

**SUBMISSION OF**  
**THE PROVINCIAL COURT**  
**JUDGES ASSOCIATION OF**  
**BRITISH COLUMBIA**

**to the**

**2019 JUDICIAL COMPENSATION**  
**COMMISSION**

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**Submission of**  
**The Provincial Court Judges Association of**  
**British Columbia**  
**to the**  
**2019 Judicial Compensation Commission**

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## **EXECUTIVE SUMMARY**

For the detailed reasons set out in the Submission that follows, the Judges' Association asks this 2019 JCC to make the following recommendations for increases to the existing compensation paid to judges of the Provincial Court of British Columbia and for payment of the costs incurred by the Judges' Association in order to engage in this process.

### **1. SALARY**

- Effective April 1, 2020 the annual salary for puisne judges shall be increased to \$310,000; and
- Effective on each of April 1, 2021 and April 1, 2022, the salaries for puisne judges shall be further increased by two percent (2%) per annum.

### **2. INTEREST**

- Interest should be payable on retroactive salary adjustments in accordance with the detailed proposal set out on page 86 of the Submission below.

### **3. PROFESSIONAL ALLOWANCE**

- Effective April 1, 2020, the Professional Allowance for each judge shall be increased from \$4000 to \$4500 per year, with the ability to carry over any unused portion for one year.

(This is a joint submission by the Government and the Judges' Association)

- Effective April 1, 2020, the portion of the total that can be allocated to health and wellness related expenditures shall be increased from \$500 per annum to \$750.

### **4. COSTS**

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

## INTRODUCTION

1. The mandate of this Judicial Compensation Commission (“JCC”) is to report to the Minister and the Chief Judge regarding all matters respecting the remuneration, allowances or benefits for judges and judicial justices of the Provincial Court of British Columbia (also referred to as the “Provincial Court” or the “Court”) and to make recommendations in relation to those matters for the three year period from April 1, 2020 to March 31, 2023. To assist the Commission with this task, the Provincial Court Judges Association of British Columbia (hereinafter referred to as “the Judges’ Association”) provides the following submissions on behalf of judges of the Provincial Court.

*Judicial Compensation Act, Joint Book of Authorities, **Tab 1**, section 5(1)*

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

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

4. Part IV details the Judges’ Association’s proposals for recommendations from this Commission with respect to salary, interest on retroactive salary adjustments, and professional allowance.

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

## **PART I: HISTORY AND OVERVIEW OF THE COMMISSION PROCESS IN BC: LEGAL AND LEGISLATIVE FRAMEWORK**

### **Judicial Compensation Commissions: An Overview**

6. Every federal, provincial and territorial jurisdiction across Canada has some form of constitutionally established administrative body responsible for making recommendations to government about what is appropriate compensation for judges for the period of that commission's mandate. Since 2016 in BC, that administrative body is called a "Judicial Compensation Commission" ("JCC"), combining what was formerly the Judges' Compensation Commission with the Judicial Justices Compensation Commission. Certain jurisdictions use other terms such as "Judicial Remuneration Commission" or "Salary and Benefits Tribunal".

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

8. We refer below to some of the past circumstances and litigation that has occurred in British Columbia. Such information is important to an understanding of the proper historical context of this Commission, but it is also particularly useful in this instance given that the outcome of the 2016 JCC process remains unknown.

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

*Reference re Remuneration of Judges of The Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Ekmecic; R. v. Wickman; Manitoba Provincial Judges' Association v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3, (hereinafter referred to as "*PEI Reference*"), Joint Book of Authorities, **Tab 4**, para 7

10. The Provincial Judges' Association of Manitoba challenged the constitutionality of the reduction in salary for provincial judges in Manitoba that resulted from the enactment of Bill 22, *The Public Sector Reduced Work Week and Compensation Management Act*. The judges alleged that the Bill infringed judicial independence.

*PEI Reference, supra*, Joint Book of Authorities, **Tab 4**, paras 21-22

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

*PEI Reference, supra*, Joint Book of Authorities, **Tab 4**, paras 16-18

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

*PEI Reference, supra*, Joint Book of Authorities, **Tab 4**, paras 11-13

13. The decision in *PEI Reference* was a major turning point in the history of the courts in Canada, as it underscored the importance of judicial independence and, in particular, the financial security aspect thereof. Lamer CJC outlined the three aspects of judicial independence which include financial security, administrative independence and security



of tenure. According to Lamer CJC, a JCC process is necessary to ensure financial security for judges.

14. As the Supreme Court of Canada reiterated in its 2005 decision, in a case referred to as *Bodner*, financial security embodies three requirements: (1) judicial salaries can be maintained or changed only by recourse to an independent commission; (2) there can be no negotiations between the judiciary and the government over compensation; and (3), judicial salaries may not fall below a minimum level.

*Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Québec (Attorney General); Minc v. Québec (Attorney General)*, 2005 SCC 44, (hereinafter "*Bodner*"), Joint Book of Authorities, **Tab 5**, para 8

15. In *PEI Reference*, as well as in *Bodner*, the Supreme Court of Canada outlined the flexible requirements for JCC processes, which must be independent, objective and effective. Regarding the rationale for the requirement of independence, Lamer CJC explained in *PEI Reference* that the constitutional function of the commissions is to serve as an "institutional sieve, to prevent the setting or freezing of judicial remuneration from being used as a means to exert political pressure through the economic manipulation of the judiciary."

*PEI Reference, supra*, Joint Book of Authorities, **Tab 4**, para 170

16. On the requirement of objectivity, Lamer CJC explained that the JCCs must make their recommendations by reference to "objective criteria, not political expediencies" and present "an objective and fair set of recommendations dictated by the public interest".

*PEI Reference, supra*, Joint Book of Authorities, **Tab 4**, para 173

17. As for the requirement of effectiveness, Lamer CJC wrote that it was to be guaranteed by the Government's obligation not to freeze or change compensation until it had received a report of a salary commission, the requirement for regular reviews to avoid

the possibility of erosion due to increases in the cost of living, and that the JCC report must have a “meaningful effect” on the determination of judicial compensation. While the effectiveness requirement could mean that the commission’s report is binding on government, a variety of models would be consistent with judicial independence. Where the JCC recommendations were not binding, the government could refuse to implement the recommendations if it gave legitimate reasons and could justify its decision, if necessary in a court of law.

*PEI Reference, supra*, Joint Book of Authorities, **Tab 4**, paras 174-175, 180-183

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

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

*Bodner, supra*, Joint Book of Authorities, **Tab 5**

20. In *Bodner*, the Supreme Court of Canada reiterated that the JCC process is necessary in order to ensure the financial security of the judiciary. The Court described the focus of a JCC as being “on identifying the appropriate level of remuneration for the judicial office in question.” The Court clearly enunciated that the task of a JCC is unique.

As the Court emphasized, “the process is neither adjudicative interest arbitration nor judicial decision making”. Rather, a JCC must focus on what is appropriate remuneration for judges in light of all the factors identified in section 5 of the *Judicial Compensation Act*, S.BC c.59. We discuss those factors in much detail below.

*Bodner, supra*, Joint Book of Authorities, **Tab 5**, para 14  
*Judicial Compensation Act*, Joint Book of Authorities, **Tab 1**

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

1. Has the government articulated a legitimate reason for departing from the commission’s recommendations?
2. Do the government’s reasons rely upon a reasonable factual foundation?
3. Viewed globally, has the commission process been respected and have the purposes of the commission – preserving judicial independence and depoliticizing the setting of judicial remuneration – been achieved?

*Bodner, supra*, Joint Book of Authorities, **Tab 5**, para 31

22. In the years after *Bodner*, litigation has been focussed in particular jurisdictions. While the timing of the JCC process is slightly different in each jurisdiction, considering the last three commission processes in each jurisdiction, there has been litigation over the implementation of commission recommendations in British Columbia (2010 JCC - twice, the 2013 JCC and the 2016 JCC), Manitoba (2014 JCC), Newfoundland & Labrador (2014 JCC) and Nova Scotia (2017 JCC).

## **History of Judicial Compensation in British Columbia**

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

1998 JCC Report, Joint Book of Documents, **Tab 3**, page 9

24. Judicial compensation commissions have been conducted every three years since 1995 and the Reports of past Commissions are all provided in the Joint Book of Documents. The focus below is on the three most recent commissions, beginning in 2010.

### **2010 Judges Compensation Commission**

25. The 2010 Judges Compensation Commission (“2010 JCC”) was a five person panel, chaired by George Morfitt, which made recommendations about appropriate compensation for the period April 1, 2011 to March 31, 2014.

26. The 2010 JCC considered that the global economic downturn had a significant effect on Government finances and found, as a result, that significant enhancements to judicial salaries and benefits were not supportable for the 2011/12 and 2012/13 fiscal years. During this process, the Association recognized that the economic climate was challenging. Consistent with that recognition, the Judges’ Association made a joint submission with government for a two-year salary freeze (i.e. in 2011 and 2012). For the third year, beginning April 1, 2013, the JCC recommended an increase equal to the cumulative increase in the BC Consumer Price Index over the preceding three fiscal

years, compounded annually. In so doing, the 2010 JCC adopted the analysis of the 2007 JCC regarding the importance of continuing to attract highly qualified lawyers from both the private bar and public service, and the need to minimize the wage disparity between the s. 96 (federal) and Provincial Courts in order to avoid the Provincial Court being overlooked by applicants for financial reasons.

27. The 2010 JCC also recommended an increase in the pension accrual rate to 3.5% effective April 1, 2013.

2010 JCC Report, Joint Book of Documents, **Tab 7**, pages 34-36

28. The Government rejected the 2010 JCC's recommendations for a modest salary increase and an increased pension accrual rate.

Government Response to the Report of the 2010 Judges Compensation Commission (May 2011), Joint Book of Documents, **Tab 8**

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

29. Two years of litigation over the Government's Responses to the 2010 JCC concluded with the denial of the Government's request for leave to appeal to the Supreme Court of Canada. According to a decision of the majority of the Court of Appeal, the Government was obliged to implement all of the 2010 JCC's recommendations. Because the litigation remained on-going at the time the 2013 JCC made its Report, which affected its recommendations, it is important to review the chronology of events.

*Provincial Court Judges Association of British Columbia v. British Columbia (Attorney General)*, [2015] BCJ. No. 574, Joint Book of Authorities, **Tab 11**, para 88 (hereinafter "2015 Decision of the Court of Appeal")

30. In May 2011, the Government rejected the 2010 JCC's recommendations for salary and pension increases.

2011 Government Response to the 2010 JCC Report, Joint Book of Documents, **Tab 8**

31. The Judges' Association challenged the legitimacy of the Government's rejection of the JCC recommendations. Justice Macauley ordered the matter be returned to Government and to the Legislative Assembly for reconsideration. Special costs were awarded against the Government: [2012] BCJ. No. 1990 (Joint Book of Authorities, **Tab 9**).

*Provincial Court Judges' Assn. of British Columbia v. British Columbia (Attorney General)*, [2012] B.C.J. No. 1443, 2012 BCSC 1022, Joint Book of Authorities, **Tab 8**

32. The Legislative Assembly again rejected the recommendations and substituted a 1.5% increase effective April 1, 2013 in place of the 2010 JCC's recommendation which would have meant a 4.9% increase. It made the same decision as before on the other recommendations.

2013 Government Response to the 2010 JCC Report, Joint Book of Documents, **Tab 10**

33. The Association challenged the second rejection of the recommendations in the BC Supreme Court. That petition was dismissed on March 3, 2014.

*Provincial Court Judges Association of British Columbia v. British Columbia (Attorney General)*, [2014] B.C.J. No. 611, Joint Book of Authorities, **Tab 10**

34. The Court of Appeal overturned that decision and ordered all of the 2010 JCC's recommendations to be implemented (Joint Book of Authorities, **Tab 11**). The Government sought leave to appeal to the Supreme Court of Canada, which application was dismissed with costs on October 29, 2015.

*Provincial Court Judges Association of British Columbia v. British Columbia (Attorney General)*, [2015] BCJ. No. 574, Joint Book of Authorities, **Tab 11**

### **2013 Judges Compensation Commission (“2013 JCC”)**

35. The 2013 Judges’ Compensation Commission (the “2013 JCC”) made recommendations about appropriate compensation for the three year period from April 1, 2014 to March 31, 2017.

36. The commencement of the 2013 JCC preceded the 2015 decision from the Court of Appeal with respect to the implementation of the 2010 JCC recommendations. As a result, the base salary for 2013 was not before the Commission. The decision by the 2013 JCC to recommend percentage increases based on the actual compensation in place at the time in fact resulted in a salary decrease, once the 2010 JCC recommendations were implemented.

2013 JCC Report, Joint Book of Documents, **Tab 11**, page 44

Government 2013 Response to 2010 JCC Report, Joint Book of Documents, **Tab 10**

37. The 2013 JCC took into account the cautious predictions for gradual improvement in the economy and recommended that salaries for *puisne* judges should increase by 2.9% effective April 1, 2014. Effective April 1, 2015, it recommended a further increase of 1.5%, followed by an additional 2% increase effective April 1, 2016.

2013 JCC Report, Joint Book of Documents, **Tab 11**, pages 47-48

38. The 2013 JCC also recommended that the Government pay 100% of the Judges’ Association’s reasonable legal fees including the cost of experts.

2013 JCC Report, Joint Book of Documents, **Tab 11**, pages 50-54

### **Government’s Response to the 2013 JCC Quashed on Judicial Review**

39. The Government rejected the most significant of the recommendations made by the 2013 JCC, including those relating to salary and the pension accrual rate. The 2013

JCC's salary recommendations and the lower salaries first substituted by Government are shown below:

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

40. A complete copy of the Government's Response to the 2013 JCC is attached as **Tab 12** in the Joint Book of Documents. The Judges' Association sought judicial review. Justice Grauer quashed the Government's Response and referred the matter back to the Legislature for reconsideration.

*Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2016 BCSC 1420, **Tab 12**, Joint Book of Authorities

41. The Government appealed, and the Association cross-appealed with respect to the remedy. The Court of Appeal released its decision on February 7, 2017. It determined that, because the Government's Resolution had been passed in the context of existing salaries and benefits that were later changed by court order (i.e. the 2015 order of the Court of Appeal that the recommendations of the 2010 JCC must be implemented), the matter should be remitted to the Legislature to reconsider in light of the new baseline for salaries.

*Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2017 BCCA 63, Joint Book of Authorities, **Tab 13**

42. On October 25, 2017, the Legislature reconsidered the 2013 JCC Report (and on the same day, also provided its response to the 2016 JCC Report, which is discussed below). The following chart compares the salaries recommended by the 2013 JCC, with those ultimately implemented in the Government's Second Response.



<b>Year</b>	<b>2013 JCC</b>	<b>Government's Second Response</b>
2014	\$241,500 (a 2.9% increase over the 2013 salary that had been substituted by Government for the 2010 JCC's recommendation)	\$244,889 (1.0%)
2015	\$245,122 (1.5%)	\$248,562 (1.5%)
2016	\$250,024 (2.0%)	\$252,290 (2.0%)

43. No further judicial review was sought.

### **2016 Judicial Compensation Commission**

44. The 2016 Judicial Compensation Commission (the "2016 JCC") made recommendations about appropriate compensation for the three year period from April 1, 2017 to March 31, 2020. The five person panel was chaired by The Honourable Frank Iacobucci, C.C., Q.C. and released its Report on October 27, 2016. The Report was issued almost one year before the outcome of the 2013 JCC process was finalized, in October 2017. The 2016 JCC was the first Commission to make recommendations for both judges and judicial justices.

45. The 2016 JCC reviewed the principles of judicial independence that form the foundations for the judicial compensation process and expressed concern that the litigation arising out of the previous commissions "indicates a weakening of the judicial compensation process in British Columbia". The Commission urged "...all participants to refresh their commitment to the essential goal of judicial independence".

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 14

46. At the time the 2016 JCC authored its Report, the decision of Grauer J. had been issued, quashing the Government's response to the 2013 JCC, and the 2016 JCC was aware that the Government had appealed Grauer J.'s decision, and that the Association was cross-appealing on the issue of remedy.

47. On the issue of how it was to identify an appropriate “starting point”, the 2016 JCC explained its view that “...determining what is reasonable compensation for judges and judicial justices by focusing too specifically on the previous commission’s recommendations as a “starting point” is not helpful.”

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 59

48. The 2016 JCC noted the direction set out in *Bodner*, that the reports of past Commissions and their outcomes form part of the background and context for the new commission, but stated that this was not a direction to determine reasonable compensation from a “particular starting point”. While the past reports and the discussion of case law was “useful and instructive”, the 2016 JCC noted that the context had changed in the three years since the last commission, and it must “...look at what is reasonable in the unique facts and context before it.”

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 60

49. After carefully considering each of the factors identified in section 5(5) of the *Judicial Compensation Act* (“the Act”), the Commission recommended the following salaries for *puisne* judges:

Effective April 1, 2017, \$273,000;  
Effective April 1, 2018, \$277,095; and  
Effective April 1, 2019, \$281,251.

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 60-61

50. The 2016 JCC also recommended that the Government pay 100% of the reasonable costs of the Judges’ Association (and the JJ Association), including legal fees and disbursements, and the cost of the opinions and evidence of the expert witnesses (an economist and actuary).

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 62-70

## **The Government Rejected the Salary and Costs Recommendations of the 2016 JCC**

51. On October 25, 2017, the Legislature passed the Government's Resolution rejecting the 2016 JCC's recommendations on salaries and costs. It substituted salaries of \$262,000 effective April 1, 2017, \$266,000 effective April 1, 2018, and \$270,000 effective on April 1, 2019. In place of the recommendation for 100% of the Judges' Association's costs to be paid, the Government resolved to pay 100% of the costs up for the first \$30,000, and 2/3 of the costs between \$30,000 and \$150,000.

Government's Response to the 2016 JCC Report, Joint Book of Documents, **Tab 14**

52. Submitting that the government had, once again, not fairly engaged in the independent JCC process, the Judges' Association filed a Petition seeking judicial review of the Government's reasons for rejecting the recommendations. The Judges' Association sought production of a document that had been before cabinet at the time it formulated the Resolution that was ultimately put before the Legislature. Although the document was ordered to be produced by a Master, the Chief Justice of the BC Supreme Court and the Court of Appeal, the Government was successful in seeking leave to appeal to the Supreme Court of Canada. In the meantime, the judicial review case was argued, and the decision is being held in abeyance pending any further submissions that may be necessary if the cabinet document is eventually produced. As the hearing of that case before the SCC is expected to occur in January 2020, it can be assumed that the outcome of the 2016 JCC process will not be known until well after this 2019 JCC has made its recommendations.

## **The Role and Jurisdiction of this 2019 Judicial Compensation Commission**

53. This 2019 JCC is tasked with making recommendations for appropriate compensation for both judges and judicial justices for the three fiscal years commencing April 1, 2020.

54. This 2019 JCC faces the same situation as both the 2016 and 2013 JCCs, in that the current compensation for judges has not been finally established, as the Government's Response to the 2016 JCC remains subject to an application for judicial review. As noted, that case is unlikely to be concluded before this Commission issues its Report. For the reasons outlined in detail below, it is the position of the Judges' Association that this uncertainty should have no impact on this 2019 JCC's analysis and its recommendations.

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

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

*Bodner, supra*, Joint Book of Authorities, **Tab 5**, para 15

56. As the outcome of the 2016 JCC process remains unknown, it is particularly important for this 2019 JCC to make its own assessment of appropriate compensation for the years within its own mandate.

## **PART II: PROVINCIAL COURT OF BRITISH COLUMBIA - A BRIEF OVERVIEW**

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

58. Part II begins with a brief history of the Provincial Court of British Columbia with a focus on the Court as it exists today. The Court's jurisdiction is then discussed, together with some of the many practical initiatives undertaken in recent years to create further efficiencies in the system or to better address the specific needs of particular communities.

### **Historical Overview**

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

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

applicants to have at least 10 years at the Bar, and most newly appointed judges have practiced law for approximately 20 years prior to their appointment.

Annual Report 2017-18, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, page 8

61. As of April 30, 2019, the Court had 120 full-time judges and 24 part-time judges who work in the Senior Judges program. The Senior Judges program came about as a result of a joint submission presented to and adopted by the 2001 Judicial Compensation Commission. According to the *Provincial Court Act*, a judge who has at least 10 years of full-time service and who is at least age 55, may elect to become a Senior Judge. He or she retires for pension purposes, and is paid a salary of not more than 40% of a full-time judges' salary such that his or her total compensation does not exceed that of a full-time judge. Senior Judges may continue to work in this part-time capacity for up to seven years.

*Provincial Court Judges' Complement as of April 30, 2019*, Judges' Association's Documents, **Tab 1**

*Provincial Court Act*, R.S.BC 1996, Chapter 379, s. 9.1, Joint Book of Authorities, **Tab 2**

62. Provincial Court judges preside in over 80 court locations throughout the Province, with facilities ranging from the modern and high security courtrooms of the Surrey Provincial Court complex to multi-use community-based facilities such as the Community Centre in Lower Post. A map showing the many communities where the Provincial Court sits can be found at page 17 in the Provincial Court's Annual Report. To put this in context, the Supreme Court of British Columbia, which is the other trial court serving British Columbia, sits in only 30 locations.

Annual Report 2017-18, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, page 17

63. For judges serving outside the lower mainland, travel is a "constant and rigorous" feature of their work. For example, judges who are based in Smithers travel almost daily

to courts in Hazelton, Houston and Burns Lake. Judges based in Kelowna travel to Princeton, Penticton, Vernon, Salmon Arm and Revelstoke. In other locations, such as Bella Bella, court is held on several consecutive days periodically throughout the year. Many of the circuits involve year-round travel through mountain passes on routes that take four hours each way.

2010 JCC Report, Joint Book of Documents, **Tab 7**, page 19

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 19

### **Broad and Comprehensive Jurisdiction**

64. As the 2004 JCC noted, “The Provincial Court of British Columbia has one of the broadest and most comprehensive jurisdictions of any Provincial Court in Canada”. Indeed, the 2013 and 2016 JCC recognized, the Provincial Court has been “called the “People’s Court” because most citizens who come in contact with the justice system only experience it through the Provincial Court”.

2004 JCC Report, Joint Book of Documents, **Tab 5**, page 12

2013 JCC Report, Joint Book of Documents, **Tab 11**, page 15

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 17

65. A majority of the Court’s work involves criminal and youth matters, with the balance relating to child protection, family and civil matters. During the 2017-18 fiscal year for instance, more than 200,000 cases were initiated in the Provincial Court. Excluding the 85,990 new traffic and bylaw cases, the total number of new cases was 114,584. Of those new cases, 57% involved adult and youth criminal cases (55% adult and 2% youth), 25% involved family matters, 8% involved civil matters, and 9% involved child protection matters. While the Court’s judicial justices hear most of the traffic and bylaw matters, judges do hear these matters in remote locations. Judges also hear traffic and by-law cases which involve the application of the *Charter of Rights*.

Annual Report 2017-18, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, page 9

## **Adult Criminal and Youth Jurisdiction**

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

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

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

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



## **Family Law Jurisdiction: Child Custody, Access, and Support**

70. The Provincial Court deals with two main areas of family law.

71. The Provincial Court has concurrent jurisdiction with the Supreme Court of British Columbia under the *Family Law Act* in all matters concerning family maintenance and child custody, parenting arrangements, guardianship, and access.

72. Notwithstanding that the Provincial Court does not have jurisdiction to grant divorces, make orders dividing matrimonial property, or relating to the occupation of the family home (apart from ancillary orders relating to occupation under the *Family Law Act*), the Court's volume of family cases is roughly equal to that of the Supreme Court.

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

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

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

76. Only BC, Alberta, Quebec and the Northwest Territories have granted this wide ranging family jurisdiction to Provincial Court judges.<sup>1</sup>

### **Child Protection Jurisdiction**

77. The Court also has exclusive jurisdiction in respect of child protection under the *Child, Family and Community Service Act*, with the exception of protective intervention orders and restraining orders.

78. The *Child, Family and Community Service Act* provides that children may be removed from their families where provincial officials have reason to believe that the children are not being adequately or properly cared for. In many cases, poverty and mental disability are contributing factors. In order to better determine where the best interests of children may lie, the Provincial Court judges have determined that all parties must first attend what is called a Family Case Conference. At this conference, the protection authorities and the parents, under the guidance of a judge, are often able to reach a solution which avoids the necessity of a contested hearing. In those cases where a consent solution has not been achieved, the matter will be scheduled for trial.

79. While there are fewer child protection cases than criminal and civil cases, the time spent on each case is, on average, many times greater than that spent on criminal or civil

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

cases. Where the issue is whether the child should be permanently removed from the parents, the trial will typically take at least four court days.

80. The number of child protection cases declined slightly this year from the previous year but still remain higher than they were five years ago.

Annual Report 2017-2018, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, page 9

### **Civil Jurisdiction**

81. On June 1, 2017, legislative amendments increased the Court's civil jurisdiction from \$25,000 to \$35,000. The Provincial Court's civil jurisdiction currently extends to claims up to \$35,000 for debt recovery, damages of personal property, and specific performance of contracts. As part of its civil jurisdiction, the Court deals with all torts of negligence, including most notably personal injury and all forms of breach of contract. The monetary limit of the jurisdiction has increased over the years, and for some time it has been anticipated that it will increase again to \$50,000 (by Order in Council).

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

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

83. In 1991, the *Small Claims Act and Rules* came into force and introduced a simplified, plain-language process for litigants without a lawyer. A noteworthy feature was the provision for mandatory settlement conferences, which built elements of

mediation into the Court's civil process for the first time. British Columbia's progressive civil claims procedure initiatives won the 1993 Justice Achievement Award of the National Association for Court Management.

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

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

86. Under the Small Claims Rules developed by the Provincial Court, every party to a civil dispute must together attend a settlement conference, presided over by a judge. Judges are well trained in mediation skills, and will assist the parties in trying to reach a settlement at this conference. This form of judge-led mediation has proven quite successful in resolving disputes at an early stage, and ensures that court time is conserved for those matters which require adjudication. The Court also continues to expand its use of adaptive technologies as a way to keep costs down for litigants, such as by permitting out of town litigants to attend by telephone or computer-facilitated video conferencing.

87. Due to a particularly heavy caseload of civil matters entering the justice system in the Vancouver District, the Court initiated a project to streamline the process for certain

of these claims in order to promote early resolution or to expedite the trial process. The Internal Audit Advisory Service Division of the Ministry of Finance conducted a review of the justice system in British Columbia in September 2011. It concluded that an estimated 1600 court hours and the equivalent of 2 judges, totalling \$0.67 million had been saved as a result of this pilot project.

88. The Government has established a Civil Resolution Tribunal (the “CRT”), Canada’s first online tribunal, to resolve small claims of \$5,000 or less relating to claims for debts or damages, recovery of personal property, specific performance of an agreement relating to personal property or services, and relief from opposing claims to personal property. The CRT also hears strata property disputes and certain motor vehicle accident claims (those where a claimant is seeking \$5,500 or less in damages). The Government now requires that most claims that fall under the CRT’s jurisdiction be taken to an online Civil Resolution Tribunal. The decrease in the number of new small claims files in the Provincial Court appears to be related to the change in jurisdiction. However, if a party disputes a small claims decision of the CRT, the matter would proceed to Provincial Court, which would conduct a hearing *de novo*.

### **Continuing Judicial Education**

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

2010 JCC Report, Joint Book of Documents, **Tab 7**, page 21

90. Continuing education for judges has three major components:

- (a) five days of mandatory educational programming annually, sponsored and organized by the Education Committee of the British Columbia Provincial

Court Judges' Association with education offered in substantive law, judicial skills, and social context;

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

91. Many judges have been paying a portion of these education-related costs themselves, as the professional allowance is not sufficient to cover the associated expenses. This has prompted the joint submission, discussed below, for an increase in the allowance amount.

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

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

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

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

2017-2018 Annual Report, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, pages 51-54

96. A Judges Technology Working Group has also been established. The mandate of the working group is to review the utility and desired features of software applications to aid judicial officers in the performance of their duties. A key consideration for the adoption of a software application is the ability of Judges to access court file material electronically both in and outside of the courtroom.

2017-2018 Annual Report, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, page 54

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

## **Innovation and Reform**

98. Past JCCs have consistently recognized that the judges of the Provincial Court of British Columbia are leaders in reform and innovation in the interests of the public they serve. The 2016 JCC Report stated:

“The Commission is impressed with the Provincial Court’s continuing willingness to adapt its processes to improve its level of service to the public.”

