

The chart below shows the salaries for comparable jurisdictions. The horizontal lines are the British Columbia and federal salaries while the vertical bars show provincial court salaries from other Canadian jurisdictions. Data from all jurisdictions are not available for every year because of pending judicial compensation processes.



As can be seen from the chart, the percentage of Provincial Court judges' to federally appointed judges' salary ranges from year to year. In 2019/2020, Nova Scotia judges' salaries were 72.3% of federally appointed judges' salaries. Nova Scotia was an outlier on the low end of the range. Other jurisdictions for which information was available ranged from 80% (New Brunswick) to 94% (Ontario). Saskatchewan and Alberta

judges were at 92.2% and 89.1%, respectively.

We conclude that this factor supports a conclusion that British Columbia Provincial Court judges' salaries are low having regard to similar judicial positions in Canada and taking into account the differences between those jurisdictions and British Columbia.

## Judicial justices

*The remuneration of British Columbia's judicial justices is low compared to compensation in respect of similar judicial positions in Canada, having regard to the differences between those jurisdictions and British Columbia.*

There was no disagreement at the hearing that judicial justices are paid less in British Columbia than in all but one other province or territory or that judicial justices have at least as broad jurisdiction as their counterparts in other jurisdictions.

While the best comparators are justices of the peace in Alberta and Ontario, only Manitoba justices of the peace had lower salaries than British Columbia's judicial justices.



\*Québec<sup>39</sup>

We find that this factor supports the conclusion that the remuneration of British Columbia's judicial justices is low compared to compensation in respect of similar judicial

positions in Canada, having regard to the differences between those jurisdictions and British Columbia.

#### 5.4 Fourth factor: Changes in the compensation of others paid by provincial public funds in British Columbia<sup>40</sup>

*This factor does not provide support for simply applying a 2% increase to judges as the Government's position proposes.*

The participants have markedly different views about how to consider this factor and the weight we should give to it. In our view, this factor applies in the same way to both judges and judicial justices so we will discuss them together.

The Government submits that this is one of the most reliable markers of reasonable judicial compensation. It ensures that judicial compensation reflects the values and economic realities of the provincial public sector. Treating judicial remuneration in a way that is similar to the treatment of others paid from public funds helps sustain the perception of judicial independence by eliminating any perception that the judiciary are being singled out.

The Government says that this factor shows that its proposals on salary are reasonable. The Government's 2019 *Sustainable Services Negotiating Mandate* applies to negotiations with public sector unions over three-year collective agreements and one of its elements is general wage increases of 2% per year. The Government notes that salaries for administrative appointees did not change from 2010 to 2017. Non-unionized government employees have had five years of salary freezes with increases based only on employee performance. In contrast, judges received annualised and total percentage increases higher than most public sector employees. Judicial justices also received annualised increases higher than most public sector employees.

The Government submits that these considerations strongly support its view that a 2% per year increase for the judges and

judicial justices constitutes reasonable remuneration.

The PCJABC, the JJABC, the Canadian Bar Association British Columbia Branch and the Law Society of British Columbia think that this factor should be approached with care to distinguish the role of judges and judicial justices from others paid from public funds.

It is important that judges not be singled out for adverse treatment compared to others paid out of public funds. However, we find this factor does not provide support for simply applying a 2% increase to judges as the Government proposes. We say this for several reasons.

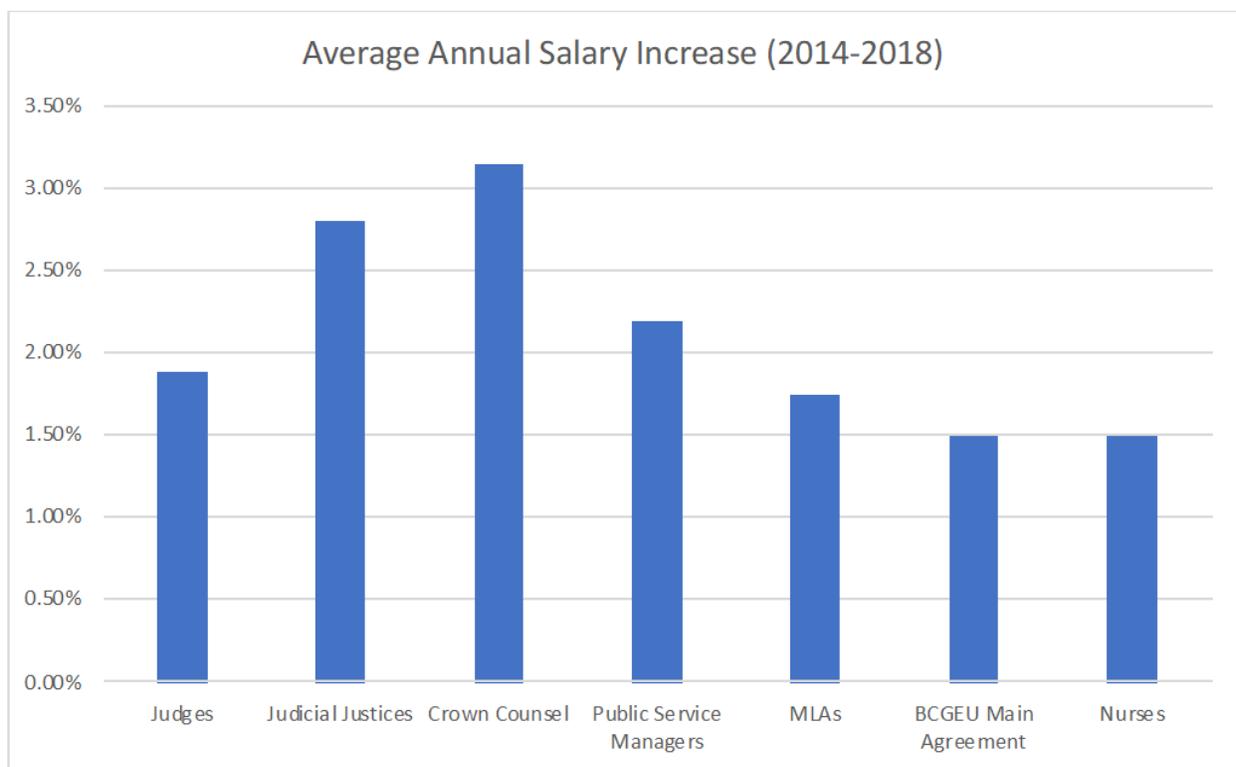
First, we find it significant that judges and judicial justices are unique in constitutional status and job function and are not equivalent to civil servants. They constitute a small, highly trained and highly skilled group with enormous power over their fellow citizens.

