

**Government's Proposed Response to the Report of  
the 2016 Judicial Compensation Commission in Respect of Provincial Court Judges**

**October 23, 2017**

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This is the government's proposed Response to the Report of the 2016 Judicial Compensation Commission (the "Commission Report") in respect of Provincial Court Judges.

The 2016 Judicial Compensation Commission (the "2016 Commission") was an independent commission mandated by the *Judicial Compensation Act* (the "Act") to report on and make recommendations respecting Provincial Court judges' remuneration, allowances and benefits. The recommendations of the 2016 Commission cover the period from April 1, 2017 to March 31, 2020.

**Independence of the Judiciary**

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

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

The Supreme Court of Canada has affirmed, as a constitutional requirement for financial security, that judges' remuneration must not become the subject of negotiation between the judiciary and government. Instead, it must be established through a process that incorporates an independent, objective and effective judicial compensation commission that reports and makes recommendations on judicial remuneration.<sup>1</sup>

In 2005, the Supreme Court of Canada provided further guidance on the tests a government must meet if it wishes to reject recommendations from a judicial compensation commission:

[A commission's] recommendations must be given weight, but the government retains the power to depart from the recommendations as long as it justifies its decision with rational reasons in its response to the recommendations. Reasons that are complete and that deal with the commission's recommendations in a meaningful way will meet

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<sup>1</sup> *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] S.C.R. 319 (hereinafter referred to as the "PEI Reference Case")

the standard of rationality. The reasons must also rely upon a reasonable factual foundation. If different weights are given to relevant factors, this difference must be justified. The use of a particular comparator must also be explained. If it is called upon to justify its decision in a court of law, the government may not advance reasons other than those mentioned in its response, though it may provide more detailed information with regard to the factual foundation it has relied upon.

The government's response is subject to a limited form of judicial review by the superior courts. The reviewing court is not asked to determine the adequacy of judicial remuneration but must focus on the government's response and on whether the purpose of the commission process has been achieved.<sup>2</sup>

### **Provincial Court Judges**

Provincial Court Judges ("PCJs") are appointed under the *Provincial Court Act* and may hold office to age 75. The Provincial Court of British Columbia's jurisdiction includes criminal law (except for a few matters that are reserved for the superior courts), civil law disputes to a maximum of \$25,000, family law matters and child protection.

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

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

The process for setting the remuneration, allowances and benefits of Provincial Court Judges is governed by both the common law referred to above and by statute. The statutory framework is set out in the Act.

The Act sets out the requirements for the Commission's consideration of compensation for PCJs:

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<sup>2</sup> *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 the "Bodner" decision).

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

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

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

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

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

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

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

The Legislative Assembly must consider the Commission Report in the context of the principle of judicial independence, the Act and the Legislature's responsibility to deal with matters of the public interest broadly understood. This includes responsible fiscal management for all of government, and recognizing that it is government's task to set policy and priorities having regard to government's commitments as a whole. Government must then present its spending proposals to the Legislative Assembly for approval.

Recommendations of the Commission Report that are not rejected by the Legislative Assembly within the time limits set out in the Act take effect beginning on the date recommended by the Commission. Substituted recommendations by the Legislative Assembly take effect on the date stipulated in the resolution.

### **The 2016 Judicial Compensation Commission**

In accordance with section 2 of the Act, the members of the Commission were appointed on or before March 1, 2016. The members were the Hon. Frank Iacobucci, C.C., Q.C. (Chairperson), Robin McFee Q.C., Randy Kaardal Q.C., Brenda Eaton and Peter Lloyd.

The Commission's responsibility pursuant to section 5 of the Act was to report on and make recommendations respecting the remuneration, allowances and benefits of PCJs and JJs for the fiscal years 2017/18, 2018/19, and 2019/20. The recommendations of the Commission are contained in the *Report of the 2016 British Columbia Judicial Compensation Commission* ("the Commission Report").