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 22

99. After reviewing a number of the recent initiatives the Court undertook to enhance its efficiency and effectiveness, the 2013 JCC Report stated:

“These initiatives demonstrate the innovation, flexibility, and hard work of BC Provincial Court judges in meeting the needs of the justice system. Innovations and reforms such as these confirm the Commission’s view that the Court’s work is impressive and that British Columbians are well served by their Provincial Court judges.”

2013 JCC Report, Joint Book of Documents, **Tab 11**, page 19

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

2010 JCC Report, Joint Book of Documents, **Tab 7**, page 21

2007 JCC Report, Joint Book of Documents, **Tab 6**, page 12

2004 JCC Report, Joint Book of Documents, **Tab 5**, page 12

2001 JCC Report, Joint Book of Documents, **Tab 4**, page 11



101. Indeed, over the years, the Provincial Court of British Columbia has pioneered mediation in civil, family, and child protection cases in Canada, introduced criminal process rules, and started the first Community Court in Canada. The Provincial Court of British Columbia continues to focus on new initiatives to improve the justice system, with several initiatives progressing since the 2016 JCC made its Report.

102. Criminal reforms focused on reducing the time to trial delays, by having judges focus more time on substantive matters, have spread from a pilot in Victoria to seven other judicial districts. For the 2017-2018 fiscal year, the Court did not meet the time-to-trial targets but either improved or held steady in various areas. The Provincial Court continues to focus efforts to reduce the time to trial in its divisions. Regular updates can be viewed on the *Court Reports* page of the Court's website.

Annual Report 2017-2018, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, pages 9-10

103. On July 8, 2016 the Supreme Court of Canada released its decision in the case of *R. v. Jordan* 2016 SCC 27 ("Jordan"). In this case the Supreme Court of Canada made changes to the way in which delay is calculated and imposed ceilings beyond which delay is presumed to be unreasonable. For trials in Provincial Court this ceiling is 18 months from the time the Information is sworn to the conclusion of the trial.

104. In response to the *Jordan* decision the Provincial Court has been closely monitoring time to trial and pending case data. In almost all areas of the province the Court is able to offer court time for trials well below the 18 month ceiling. After the release of the *Jordan* decision the Court embarked on a review of its case management processes and work continues to ensure that court time is used effectively and Judges are appropriately managing longer and more complex cases.

Annual Report 2017-2018, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, page 10

105. The Provincial Court's specialized courts continue to apply innovative approaches, primarily in criminal sentencing procedures. Through ongoing consultation and collaboration with social and health services agencies, the Court is addressing the particular needs of offenders with mental health and substance-abuse issues, as well as cases involving domestic violence in various communities.

106. The Drug Treatment Court of Vancouver provides an alternative to the regular criminal court process for individuals who commit drug offences or minor Criminal Code offences arising from their addiction to cocaine, heroin or other controlled substances. Participants undergo drug addiction treatment supervised by a Drug Treatment Court Judge. The participants receive services from addiction counsellors, case managers, a psychologist, a physician who specializes in addictions medicine, a nurse and a financial assistance worker. In order to graduate, participants must abstain from illicit drug use, secure stable housing, engage in secure employment, and not be charged with new criminal offences in the six month period leading up to graduation. In the 2017/2018 fiscal year, the Court approved 38 new intakes as eligible to participate in the drug treatment program, along with 13 graduations. The typical number of participants in the treatment program is approximately 50 persons per month.

Annual Report 2017-2018, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, pages 57-58

107. Vancouver's Downtown Community Court ("DCC") was the first of its kind in Canada and first opened in September 2008 as a partnership between the Court and justice, social, and health services agencies which all shared the common goals of reducing crime, improving public safety, providing integrated justice, and requiring accountability. The DCC attempts to prevent criminal activity and address the risks posed by offenders, while also supporting their health and social needs. The DCC remains the only community court in Canada and continues to serve as a model of court innovation.

Annual Report 2017-2018, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, pages 58-59

108. The Victoria Integrated Court (the “VIC”) was created in 2010 in response to the chronic demands placed on the justice, health and social systems by homeless, mentally disordered and/or substance-abusing individuals. The VIC strives to deal with criminal charges while at the same time dealing with health and social needs of offenders. In this Court, community service is often ordered as a part of an offender’s sentence. Judges are told about housing, medical and other issues affecting an offender, and they hear recommendations for orders to help a team support and supervise the offender, including engaging in treatment and in community service. It operates in a manner similar to the DCC, except that it is fully functional within the existing criminal remand court in Victoria, rather than as a separate entity.

109. The VIC continues to operate well above its capacity. In the 2017/2018 year, the number of persons appearing increased from 122 to 128. The high level of monitoring and support requires significant resources, including court time.

Annual Report 2017-2018, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, page 59

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

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

collaborative effort of the local coordinating committee for domestic safety. Similar Courts also now sits in Kelowna, Penticton and Kamloops.

Annual Report 2017-2018, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, page 60

112. In May of 2016 a domestic violence initiative was undertaken at the Surrey Courthouse in which all domestic violence cases are assigned to one courtroom to deal with front end appearances. This initiative is supported by a dedicated duty counsel and a domestic violence team of prosecutors.

Annual Report 2017-2018, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, page 60

113. First Nations courts and/or specialized dockets now operate in New Westminister, Kamloops, North Vancouver, Duncan, Nicola Valley and Prince George (Nicola Valley and Prince George being added in 2017 and 2018 respectively). The First Nations courts provide a holistic and restorative approach to sentencing, incorporating aboriginal practices. The court has the benefit of hearing about an offender's current needs for housing, health services and the views of the community toward the offence.

Annual Report 2017-2018, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, page 55

114. The Provincial Court collaborated with Indigenous Elders and three provincial government ministries to launch the Aboriginal Family Healing Court Conference (AFHCC) pilot project in New Westminister in January 2017. In the 2017-18 fiscal year the project worked to reduce the over-representation of Aboriginal children in care by providing their families with support, flexibility, choice and cultural connection before, during and after case conferences held under the Child, Family, and Community Service Act.

Annual Report 2017-2018, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, page 57

115. The Provincial Court also launched or continued several initiatives in the 2017-2018 fiscal year to help meet its goals of accessibility and openness.

116. Formed in response to a national call for action from the Chief Justice of Canada to make family and civil justice more accessible, The Access To Justice BC initiative was established in 2014. Access to Justice BC is a network of justice system stakeholders chaired by the Chief Justice that are collectively committed to improving access to justice by improving access to justice, improving the user's experience with the justice system, and improving costs. The group is committed to listening to users' experience and involving them in developing solutions. Its unique membership provides perspectives from Indigenous and multicultural communities, self-represented litigants, people with disabilities, small businesses, non-profits, government, judges, lawyers and other sectors like health and community services. In the 2017-18 fiscal year, the group focused on improving access to justice in family and civil matters.

Annual Report 2017-2018, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, page 12

117. Self-represented litigants have identified the ability to have someone attend court with them as an important aspect of access to justice. As part of its own efforts to improve meaningful access to justice for self-represented litigants, the Provincial Court has developed Guidelines to provide a measure of certainty about when people will be permitted to have a support person help them in Provincial Court, and the scope of that help. The Court's Guidelines for Using a Support Person in Provincial Court makes it clear that the Court welcomes support persons to provide quiet help to self-represented litigants in civil and family court trials.

Annual Report 2017-2018, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, page 12

118. The Provincial Court also worked with Courthouse Libraries BC's Clicklaw to produce and distribute materials with concise descriptions of helpful online resources, along with an explanatory flyer, for self-represented litigants.

Annual Report 2017-2018, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, page 12

119. The Court has continued to expand video links from the Justice Centre in Burnaby to other locations, allowing access to bail hearings and other matters in remote locations. In 2017/18, the use of video technology saved 34,731 prisoner transports which created savings in time and cost not only for the Court but also for other participants in the justice system. The Court continued to expand its use by refreshing or adding equipment at various locations.

Annual Report 2017-2018, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, page 60

120. The Provincial Court of BC is recognized as a leader among Canadian courts for its active and engaging online communications. The Court's website analytics for 2017 showed more than 940,000 page views by more than 225,000 unique visitors. Page views of eNews, the informal articles posted weekly on the website, increased by 60% over last year, reaching 35,928. In 2017 the Court also held its second live Twitter Town Hall, hosted a workshop for journalists, and published a Media Guide.

Annual Report 2017-2018, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, page 62

121. The Provincial Court's partnership with the Peter A. Allard School of Law at the University of British Columbia in the Judicial Externship Program continued to benefit both students and Judges. In 2017-2018, 16 Allard Law students spent a term working with Provincial Court Judges for academic credit. Funding from the Law Foundation of British Columbia enabled each student to accompany a Court party on a Circuit Court.

Annual Report 2017-2018, Provincial Court of British Columbia, Joint Book of Documents, **Tab 1**, page 12

122. As is evident from the foregoing, the judges of the Provincial Court of British Columbia continue to explore new and innovative ways to deliver justice in a timely and cost efficient way to the citizens of this province. The Court continues to work with the

other branches of government in an effort to ensure that the Government's policy objectives can be achieved in a manner that is consistent with judicial independence.

### **PART III: FACTORS FOR CONSIDERATION**

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

124. Following the amendments which came into force in advance of the 2016 JCC process, the *Judicial Compensation Act* (“the Act”) provides in part:

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

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

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



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

*Judicial Compensation Act*, s.5(5), Joint Book of Authorities, **Tab 1**

125. Past Commissions, both for judges and judicial justices, were required to consider the following less robust list of factors:

- (a) the current financial position of the Government;
- (b) the need to provide reasonable compensation to the judges or judicial justices;
- (c) the need to maintain a strong court by attracting qualified applicants;
- (d) the laws of British Columbia;
- (e) any other matter the Commission considers relevant.

126. Despite that, as the 2016 JCC recognized, past Commissions took into account many of the factors which are now expressly identified, as “other matters that the Commission considered to be relevant”.

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 42

127. As the 2016 JCC explained in its Report:

No one criterion is *prima facie* more important than the other; the Commission’s report must show that we have considered all of the above factors (sub-section 5(5.1)). However, as each commission must look at what is reasonable on the unique facts and context before it, depending on those facts and context, the importance of each of the criteria will vary from commission to commission.

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 42

128. Section 5(5) confirms that the guiding principle is “the need to provide reasonable compensation for judges ...”. This is consistent with the Supreme Court of Canada’s direction in *Bodner*.

*Bodner, supra*, Joint Book of Authorities, **Tab 5**, para 67

### **Prospective Nature of the Process**

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

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

*Provincial Court Judges Association of British Columbia v. British Columbia (Attorney General)*, [2015] B.C.J. No. 574 (Court of Appeal), Joint Book of Authorities, **Tab 11**, paras 34, 37

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

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

132. In considering the first factor identified in s. 5(5)(a) of the Act, it is submitted that the 2019 JCC should weigh five points: the relevance of the Commission process itself; the significance, if any, to be drawn from the number of applicants; the need to attract highly qualified candidates; the competition for applicants from s. 96 courts; and the need to promote legal diversity on the Bench. These points are discussed in turn.

**The Relevance of the Commission Process Itself**

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

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

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

136. The importance of the JCC process itself was recognized by the 2004 JCC, which noted that an effective process would give incumbents and applicants alike "confidence

that they will be treated fairly over time”. This is essential because judges are constitutionally prohibited from negotiating with Government.

2004 JCC Report, Joint Book of Documents, **Tab 5**, page 25  
*PEI Reference, supra*, Joint Book of Authorities, **Tab 4**, para 170

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

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

2004 JCC Report, Joint Book of Documents, **Tab 5**, page 24

139. Third, and most importantly, that expectation assumes that this 2019 Commission and its successors will have a meaningful effect on the determination of judicial compensation.

### **The Number of Applicants**

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

141. There are lawyers for whom the opportunity to exercise power and control makes the prospect of becoming a judge attractive. There are lawyers for whom the prestige of the office makes the prospect of becoming a judge attractive. There will always be those lawyers in the pool of applicants for appointment. That does not mean that they are qualified.

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

### **This Criterion is More Rigorous than Attracting Qualified Applicants**

143. Since 2015, the articulation of this factor expressly recognizes the need to attract “highly” qualified applicants. Even when the earlier legislation did not include this adjective, both the Judicial Council and past JCCs had focussed on the need to attract the best possible candidates to the Bench.

144. The Judicial Council of British Columbia includes among its criteria for appointment a “superb legal reputation” (Judicial Council Annual Report 2017, Judges’ Association Documents, **Tab 3**, page 17). As cited above, the 2004 JCC stated that the “heading encompasses the need, not only to attract highly qualified candidates...”. (Joint Book of Documents, **Tab 5**, page 24) The 2007 JCC wrote: “The Commission recognizes the need to set salaries and benefits at a level sufficient to attract to the Provincial Court lawyers from the top ranks of the British Columbia bar.” (Joint Book of Documents, **Tab 6**, page 18) For its part, the 2010 JCC recognized “the need to set compensation for Provincial Court Judges at a level sufficient to attract outstanding candidates from both the private bar and the public service.” (Joint Book of Documents, **Tab 7**, page 30)

145. The 2013 JCC considered it necessary to maintain a “reasonable salary that is sufficient to attract exceptional candidates that meet the needs of the Court” and noted

that "...attracting the best candidates could become a problem if the compensation of the Court does not keep pace with other options open to highly desirable candidates."

2013 JCC Report, Joint Book of Documents, **Tab 11**, page 44

146. The 2016 JCC was mindful that "...attracting the highly qualified candidates could become a problem if the compensation does not keep pace with the other options open to those candidates". For that reason, "... it is necessary to maintain a reasonable salary that is sufficient to attract exceptional candidates who can meet the needs of the Court."

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 45

### **The Competition for Applicants**

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

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

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 45

2013 JCC Report, Joint Book of Documents, **Tab 11**, page 44

2010 JCC Report, Joint Book of Documents, **Tab 7**, page 33

2007 JCC Report, Joint Book of Documents, **Tab 6**, page 23

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<sup>2</sup> While section 6(2) of the *Provincial Court Act* (Joint Book of Authorities, **Tab 2**) requires that a prospective judge have a minimum of 5 years of membership in the Law Society of British Columbia, the Judicial Council requires at least 10 years in the practice of law among its criteria. (Judicial Council Annual Report 2017, Judges' Association Documents, **Tab 2**, page 17). In practice, successful applicants have approximately 20 years at the Bar prior to their appointment.

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

150. BC's Provincial Court judges are currently paid a salary equal to 81.8% of the salary paid to federally appointed judges working in British Columbia (\$270,000 versus \$329,900), a dollar gap of almost \$60,000 in salary alone. If the 2016 JCC's recommendation for 2019 is ultimately implemented, the salary would become \$281,251, which is 85.3% of the federal salary and a dollar gap of \$48,649.