Second, judges and judicial justices cannot negotiate their terms of employment. They do not receive bonuses, step increases or promotions. A judicial officer of 1 day's experience receives the same remuneration as a colleague of 25 years' experience. They have none of the financial incentives available to civil servants. Judges cannot supplement their earnings from other sources.<sup>41</sup>

Third, for others paid by provincial public funds increases are not in fact limited to 2%. The evidence was that Government has on a fairly regular basis given wage increases that are greater than 2%. These include Crown Counsel who received annual increases of

3.2% from 2009 to 2018. The Government also explained at the hearings that over the past five years, unionized public sector employees received additional wage increases through a negotiated “Economic Stability Dividend”, which totalled 1.95% of their wages. In addition to annual wage increases of 2%, the current *Sustainable Services Negotiating Mandate* provides up to an additional 0.25% per year for a potential aggregate of up to 0.75% over the three years.

Government also negotiates with other specialized groups of non-unionized service providers such as physicians and legal aid lawyers that are not subject to the *Sustainable Services Negotiating Mandate*. While the government tries to have some consistency with their negotiating mandates the increases are often higher than the *Mandate*. The significant interim increase recently given to legal aid lawyers is an example of this.



For the reasons set out above we considered this factor, but we find it does not support the government’s position of a 2% increase for judges and judicial justice as strongly as the government submits that it does. There are no positions among those paid out of public funds with duties that are truly comparable to the judges and judicial justices. Many others paid out of public funds have progressive

compensation and the opportunity to earn additional income. Some paid from public funds, notably Crown Counsel, have consistently been given increases exceeding 2%.

We also conclude that this factor supports more moderate increases than those proposed by the judges and judicial justices.

## 5.5 Fifth and sixth factors: The generally accepted current and expected economic conditions in British Columbia<sup>42</sup> and the current and expected financial position of the government over the three fiscal years covered by the report<sup>43</sup>

*Reasonable judicial remuneration in British Columbia should be roughly in line with the three other provinces with the soundest and most similar economies and government finances and which are most similar to British Columbia in their populations, budgets and jurisdiction.*

We will consider these factors together. They relate in the same way to remuneration of judges and judicial justices and so we will address them both in the course of our discussion.

The PCJABC says that these factors are not about the Province's ability to pay. However, in tough times they become more important because there is belt tightening across the board. In good times, other factors become more determinative. The PCJABC also says that these factors can be used to assess other statutory factors such as which provinces and territories are the best comparators for British Columbian judges.

The JJABC submits that we should assess reasonable compensation in light of the four non-economic statutory factors and then we should look at the economic factors to see if they change our ultimate conclusion on reasonable compensation. Unlike the PCJABC, the JJABC does not think that the economic statutory factors are relevant to how judicial justice salaries compare with similar positions in other jurisdictions.

The Government acknowledges it is difficult to apply the economic statutory factors to determine reasonable compensation but says that these factors can be considered when we consider the other factors.

We conclude that information provided in relation to these factors is useful in two ways.

First, as submitted by the PCJABC and the Government, these factors inform our consideration of one of the other factors, namely the compensation provided in respect of similar judicial positions in Canada having regard to the differences between those jurisdictions and British Columbia. The economies and government finances of those other jurisdictions are relevant matters to consider in making the comparison.

Second, these factors inform the overall reasonableness inquiry. Judicial remuneration should not be out of step with the generally accepted current and expected economic conditions in British Columbia or the financial position of the Government.

These factors suggest that reasonable judicial remuneration in British Columbia should be considered in light of the other three provinces that have the soundest and most similar economies and government finances.

