

**SUBMISSION OF**  
**THE PROVINCIAL COURT JUDGES**  
**ASSOCIATION OF BRITISH COLUMBIA**  
  
**to the**  
**2022 JUDICIAL COMPENSATION COMMISSION**

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**Alison M. Latimer, KC**  
**Barrister & Solicitor**  
1200-1111 Melville St.  
Vancouver, BC V6E 3V6

Counsel for the Judges' Association  
Telephone: (778) 847-7324  
E-Mail: [alison@alatimer.ca](mailto:alison@alatimer.ca)

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## **EXECUTIVE SUMMARY**

For the detailed reasons set out in the submission that follows, the Provincial Court Judges' Association of British Columbia ("**PCJABC**" or "**Judges' Association**") asks this 2022 Judicial Compensation Commission ("**JCC**" or "**Commission**") to make the following recommendations for increases to the existing compensation paid to judges of the Provincial Court of British Columbia ("**Judges**") and for payment of the costs incurred by the PCJABC in order to engage in this process.

### **1. Salary**

- Effective April 1, 2023 the annual salary for puisne judges shall be increased to \$350,863; and
- Effective on each of April 1, 2024, April 1, 2025 and April 1, 2026, the salaries for puisne judges shall be further increased by the Consumer Price Index ("**CPI**") per annum.

### **2. Interest**

- If the Commission recommendation for a salary increase that would take effect on or after April 1, 2023 gives rise to a retroactive payment, the amount of that retroactive payment should bear interest at the prejudgment interest rate from April 1, 2023 until the date on which the increased remuneration is established and at the post-judgment rate from that date until the date of the retroactive payment.

### **3. 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.

The Judges ask that no other changes to their remuneration be made. In particular, the following matters of remuneration remain the same:

- The Chief Judge of the Provincial Court, the Associate Chief Judges and the Regional Administrative Judges continue to receive percentage salary differentials of 112%, 108% and 106% respectively of the salary of a judge.

- The current accrual rate for judges' pensions be maintained at 3%.
- There be no change to the professional development allowance over the next four fiscal years.
- Judges continue to receive the same *per diem* travel reimbursement as Members of the Legislative Assembly.
- There be no change to the health and wellness-related expenditures allowed under the judge's professional development allowance for the next four fiscal years.
- There be no change to the judges' flexible benefits plan over the next four fiscal years.

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

### **A. Introduction**

1. The mandate of this 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 ( “**Provincial Court**” or “**Court**”) and to make recommendations in relation to those matters for the four year period from April 1, 2023 to March 31, 2027.<sup>1</sup> To assist the JCC with this task, the PCJABC provides the following submissions on behalf of the Judges of the Provincial Court.

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.

3. Part II gives an overview of the role and jurisdiction of the Provincial Court within the court system, as well as the nature of the work performed by Provincial Court Judges.

4. Part III of the submission addresses the theory and principles which the PCJABC submits should be considered by this Commission in light of the decisions of past JCCs in British Columbia, the decisions of judicial compensation commissions in other jurisdictions, court decisions judicially reviewing those commission decisions, and the applicable legislation.

5. Part IV details the PCJABC proposals for recommendations from this Commission with respect to salary, interest on retroactive salary adjustments, and costs.

### **B. 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.

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<sup>1</sup> *Judicial Compensation Act*, SBC 2003, c 59 [**JCA** or **Act**], [s. 5\(1\)](#)

7. Since 2016 in BC, that administrative body is called a “Judicial Compensation Commission”, 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”.

8. 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.

9. 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 2019 JCC process remains unknown.