151. As detailed in the salary section below, the Judges' Association's proposed 2020 salary of \$310,000 would restore the base salary for BC judges to an appropriate relationship with federal salaries and thereby reduce the financial disincentive for potential applicants to the Provincial Court. Its proposal for 2% salary adjustments each year thereafter would ensure that the salary gap does not widen significantly throughout this JCC's mandate.

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

- (a) A federally appointed judge accumulates a full judicial annuity (pension) after only 15 years of service with an effective accrual rate of 4.44% per annum. By contrast, with an accrual rate of 3%, the current judicial pension in British Columbia requires 23.3 years of service before a judge reaches maximum pension.
- (b) A federally appointed judge's annuity is calculated based on a higher salary than the salary paid to a Provincial Court judge.
- (c) A federally appointed judge's annuity is calculated based on the salary paid at the moment of retirement. By contrast, the pensionable salary used to

calculate the pension for Provincial Court judges is the average of the three highest consecutive years of salary.

- (d) Once a federally appointed judge's annuity benefits have been determined upon retirement and have commenced, they are *guaranteed* to be fully indexed against the eroding effects of inflation. While 100% indexing has been provided in the past for British Columbia's judicial pension benefits, the provision of indexing is discretionary and is not guaranteed.

153. A detailed comparison of the relative values of the annuity paid to federally appointed judges and the pension provided to BC's Provincial Court judges is set out in a Report prepared for the Judges' Association by André Sauv , actuary, dated May 6, 2019. As discussed in detail beginning at paragraph 268 below, even if the 2016 JCC's recommendations are eventually implemented, the combined value of the salary and pension paid to federally appointed judges would continue to be 34.5% greater (\$97,078 in dollar terms) than the value of the salary and pension arrangements for BC judges. As it stands currently, with the salary of \$270,000 that the Government substituted effective April 1, 2017, the gap is 40.1% of salary, or \$108,329 in dollar terms. For the reasons detailed below, it is time for this significant gap in compensation to be substantially reduced.

Sauv  Report, Judges' Association Documents, **Tab 3**, page 6

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



2016 JCC Report, Joint Book of Documents, **Tab 13**, page 45  
2013 JCC Report, Joint Book of Documents, **Tab 11**, page 44  
2010 JCC Report, Joint Book of Documents, **Tab 7**, page 33  
2007 JCC Report, Joint Book of Documents, **Tab 6**, page 23

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

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

2013 JCC Report, Joint Book of Documents, **Tab 11**, pages 42-43

156. The Chief Judge advised the 2016 JCC that his experience is that a significant proportion of those who are appointed to the Provincial Bench also applied for a s. 96 appointment (either before or after their appointment). In its Report, the 2016 JCC referred to the Chief Judge's Submission as stating that:

"... The Provincial Court and Supreme Courts seek qualified candidates from the same pool of potential candidates. His submission emphasized that the Provincial Court loses judges to the British Columbia Supreme Court, noting that in the past 35 years, 20 Provincial Court judges have been appointed to the Supreme Court. The Chief Judge is also aware that a number of his colleagues have applied for appointment to the Supreme Court. He said that he adopted and supported the PCJA's submission as being consistent with what he believes is necessary to attract and retain qualified applicants to the Court and support judges in their work serving British Columbians. Compensation and travel are two of the most common

issues that he hears about from judges in relation to attracting and retaining applicants. While the Government cannot do anything about the travel-intensive nature of the work, it can do something about salary.

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 43

157. The Judicial Council echoed these points in its submission to the 2016 JCC. The 2016 JCC recounted the Judicial Council's submission as noting:

"The Provincial Court competes with the Supreme Court for applicants and it is likely that the Provincial Court is losing applicants to the Supreme Court, possibly due to lower remuneration, a shorter pension accrual rate, the greater prestige of the Supreme Court or because of the different work and judicial "style". A significant widening of the gap in remuneration levels could only intensify the problem."

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 44

158. Since the 2016 JCC, three additional Provincial Court judges have left the Bench for an appointment to the BC Supreme Court, including the former Chief Judge.

159. For its part, the 2016 JCC ultimately concluded, while there had not been a problem in attracting highly qualified applicants to date, that "...could become a problem if the compensation of the Court does not keep pace with the other options open to these candidates." It determined, "[i]n any event, it is necessary to maintain a reasonable salary that is sufficient to attract exceptional candidates who can meet the needs of the Court."

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 45

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

## Legal Diversity

161. It goes without saying that in our pluralistic society, it is well recognized that a Bench consisting of members of diverse backgrounds - racial, ethnic, cultural, linguistic, and gender is not merely desirable, it is essential to the community's confidence in the courts. There is risk that a court, whose composition lacks diversity, will lose credibility with the general public or a significant portion of that general public.

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

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

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

165. If the pool of applicants fails to include highly qualified applicants from the private bar, there is substantial risk that the Provincial Court of British Columbia will have a disproportionate number of judges who practiced as Crown attorneys prior to their appointment. In its Report, the 2016 JCC recognized "a potential overrepresentation of Crown counsel relative to the bar generally". Although it noted that this was not necessarily a problem in that former Crown counsel are experienced in criminal law, it noted that a lack of diversity can nevertheless exacerbate the needs in other areas, especially civil and family law.

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

167. The concern about the lack of diversity in the applicants was raised by the Judicial Council before the 2010 JCC, which noted that the Judicial Council had identified “...a need for the Provincial Court to attract experienced private practitioners with a breadth of experience, particularly in civil litigation.”

2010 JCC Report, Joint Book of Documents, **Tab 7**, page 31

168. The most recent information available suggests the need continues. The Judicial Council’s 2017 Annual Report contains the following data regarding the number and area of practice of applicants to the Provincial Court.<sup>3</sup>

Year	Private	Crown Counsel	Other Areas	Total	Applicants Recommended	Applicants Appointed
2017	31 (52%)	20 (33%)	9 (15%)	60	14	14
2016	26 (62%)	12 (29%)	4 (9%)	42	11	9
2015	12 (46%)	9 (35%)	5 (19%)	26	17	13
2014	28 (56%)	18 (36%)	4 (8%)	50	17	6
2013	34 (74%)	8 (17%)	4 (9%)	46	19	10
2012	19 (54%)	10 (29%)	6 (17%)	34	12	11
2011	27 (61%)	12 (27%)	5 (11%)	44	14	6
2010	30 (63%)	10 (21%)	7 (15%)	47	17	8
2009	32 (54%)	10 (17%)	17 (29%)	59	7	4
2008	34 (63%)	14 (26%)	6 (11%)	54	13	5

Judicial Council of British Columbia, Annual Report 2017, Judges’ Association Documents, **Tab 2**, pages 34-35

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

169. In 2017, 60 applications were received, a number that is significantly higher than the 10 year average.<sup>4</sup> While in the past, applications from private practice had tended on average to form about two-thirds of the total number, in 2017, the percentage of private bar applicants dropped to 52%. Crown counsel submitted 33% of the applications and applications from other areas made up 15%. While some of those who were interviewed had submitted their applications in earlier years, the total number recommended in 2017 was 14, and 14 judges were appointed. Significantly, while the total number of applicants in 2017 was higher than in recent years, the number of “recommended” applicants remained similar to past years. This outcome reinforces that the goal must be to attract superb candidates, not simply a greater number of applicants.

170. The Judges’ Association asked the Law Society of British Columbia in 2013 to advise of the number of lawyers in the province by practice area. While the Law Society tracks the information in a slightly different way than the Judicial Council, it advised at that time that of approximately 10,369 practicing lawyers, there are 8,100 in private practice, 419 working as Crown counsel (prosecution only), and 1,850 working as in-house counsel for either government or corporations. While the numbers may not be identical today, there is no reason to expect the proportions have changed significantly.<sup>5</sup>

171. While 78% of practicing lawyers are private practitioners, these lawyers represented only 52% of applicants in 2017. By contrast, only 4% of practicing lawyers are Crown prosecutors, yet they represented almost 33% of applicants to the Provincial Bench. There has been a significant change since 2001, when the 2001 JCC noted:

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

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<sup>4</sup> The Judicial Council explains in the 2017 Annual Report that the increase was caused by an influx of paper applications being submitted before the launch of a new online application system.

<sup>5</sup> Repeated requests were made on behalf of the Judges’ Association, to obtain updated numbers of practicing lawyers, but to date the Law Society of BC has not provided the information.

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

173. The Judicial Council has made it its business to encourage applications from lawyers with a diversity of backgrounds. As set out in its 2017 Annual Report, “The Judicial Council ... analyzes factors such as the applicant’s gender, age, ethnicity, residential region and type of practice.”

Judicial Council of British Columbia, Annual Report 2017, Judges’ Association Documents, **Tab 2**, page 6

174. The Judicial Council’s efforts to ensure diversity in type of practice appear to be bearing fruit, at least to some degree, as a greater proportion of private practitioners have been appointed in recent years. Of the 41 judges who have been appointed since the beginning of 2016, 28 (68%) were from the private sector, and thirteen (32%) were from government (including Crown, Crown agencies, the Office of the Chief Judge and the Lieutenant Governor). Despite this, Crown lawyers continue to be overrepresented among those lawyers who choose to apply. As only 52% of applicants in 2017 were private practitioners, it remains to be seen if there will be any longer term impact from these initiatives.

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

176. Given the fact that the federal and provincial courts compete for candidates, the income of self-employed lawyers is subsumed to some extent in the remuneration of

federally appointed judges and how it is more attractive than that of provincially appointed judges. Taking into account that the two courts compete for the same pool of applicants, the 2016 JCC was “mindful that attracting the highly qualified applicants could become a problem if the compensation of the Court does not keep pace with the other options open to these candidates”.

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 45

**(b) Changes to the Jurisdiction of Judges**

177. Section 5(5)(b) mandates consideration of changes to the jurisdiction of judges (or judicial justices, as the case may be). As outlined in Part I of the Submission, beyond an increase in the amount that can be heard for a small claim, the jurisdiction of judges has not changed significantly since the 2016 JCC issued its Report. To the extent changes now under consideration materialize during the years within this JCC’s mandate, their impact on the determination of appropriate compensation, if any, can be considered by the next JCC.

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

178. Consistent with the finding of the 2016 JCC, the Judges’ Association submits that the compensation of other judges in Canada is an “important consideration” in determining reasonable compensation. This is because of the uniqueness of the judicial role in terms of not only the work performed but the manner in which their compensation must be determined. As such, the compensation of other judges provides the Commission with “objective markers of reasonableness” against which to measure the appropriateness of the salaries that are proposed for BC judges, taking into account the differences between each of those jurisdictions and British Columbia.

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 47

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

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

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

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

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

2010 JCC Report, Joint Book of Documents, **Tab 7**, page 26

2007 JCC Report, Joint Book of Documents, **Tab 6**, page 14

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

181. Judges of the Provincial Court are also subject to considerable scrutiny from the public and the media because of the types of criminal cases they adjudicate. The outcomes of judicial interim release applications and sentencing for crimes are often reported on by the media, and not all of this coverage is favourable to the judge, or even neutral. This is not to suggest that the courts, and by extension the judges of the Provincial Court, should not be subject to both public scrutiny and criticism. Rather, it is to note that this scrutiny can have a significant impact on judges, both professionally and personally. Moreover, judges are not in a position to respond publicly to the media scrutiny.



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

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

*PEI Reference, supra*, Joint Book of Authorities, **Tab 4**, para 186

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

1998 JCC Report, Joint Book of Documents, **Tab 3**, page 14

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

### **Comparison with Federally Appointed Judges in British Columbia**

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

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 47

186. In *Bodner*, the Supreme Court determined that a JCC would be misdirecting itself if it focused on a comparison with “s.96 judges” to the exclusion or virtual exclusion of other relevant factors. Indeed, as the 2016 JCC noted, the 2013 JCC considered that the disparity in compensation is an “important factor in determining reasonable compensation for Provincial Court judges, but it is not an overriding one”. To be clear, the Judges’ Association does not propose that the salary for British Columbia’s provincially appointed judges be determined based on the salary of federally appointed judges, but rather that the compensation paid to that group is a relevant and important consideration for reasons accepted by past JCCs in British Columbia.

*Bodner, supra*, Joint Book of Authorities, **Tab 5**, para 72  
2013 JCC Report, Joint Book of Documents, **Tab 11**, page 38  
2016 JCC Report, Joint Book of Documents, **Tab 13**, page 48

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

188. The 2010 JCC concluded: “... while there are differences between the types of cases and functions of the Provincial Court and the Supreme Court, each plays a very important role in the administration of justice in British Columbia”. The 2013 JCC concluded that “... federally appointed judges are an important comparator group for Provincial Court judges, but they are not the only relevant comparator group”. The 2016 JCC found that “...the disparity in compensation between judges of the Supreme Court and Provincial Court is an important factor in determining reasonable compensation for Provincial Court judges.”

### **Comparison with other Provincial Court Judges**

189. Because of the unique role of judges within our society, past JCCs have also compared the remuneration paid to Provincial Court judges in British Columbia with that paid to Provincial Court Judges in other jurisdictions. For the reasons explained by past JCCs and to reflect a comparison with other jurisdictions who are in favourable economic positions, the focus is on comparisons with Alberta, Saskatchewan and Ontario.

190. The factor set out in s. 5(5)(c) broadly refers to “compensation”, which imports consideration of all aspects of the total compensation package. By far the most significant aspects of judicial compensation are salary and pension. Judicial salaries are compared in the chart that forms **Tab 15** in the Joint Book of Documents. The Sauvé Report, which compares the relative value of the BC judges’ pension with the value of the pensions provided to judges in Alberta, Saskatchewan, Ontario and the federal jurisdiction, is provided at **Tab 3** in the Judges’ Association Documents. The Sauvé Report is discussed in detail beginning at paragraph 268 below.

191. To assist with a proper comparison of overall compensation the focus of the Sauvé Report is on salary and pension, as again, these are by far the most significant items of compensation.

192. This factor also demands that the JCC have regard to the “differences between those jurisdictions and British Columbia”. This requires consideration of differences such as the breadth of the jurisdiction exercised by BC Provincial Court judges as compared with their counterparts but, perhaps most significantly, the differences in the economic conditions and the fiscal positions of the governments across the jurisdictions. The latter points are addressed in some detail below, beginning at paragraph 207.