We received extensive expert evidence on these issues. With respect to the province's general economic conditions, there was a more pessimistic view expressed on behalf of the Government than on behalf of the PCJABC. But, at the end of the day, the experts for both the PCJABC and the Government say that our economy is "sound". All of the evidence before the Commission indicates that we can be confident that the provincial economy is

currently sound and will likely remain sound for the next three years.

There is, as the Government notes, justified concern about the potentially negative economic impact of the housing market and global instability. However, the facts remain that: British Columbia has the lowest Debt-to-GDP ratio since 2008; the Economic Forecast Council predicts that British Columbia's real gross domestic product will grow by 2.3% (2018), 2.6% (2019) and 2.6% (2020); the Conference Board of Canada forecasts that British Columbia will lead all provinces at least until the end of 2020; British Columbia's economy has tended to outperform the Canadian economy and the 2019 Budget forecasts growth continuing to exceed the Canadian economy; British Columbia's unemployment rates were the lowest in Canada for 2016, 2017 and for every month of 2018 and 2019; and the province's well-diversified economy insulates it somewhat from boom and bust cycles and implies less uncertainty in forecasts of future provincial economic growth.

However, we must also take into account that employee earnings in British Columbia are in the middle of the pack nationally, with British Columbia's average weekly wages ranking fifth among provinces and its average weekly wages below the national average for the last seven years.<sup>44</sup>

Turning to the financial position of the Province, it is unquestionably sound. The Province has had seven straight surpluses. The 2019 Budget projects surpluses of \$274 million, \$287 million and \$585 million over the next three years of the Province's fiscal plan. The Province has a AAA credit-rating from all three major international rating agencies and has eliminated its operating debt for the first time in 40 years. Provincial debt levels are stable. The Province's taxpayer-supported-debt as a percent of GDP places British Columbia third among provinces at 15.6%, with only Alberta and Saskatchewan lower. British Columbia has the third lowest debt in the country, behind Alberta and Saskatchewan.

After the hearings, we were provided with the Government's update to the 2019 Budget and Fiscal Plan. While the specific numbers for the projected surpluses, revenue, expenses and taxpayer-supported-debt as a percent of GDP changed (upwards and downwards) somewhat, the update's overall conclusion is that the Province's fiscal outlook remains balanced and its debt metrics remain affordable.

To conclude, these two factors suggest that reasonable judicial remuneration in British Columbia should be roughly in line with the three other provinces with the soundest economies and government finances and which are most similar to British Columbia in their populations, budgets and jurisdiction: Alberta, Saskatchewan and Ontario.

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

### 6.1 Salaries of Administrative Judges and Judicial Justices

#### ***RECOMMENDATION 1***

The Chief Judge of the Provincial Court, the Associate Chief Judges and the Regional Administrative Judges currently receive percentage salary differentials of 112%, 108% and 106% respectively of the salary of a judge. The parties jointly recommend that there be no change over the next three fiscal years. The current arrangements are justified by the relevant considerations and we so recommend.

### 6.2 Pension for judges

#### ***RECOMMENDATION 3***

No party made submissions for any change to the current 3% accrual rate for judges’

### 6.3 Professional development allowance

#### ***RECOMMENDATION 4***

The parties jointly recommend an increase in the professional development allowance for judges to \$4,500 as of April 1, 2020, with the ability to carry over any unused amounts for one year. We see no reason to depart from this joint recommendation.

#### ***RECOMMENDATION 2***

The Government, the JJABC and the Chief Judge ask us to recommend that the remuneration for Administrative Judicial Justices be 106% of judicial justice salary for the next three fiscal years. The current arrangements are justified by the relevant considerations and we so recommend.

pensions. We see no reason to recommend any change and so we recommend a 3% accrual rate.

#### ***RECOMMENDATION 5***

The Government and the JJABC recommend an increase in the judicial justices’ professional development allowance to \$3,250 as of April 1, 2020. Also, both participants propose that judicial justices be allowed to use up to \$1,500 of the professional development allowance towards general expenses reasonably incurred in the execution of the office of judicial justice. We agree with both proposals.

## 6.4 *Per diem* travel allowances

### ***RECOMMENDATION 6***

The Chief Judge asks the Commission to recommend the same *per diem* travel reimbursement for judges and judicial justices as for Members of the Legislative Assembly. The Government advised us in oral submissions that it does not oppose this request.

Our province is vast. Many judges, and some judicial justices, must travel extensively and

### ***RECOMMENDATION 7***

The parties also jointly recommend an increase in the health and wellness-related expenditures allowed under the judges’

## 6.5 *Flexible benefits plan*

### ***RECOMMENDATION 8***

The Government proposes some changes to the judges’ flexible benefits plan, which are unopposed. These changes are listed in Appendix “B” to our report. No submissions

often great distances to carry out their duties. We are of the view that the current *per diem* expense is inadequate and that the *per diem* available to Members of the Legislative Assembly is more appropriate for public officials who must travel to carry out important public functions. We so recommend.

professional development allowance to \$750 per year. Again, we see no reason to depart from this joint recommendation.

were made in opposition to this recommendation and we conclude that it is reasonable and so recommend.