The 2016 Commission is the first to consider compensation for both PCJs and Judicial Justices ("JJs") under the statutory criteria listed above following amendments to the Act in 2015.<sup>3</sup>

### **2013 Judges Compensation Commission: Judicial Review and Reconsideration by the Legislature**

For the fiscal year immediately preceding the years covered by the 2016 Commission, the salary for PCJs that was approved by the Legislative Assembly on March 24, 2014 is \$244,112. This is the salary that the 2016 Commission had before it during its deliberations, albeit with the knowledge that a judicial review of the Legislative Assembly's response to the 2013 Commission was ongoing and that that salary figure might change.

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<sup>3</sup> Section 5(5) previously read as follows:

- 5(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.

On February 7, 2017, after the 2016 Commission had issued its report, the B.C. Court of Appeal (“BCCA”) ordered the Legislature to reconsider the Legislature’s response to the 2013 Commission Report. A previous decision of the BCCA respecting the 2010 Commission Report had raised the salary and pension accrual rates of the judges for the 2013/2014 fiscal year as recommended by the 2010 Commission. In the February 2017 decision the BCCA held that those changes should be taken into account when remuneration is set for the three years of the 2013 Commission’s mandate. The BCCA in 2017 observed that its previous decision

.....so altered the legal foundation for the Legislative Assembly’s resolution that, without fault to the parties or the Legislative Assembly, the resolution [of March 24, 2014] is fatally flawed as being based on an incorrect legal premise of the salaries and benefits applicable at the time the resolution was passed. In that circumstance and the Legislative Assembly never having had the opportunity to consider the issue of Provincial Court judges emoluments in the context of that court ordered framework, it would be wrong for us to pronounce on a resolution that takes as its base point for discussion a state of affairs that has been erased by court order. The situation calls for an order remitting the matter to the Legislative Assembly for fresh consideration knowing the effect of *Provincial Court Judges 2015*.<sup>4</sup>

Accordingly, a reconsideration of the 2013 Commission report has been tabled by the Attorney General for approval by the Legislative Assembly. The proposals in that reconsideration that are relevant to this response relate to judicial salaries.

The proposed reconsideration would raise the salaries of PCJs for the three years covered by the 2013 Commission as follows:

2014/15: \$244,889  
2015/16: \$248,562  
2016/17: \$252,290

Thus, if the proposed response to the recommendations of the 2013 Commission is adopted, the starting point for judges’ salaries for the three fiscal years covered by the 2016 Commission will be higher than that considered by the 2016 Commission.

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<sup>4</sup> *Provincial Court Judges’ Association of British Columbia v. British Columbia (Attorney General)*, 2017 BCCA 63, para 4.

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

The Commission Report makes nine recommendations respecting PCJs' salaries and benefits. As set out in the motion accompanying this response, government proposes that one recommendation be rejected and that the remaining recommendations be accepted.

The Commission Report also makes a recommendation respecting the costs to be reimbursed to the Provincial Court Judges Association. As set out in the motion accompanying this response, government proposes that that recommendation be rejected.

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

### **Provincial Court Judges' Salaries**

The Commission made the following recommendations respecting the salaries of Provincial Court Judges:

#### **Recommendation 1:**

- (a) Effective April 1, 2017, that the salary for puisne judges be \$273,000;
- (b) Effective April 1, 2018, that the salary for puisne judges be \$277,095;
- (c) Effective April 1, 2019, that the salary for puisne judges be \$281,251.

#### **Recommendation 2:**

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

### **Response to Commission Salary Recommendations Respecting Judges**

Government proposes that Recommendation 1 be rejected and the following salaries be substituted:

- (a) Effective April 1, 2017, that the salary for puisne judges be \$262,000;
- (b) Effective April 1, 2018, that the salary for puisne judges be \$266,000;
- (c) Effective April 1, 2019, that the salary for puisne judges be \$270,000.

Government proposes that Recommendation 2 be accepted.

If the Legislature accepts government's proposed response to the 2013 Commission Report, the salary for puisne judges for 2016/17 will be \$252,290. The proposal contained in this response would result in an increase to judges' salaries of \$17,710 or 7.02% over the three years addressed by the 2016 Commission above that 2016/17 salary. The Commission recommendations would result in a three-year increase of \$28,961 or 11.48%.

Based on the 2016/17 salary then before the Commission (i.e. \$244,112), the Commission's recommendations would represent a three-year increase of \$37,139 or 15.21%, while government's proposed response would represent an increase of \$25,888 or 10.60%.