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

193. Subsection 5(5)(d) of the *Judicial Compensation Act* obliges this 2019 JCC to consider “changes in the compensation of others paid by provincial public funds in British Columbia”. This factor does not reference the actual salary levels of public servants, but rather only the *changes* in compensation of others paid by provincial public funds. This is because it is well understood that judges are not civil servants and occupy a unique role among the various groups paid by the public purse. The changes in the compensation for members of these other groups must be considered in light of the many differences between the manner in which public sector compensation is determined, and the process for determining judicial compensation. These differences are highlighted below.

*Judicial Compensation Act*, Joint Book of Authorities, **Tab 1**, ss 5(5)(d)

194. Firstly, Lamer CJC clearly articulated in *PEI Reference* that decisions about the use of public funds are inherently political and the purpose of the JCC is to act as an institutional sieve to depoliticize, to the greatest extent possible, the setting of judicial compensation. The level of increases provided to others paid by provincial public funds show what increases the Government has been prepared to agree to for groups which engage in collective bargaining, based on political considerations. These levels also show what the Government has, itself, decided it will pay to employees who do not bargain collectively.

*PEI Reference, supra*, Joint Book of Authorities, **Tab 4**, para 146

195. The changes in compensation of others paid by provincial public funds must be viewed as evidence of the willingness of the Government to pay and accordingly, its own political assessment of its financial position. An objective analysis of that financial position, and the enviable fiscal capacity that continues to benefit BC, is discussed in detail below and in the Report authored by the economist retained by the Judges’ Association, Mr. Ian McKinnon.

196. When considered as an indicator of the willingness of the Government as a whole to pay, the levels of the increases provided to other groups are a useful consideration against which the Government's position about appropriate salaries for judges can be tested. In referencing the changes in compensation, however, it must be recognized that pay for these other groups is not set in reference to the particular factors set out in the *Judicial Compensation Act* that govern this JCC process. Further, the changes for these other groups may well be affected, to greater or lesser degree, by the strength of the bargaining power enjoyed by the group in question.

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

*Newfoundland Association of Provincial Court Judges v. Newfoundland*, [2000] N.J. No. 258 (excerpt only), Judges' Association Documents, **Tab 5**, para 191

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

Report of the 2011 Manitoba Judicial Compensation Committee (excerpt only), Judges' Association Documents, **Tab 6**, page 73

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

1998 JCC Report, Joint Book of Documents, **Tab 3**, page 14-15  
*Provincial Court Act*, Joint Book of Authorities, **Tab 2**, s. 14(1)

200. Finally, when considering the relevance of public sector pay increases, it should be noted that the increases received by a certain proportion of the public sector have, at least in past years, been tied to the increases received by judges. Through collective bargaining or otherwise, the Government of British Columbia chose to link the increases in compensation for the following groups to the salary increases received by judges: Crown and legal counsel received the judges' salary increase plus a further increase of 1.27%<sup>6</sup>; Officers of the Legislature, whose salaries were tied to those of the Chief Judge<sup>7</sup>, and Masters of the Supreme Court whose remuneration is equal to that of Provincial Court judges.

See discussion in *Provincial Court Judges' Assn. of British Columbia v. British Columbia (Attorney General)*, [2012] B.C.J. No. 1443, 2012 BCSC 1022 (Macaulay J.), Joint Book of Authorities, **Tab 8**, para 58 and following

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

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<sup>6</sup> The Collective Agreement between the BC Crown Counsel Association and the Province expired on March 31, 2019. There is no indication whether any linkage with Provincial Court Judges' salaries will continue, as the collective bargaining process is on-going.

<sup>7</sup> The salaries for the Clerk and the Sargeant at Arms of the BC Legislature have been the focus of considerable recent media attention given that these particulars salaries are higher than the Chief Judge.

pressures exerted during collective bargaining. The fact that the Government chose to link the compensation of judges to that of others is a political choice. The Government's decision for these categories of employees (and for Masters) must not be allowed to be used by Government to politicize the setting of judges' compensation.

202. In 2010, the parties again agreed that the 2010 JCC was to be specifically advised that the impact of the linkage on the overall costs of the recommendations was not a factor to be considered by the JCC. Despite this, the Government did in fact consider the broader impact to the public sector in responding to the 2010 JCC's recommendations in March, 2011. Given the shocking conduct of the Government in its first response to the 2010 JCC, it is imperative that this 2019 JCC again clearly state in its decision that the existence of any linkage, historical or on-going, including any cost implications arising therefrom, is not properly a consideration in determining judicial compensation.

*Prov. Ct Judges' Assn of British Columbia v. British Columbia (Attorney General)*, [2012] BCJ. No. 1990, Joint Book of Authorities, **Tab 9**, paras 12-14

Letter of April 10, 2012 to Joseph Arvay, Q.C. from Jonathan Penner, with attachments, Joint Book of Documents, **Tab 9**

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

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

view, this is not a proper factor in the consideration of reasonable compensation for judges.”

2013 JCC Report, Joint Book of Documents, **Tab 11**, page 36

204. For many of the reasons set out above, the 2016 JCC cautioned against too much emphasis on this factor in the determination of appropriate compensation for judges. It wrote:

In this Commission’s view, changes in compensation is a statutorily-mandated factor that it must, and did, consider. Similar to the criterion in sub-section 5(5)(c), its utility is in ensuring commissions consider whether judicial salaries in British Columbia are getting out of step. However, it must be remembered that the judicial role is unique: judges and judicial justices hold an office. They are not employees. Thus, they are not easily compared with others in the British Columbia economy, even those in senior leadership in the public service. Moreover, the constitutional role of judicial compensation commissions is to depoliticize the determination of reasonable compensation. Therefore, too much emphasis on compensation changes to public sector employees, which is the result of political decisions made by Government in setting its fiscal policy, must be avoided.

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 53

205. Once again, what may or may not be appropriate for certain government employees or Masters of the Supreme Court is not within the mandate of this 2019 JCC. To the extent any linkages continue, the Government’s decision to create or maintain these linkages must not impact the JCC’s analysis about what is appropriate compensation for judges.

206. For all these reasons, data regarding changes in the compensation of others paid by public funds must be carefully interpreted and understood and is likely to be of limited, if any, utility in the determination of appropriate compensation for judges.



(e) **Generally Accepted Current and Expected Economic Conditions in British Columbia**

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

208. In the 2019 Budget Speech, delivered February 19, 2019, the following declarations were made:

"BC is in a strong position. We can be optimistic and deliberate about how we chart our course from here."

"Mr. Speaker, we are all grateful to live in a province with a thriving economy."

"On that note, Mr. Speaker, I'm proud to say that British Columbia's economy is thriving."

"We're starting from a positive place. We're projected to run surpluses of \$274 million, \$287 million, and \$585 million, over the three years of the fiscal plan, respectively."

"Our debt-to-GDP ratio is at its lowest level since before the financial crisis, and we are the only province with a triple-A credit rating from all three major international rating agencies. We have eliminated the operating debt for the first time in 40 years, and the Economic Forecast Council predicts British Columbia's economy will grow by 2.5% this year and 2.6% next year, leading all of Canada."

British Columbia Budget Speech 2019, **Tab 7**, Judges' Association Documents, pages 8, 14, 21-22

209. Projections from the Economic Forecast Council forecast that British Columbia's strong economy will outperform Canada over the next three years. The Council predicts BC's real gross domestic product will grow by 2.3% in 2018 and by 2.6% in both 2019

and 2020. Over the medium term, BC's economic forecast has been revised upward and is predicted to grow by 2.3% on average from 2021 to 2023.

News Release, "BC to lead Canada in Economic Growth", December 7, 2018, Judges' Association Documents, **Tab 8**

210. The Conference Board of Canada shares in the Government's positive outlook for British Columbia. The Board's most recent economic forecast reveals that BC will continue to lead all provinces in economic growth over the near term with GDP growth at 2.7% in 2018, 2.5% in 2019 and 2.4% in 2020.

Conference Board of Canada Provincial Economic Outlook for British Columbia, Winter 2019, Judges' Association Documents, **Tab 9**, page 1

211. A recent Globe and Mail Article referred to BC as the "economic powerhouse of the country" and, while noting that the Province has posted seven straight surpluses, noted that "BC is now becoming comfortable at the top of the economic heap in this country, a spot once seemed perennially reserved for its neighbour. Not anymore."

Globe and Mail, Meet Canada's new economic power: British Columbia, February 19, 2019, Judges' Association Documents, **Tab 10**

212. As it did for past JCCs, the Judges' Association retained economist Ian McKinnon of Pacific Issues Partners to provide expert evidence on its behalf. His Report, entitled *"The Current and Expected Economic Conditions in British Columbia and the Financial Position of the Government of British Columbia"*, dated May 2019 (hereinafter "the McKinnon Report"), is attached as **Tab 4** in the Judges' Association Documents.

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

- Canada's economic performance has been on par or better than comparable countries (page 5)
- The drop in employment levels through the 2008/09 crisis was significantly smaller in Canada and employment has recently returned to record levels (pages 5-6)
- this advantage [low debt levels entering the 2008-09 recession] continues for Canada and allows the economy to have greater resiliency in response to an economic downturn than is the case for many other jurisdictions (p. 6)
- the federal government is projecting a further gradual decrease in the debt-to-GDP ratio from its already low levels... This resilience is particularly important in times of uncertainty of the type highlighted by the IMF and OECD (p. 8).

McKinnon Report, Judges' Association Documents, **Tab 4**

214. The McKinnon Report describes the state of the British Columbia economy with a focus on the years at issue for this 2019 JCC. McKinnon remarks that a review of Annual Real GDP growth shows that British Columbia's economy has tended to outperform the Canadian economy, and that the Province's 2019/2020 Budget forecasts growth that continues to exceed that of the Canadian economy. He provides a table setting out the annual change in Real GDP from 2011-2021 and states that "BC's economic growth has or will exceed the Canadian average in nine of the eleven years covered..."

McKinnon Report, Judges' Association Documents, **Tab 4**, page 9

215. The McKinnon Report compares the unemployment rate in BC with other jurisdictions and notes that BC had the lowest rate in the country for 2016, 2017, and for every month of 2018 and 2019. He concludes:

"In summary, for the past five years, BC's economy has grown faster than the country as a whole. This economic strength is reflected in very strong employment numbers. Both the federal and BC provincial budget forecasts project low unemployment levels continuing over the next three years."

McKinnon Report, Judges' Association Documents, **Tab 4**, page 11

216. The McKinnon Report reflects on the structure of the provincial economy and considers whether that structure exposes the Province to “boom and bust cycles.” He compares the diversification of British Columbia with the energy producing provinces of Alberta and Saskatchewan, as well as the manufacturing provinces of Ontario and Quebec. McKinnon opines that the lack of diversification tends to result in “rapid and major changes in the economy as the critical sector grows rapidly or declines. Boom and bust cycles then affect those provinces’ finances”. For BC, in contrast, McKinnon remarks:

“... the well-diversified economies like BC’s may not feel booms as strongly, but they are also less likely to be as deeply affected when a critical sector has difficulties. In turn, this implies less uncertainty in forecasts of future provincial economic growth.”

McKinnon Report, Judges’ Association Documents, **Tab 4**, page 14

217. The McKinnon Report also considers the range of countries to which BC exports goods and finds that “[a]ll this diversity means greater resilience if faced by external economic shocks like trade disputes.”

McKinnon Report, Judges’ Association Documents, **Tab 4**, page 15

218. Because of the diversification of BC’s economy, the McKinnon Report concludes that “... the economy is less likely to be deeply affected by an exogenous shock that affects a specific sector of the economy”. As such, it is a “resilient economy”.

McKinnon Report, Judges’ Association Documents, **Tab 4**, page 16

219. In short, the current and predicted strength of the provincial economy over the period mandated by this 2019 JCC is overwhelmingly positive and supports the Association’s requests for increased compensation.

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

220. Section 5(5)(f) of the Act requires this 2019 JCC to consider the current and expected financial position of the Government over the three fiscal years that are the subject of its Report. A review of the Government's current and projected financial position reveals that its position is solid.

221. The McKinnon Report confirms the health and ongoing strength of the Government's fiscal position. He considers the Government's finances and fiscal situation from two perspectives: historically within British Columbia and in comparison with the situation in other provinces.

222. McKinnon provides a table showing the surplus/deficit in each year dating back to 2008 and forecasting through 2022. Aside from the years after the global recession, the Government has primarily enjoyed surpluses in each year. McKinnon opines that this table "displays the strength of the government's financial position and its success at responding to economic shocks." In terms of future projections, McKinnon notes "the continued plans for surpluses in the recent Budget", concluding that "the Provincial Budget shows nine successive budget surpluses, achieved or forecast."

McKinnon Report, Judges' Association Documents, **Tab 4**, page 19

223. McKinnon then reviews the considerable changes in the fiscal position of Government from the recession until current. He notes that while the 2.5% decline in provincial GDP in 2009 (caused by the recession) led to four successive deficits, those deficits were gradually reduced and were followed by a steady succession of surpluses. According to McKinnon, this bodes well for future projections and notes the contrast with the experience of earlier decades "...when long series of deficits were run by many Governments, even as the economy improved".

McKinnon Report, Judges' Association Documents, **Tab 4**, page 19

224. McKinnon states:

The effective responses of the government in restoring strong budget balances, even following a significant downturn, gives us confidence that the BC economy and the provincial government's finances will be resilient, even with an external economic threat.

McKinnon Report, Judges' Association Documents, **Tab 4**, page 19

225. McKinnon also considers trends in capital expenditures in the Province, noting that governments often tend to defer or reduce capital investments when it is trying to improve its finances. McKinnon notes that throughout the fiscal difficulties caused by the global economic recession, the Government nevertheless continued to invest in capital assets. McKinnon goes on to note that capital investment was not and will not be halted in order to improve provincial finances, explaining that the trends in capital investment in the coming three years "... confirms the healthy position of the government's finances".

McKinnon Report, Judges' Association Documents, **Tab 4**, page 20

226. The McKinnon Report also considers the Province's debt in some detail beginning at page 20. McKinnon summarizes the various ways debt is considered and concludes that "whether one looks at the overall debt, or only at the narrower taxpayer-supported debt, the levels are stable."

McKinnon Report, Judges' Association Documents, **Tab 4**, page 25

227. The McKinnon Report goes on to consider future obligations and pressures on the Province. With regard to the funding of public sector pension plans, McKinnon explains that pension fund assets amount "to 106.4% of accrued benefit obligations", meaning that, overall, the province has "public sector pension plans that are fully funded".