## 7 Recommendation concerning judges

### 7.1 Salary

#### **RECOMMENDATION 9**

*Our recommended salary would put British Columbia judges' salaries about in fifth place nationally, after Alberta, Saskatchewan, Ontario and the Northwest Territories. The three provinces are the most similar overall with our province when economy, population, budget and provincial court jurisdiction are considered.*

Over the course of the Commission's three-year mandate, we recommend the annual salary of judges be as follows:

1. Effective April 1, 2020, \$287,000;
2. Effective April 1, 2021, \$297,000; and
3. Effective April 1, 2022, \$307,000.

For the fiscal year 2019/2020, judges will receive \$270,000 in salary.<sup>45</sup>

The Provincial Court is currently able to attract enough highly qualified applicants to maintain a strong Court. Thus, this factor cannot be used to justify a significant increase in compensation for judges. It does, however, support at least an increase to keep the current salaries stable in real terms. This factor therefore supports an increase of about 2% in each year. The recent changes in legal aid rates and increases for Crown Counsel, both paid from the public purse, point towards more than a 2% increase given that these practice areas are sources of applicants for a strong Provincial Court.

The other statutory factors in our view support an increase beyond 2% in order to assure reasonable compensation for Provincial Court judges. Comparison with similar judicial positions in other jurisdictions, having due regard to the differences between them and British Columbia, as well as the province's current and expected economic conditions and the current and expected financial position of the government over the next three years all, in our view, support something more than a simple inflationary adjustment.

Our recommended salary would, as best as can be estimated from the information before the Commission, put British Columbia judges' salaries in essentially a tie for fifth place with, or just below, the Yukon and below Alberta, Saskatchewan, Ontario and the Northwest Territories. The three provinces are the most similar overall with our province when economy, population, budget and provincial court jurisdiction are considered.

As discussed earlier, we think it appropriate to consider salaries of federally appointed judges. Our recommendation would most

likely put British Columbia Provincial Court judge salaries at about 85% of the salaries of Supreme Court of British Columbia judges. Based on the data available, this level of percent salary would put our Provincial Court judges in fourth or fifth place among all jurisdictions. Judges in Alberta, Saskatchewan and Ontario (the most comparable jurisdictions) would still have higher proportional salaries.

The province's current and expected economic conditions as well as the current and expected fiscal position of the Government support our view that it is unreasonable that British Columbia Provincial Court judges are not paid more closely in line with the salaries of the three provinces that have the soundest and most similar economies and government finances.

We cannot give the weight that Government asks us to give to the changes in compensation of others paid by provincial public funds. As we explained earlier, the

judges are a small and unique group in several ways. There are no positions among those paid out of public funds with duties that are truly comparable to judges and judicial justices. Many others paid out of public funds have progressive compensation and the opportunity to earn additional income. Thus, what is reasonable compensation for judges has to be assessed accordingly. Moreover, the most obvious comparator group within the public service—Crown Counsel—has consistently received more than the 2% increase proposed by Government.

In short, we conclude that the 2% per year increase proposed by the Government does not constitute reasonable compensation having regard to the factors that we are bound to consider in our mandate. Our view is that to achieve reasonable remuneration, in addition to yearly 2% inflationary adjustments in each year of our mandate, an increase in the first fiscal year of 4.3% is required followed by more modest increases of about 1% a year for the last two years.

## 8 Recommendations concerning judicial justices

### 8.1 Salary and shift premiums

#### **RECOMMENDATION 10**

*A significant increase in remuneration for judicial justices is urgently needed.*

The annual salary of judicial justices be set as follows:

1. Effective April 1, 2020, the salary be \$138,000;
2. Effective April 1, 2021, the salary be \$142,000; and
3. Effective April 1, 2022, the salary be \$146,000.

Our salary recommendations for the last two years of our mandate are greater than those proposed by the JJABC. This is a result of our independent assessment of the statutory factors and also because we are not recommending some of the other increases for remuneration proposed by the judicial justices.

#### **RECOMMENDATION 11**

A shift premium of \$245 for shifts worked on the following statutory holidays:

New Year's Day	British Columbia Day
Family Day	Labour Day
Good Friday	Thanksgiving Day
Victoria Day	Remembrance Day
Canada Day	Christmas Day

Both Recommendations 11 and 12 result from our view that a significant increase in remuneration for judicial justices is urgently needed. There is a pressing need to attract highly qualified applicants for this important component of the Court's complement. As we outlined earlier, recruiting highly qualified judicial justices is an acute problem. There is no dispute that judicial justice salaries are near the bottom of the compensation scale across the country and there is evidence of a shortage of applicants. This has resulted in shifts being filled by judges, which is inefficient and an unnecessarily large expenditure of taxpayer dollars. The evidence shows that a significant wage increase, or market adjustment if put in human resource terms, is warranted.

While the recommended salary increase is significant and would close the interprovincial gap somewhat, we think it will be necessary to assess over the next three years whether these increases, if made, are in fact sufficient to attract highly qualified applicants. We note that even the substantial increases that we recommend still leave judicial justices near the bottom of salaries for similar judicial positions in Canada.

In addition to the overall salary increase, we also recommend extra remuneration for

judicial justices working on the ten statutory holidays listed above. We accept the evidence that we heard that these shifts are difficult to fill—to the point that the Chief Judge herself worked a shift on Christmas Day.