If the Legislature accepts government's proposed response to the 2013 Commission Report, the total three-year estimated fiscal impact of the 2016 Commission's salary recommendations would be \$12.94 million, compared to \$7.15 million for the proposed substituted salaries.

The Commission's rationale for its salary recommendations is found on pages 43-59 of its report, with a summary of that rationale on pages 60-61. In summary, the Commission found the following:

- There is currently no problem attracting and retaining highly qualified candidates, but this could become a problem if compensation does not keep pace with other options open to these candidates, and in any event it is necessary to maintain a reasonable salary that is sufficient to attract candidates who can meet the needs of the Court (p. 45).
- The current disparity in compensation between B.C.'s provincial judges and superior court judges is an important factor. It should not become so great that it makes the compensation unreasonable to those who might seek the office. However, there are differences between the courts, and between the provincial and federal governments, so that a specific target percentage should not be used.
- Salaries for British Columbia's Provincial Court Judges rank 8<sup>th</sup> among provinces and 11<sup>th</sup> if territories are included. The Commission finds this figure "compelling" (p. 50). It recommends that overall, British Columbia judges should be in the range of 3<sup>rd</sup> to 4<sup>th</sup> nationally (p. 61). It refers to an argument made by government before the 2007 Commission respecting placing B.C.'s judges third amongst the provinces, and further references government's Executive Compensation policy, which sets a target for excluded managers of 3<sup>rd</sup> to 5<sup>th</sup> nationally (p.50).

- The judicial role is unique and judges are not employees of government. Thus judges are not easily compared with others in the British Columbia economy, even those in senior leadership in the public service. Moreover, too much emphasis on compensation changes for others paid by provincial public funds, which is the result of political decisions made by government, risks politicizing judicial compensation and must be avoided (p.53).
- British Columbia’s current and expected economic outlook is one of moderate growth over the term covered by the Commission. Small surpluses are forecast. Through prudent management, British Columbia is better positioned nationally than many other provinces (p. 57).
- Based on the evidence, the financial position of government does not demonstrate that increases in compensation should not be made to the judiciary (p.58).
- While the jurisdiction of the court is not expanding, and while the number of new cases in Provincial Court has decreased by almost 13% since 2010/11, the evolving and increasingly complex nature of the work is a relevant factor to consider (p.59).

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

1. *The Commission failed to properly consider section 5(5)(d) of the Act*

Section 5(5)(d) of the Act requires the Commission to consider changes in the compensation of others paid by provincial public funds in British Columbia.

The Commission’s consideration of s. 5(5)(d) is very limited. In government’s view, the Commission did not meaningfully engage with this factor in the manner required by the Act.

The Commission erred by misconstruing the concept of “politicization” in respect of judicial compensation as described by the Supreme Court of Canada in the *PEI Reference* (p. 53) when it found that “too much emphasis on compensation changes to public sector employees, which is the result of political decisions made by Government, must be avoided”. Section 5(5) simply sets out the factors which must be taken into account. The Commission, apart from saying that too much emphasis should not be placed on compensation changes to public sector employees, does not set out how it has in fact taken into account those changes. Taking such changes into account is not politicization of judicial compensation. Further, compensation changes for others paid from the public purse is only a political decision in the sense that it is a decision made by government in its determination of how public funds are to be allocated.

The Supreme Court of Canada in *PEI Reference* said the following in respect of depoliticization and the role of compensation commissions:

....[T]he imperative of protecting the courts from political interference through economic manipulation requires that an independent body — a judicial compensation commission — be interposed between the judiciary and the other branches of government. The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature.<sup>5</sup>

The Court elsewhere acknowledged that the setting of public compensation, including that of judges, is “inherently political” because control over the public purse necessarily resides with either the Legislature or the executive branch of government.<sup>6</sup> The risk of politicization is minimized through the use of independent and effective compensation commissions. There is nothing in the Court’s reasons that discourages such independent commissions from considering changes to the compensation paid to others from public funds. To the contrary, compensation commissions in several other Canadian jurisdictions compare judicial compensation to compensation paid to others in the public sector (including rates of change in that compensation), either in the statutory direction given to the commissions or in the practices they themselves have adopted.<sup>7</sup> In British Columbia, the 2013 Judges Compensation Commission found that examining the salaries and wage growth/decline of comparator groups, including deputy ministers and assistant deputy ministers in the public service, was helpful because they constitute “objective markers of reasonableness”.<sup>8</sup>