McKinnon Report, Judges' Association Documents, **Tab 4**, page 26

228. McKinnon concludes that the various measures of debts and future obligations, “clearly demonstrate the strong financial position of the province.”

McKinnon Report, Judges’ Association Documents, **Tab 4**, page 24

### **Comparison with Other Jurisdictions**

229. British Columbia is in an enviable financial position as compared with many jurisdictions across Canada.

230. According to McKinnon, British Columbia has the third lowest debt in the country, trailing only Alberta and Saskatchewan (provinces that enjoyed substantial oil revenues until recently) and enjoys considerably lower debt levels than Ontario (26% lower) and Quebec (32% lower).

McKinnon Report, Judges’ Association Documents, **Tab 4**, page 25

231. Clearly, the financial position of the Government is strong compared with the financial positions of most other governments in Canada. It is also strong relative to past years, including in particular the difficult time at which the 2010 JCC considered its recommendations, and the cautious optimism that prevailed in 2013. The “moderate growth” forecast at the time of the 2016 JCC has been the reality of the recent years and is forecast to continue throughout the period of this 2019 JCC’s mandate.

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 57

232. Given the prospective nature of this JCC process, McKinnon’s analysis regarding the accuracy and reliability of the Government’s own projections about its future fiscal position is particularly useful. McKinnon explains that in past decades, the BC Government had provided overly optimistic financial forecasts, including forecasted balanced budgets two or three years into the future that never materialized. However, in the recent decade, the past Liberal Government and the current NDP Government have

taken a far more cautious and conservative approach in its budget estimations and reporting practices.

McKinnon Report, Judges' Association Documents, **Tab 4**, page 27

233. The Province has taken two key steps aimed at securing external validation of the Government's forecasts. The first step is the use of the 13-member Economic Forecast Council to advise the Government on its own economic forecasts for British Columbia prior to the release of the annual Budget. This is used as a ceiling in creating the Budget, to prevent the Government from making overly optimistic forecasts. The second step is the Government's willingness to have external specialists advise on specifics of budget forecasting. As an example, McKinnon notes that the past Liberal Government brought in Dr. Tim O'Neill, a well-respected economist, to review the Government's revenue forecast models and he determined a level of prudence had been built into the revenue forecast approach.

McKinnon Report, Judges' Association Documents, **Tab 4**, page 27-30

234. On these steps, McKinnon remarks:

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

McKinnon Report, Judges' Association Documents, **Tab 4**, page 30

235. Lastly, the McKinnon Report considers the credit rating agencies' assessments of the Province's capacity to carry and service its debt levels. McKinnon reviews those ratings and remarks that BC "receives the highest possible ranking from three of the four



rating services” and that “More encouraging still for BC, only one other province even ties BC’s rating from any of the bond rating services - that is Saskatchewan which also receives Moddy’s Aaa-stable rating.”

McKinnon Report, Judges’ Association Documents, **Tab 4**, page 32

236. McKinnon includes summary statements from the various credit rating agencies and then concludes by stating:

“These statements from neutral and external evaluators are clear expressions of optimism about “the current and expected economic conditions in British Columbia,” and “the current and expected financial position of the government” over the three fiscal years that are the subject of the Commission’s report. Their conclusion about the strength of the financial position of the province are fully consistent with the comparisons and analysis of this report.”

McKinnon Report, Judges’ Association Documents, **Tab 4**, page 33

237. McKinnon refers to the Government’s “record of caution in forecasting” and concludes that “[w]hether using historical comparisons, cross-jurisdictional comparisons or the ratings of neutral, expert observers, BC’s financial position is solid”.

McKinnon Report, Judges’ Association Documents, **Tab 4**, page 36

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

### **Other Relevant Factors**

239. Subsection 5(5.2) of the *Judicial Compensation Act* also directs this 2019 JCC to consider other “factors it considers relevant”, but requires that if it does so, it must explain the relevance of those factors in its report. No other factors are proposed by the Judges’ Association for consideration by this 2019 JCC.

*Judicial Compensation Act*, Joint Book of Authorities, **Tab 1**

## **PART IV: RECOMMENDATIONS**

### **1. Salary**

#### **Recommendation Sought:**

- That effective April 1, 2020, the annual salary for *puisne* judges shall be increased to \$310,000; and
- That effective on each of April 1, 2021 and April 1, 2022, the salaries for *puisne* judges shall be further increased by two percent (2%) per annum.

240. It is respectfully submitted that a fair consideration of the relevant objective factors supports that there ought to be a significant salary increase for the fiscal year 2020. As discussed below, the salaries of BC judges have fallen far behind the salaries of their most important comparators, to an extent which is not justifiable based on the relevant factors. The Judges' Association's proposal is to restore the salary to a level which is fair and appropriate. Once so restored for 2020, the proposal is for only minor adjustments in 2021 and 2022, which will protect against salary erosion due to rising cost of living and will maintain a reasonable relationship with the appropriate comparators throughout the mandate of this 2019 JCC.

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

#### **Current Salary**

242. Based on the salaries substituted by the Government for those recommended by the 2016 JCC, *puisne* judges are currently paid a salary of \$270,000, which was effective April 1, 2019. If the recommendations of the 2016 JCC are eventually implemented, the 2019 salary will rise to \$281,251.

243. The Chief Judge, Associate Chief Judges and Regional Administrative Judges receive differentials on top of the *puisne* judge salary equal to 112%, 108% and 106%

respectively. To be clear, the Judges' Association is proposing no change to the percentage differentials. The proposal contemplates that these would continue to apply to the increased *puisne* judge salaries.

Government's Response to the 2016 JCC Report, Joint Book of Documents, **Tab 14**

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 62

### Salary History 2011-2019

244. The recent history of judicial salaries in BC is complex, given the Government's rejection of the salary recommendations of three successive JCCs and the ensuing litigation. The following table summarizes the recommendations and the outcomes of the 2010, 2013 and 2016 JCCs:

Year	JCC Recommendation	Government's Response(s)	Final Outcome
2011	\$231,138	\$231,138 / \$231,138	\$231,138
2012	\$231,138	\$231,138 / \$231,138	\$231,138
2013	\$242,464	\$231,138 / \$234,605	\$242,464
2014	\$241,500	\$236,950 / \$244,889	\$244,889
2015	\$245,122	\$240,504 / \$248,562	\$248,562
2016	\$250,024	\$244,112 / \$252,590	\$252,590
2017	\$273,000	\$262,000	Unknown
2018	\$277,095	\$266,000	Unknown
2019	\$281,251	\$270,000	Unknown

245. The role of this 2019 JCC is not to determine what percentage increase is appropriate for judges. Rather, its task is to determine what compensation is appropriate for the three years within its mandate. For that reason, the Judges' Association urges the JCC to recommend an appropriate salary figure for each year within its mandate, rather than a percentage increase from the current salary.

246. For the reasons set out below, the uncertainty over the 2019 salary is largely beside the point and should not cause this 2019 JCC any practical difficulty. This is

because consideration of the relevant factors identified in the *Judicial Compensation Act*, and the reasoning of past JCCs, justifies the proposal by the Judges' Association for a salary that exceeds any of the potential final salaries for 2019.

## **2020 Salary**

247. The Judges' Association submits that a salary of \$310,000, effective April 1, 2020, is appropriate as it reasonably takes into account all of the objective factors that must be considered by this 2019 JCC pursuant to section 5(5) of the *Judicial Compensation Act*. How each of the factors supports this proposal is explained in detail below. The modesty of this proposal is also confirmed when it is considered in the context of the combined value of both the salary and pension paid to judges in BC and the comparator jurisdictions.

## **Attraction of Highly Qualified Applicants**

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

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

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

Provincial Court judges and Supreme Court justices needs to be closed; but there is sufficient evidence to show that letting the gap widen could be dangerous.

2013 JCC Report, Joint Book of Documents, **Tab 11**, page 47

250. The 2016 JCC recommended salaries on the basis, in part, that “the gap [with federal salaries] would be closed somewhat.” This would have occurred with the salary of \$273,000 recommended for 2017, which is 86.6% of the 2017 federal salary. The salary substituted by Government when it rejected the recommendations amounts to only 83%. The relationship has slipped further by 2019, to only 81.8% of the 2019 salary for federally appointed judges, given the 2019 salary of \$270,000 that was substituted by Government for the \$281,251 recommended by the 2016 JCC.

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 61

251. The current salary for a federally appointed judge is \$329,900. The 2020 federal judges’ salary is not yet known but can be reasonably estimated using available forecasts for Average Weekly Earnings for Canada. According to section 25 of the *Judges’ Act*, R.S.C., 1985, c.J-1, the salary for federally appointed judges will be increased by the percentage change in the Industrial Aggregate Index (also known as Average Weekly Earnings) in the previous calendar year. It may also be that the 2020 federal Judicial Compensation and Benefits Commission will recommend further adjustments in compensation beyond the statutory adjustments.

252. In the recent 2017 Alberta JCC process, which conducted its hearings in November 2018, the Government of Alberta provided the Commission with the estimates of increases in the Average Weekly Earnings for Canada which were produced by the Office of the Chief Actuary, of the Office of the Superintendent of Financial Institutions Canada. Those estimates are included in the chart below, which compares them with the increases actually received by federal judges to date, and the salaries that would result based on the estimates:

	2017	2018	2019	2020	2021	2022
Office of Chief Actuary estimate for AWE in <i>preceding</i> calendar year		2.0%	3.2%	2.9% (\$339,467)	2.8% (\$348,972)	3.1% (\$359,790)
Federal salary	\$315,300	\$321,600	\$329,900	AWE	AWE	AWE
Percentage increase received		1.998%	2.58%			

2019 Actuarial Report on the Employment Insurance Premium Rate, Judges' Association Documents, **Tab 11**, page 23

253. The estimate provided in Chief Actuary's report for 2018 was slightly higher than the actual figure used to adjust federal salaries effective April 1, 2019. Given this, it may be reasonable to assume that the increases will be between 2.5% and 2.9%, which would result in a federal salary in the range of approximately \$338,148 to \$339,467 commencing April 1, 2020.

254. The proposed salary of \$310,000 would be 91.3% of the estimated salary of \$339,467 for federal judges (or 91.6% of the lower estimated salary). This proposal reflects B.C.'s very strong economic position and the fact that the gap with federal salaries has narrowed considerably in the important comparator jurisdictions in recent years. Those other judicial salaries are addressed below.

255. Because the salaries of federally appointed judges are adjusted annually based on the AWE for Canada and the Judges' Association is proposing fixed adjustments of 2% in each of 2020 and 2021, the salaries for BC judges will not increase at the same rate as the salaries of federal judges. However, they will remain within a range that past JCCs have considered reasonable throughout the mandate of this 2019 JCC.

## Comparison with Judicial Salaries in Alberta, Saskatchewan and Ontario

256. As set out in the chart at **Tab 15** in the Joint Book of Documents, the group of provinces in the top tier of judicial salaries are Alberta, Saskatchewan and Ontario. The salaries of BC judges have fallen well below the salaries of judges in those comparator jurisdictions, and currently lag behind the salaries of judges in Manitoba.

257. The Judges' Association's proposal would properly and appropriately restore the salaries of BC judges to within close range of judicial salaries in the other top tier jurisdictions. This is consistent with the reasoning of past JCCs, the Government's own argument to the 2007 JCC and the relative strength of BC's financial position among the other provinces as described in the McKinnon Report. The strong economic prospects for British Columbia and the Government's solid financial position are such that it is not reasonable for judicial salaries to fall outside the close range of these important comparators.

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

The Government argues that the effect of the increases recommended by the 2004 Commission was to place British Columbia Provincial Court salaries precisely where they should be in comparison to the other provinces. The Government, relying on the economic indicators cited earlier, maintains that British Columbia's economy ranks third behind that of Ontario and Alberta, as do its wages. As such, it is entirely fitting that British Columbia's judges should receive the third highest salaries, behind their counterparts in Ontario and Alberta. It would not be appropriate, the Government argues, to pay one isolated segment of this province disproportionately higher than the rest.

2007 JCC Report, Joint Book of Documents, **Tab 6**, page 17

259. Because of the particular relevance of Alberta, Saskatchewan and Ontario as comparators for British Columbia, and because salaries for relevant years have yet to be

established in those jurisdictions, it is important to consider reasonable predictions about current and future judicial salaries in those provinces, to facilitate a comparison going forward.

260. The chart below compares the Judges' Association's proposal (in italics) with the established salaries and/or the Judges' Association's reasonable estimates of judicial salaries in each of Alberta, Saskatchewan, and Ontario. The basis for each of the estimates, shown in italics, is explained in the paragraphs that follow.

Jurisdiction	2017	2018	2019	<b>2020</b>	2021	2022
<b>BC</b> (actual) (recommended)	\$262,000 <i>\$273,000</i>	\$266,000 <i>\$277,095</i>	\$270,000 <i>\$281,251</i>	<b><i>\$310,000</i></b>	\$316,200	\$322,524
<b>Alberta</b>	<i>\$297,225</i>	<i>\$303,467</i>	<i>\$309,232</i>	<b><i>\$315,107</i></b>		
<b>Saskatchewan</b>	\$290,848	\$296,792	\$304,074	<b><i>\$313,500</i></b>	\$320,397	\$326,805
<b>Ontario</b>	\$292,829	\$300,600	\$310,337	<b><i>\$321,373</i></b>	\$332,466	

### Alberta

261. The Report of the 2017 Alberta JCC was provided on May 23, 2019 but remains confidential pending consideration by cabinet within 120 days. The 2016 salary for Alberta judges was \$293,991. The proposals advanced by the Government of Alberta and the Alberta Provincial Judges' Association for each of the years at issue are set out in the chart below, together with the salaries that the Alberta judges argued would result simply from increases based on the percentage change in the CPI for Alberta.

	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>	<b>2020</b>
APJA	293,991 (existing salary)	\$296,382	\$302,304	94.5% of the federal salary (proposal estimated to be \$309,990)	95% of the federal salary (proposal estimated to be \$317,863)



Government of Alberta	\$293,991	\$293,991	\$293,991	\$293,991	\$293,991
Salaries if adjusted only for Alberta CPI	\$293,991	\$297,225	\$303,467	\$309,232	\$315,107

Excerpt of the Submissions filed by the Alberta Provincial Judges' Association to the 2017 Alberta JCC, Judges' Association's Documents, **Tab 12**

262. The 2017 Alberta JCC Report will be provided to this 2019 JCC as soon as it is publicly available.

### Saskatchewan

263. The 2017 Saskatchewan JCC recommended (and the Government accepted) a *puisne* judge salary of \$295,792 for the fiscal year 2018, followed by percentage increases in each of 2019 and 2020 equal to the percentage change in the Saskatchewan CPI plus an additional 1%. The 2019 salary is \$304,074 but the 2020 salary must be estimated, since the annual percentage increase in the Saskatchewan CPI for 2019 remains unknown. Saskatchewan's 2019/20 Budget predicts growth in the Consumer Price Index at 2.1% per annum in 2019. As such, we have assumed that Saskatchewan salaries will increase by 3.1% effective April 1, 2020 to \$313,500.