Search warrants and related orders as well as bail are urgent and important, 24/7 aspects of the Court's work. It is essential that highly qualified people are available to perform this critical work. We note that the Government does not oppose shift premiums for these holidays, although that position is based on a significantly lower proposal in relation to remuneration. We also note that we are not recommending all of the premiums requested by the JJABC. In light of the significant increase in remuneration that we are recommending, we think it prudent to assess how well this package of recommendations, if accepted, addresses the current problems.

We also are of the view that there will have to be an understanding on the part of newly

## 8.2 Pension for full-time judicial justices

### **RECOMMENDATION 12**

We recommend that there be no change to the pension plan for full-time judicial justices.

Full-time judicial justices are a part of the Public Service Pension Plan. (*Per diem* judicial justices are not.) Under the Public Service Pension Plan, the accrual rate is 1.85% and the pension is based on 70% of the best five years. The JJABC asks us to recommend a 3% accrual rate and a pension based on 70% of the best three years for full-time judicial justices so that these aspects of their pensions are comparable to those of Provincial Court judges.

While we certainly understand why the full-time judicial justices feel that their pension plan should be enhanced, we conclude that the statutory factors do not support the changes they propose. These enhancements

recruited judicial justices that they will have to work a fair share of the less desirable shifts. We encourage the Office of the Chief Judge to look at its agreements with *per diem* judicial justices in this regard. We understand that this was the expectation when *per diem* judicial justices were first appointed in 2007.

Increases of the nature we recommend are not only supported by the need to maintain a strong Court by attracting highly qualified applicants. They are supported by all of the other relevant statutory factors. We noted earlier that British Columbia's judicial justices are among the worst paid in the country. We also noted earlier that the generally accepted current and expected economic conditions in British Columbia and the current and expected financial position of the government support the conclusion that reasonable remuneration for British Columbia's judicial officers should be compared with the three most similar provinces. That comparison supports a significant increase.

would not help to address what we find to be the most important factor, the need to maintain a strong Court by attracting highly qualified applicants. This is for the simple reason that no full-time judicial justices have been appointed since 2007 and as things stand now, no more will be appointed. In short, the pension plan is not relevant to recruiting. We also were provided with no comparative information about the current full-time judicial justice pension plan compared to positions in other jurisdictions equivalent to judicial justices. Also to be borne in mind is that we have recommended substantial increases to judicial justice remuneration and our decision not to recommend pension enhancements for the full-time judicial justices takes that recommendation into account.

## 9 Recommendations concerning costs and interest

### 9.1 Costs

#### **RECOMMENDATION 13**

The Government pay 100% of the reasonable costs of the legal fees and disbursements of the Provincial Court Judges Association of British Columbia and the Judicial Justices Association of British Columbia, including the costs for experts.

The PCJABC and the JJABC ask us to recommend that Government pay 100% of their reasonable legal fees and disbursements incurred by participating in our process, including 100% of the cost of expert evidence.

The Government says that we should decline to make a recommendation about costs beyond the specific provision for costs set out in the legislation.

Costs are provided for in section 7.1 of the *Judicial Compensation Act*. It provides that the Government is authorized to pay the reasonable costs of judge and judicial justice participation in the Commission process up to a maximum of the first \$30,000 in costs and then 2/3 of the costs over \$30,000 but under \$150,000. However, the same section also provides that the Lieutenant Governor in Council may by regulation authorize the Government to pay additional amounts.<sup>46</sup>

The Commission, in our view, is able to recommend that the Lieutenant Governor in Council pass a regulation under the *Judicial Compensation Act* to increase the amounts under the Act's costs formula to pay

additional amounts up to 100% of the reasonable costs actually incurred. We accept of course that all costs paid out of public funds must be reasonable and appropriate. But we also conclude that a cap of \$110,000 for a four-day hearing, along with the costs of retaining and instructing expert witnesses and preparing the volumes of material that were filed will often be unreasonably low.

We think it appropriate, as did the 2016 Judicial Compensation Commission, to recommend that the Lieutenant Governor in Council pass a regulation under the *Judicial Compensation Act* that would allow government to pay 100% of the judges' and judicial justices' reasonable costs of these proceedings.

The Commission's proceedings are part of a constitutionally required process put in place, in part, because judges and judicial justices are not permitted to negotiate their terms of employment with government. The constitutionally mandated commission process is best served by the full participation of judges and judicial justices. Full indemnity for reasonable costs encourages that participation. Government uses external counsel who is paid out of the public purse. In addition, government, unlike the judiciary, has resources and personnel available to assist it to advance its position. It is only fair that the judiciary should be in a roughly equal position for the purposes of this process. We also note that the costs of participation by

judicial justices would have to be shared by a very small number of individuals.

Our recommendation is premised on the claimed costs being reasonable. We remain available in the unlikely event that any issue about that arises.

## 9.2 Interest on retroactive salary adjustments

### ***RECOMMENDATION 14***

If a Commission recommendation for a salary increase that would take effect on or after April 1, 2020 gives rise to a retroactive payment, the amount of that retroactive payment should bear interest at the pre-judgment interest rate from April 1, 2020 until the date on which the increased remuneration is established and at the post-judgment rate from that date until the date of the retroactive payment.