At page 53 of its Report, the Commission states that the utility of considering changes in the compensation of others paid from public funds is “in ensuring commissions consider whether judicial salaries in British Columbia are getting out of step”. The Commission did not explain how it took this concept into account in its analysis. The government does not agree with this view of the purpose of s. 5(5)(d) of the Act. First, s. 5(5)(d) is not focused on the magnitude of judges’ salaries, but rather on the extent of compensation changes having regard to changes in the compensation of others paid by provincial public funds, which will be reflective of matters such as the state of the economy and government policies in relation to matters such as deficit management and debt reduction.

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<sup>5</sup> PEI Reference, para 147.

<sup>6</sup> PEI Reference, para 146.

<sup>7</sup> Alberta, Quebec and New Brunswick provide statutory direction. Nova Scotia and Saskatchewan compensation commissions have adopted similar practices.

<sup>8</sup> 2013 Judges Compensation Commission report, p. 36.

Second, s. 5(5)(d) in part reflects the Supreme Court’s observation that judicial independence “can be threatened by measures which treat judges either differently from, or identically to, other persons paid from the public purse”.<sup>9</sup> The Chief Justice stated that “in my opinion, the risk of political interference through economic manipulation is clearly greater when judges are treated differently from other persons paid from the public purse”.<sup>10</sup> In this regard, s. 5(5)(d) contemplates that Commissions will consider how judges are treated compared to others paid from the public purse, not in terms of the size of their salary, but in terms of the magnitude of any changes to salary. The Commission must recognize that judges are not civil servants, but the Commission must consider the implications of recommending salary increases for judges that differ in magnitude from increases received by others paid from provincial public funds. For example, the Commission should consider the implications of sparing judges from expenditure management policies that impact others paid from provincial public funds, or conversely the implications of treating judges less generously than others paid from the public purse. In turn, the Legislature must consider this issue as well.

At page 60-61 of Report, where the Commission sets out the bases for its salary recommendations, the Commission makes no mention of the changes in compensation of others paid from provincial public funds or how this may have been considered. It is government’s view that the Commission did not sufficiently consider this issue.

Government has not taken issue with the notion that the judiciary is distinct from the civil service, nor does government propose that judges must receive increases of the same magnitude as those received by others who are paid from the public purse. The government’s position has been that both judges and civil servants may have to participate in sharing the burden of government’s expenditure management. This principle applies regardless of whether government is in a surplus or deficit position: changes to judges’ salaries must take into account changes in compensation paid to others by provincial public funds, as the *Judicial Compensation Act* requires.

The evidence before the Commission was that unionized employees would be receiving increases of 1.5% on average, with the potential for an Economic Stability Dividend. Management employees were eligible to receive performance-based adjustments within their existing salary ranges of up to 2% per year. Deputy ministers and assistant deputy ministers have received small wage increases, and a number have received no increases at all.<sup>11</sup>

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<sup>9</sup> PEI Reference, para 158.

<sup>10</sup> PEI Reference, para 158.

<sup>11</sup> The average Deputy Minister salary (without holdback) increased from \$201,277 in 2013 to \$204,778 in 2016. The average Assistant Deputy Minister salary (without holdback) declined from \$146,100 in 2013 to \$143,438 in 2016. Province’s submission to the Commission, p. 49.

Notwithstanding those comparatives, the Commission recommended a wholly disparate salary increase of 15.2% over 3 years (based on the starting point assumed by the Commission).

There is no analysis or discussion by the Commission of how its recommendations relate to these changes to the compensation paid to others from public funds, and no apparent weight is given to them. The Commission relies upon one element of the province's executive compensation policy (its intended inter-provincial ranking) without considering the extent to which the policy reflects actual compensation levels.