10. 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*. In that decision, the Supreme Court of Canada 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”.<sup>2</sup>

11. 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.<sup>3</sup>

12. In Alberta, the situation was slightly different in that the cases eventually determined

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<sup>2</sup> *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, [*PEI Reference*], [para 7](#)

<sup>3</sup> *PEI Reference*, [paras 21-22](#)

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.<sup>4</sup>

13. In Prince Edward Island, the case arose as a reference by the Lieutenant Governor, who referred two constitutional questions to the Court after numerous accused persons challenged the constitutionality of the Provincial Court of Prince Edward Island following the passage of provincial legislation which reduced the pay of judges.<sup>5</sup>

14. 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 core characteristics of judicial independence which include financial security, administrative independence and security of tenure.<sup>6</sup> According to Lamer CJC, a JCC process is necessary to ensure financial security for judges.<sup>7</sup>

15. 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.<sup>8</sup>

16. 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

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<sup>4</sup> *PEI Reference*, [paras 16-18](#)

<sup>5</sup> *PEI Reference*, [paras 11-13](#)

<sup>6</sup> *PEI Reference*, [para 115](#)

<sup>7</sup> *PEI Reference*, [paras 133, 147, 166](#)

<sup>8</sup> *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, [*Bodner*], [paras 7-8](#)



being used as a means to exert political pressure through the economic manipulation of the judiciary.”<sup>9</sup>

17. 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”.<sup>10</sup>

18. 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, and by 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.<sup>11</sup>

19. 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*. 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.

20. 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

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<sup>9</sup> *PEI Reference*, [para 170](#)

<sup>10</sup> *PEI Reference*, [para 173](#)

<sup>11</sup> *PEI Reference*, [paras 174-175, 180-183](#)

by a reviewing court to a government's response to the recommendations of a JCC?"

21. 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."<sup>12</sup> 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".<sup>13</sup> 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*. We discuss those factors in much detail below.<sup>14</sup>

22. 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.

- a. Has the government articulated a legitimate reason for departing from the commission's recommendations?
- b. Do the government's reasons rely upon a reasonable factual foundation?
- c. 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?<sup>15</sup>

23. In the years after *Bodner*, there has been continued litigation. While the timing of the JCC process is slightly different in each jurisdiction, considering the last four commission processes in each jurisdiction, there has been litigation over the implementation of commission recommendations in British Columbia (2010 JCC - twice, 2013 JCC, 2016 JCC and 2019 JCC), Alberta (2017 JCC), Manitoba (2014 JCC), Newfoundland & Labrador (2014 JCC, 2017 JCC) and Nova Scotia (2016 JCC and 2019 JCC).

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<sup>12</sup> *Bodner*, [para 14](#)

<sup>13</sup> *Bodner*, [para 14](#)

<sup>14</sup> *JCA*, [s. 5](#)

<sup>15</sup> *Bodner*, [para 31](#)

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

24. 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 Advisory Committee members were appointed by the Government and the Advisory Committee’s recommendations had no binding effect.<sup>16</sup>

25. Judicial compensation commissions have been conducted every three years since 1995 and the Reports of the four most recent past Commissions are provided in the Joint Book of Documents, beginning in 2010.

#### **2010 Judges Compensation Commission (“2010 JCC”)**

26. The 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.<sup>17</sup>

27. 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 (“CPI”) 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

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<sup>16</sup> 1998 JCC Report excerpt, Judges’ Book of Documents, **Tab 5**, page 9

<sup>17</sup> 2010 JCC Report, Joint Book of Documents, **Tab 29**

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.<sup>18</sup>

28. The 2010 JCC also recommended an increase in the pension accrual rate to 3.5% effective April 1, 2013.<sup>19</sup>

### **Government's Response to 2010 JCC Recommendations Quashed on Judicial Review**

29. The Government rejected the 2010 JCC's recommendations for a modest salary increase and an increased pension accrual rate.<sup>20</sup>

30. Two years of litigation over the Government's Responses to the 2010 JCC ultimately 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.<sup>21</sup> 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 in some detail.