The PCJABC asks the Commission for interest on any retroactive salary adjustments arising from our recommendation for a salary increase that would take effect on or after April 1, 2020. The request is for interest from April 1, 2020 to the date of retroactive payment of salary increase(s), in particular, pre-judgment and post-judgment interest as per the *Court Order Interest Act*.<sup>47</sup> The PCJABC's proposal is based on the decline over time of the value of money and the loss of the use of money, which underlie all interest awards. Interest awards are thus compensatory, not punitive.

The Government opposes any recommendation for the payment of interest that is premised on the assumption that Government must implement our

recommendations. We agree that we should make no such assumption. However, we have formulated our recommendation for interest to apply simply in the event that a retroactive payment arising from our Commission's salary recommendations becomes due after April 1, 2020. We are of the view that this is within our mandate. We are required to make recommendations with respect to "all matters respecting the remuneration, allowances and benefits of judges and judicial justices."<sup>48</sup> This language, in our view, is broad and includes the ability to recommend that interest be paid on retroactive salary payments.

Any delay in payment of judge or judicial justice salary gives the Government the use of the funds. Interest is the usual way of paying for this use of funds. Interest is also a method of compensating for the cost of not receiving money when it was due. We note that the Government has tied Crown Counsel salary adjustments to salary increases received by judges and in 2015 after the Court of Appeal ordered an adjustment to judges' salaries for the years covered by the 2013 Judges Compensation Commission,<sup>49</sup> Crown Counsel received interest on their retroactive salary payments.

## 10 Funding of long-term disability (age 65-75)

The Chief Judge asks us to recommend that Government fully fund the Provincial Court's long-term disability plan (ages 65-75) for judges and full-time judicial justices on an ongoing basis.

Long-term disability for judicial officers aged 65 to 75, comes out of the Provincial Court's operating budget. In 2018/2019, the cost of long-term disability was approximately \$1,400,000 and Government provided \$408,000 in funding earmarked for that purpose. In 2019/2020, the projected cost for long-term disability is about \$1,200,000 and the Government is providing \$408,000 in earmarked funding.

This funding discrepancy reduces the money available to the Provincial Court for other needed expenditures and creates budgetary uncertainty. It means that the Office of the Chief Judge does not have funding to pay judges or judicial justices to replace those on long-term disability.

The 2010 Judges Compensation Commission recommended that the cost of long-term disability benefits should be fully funded by Government outside of the Office of the Chief Judge. The Government and the Legislature rejected this recommendation, but in 2015, the Court of Appeal declared that judges were entitled to the 2010 Judges Compensation Commission recommendations and that Government should act in accordance with those recommendations.<sup>50</sup>

At our hearing, Government acknowledged that the result of the 2015 Court of Appeal judgment was that Government must fund all long-term disability for judicial officers. It committed to working with the Chief Judge to rectify the shortfall in her budget. Based on this, we conclude that it would be superfluous for us to make a recommendation about this issue. We urge the Government to meet its admitted legal obligation without further delay.

## 11 Conclusions

*We have done our best to provide the Government with objective, evidence-based recommendations as to what would constitute reasonable remuneration for the judges and judicial justices.*

We thank all participants for their helpful submissions. We greatly appreciate all of the work done to make our site visits so informative and our hearings run so smoothly.

We heard from the Government, the PCJABC and the JJABC that the judicial compensation commission process would benefit from an earlier start to the proceedings. If the process is initiated sooner in the year, then there is a better opportunity for case management and this could lead to efficiencies such as common experts, a further narrowing of issues and joint statements of fact. We encourage the parties to start the process earlier in the next cycle.

We also thank our counsel, Ms. Maia Tsurumi. She has fulfilled her role to perfection and done so with grace and

efficiency. Her assistance has been indispensable.

Our work and report should serve to reduce any tension between the two bed rock principles to which we referred at the outset. We have done our best to provide the Government with objective, evidence-based recommendations as to what would constitute reasonable remuneration for judges and judicial justices. We hope that this assists the Government and the Legislature in authorizing the expenditure of public funds for this purpose. We also hope that, as intended by the Supreme Court of Canada, this process helps to maintain the appropriate relationship between judicial officers and government so that judicial independence is fully protected and public confidence in the courts is maintained.



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The Honourable Thomas A. Cromwell,  
C.C., Chair



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Vern Blair, FCPA, FCA, FCBV, FRICS



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Robin McFee, Q.C.



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Michael Marchbank



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Lisa Southern

# Appendix A: Written submissions

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1. Provincial Court Judges Association of British Columbia, Main Submission, dated May 28, 2019;
2. Judicial Justices Association of British Columbia, Main Submission, dated May 29, 2019;
3. Government of British Columbia, Main Submission, dated May 29, 2019;
4. Provincial Court Judges Association of British Columbia, Reply Submission, dated June 13, 2019;
5. Judicial Justices Association of British Columbia, Reply Submission, dated June 14, 2019;
6. Government of British Columbia, Reply Submission, dated June 14, 2019;
7. Judicial Justice B. Adair, Q.C., dated May 2019;
8. Judicial Justice G. Hayes, dated May 29, 2019;
9. Judicial Justice F.D. Hodge, dated May 27, 2019;
10. Judicial Justice T. Holmes, dated May 26, 2019;
11. Judicial Justice T. Holmes, Reply Submission, dated June 1, 2019;
12. The Chief Judge of the Provincial Court of British Columbia, dated June 5, 2019;
13. The Judicial Council of British Columbia, dated June 5, 2019;
14. Canadian Bar Association, BC Branch, dated June 5, 2019;
15. The Law Society of British Columbia, dated May 21, 2019; and
16. The Law Society of British Columbia, Supplemental Submission, dated June 28, 2019.