Further, the Commission finds that its recommendations will put judges' salaries "in the range of salaries of senior leadership in the public sector".(p. 61) It is not clear what the Commission meant by this, nor why the Commission believed this was relevant to the factors set out in s. 5(5) of the Act. As indicated above, s. 5(5)(d) compels the Commission to consider changes in the compensation paid to others in the public sector. The actual range of compensation for "senior leadership" is vast, depending on how one defines senior leadership. To simply state that the Commission's recommendations put judges in this range does not provide a meaningful rationale for the recommended salary increases.

In Government's view, when section 5(5)(d) is properly taken into account, it militates in favour of smaller salary increases than the Commission recommended, in view of the changes in the compensation of others paid by provincial public funds in British Columbia. Government has taken this into account in making its salary proposal.

## 2. The Commission failed to properly consider section 5(5)(f) of the Act

Concerning the current and expected financial position of government, the Commission found that "the financial position of Government does not demonstrate that increases in compensation should not be made to the members of the Court if such increases are found by this Commission to be in the public interest"(p. 58). However, the issue was not whether there should be increases in compensation – all parties agreed there should be. The issue for the Commission to consider was how the current and expected financial position of government might impact the size of those increases. The Commission does not explain how evidence of the government's program of expenditure management, and evidence that the modest surplus results from the program of expenditure management, were taken into account in determining the size of salary increases that were recommended.

In its conclusion, the Commission returns to this topic, finding that "as Government has acknowledged, full salary and compensation costs of Judges and Judicial Justices are within the fiscal capacity of Government to pay"(p. 61).

This demonstrates that the Commission focussed on whether government had the capacity to pay, rather than on the question of whether, and to what extent, salary increases should be moderated by the fact that the context for the government's financial position is a program of expenditure management. Further, the reference to the government's "acknowledgement" takes the government's submission out of context. What the government said on this point is as follows:

It is acknowledged that the full salary and compensation costs of judges and judicial justices are within the fiscal capacity of Government to pay. The annual budget of the Court in 2014/2015 was \$54,000,000. That is not the issue. The issue is what is reasonable and adequate compensation to meet the factors under the Act.  
(Government submission, para 17)

The reference to "fiscal capacity" is clearly a recognition that judicial salaries are a fraction of the total justice budget and an even smaller one in regard to the overall provincial budget. This will always be the case and viewed this way the government will always have the capacity to pay because it can always raise taxes or incur debt.

However, government's statement was not an acknowledgement that government can afford to pay generous increases when viewed within the context of the government's program of expenditure management, nor was it an acknowledgment that generous salary increases do not have a significant fiscal impact on government.

Government views the fiscal impacts set out above, and in particular the difference between the Commission's recommendations and government's proposed response, as significant despite the fact that they are small in the context of government's total budget.

### 3. Summary

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

- the Commission did not properly consider the issue of changes in the compensation of others paid by provincial public funds – these changes reflect the government's program of expenditure management, which applies broadly;
- the Commission did not properly consider how the current and expected financial position of Government should impact the magnitude of salary increases;

- the estimated fiscal impact of the Commission’s salary recommendations is \$12.94 million, whereas the estimated fiscal impact of the ministry’s proposed increases is \$7.15 million, a difference which government views as significant;
- the fiscal situation in the province is improved in the current year, but expenditure management remains a focus of government and compensation increases must be assessed within that context, recognizing that there are many competing program needs faced by government;
- the substituted salaries are expected to put B.C.’s judges in fourth place amongst the provinces in 2017/18 (not all provinces have yet determined their compensation for the current fiscal year);
- the substituted salaries reduce the gap in salary between B.C.’s judges and superior court judges from 19.7% in 2016/17 (assuming adoption of the proposed reconsidered PCJ salary of \$252,290 for that year) to 16.9% in 2017/18;
- the substituted salaries take into account the fact that the law which judges must adjudicate continues to evolve and may become more complex, but that the number of new cases in the Court has declined, as has the caseload per judicial FTE.

### **Provincial Court Judges’ Benefits**

The Commission made the following recommendations respecting the benefits of Provincial Court Judges:

**Recommendation 3:** Effective April 1, 2017, the accrual rate for judicial pensions be 3.0%.

**Recommendation 4:** There be no change to the flexible benefits plan for judges.

**Recommendation 5:** The per diem for travel for judges be set at Level III of Treasury Board Directive 01/07.

**Recommendation 6:** Sub-section 19(1)(b) of the *Judicial Compensation Act* be amended to remove the two-year vesting period for members who ceased to hold office after September 30, 2015.