31. In May 2011, the Government rejected the 2010 JCC's recommendations for salary and pension increases.<sup>22</sup>

32. The Judges' Association challenged the legitimacy of the Government's rejection of the JCC recommendations. With respect to the recommendation concerning a salary increase, Macaulay J. found that the Government response lacked legitimacy and rationality. Macaulay J. concluded that the Government did not participate meaningfully in the constitutional process and "rendered the process largely pointless."<sup>23</sup> The main reason being that Government's reliance on its "net zero" mandate was "to avoid the potential

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<sup>18</sup> 2010 JCC Report, Joint Book of Documents, **Tab 29**, page 33

<sup>19</sup> 2010 JCC Report, Joint Book of Documents, **Tab 29**, pages 34-36

<sup>20</sup> Government Response to the 2010 Judges Compensation Commission (May 2011), Joint Book of Documents, **Tab 30**

<sup>21</sup> *Provincial Court Judges Association of British Columbia v. British Columbia (Attorney General)*, 2015 BCCA 136 [**2015 Decision of the Court of Appeal**], [para 88](#)

<sup>22</sup> 2011 Government Response to the 2010 JCC Report, Joint Book of Documents, **Tab 30**

<sup>23</sup> *Provincial Court Judges' Assn. of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022 [**First Judicial Review**], [para. 79](#)

impact of accepting recommendations on other public sector bargaining units.”<sup>24</sup> Further, Macaulay J. found that a Cabinet submission disclosed in the course of the litigation “evidenced, at best, a lack of good faith commitment to the constitutional process. At worst, it is a deliberate information shell game.” He said that the inappropriate emphasis on the costs associated with linked outcomes for some other non-judicial public sector employees appears intended as a “silent” answer to the Commission’s conclusion that “judicial compensation forms such a small part of Government expenditure that increases in that compensation will always be affordable.”<sup>25</sup>

33. Justice Macauley ordered the matter be returned to Government and to the Legislative Assembly for reconsideration. Special costs were awarded against the Government because the Court found that Government’s conduct, including the Cabinet submission, was deserving of censure and rebuke.<sup>26</sup>

34. Following the first judicial review of the government’s response to the 2010 JCC recommendations, 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.<sup>27</sup>

35. The Association challenged the second rejection of the recommendations in the BC Supreme Court. That petition was dismissed on March 3, 2014.<sup>28</sup> In the 2015 Decision of the Court of Appeal, the Court of Appeal overturned that decision and ordered all of the 2010 JCC’s recommendations to be implemented.<sup>29</sup> The Government sought leave to appeal to the Supreme Court of Canada, which application was dismissed with costs on October 29, 2015.

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<sup>24</sup> First Judicial Review, [paras. 73-74](#)

<sup>25</sup> First Judicial Review, [para. 81](#)

<sup>26</sup> *Provincial Court Judges’ Assn. of British Columbia v. British Columbia (Attorney General)*, [2012 BCSC 1420](#)

<sup>27</sup> 2013 Government Response to the 2010 JCC Report, Joint Book of Documents, **Tab 31**

<sup>28</sup> *Provincial Court Judges’ Assn. of British Columbia v. British Columbia (Attorney General)*, 2014 BCSC 336 [[Second Judicial Review](#)]

<sup>29</sup> [2015 Decision of the Court of Appeal](#)

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

36. The 2013 JCC made recommendations about appropriate compensation for the three year period from April 1, 2014 to March 31, 2017.

37. 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.<sup>30</sup>

38. 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.<sup>31</sup>

39. The 2013 JCC also recommended that the Government pay 100% of the Judges’ Association’s reasonable legal fees including the cost of experts.<sup>32</sup>

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

40. 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

41. The Judges’ Association sought judicial review. Justice Grauer quashed the Government’s Response and referred the matter back to the Legislature for

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<sup>30</sup> 2013 JCC Report, Joint Book of Documents, **Tab 24**, page 44; Government 2013 Response to 2010 JCC Report, Joint Book of Documents, **Tab 25**

<sup>31</sup> 2013 JCC Report, Joint Book of Documents, **Tab 24**, pages 47-48

<sup>32</sup> 2013 JCC Report, Joint Book of Documents, **Tab 24**, pages 50-54

reconsideration.<sup>33</sup>

42. 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 response had been passed in the context of existing salaries and benefits that were later changed by court order (i.e. the 2015 Decision 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.<sup>34</sup>

43. 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.