# Appendix B: Government's proposed changes to the flexible benefits plan

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

## Appendix C: Documents and authorities

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1. Joint Book of Documents, Provincial Court Judges Association of British Columbia and the Government of British Columbia;
2. Joint Book of Documents, Judicial Justices Association of British Columbia and the Government of British Columbia;
3. Book of Documents of the Provincial Court Judges Association of British Columbia;
4. Book of Documents of the Judicial Justices Association of British Columbia; and
5. Joint Book of Authorities (PCJABC, JJABC and Government of BC).

## Appendix D: Hearing exhibit list

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1. Ian McKinnon, “The Current Financial Position of the Government” PowerPoint presentation;
2. Brent Jang, “Vancouver real estate market experiences dramatic drop in foreign buying tax”, Globe & Mail, dated July 8, 2019;
3. *Curriculum vitae* of Stephen Cheng;
4. Information on British Columbia wildfire averages for 2008-2018;
5. BC Liquor Distribution Branch Executive Compensation Policy;
6. Memo from Chief Judge, Re: Information Requested by 2019 Judicial Compensation Commission, dated July 10, 2019; and
7. In-house Long-term Disability Historical and Projected Expenditures for 2011/12 to 2022/23.
8. British Columbia, “Making Life Better: First Quarterly Report: Fiscal Plan Update 2019/20 – 2021/22, 2019/20 Economic Outlook and Financial Forecast & Three Month Results April – June 2019”, dated September 10, 2019.
9. Report and Recommendations of the 2017 Alberta Judicial Compensation Commission.
10. Alberta Order in Council 161/2019, dated September 13, 2019

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- <sup>1</sup> The Commission’s work is conducted pursuant to the *Judicial Compensation Act*, S.B.C. 2003, c. 59.
- <sup>2</sup> The specific mandate of the Commission is set out in section 5 of the *Judicial Compensation Act*.
- <sup>3</sup> In this report, the words “judicial”, “judiciary” and “judicial officer” apply to both judges and judicial justices.
- <sup>4</sup> *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3, para. 7.
- <sup>5</sup> *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3, para 7.
- <sup>6</sup> *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3, para 166.
- <sup>7</sup> *Provincial Court Judges’ Association of British Columbia v. British Columbia (Attorney General)*, 2015 BCCA 136.
- <sup>8</sup> *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3, para 174.
- <sup>9</sup> *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3, paras. 175 and 178.
- <sup>10</sup> *Judicial Compensation Act*, s. 2.
- <sup>11</sup> Sheila Tucker, Q.C., was appointed to the Commission, but in late June of 2019, she was appointed to the Supreme Court of British Columbia and therefore became ineligible to continue to serve as a Commissioner. Ms. Southern was appointed to the Commission to fill the vacancy left by Madam Justice Tucker’s appointment to the bench.
- <sup>12</sup> A full list of the submissions received is found in Appendix “A”.
- <sup>13</sup> The Provincial Court regions are Fraser; Interior; Northern; Vancouver Island; and Vancouver. Each region is overseen by a Regional Administrative Judge.
- <sup>14</sup> Criminal cases in which the Court does not have jurisdiction are adults charged with murder and a few rare offences such as treason.
- <sup>15</sup> This jurisdiction is set out by the *Family Law Act*, S.B.C. 2011, c. 25.
- <sup>16</sup> This jurisdiction is set out by the *Child, Family and Community Services Act*, R.S.B.C. 1996, c. 46.
- <sup>17</sup> The other provinces or territories with provincial / territorial civil jurisdiction are: Newfoundland, Saskatchewan, Alberta, Quebec, Yukon and the Northwest Territories.
- <sup>18</sup> Of the 57%, 55% were adult matters and 2% were youth matters.
- <sup>19</sup> Under the *Criminal Code*, R.S.C. 1985, c. C-46 and *Missing Persons Act*, S.B.C. 2014, c. 2.
- <sup>20</sup> *Provincial Court Act*, s. 2.1.
- <sup>21</sup> *Provincial Court Act*, s. 11.
- <sup>22</sup> Under the *Small Claims Act*, R.S.B.C. 1996, c. 430 and *Small Claims Rules*, B.C. Reg. 261/93.
- <sup>23</sup> Under the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 and *Offence Act*, R.S.B.C. 1996, c. 338 and the Government *Property Traffic Regulations*, C.R.C., c. 887 and *Airport Traffic Regulations*, C.R.C., c. 886, made under to the *Government Property Traffic Act*, R.S.C. 1985, c. G-6 (for adults only).
- <sup>24</sup> Including municipal bylaw offences.
- <sup>25</sup> These are federal offences under the *Contraventions Act*, S.C. 1992, c. 47, for proceedings commenced by ticket information.
- <sup>26</sup> *Provincial Court Act*, R.S.B.C. 1996, c. 379, ss. 6(2).
- <sup>27</sup> A “self-represented appearance” is a hearing where at least one party is not represented by counsel or an agent.
- <sup>28</sup> The Commission visited Vancouver’s Downtown Community Court, the Drug Treatment Court of Vancouver and the Indigenous Court in Prince George.
- <sup>29</sup> The Aboriginal Family Healing Court Conference is a three-year pilot project launched in 2017 in New Westminster. It is designed to reduce the over-representation of Aboriginal children in foster care. The goals are to: provide cultural interventions that increase the effectiveness of court processes for child protection cases; reduce the number of cases that proceed to trial; and improve health, social and justice outcomes for Aboriginal children and families who come into contact with the child protection system.
- <sup>30</sup> The Domestic Violence Courts are in the Cowichan Valley and Nanaimo. They are a blend of an “expedited case management” court and a “treatment or problem-solving” court. The goal is to bring these cases to the disposition stage as soon as possible to reduce the rate of victim recantation or other witness-related problems; offer a less