**Recommendation 7:** Sub-section 22(2) of the *Judicial Compensation Act* be amended to provide an early retirement reduction factor for a member with less than two years of contributory service who has reached age 55.

Recommendation 8: The *Judicial Compensation Act* be amended to clarify that a judge who ceases to hold office before age 55 may receive, at his or her option, the lump sum commuted value of his or her earned pension or a deferred pension.

Recommendation 9: The *Judicial Compensation Act* be amended to clarify that if a judge dies prior to retirement, his or her spouse or beneficiary is entitled to receive the lump sum commuted value of the judge's pension.

### **Response to Commission Benefits Recommendations Respecting Judges**

Government proposes that the Commission's benefits recommendations be accepted.

Concerning recommendation 3, the 2016 Commission stated that its rationale for its recommended salary increases supports the determination that a 3% accrual rate is reasonable compensation. The Commission noted that its mandate is to consider total compensation and not to over-emphasize individual aspects of compensation in isolation. In this regard, it further noted that the recommended increases in salaries would increase the value of judges' pensions.<sup>12</sup>

At the same time, the Commission noted that the 3% accrual rate is similar to the accrual rates for pensions of provincial court judges in most other provinces. Further, the Commission observed that judges' pensions are very generous in comparison to what is otherwise available in the public or private sectors. The Commission also notes that reasonable compensation does not require that all judges reach a full pension at retirement, and that all judges held other careers prior to appointment.

Notwithstanding that government recommends that the Commission's salary recommendations be substituted with lower salary increases, government proposes that the pension accrual rate remain at 3%. The government's proposed salary increases, while lower than those recommended by the Commission, would still result in an increase to the value of judges' pensions. The government agrees with the Commission that judges' pensions are generous compared to those received by public sector employees and most in the private sector, and that reasonable compensation does not require that all judges reach a full pension at retirement. The 3% accrual rate is in line with the accrual rate for provincial court judges in most other provinces.

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<sup>12</sup> The formula for judges' pensions includes calculating the average of the three highest years' salaries.

### **Costs for Provincial Court Judges Association**

The Commission made the recommendation that government pay 100% of the PCJA's reasonable costs for participating in the commission process. The government proposes that this recommendation be rejected and that the Legislature substitute an amount for costs that equals 100% of the PCJA's costs up to \$30,000 and two thirds of its costs between \$30,000 and \$150,000.

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

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

The statutory formula provides greater certainty respecting the costs the PCJA may recover, rather than leaving the ultimate resolution up to a Commission recommendation which may or may not be accepted by the Legislature. Also, government has no control over what costs the PCJA might incur.

The statutory formula further provides, however, that the Lieutenant Governor in Council ("LGIC") may, by regulation, set higher amounts than those stipulated in the Act. The regulation-making authority reflects the possibility that the nature and cost of the process might evolve over time and the formula may need to change in the future.

The Commission noted that there is a history of the government paying 100% of the reasonable costs of the PCJA, citing 2004, 2007, 2010 and 2013 as examples. The Commission further held that as a matter of fairness the judges and judicial justices should be able to participate to the fullest extent without the need for incurring personal expense.

The Act now provides that the "maximum" amount that government may pay is in accordance with the formula above. The LGIC has not enacted a regulation to provide for greater reimbursement than is set out in the Act. The LGIC's regulation-making power represents an exception to the statutory norm. The Act cannot be fairly read as contemplating that 100% reimbursement should be the norm.

While the Commission articulates its view of what is fair, it does not articulate any basis for regulating a different result from what the Legislature established as the norm. Put another

way, the Commission does not identify a basis for concluding that the formula set out in the Act is not what the Legislature would have expected to be applied in this case.

Government has already reimbursed the PCJA according to the statutory formula. Its total costs were approximately \$93,000 and government's reimbursement was approximately \$65,500, meaning that the approximately 140 judges would be collectively responsible for \$27,000 in costs, or approximately \$200 per judge.