Saskatchewan 2019/20 Budget (excerpt only), Judges' Association Documents, **Tab 13**

264. Using the estimates from the 2019 Saskatchewan Budget, and assuming the next JCC recommended that only CPI-based adjustments should be made in the years 2021 and 2022, the salaries in those years are likely to be \$320,397 and \$326,805 respectively.

Saskatchewan 2019/20 Budget (excerpt only), Judges' Association Documents, **Tab 13**

265. Given the analysis contained in the McKinnon Report, including that BC and Saskatchewan share the strongest credit rating of all jurisdictions in Canada, it is fair and

appropriate that the salary for BC judges be in close proximity to that paid to judges in Saskatchewan.

Ontario

266. Ontario judges’ salaries have been determined for the period April 1, 2014 to March 31, 2022. The Report of the 9<sup>th</sup> and 10<sup>th</sup> Provincial Judges Remuneration Commission is attached as **Tab 14** in the Judges’ Association’s Documents. The Ontario salaries for recent years, and those within this 2019 JCC’s mandate are as follows:

	2017	2018	2019	2020	2021	2022
Ontario	\$292,829	\$300,600	\$310,337	94.67% of feds <i>(If the federal salary is \$339,467 as estimated above, the Ontario salary would be \$321,373)</i>	95.27% of feds <i>(If the federal salary is \$348,972 as estimated above, the Ontario salary would be \$332,466)</i>	IAI indexing as required by Regulation (but there may be further adjustments, depending on next Commission process)

267. According to the Government’s public statements and the McKinnon Report, BC’s economy is thriving. The economic and fiscal circumstances in Alberta and Saskatchewan, and to some extent Ontario, have been challenging in recent years, and BC’s relative economic position among the provinces has only improved as a result. Given the particularly positive economic and fiscal outlooks for BC relative to those of the main comparator jurisdictions, the Judges’ Association’s proposal for a salary that would be somewhere in the range of those three provinces is entirely reasonable.

A Total Compensation Analysis Confirms the Modesty of Association’s Proposals

268. The Sauvé Report, at **Tab 3** in the Judges’ Association Documents, compares the total value of the salaries and pension arrangements provided in each of British Columbia,

Alberta, Saskatchewan, Ontario, and the federal jurisdiction. Mr. Sauvé calculated the compensation value of retirement pension benefits as a level percentage of salary each year over the working lifetime of typical judges in British Columbia. As the compensation value of the judicial pension arrangements varies by age at appointment and retirement, Mr. Sauvé used the demographic data of the current Bench including the retirement experience of British Columbia judges, to calculate a weighted average compensation value that applies for the Bench as a whole. Mr. Sauvé then calculated the relative value, to the current group of British Columbia judges, of the pension plans available to judges in the other jurisdictions.

269. According to the Sauvé Report, depending on the age of an individual judge at appointment, the value of British Columbia’s judicial pension arrangement varies from a low of 40.6% of salary to a high of 44.5% of salary. The weighted average value, which takes into account demographics of the entire complement of British Columbia judges, is 43.9% of salary. The value of British Columbia’s judicial pension arrangements is significantly lower than the value, to the British Columbia judicial complement, of the pension currently available to judges in each of Ontario, the federal jurisdiction, and Saskatchewan:

Jurisdiction	Weighted Average Compensation Value
British Columbia	43.8%
Alberta	41.7%
Saskatchewan	51.0%
Ontario	64.1%
Federal	65.8%

Sauvé Report, Judges’ Association Documents, **Tab 3**, page 5

270. As the Sauvé Report confirms, at the current salary of \$270,000, BC judges currently receive substantially less in total compensation (referring to salary and pension combined), than judges in the other jurisdictions:

	Difference in Value of Salary and Pension, using current BC salary of \$270,000		Dollar Difference in Value of Salary and Pension, using 2019 salary recommended by 2016 JCC (\$281,251)	
	Dollar Difference	% Difference	Dollar Difference	% Difference
Federal	\$108,329	40.1%	\$97,078	34.5%
Ontario	\$74,447	27.6%	\$63,196	22.5%
Saskatchewan	\$46,248	17.1%	\$34,997	12.4%
Alberta	\$20,308 (using the 2016 salary for Alberta)	7.5%	\$9,057 (using the 2016 salary for Alberta)	3.2%

271. Once the Alberta salary for 2019 is established, the gap with compensation paid to Alberta judges is likely to increase further.

272. Using the figures set out in the Sauvé Report, it is readily apparent that the Judges' Association's proposed increase to \$310,000 effective April 1, 2020, will still leave a substantial gap in the compensation payable to judges in the other jurisdictions, when viewed from the perspective of the combined value of salary and pension. Using the estimates discussed above for each of the judges' salaries in the other provinces, the total compensation of each can be calculated as follows:

Jurisdiction	Estimated/Proposed Salary for 2020	Weighted Average Pension Value as % of Salary (as per Sauve)	Total Compensation	Remaining Dollar Difference with JA Proposal
British Columbia (JA proposal)	\$310,000	43.5%	\$444,850	-
Alberta (assuming CPI based adjustments)	\$315,107	42.1%	\$447,767	\$2,917
Saskatchewan	\$313,500	49.6%	\$468,996	\$24,146
Ontario	\$321,373	59.7%	\$513,233	\$68,383
Federal	\$339,467	65.0%	\$560,121	\$115,271

273. The foregoing ignores a further disparity that arises from the fact that judges in both Ontario and the federal jurisdiction are entitled to 8 weeks of vacation as compared with the 6 weeks available to British Columbia judges. The additional 2 weeks of vacation is the equivalent of an additional 4% in salary. While the Association contends that the vacation entitlement for British Columbia judges should be increased in the future, no such change is proposed to this 2019 JCC.

274. The total compensation comparison provided in the Sauvé Report supports an argument for increases to salary and/or to the value of the pension benefit provided in British Columbia beyond what is currently proposed. However, the Judges' Association is not proposing to address the current disparities all at this time. The comparisons set out in the Sauvé Report clearly demonstrate that the Judges' Association's proposals are fair and reasonable.

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

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

276. The Government's 2019 *Sustainable Services Negotiating Mandate*, which is used for bargaining with public sector unions, provides for three-year collective agreements with general wage increases of 2% in each year. While the Government has recently settled collective agreements with various public sector unions within its 2019 mandate, various media and other accounts reveal the multitude of other financial incentives that go beyond the general wage increases provide to public sector unions.

277. What is clear from the submissions that have been made above is that the remuneration of BC judges has fallen significantly behind those of the most appropriate comparators. If BC judges' wages were commensurate with that range, the government's mandate of 2% wage increases would be reasonable and might very well have been the subject of a joint submission. However, the time has come for an appropriate adjustment to be made now to rectify the vast disparity that currently exists.

278. Again, the general wage increases for others paid from Provincial funds are only the starting point for individual employees who may also receive bonuses, step or merit increases, or promotions to other classifications with a higher rate of pay.

279. The 2013 JCC specifically rejected the Government's then proposal that its bargaining mandate for employees in the public sector, which included an "Economic Stability Dividend", should be provided to judges. The 2013 JCC wrote:

Additionally, the Government's proposal to tie an increase in judges' salaries in 2016/17 to an amount equal to the percentage by which the Province exceeds the current real GDP forecast for the previous year is highly unusual and potentially problematic. In the *PEI Reference*, the Supreme Court of Canada noted that one of the purposes of objective commissions is to "guard against the possibility that government inaction could be used as a means of economic manipulation by allowing judges' real salaries to fall because of inflation" (para 147). Accordingly, commissions, and in some provinces, governments, have indexed or related judges' salaries to inflation, CPI or other measures that reflect the cost of living. A measure like real GDP, which effectively ties a judge's salary to the success of a government's economic policies, is potentially improper in that it may lead to the perception that judges have an interest in supporting government economic initiatives that have the potential to boost GDP, which may affect the way cases are decided. The perception that judges have any influence over the success of economic policies that could affect their compensation should be avoided to better preserve judicial independence. Accordingly, it is the Commission's view that cost-of-living indexes are more applicable to the problem of protecting judicial salaries from being improperly eroded.

2013 JCC Report, Joint Book of Documents, **Tab 11**, pages 46-47

280. The 2016 JCC cautioned against undue emphasis on compensation changes for public sector employees, which are the result of political decision making:

In this Commission's view, changes in compensation is a statutorily-mandated factor that it must, and did, consider. Similar to the criterion in sub-section 5(5)(c), its utility is in ensuring commissions consider whether judicial salaries in British Columbia are getting out of step. However, it must be remembered that the judicial role is unique: judges and judicial justices hold an office. They are not employees. Thus, they are not easily compared with others in the British Columbia economy, even those in senior leadership in the public service. Moreover, the constitutional role of judicial compensation commissions is to depoliticize the determination of reasonable compensation. Therefore, too much emphasis on compensation changes to public sector employees, which is the result of political decisions made by Government in setting its fiscal policy, must be avoided.

2016 JCC Report, Joint Book of Documents, **Tab 13**, page 53

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

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

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

2011 Manitoba JCC Report (excerpt), Judges' Association Documents, **Tab 6**, page 73

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

282. Significant detail regarding these factors is set out beginning at page 61 and will not be repeated here. British Columbia's solid financial position and abundant fiscal capacity support its ability to pay what is appropriate compensation for judges in light of the other factors.

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

284. As was the case in 2016, the current circumstances are significantly improved from those which existed at the time of both the 2010 and 2013 JCCs. The economic conditions and financial position of the Government support a recommendation that fairly reflects the other objective criteria identified in the Act, and the position of BC as an economic and fiscal leader among its provincial counterparts.

2007 JCC Report, Joint Book of Documents, **Tab 6**, page 23  
2010 JCC Report, Joint Book of Documents, **Tab 7**, page 26  
2013 JCC Report, Joint Book of Documents, **Tab 11**, page 35  
2016 JCC Report, Joint Book of Documents, **Tab 13**, page 57

### **2021 and 2022 Adjustments**

285. Beyond the increase proposed for 2020, the Judges' Association proposes that salaries be adjusted by a further 2% per annum on each of April 1, 2021 and April 1, 2022 to \$316,200 and \$322,524 respectively. It proposes a fixed percentage rather than a CPI-based adjustment on the understanding that certainty for budgeting purposes was a



determining factor in the Government adopting a prospective JCC process. The 2% adjustments are generally in line with what has been forecasted for the annual percentage change in CPI for 2020 and 2021 (2.1% and 2.0% respectively), according to the Government's Budget 2019. Moreover, they accord with the 2% per year mandate the Government determined it would attempt to achieve in collective bargaining with public sector employees (although it appears to have exceeded that in many instances, when other negotiated benefits are considered).

Budget 2019, Joint Book of Documents, **Tab 16**, page 86

2019 Sustainability Services Negotiating Mandate, Joint Book of Documents, **Tab 22**

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

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

*PEI Reference, supra*, Joint Book of Authorities, **Tab 4**, para 195

288. In summary, the 2020 salary of \$310,000 that is proposed by the Judges' Association is consistent with the reasoning of past JCC's and the Government's own argument to the 2007 JCC that the salaries for Provincial Court judges in BC should compare with the salaries of judges in other jurisdictions in a manner that is consistent

with the relative economic strength of BC among the jurisdictions. Consistent with the Government's relative economic position, the Judges' Association's proposed 2020 salary would place their remuneration in the same general range as that of judicial salaries in Alberta, Saskatchewan and Ontario (although those provinces would still be ahead of BC). The proposal for 2% adjustments in each of 2021 and 2022 would protect judges' salaries against erosion due to expected increases in the cost of living in BC and would ensure that their salaries at least partially keep pace with those of their most important comparators.

## 2. INTEREST ON RETROACTIVE SALARY

### Association's Request:

- That simple interest shall be paid, from April 1, 2020 to the date of retroactive payment of salary increase(s) including the differentials for the administrative judges and related per diems for part-time judges, in accordance with the relevant prejudgment and post-judgment interest rates as set out in *The Court Order Interest Act*, RSBC 1996, c. 79.
- That prejudgment interest shall be payable from April 1, 2020 to the date it is resolved or determined that the recommendations shall be implemented, and post-judgment interest should be payable from that date to the date that judges are paid the resulting retroactive adjustments.

### The Purpose of an Interest Award

289. The Supreme Court of Canada considered the purpose of judgment interest in *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601 (Judges' Association Documents, **Tab 15**), in which the Court considered whether a trial judge had jurisdiction to award compound interest.<sup>8</sup> The Court described the concept of the time-value of money which underlies an interest award. On behalf of the Court, Justice Major wrote at paragraphs 21 to 23:

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<sup>8</sup> It is acknowledged that an award of compound interest is generally reserved for cases of breach of contract where the parties agreed, knew or ought to have known that compound interest would apply – see paragraph 55 of the decision.

The value of money decreases with the passage of time. A dollar today is worth more than the same dollar tomorrow. Three factors account for the depreciation of the value of money: (i) opportunity cost (ii) risk, and (iii) inflation.

The first factor, opportunity cost, reflects the uses of the dollar which are foregone while waiting for it. The value of the dollar is reduced because the opportunity to use it is absent. The second factor, risk, reflects the uncertainty in delaying possession. Possession of a dollar today is certain but the expectation of the same dollar in the future involves uncertainty. Perhaps the future dollar will never be paid. The third factor, inflation, reflects the fluctuation in price levels. With inflation, a dollar will not buy as much goods or services tomorrow as it does today. (G.H. Sorter, M.J. Ingberman and H.M. Maximon, *Financial Accounting: An Events and Cash Flow Approach* (1990), at p. 14). The time-value of money is common knowledge and is one of the cornerstones of all banking and financial systems.

Simple interest and compound interest each measure the time value of the initial sum of money, the principal. The difference is that compound interest reflects the time-value component to interest payments while simple interest does not. ...