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punitive approach for those willing to accept responsibility for their actions and seek treatment; and ensure the safety of victims and the public. A similar initiative was started at the Surrey Courthouse in 2016 and in Kelowna, Penticton and Kamloops, specific days are scheduled for domestic violence cases to ensure that they can proceed without delay.

<sup>31</sup> The Provincial Court and the Ministry of Attorney General are working to change the rules of procedure for family matters in Provincial Court. Early implementation of key aspects of the model were launched in May 2019. The model is a new front-end process designed to assist families in the early resolution of their issues before any court appearances. Except for urgent matters, parties will be required to meet with a Family Justice Worker as a first step. There will be early assessment, mediation, access to resources such as legal advice, and parenting education services. The goal of the new model is to help parents achieve collaborative resolution.

<sup>32</sup> *Judicial Compensation Act*, ss. 5(5), (5.1) and (5.2).

<sup>33</sup> Our salary recommendations for the last two years of our mandate is greater than the proposal of the Judicial Justices Association of British Columbia. This is a result of our independent assessment of the statutory factors and also because we are not recommending some of the other increases for remuneration proposed by the judicial justices.

<sup>34</sup> *Judicial Compensation Act*, ss. 5(5)(a).

<sup>35</sup> On October 7, 2019, the Government introduced Bill 35, the *Miscellaneous Statutes Amendment Act (No. 2), 2019*, which would permit *per diem* judicial justices to be re-appointed on a part-time basis for a subsequent 10-year term.

<sup>36</sup> *Judicial Compensation Act*, ss. 5(5)(b)).

<sup>37</sup> *Judicial Compensation Act*, ss. 5(5)(c).

<sup>38</sup> *The Canadian Oxford Dictionary*, 1<sup>st</sup> ed. (Oxford: Oxford University Press, 1998) definition of “similar”.

<sup>39</sup> Québec Justices of the Peace do not receive shift differentials for evening or weekend work but receive time off *in lieu*.

<sup>40</sup> *Judicial Compensation Act*, ss. 5(5)(d).

<sup>41</sup> The *Provincial Court Act*, ss. 14(1) and (1.1) state that a judge cannot engage directly or indirectly in any other occupation, profession or business.

<sup>42</sup> *Judicial Compensation Act*, ss. 5(5)(e).

<sup>43</sup> *Judicial Compensation Act*, ss. 5(5)(f).

<sup>44</sup> Government of British Columbia’s submission, dated May 29, 2019, pp. 84-85, citing “British Columbia Statistics: Earnings and Employment Trends – March 2019”, p. 1 and Table 2.1.

<sup>45</sup> This is the salary that judges currently receive, but the Government’s rejection of the salary recommendations of the 2016 Judicial Compensation Commission is currently the subject matter of a judicial review petition. As is mentioned above, the Chief Judge receives 12% more per year than the annual judge salary; the Associate Chief Judges receive 8% more per year than the annual judge salary; and Regional Administrative Judges receive 6% more per year than the annual judge salary.

<sup>46</sup> Section 7.1 of the Act provides:

7.1(1) Subject to subsection (2), the government may pay out of the consolidated revenue fund the reasonable costs, incurred by the Provincial Court Judges’ Association of British Columbia and the Judicial Justices Association of British Columbia, of participating in the commission.

(2) The maximum amount that may be paid under subsection (1), which maximum amount applies separately to the Provincial Court Judges’ Association of British Columbia and the Judicial Justices Association of British Columbia, is as follows:

(a) the first \$30,000 in costs;

(b) 2/3 of the costs over \$30,000 but under \$150,000

(3) Despite subsections (1) and (2), the Lieutenant Governor in Council may by regulation, set higher amounts for the purposes of subsection (2).

<sup>47</sup> *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

<sup>48</sup> *Judicial Compensation Act*, ss. 5(1).

<sup>49</sup> *Provincial Court Judges’ Association of British Columbia v. British Columbia (Attorney General)*, 2015 BCCA 136.

<sup>50</sup> *Provincial Court Judges’ Association of British Columbia v. British Columbia (Attorney General)*, 2015 BCCA 136.