290. At paragraph 36, Justice Major described the theory underlying judgment interest:

In *The Law of Interest in Canada* (1992), at pp 127-28, M.A. Waldron explained that the initial theory underpinning an award of judgment interest was that the defendant's conduct was such that he or she deserved additional punishment. The modern theory is that judgment interest is more appropriately used to compensate rather than punish. At pp. 127-28, she wrote:

Compensation is one of the chief aims of the law of damages, but a plaintiff who is successful in his action and is awarded a sum for damages assessed perhaps years before but now payable in less valuable dollars finds it quite obvious that he has been shortchanged. Equally obviously, payment of interest on his damage award from some relevant date is one way of redressing this problem.

The overwhelming opinion today of Law Reform Commissions and the academic community is that interest on a claim prior to judgment is properly part of the compensatory process. [Citations omitted.]

291. Interest is not punitive against the payor of interest. Rather, an award of interest recognizes the decline in the value of money where payment is delayed, and is recognized as being a proper part of compensation.

### **The JCC has Jurisdiction to Recommend Interest**

292. Section 5(1) of the *Judicial Compensation Act* provides:

#### **Report and recommendations**

5(1) Not later than October 1 following its formation, the commission must, in a preliminary report to the minister and chief judge,

- (a) report on all matters respecting the remuneration, allowances and benefits of judges and judicial justices, and
- (b) make recommendations with respect to those matters for each of the next 3 fiscal years.

293. This 2019 JCC's jurisdiction in s. 5(1) to report on all matters respecting "remuneration", as well as its broadly worded jurisdiction over "benefits" paid to judges, necessarily includes the jurisdiction to make a recommendation with respect to interest.

294. As the *Bank of America Canada* decision makes clear, an interest award is compensatory and accounts for the decline in the value of money when there is a delay in making a payment. It is therefore fair and reasonable that judges receive interest on any salary adjustments paid by government where payment is delayed, whatever the reason, because the value of the compensation declines with the delay. In the interim, the government has had the use of the money that will ultimately be payable to judges as part of their compensation package.

### **A JCC's Jurisdiction to Recommend Interest Was Confirmed by Manitoba's Court of Appeal**

295. Interest on retroactive salary adjustments has been recommended by four successive JCCs in Manitoba. On the first occasion, when the payment of interest was recommended by the 2008 Manitoba JCC, the Government rejected the recommendation

on the basis that the 2008 Manitoba JCC lacked jurisdiction to make such a recommendation. The Government's reasons for rejecting, *inter alia*, the interest recommendation, were considered by the Court of Queen's Bench for Manitoba (Judges' Association Documents, **Tab 16**, paras 127 to 133) and then by Manitoba's Court of Appeal.

*Manitoba Provincial Judges' Assn., v. Manitoba*, [2012] M.J. No. 105 (Q.B.), Judges' Association Documents, **Tab 16**

*Manitoba Provincial Judges' Assn. v. Manitoba*, [2013] M.J. No. 279 (C.A.) ("Decision of Steel J.A."), Judges' Association Documents, **Tab 17**

296. Both Courts agreed that the 2008 JCC had jurisdiction to make the recommendation under s.11.1(3)(b) of *The Provincial Court Act* (Manitoba). That section reads:

11.1(3) A compensation committee shall investigate, report and make recommendations with respect to the following:

- (a) the salaries to be paid to
  - (i) the Chief Judge,
  - (ii) an Associate Chief Judge, and
  - (iii) a judge of the court, other than the Chief Judge or an Associate Chief Judge; and
- (b) the benefits to be paid, including pensions, vacations, sick leave, disability benefits, travel expenses and allowances, to the Chief Judge, an Associate Chief Judge and a judge of the court.

*The Provincial Court Act (Manitoba)*, C.C.S.M. c. C275

297. Notably, the legislation which empowers this 2019 JCC is similarly broad:

**5(1)** Not later than October 1 following its formation, the commission must, in a preliminary report to the minister and chief judge,

- (a) report on all matters respecting the remuneration, allowances and benefits of judges and judicial justices, and

- (b) make recommendations with respect to those matters for each of the next 3 fiscal years.

*Judicial Compensation Act*, Joint Book of Authorities, **Tab 1**

298. Steel J.A., who wrote for the Court of Appeal, concluded that the Act necessarily implied that the JCC had jurisdiction to recommend interest.

*Decision of Steel J.A.*, Judges' Association Documents, **Tab 17**, para 136

299. Despite that the decision of the Manitoba Court of Appeal was still outstanding at the time Manitoba's 2011 JCC's report was released, the 2011 JCC also recommended that interest should be paid on the retroactive salary adjustments. It wrote:

While we are not bound to follow recommendations of past JCCs, we accept that it is open to interpret the Act in such a way as to allow the awarding of interest on retroactive salary adjustment.

Further, there is no denying that the judges have suffered from the loss of the use of the money and the Province has had the use of that money.

In light of the above, and to maintain consistency, we are prepared to recommend the payment of interest in the manner requested by the Association.

2011 Manitoba JCC Report, Judges' Association Documents, **Tab 6**, page 87

300. The Government of Manitoba initially rejected the interest recommendation of the 2011 Manitoba JCC, although it did indicate it would be "guided" by the Court of Appeal's decision on jurisdiction. The Government of Manitoba implemented the recommendation after the Court's decision was released.

301. The 2014 JCC concluded that there was "no reason to depart from the recommendation of interest made by the JCCs in 2008 and 2011." The recommendation

was accepted by the Government of Manitoba. The same recommendation was then made by the 2017 JCC and once again, was accepted by the Government of Manitoba.

2014 Manitoba JCC Report, Judges' Association Documents, **Tab 18**  
(excerpt only)

2017 Manitoba JCC Report, Judges' Association Documents, **Tab 19**  
(excerpt only)

**Delay in Implementing JCC Recommendations in British Columbia Justifies Interest**

302. The Judges' Association seeks a recommendation that interest should be paid on any retroactive salary adjustments. A recommendation for interest is warranted, particularly when judges have been required to wait while receiving an outdated salary (and hence a salary that has not been constitutionally determined) for longer than 3.5 years pending implementation of the JCC recommendations. This should be seen as a make whole remedy rather than something punitive. Knowing that interest is payable on any retroactive adjustment would be largely symbolic but would lessen the frustration and loss of morale created by delays in the process. Further, it is fair, since the Province has the use of the judges' money in the intervening period. It should be emphasized that the matter of delay in finalizing compensation decisions has been a significant problem for judicial morale for many years.

303. The chart below shows when judges' compensation was finally determined for each of the years in question:

April 1, 2011 April 1, 2012 April 1, 2013	Finally determined when SCC denied leave to appeal on October 29, 2015	Adjustments received a few months thereafter	Delay of more than 3.5 years
April 1, 2014 April 1, 2015 April 1, 2016	Finally determined after second Resolution in Legislature on October 25, 2017	Adjustments received a few months thereafter	Delay of more than 3.5 years

April 1, 2017 April 1, 2018 April 1, 2019	Unknown – litigation is ongoing		Likely to be even longer than on past occasions, given that the judicial review awaits the appeal to the SCC
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304. Significantly, Crown lawyers, whose salary adjustments were tied to those received by judges in the 2013 JCC process, were awarded interest on the retroactive adjustments they eventually received. An award of interest was provided by Arbitrator David M. McPhillips in his decision respecting the salaries of members of the British Columbia Crown Counsel Association, dated March 16, 2017.

*Government of Province of BC v. BC Crown Counsel Association*, Interim Award, March 16, 2017, Arbitrator McPhillips, Judges' Association Documents, **Tab 20**, page 18

305. In the past three JCC processes in British Columbia, judges have consistently waited more than 3 years from the start of a JCC's three year mandate to receive the resulting salary adjustments. There is a decline in the value of money over that period of time. In the interim, the Government has had use of funds that are ultimately to be paid to judges. As the Manitoba JCCs have repeatedly recognized, it is simply not appropriate that judges should bear the cost of the delay.

### **3. PROFESSIONAL ALLOWANCE**

#### **Recommendations Sought:**

- That effective April 1, 2020, the Professional Allowance for each judge shall be increased from \$4000 to \$4500 per year, with the ability to carry over any unused portion for one year.
- That effective April 1, 2020, the portion of the total that can be allocated to health and wellness related expenditures shall be increased from \$500 per annum to \$750.



306. Since April 1, 2008, judges have received a professional allowance in the amount of \$4,000, against which they can seek reimbursement of reasonable expenses that fall within certain defined categories of expenditures. Given the increases in the cost of living over the last decade, the Judges' Association and the Government of British Columbia have agreed that an increase to \$4,500 per annum is appropriate.

2007 JCC Report, Joint Book of Documents, **Tab 6**, page 25

307. The 2007 JCC had recommended that up to a maximum of \$500 of the Professional Allowance monies could be available for expenses incurred for health club memberships or wellness related expenses, including home fitness equipment. To reflect inflationary pressures on the cost of such items, the Judges' Association proposes that this maximum be increased to \$750 per annum.

## PART V: COSTS

### Recommendation Sought:

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

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

309. A recommendation concerning costs is within the 2019 JCC's jurisdiction according to section 5(1) of the *Judicial Compensation Act*, which requires the Commission to report and make recommendations on "all matters respecting the remuneration, allowances and benefits of judges...". As we set out below, while in BC the matter of costs has usually been agreed to between the Government and the Judges' Association prior to the JCC's oral hearings, it is routine for JCCs across Canada to make recommendations regarding payment by the Government of costs incurred by Provincial Court judges in preparing for and appearing at the JCC.

2013 JCC Report, Joint Book of Documents, **Tab 11**, page 53

*Judicial Compensation Act*, Joint Book of Authorities, **Tab 1**

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

2004 JCC Report, Joint Book of Documents, **Tab 5**, pages 29-30

2007 JCC Report, Joint Book of Documents, **Tab 6**, page 23

2010 JCC Report, Joint Book of Documents, **Tab 7**, page 32

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

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

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

313. The 2016 JCC was the first to consider the issue of costs in light of a new provision in the Act, which was added without consultation with the Judges’ Association:

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).

314. As noted by the 2016 JCC, the Government conceded, in its oral submissions to the 2016 JCC, that a recommendation could be made on costs but urged that the statutory costs should apply as they were reasonable and appropriate. The 2016 JCC disagreed and recommended that 100% of the reasonable costs should be paid.

315. The 2016 JCC took into account the following points in its reasoning:

- (a) the historical practice of the Government paying 100% of the costs for past commission processes in BC;
- (b) that there had been no dispute over the reasonableness of the costs in the past, and the parties agreed that the costs incurred for the 2016 JCC process were reasonable;
- (c) “the judiciary is the third branch of government, yet does not have the executive branch’s access to the government’s resources”;
- (d) participation by the judiciary is required for an objective and fair process, and it would be unfair, and not in the public interest, to expect individual judges to personally fund their participation;
- (e) JCCs in other jurisdictions have made recommendations that governments pay 100% or significant portions of the reasonable costs incurred by judges.
- (f) the Judges’ Association’s participation in the process was “helpful and appropriate and, most importantly, necessary for an effective and objective process”.

316. The costs recommendation of the 2016 JCC was rejected by Government, which substituted the costs payable pursuant to statute. The Judges' Association challenged this rejection, along with the rejection of the judicial salary recommendations, in its judicial review that remains outstanding.

Government's Response to the 2016 JCC, Joint Book of Documents, **Tab 14**

### **Rationale for Recommending Costs**

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

318. The Government uses external counsel and has available to it any number of civil servants who are presumably capable of utilizing Government resources as they see fit in order to advance the Government's position. Accordingly, it is manifestly unfair that the judiciary should be burdened by personally funding its participation in the process. It is the Judges' Association's position that, in these circumstances, its full reasonable costs, including both legal fees and disbursements (including the costs of experts) should be paid by Government.

319. While the Judges' Association does not suggest that a constitutional rule exists that *requires* its costs to be paid, it does maintain that to the extent that this 2019 JCC is of the view that the participation of the Judges' Association was reasonably necessary to enable the Commission to fulfil its constitutional mandate, it should recommend that Government pay the Judges' Association's full reasonable costs. Given the complexity

of the history in British Columbia, including the specific circumstances surrounding the 2010, 2013, 2016 JCCs and their outcomes, the Judges' Association is confident that this 2019 JCC will conclude that the participation of the judiciary was of significant assistance to the Commission in understanding the scope and implications of the issues and in thereby enabling it to be objective and effective. For those reasons, a recommendation that the Government should pay the full reasonable costs of the Judges' Association is appropriate.

320. This reasoning is consistent with the majority decision in *Newfoundland Assn. of Provincial Court Judges v. Newfoundland*, [2000] N.J. No. 258 (C.A.), para 277 and following (excerpt at **Tab 5** of the Judges' Association Documents).

### **Other JCCs have Recommended Significant Costs**

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

322. In some jurisdictions, the government is either required by legislation or there have been recommendations by JCCs that governments pay 100% of the costs incurred by judges in relation to a JCC. In Northwest Territories, the Government pays the reasonable expenses that are incurred by the territorial judges in the preparation of their submissions to the Judicial Remuneration Commission. Most recently, the Government paid 100% of the legal fees and disbursements, including the cost of experts, incurred by the Judges of the Territorial Court for the 2016 JCC.

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

324. In several other jurisdictions, JCCs have recommended that governments pay a significant proportion of legal fees and 100% of disbursement costs. In Manitoba, the

2017 JCC recommended that the Government of Manitoba should pay 75% of the Judges' Association's reasonable legal costs to a maximum aggregate payment of \$45,000 and 100% of the Judges' Association's disbursements, including the costs of experts to a maximum of \$22,500. That recommendation was accepted by the Government of Manitoba.

325. In Newfoundland and Labrador the 2014 JCC made recommendations for the years 2013 to 2017. It recommended that the government pay 2/3 of the Judges' Association's reasonable legal fees and 100% of its reasonable disbursements including, but not limited to, expert witness fees. The reasonableness of fees were to be taxable by the Tribunal at the government's request. This recommendation was accepted by the government and there was no suggestion the costs were unreasonable. As noted above, the Report of the 2017 JCC is expected shortly.

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

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

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

329. For all of the foregoing reasons, the Judges' Association urges this 2019 JCC to take the same approach as its predecessor and recommend that the Government of British Columbia follow the past practice in British Columbia of paying the entirety of the Judges' Association's reasonable legal fees and disbursements, including the cost of experts.

**All of which is respectfully submitted this 28<sup>th</sup> day of May, 2019.**



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