Year	2013 JCC	Government’s Second Response
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%)

44. No further judicial review of the government’s response to the 2013 JCC recommendations was sought

**2016 Judicial Compensation Commission (“2016 JCC”)**

45. 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

<sup>33</sup> *Provincial Court Judges’ Association of British Columbia v. British Columbia (Attorney General)*, [2016 BCSC 1420](#)

<sup>34</sup> *Provincial Court Judges’ Association of British Columbia v. British Columbia (Attorney General)*, [2017 BCCA 63](#)

recommendations for both judges and judicial justices.

46. 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”.<sup>35</sup>

47. 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 Judges’ Association had cross-appealed on the issue of remedy. 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.”<sup>36</sup>

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.”<sup>37</sup>

49. After carefully considering each of the factors identified in section 5(5) of the *Judicial Compensation 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.<sup>38</sup>

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

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<sup>35</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 14

<sup>36</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 59

<sup>37</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 60

<sup>38</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 60-61



disbursements, and the cost of the opinions and evidence of the expert witnesses (an economist and actuary).<sup>39</sup>

### **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.<sup>40</sup>

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.

53. The Government's initial response was set aside by Hinkson C.J. in respect of salaries but upheld in respect of costs.<sup>41</sup> The costs aspect was not appealed.

54. The Court of Appeal overruled the lower court's finding in respect of salaries, emphasizing the "limited" and "deferential" nature of judicial review of such decisions.<sup>42</sup> The Court found Government provided rational and legitimate reasons for substituting different salaries. The PCJA's application for leave to appeal to the SCC was dismissed.<sup>43</sup> The salary figures from the Government's initial response were implemented.

55. The outcome of the 2016 JCC process was not known until well after the 2019 JCC made its recommendations.

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

56. The 2019 JCC made recommendations about reasonable compensation for the

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<sup>39</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 62-70

<sup>40</sup> Government's Response to the 2016 JCC Report, Joint Book of Documents, **Tab 22**

<sup>41</sup> *Provincial Court Judges' Association v British Columbia (Attorney General)*, [2020 BCSC 1264](#)

<sup>42</sup> *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2021 BCCA 295 [2021 Decision of the Court of Appeal], [paras. 12, 48](#)

<sup>43</sup> *Provincial Court Judges' Association of British Columbia v. Attorney General of British Columbia*, [2022 CanLII 16715](#) (SCC)

three year period from April 1, 2020 to March 31, 2022. The five person panel was chaired by the Honourable Thomas Cromwell, C.C. and released its report on October 24, 2019. The Report was issued while the judicial review of the 2016 JCC process remained before the Courts.

57. The 2019 JCC considered it to be “critically important” that Provincial Court judicial remuneration be kept at a level that encourages highly qualified people to apply for appointment to the Court. The 2019 JCC concluded this consideration required “maintaining the salary at least at its current levels, which means that there must be at least inflationary increases for the three years under review”.<sup>44</sup>

58. Other statutory factors supported more than inflationary increases.<sup>45</sup> In particular, 2019 JCC concluded that “judicial salaries in British Columbia are out of step with those in the most appropriately comparable jurisdictions in Canada.”<sup>46</sup> Those “most appropriate comparators” were Alberta, Saskatchewan and Ontario.<sup>47</sup> Reasonable judicial remuneration in British Columbia should be considered in light of these other three provinces that have the soundest and most similar economies and government finances.<sup>48</sup> In particular “judicial remuneration in British Columbia should be roughly in line with the three other provinces with the soundest economies and government finances and which are most similar to British Columbia in their populations, budgets and jurisdiction: Alberta, Saskatchewan and Ontario.”<sup>49</sup> The 2019 JCC intended to put BC Judges in fourth or fifth place among all jurisdictions.<sup>50</sup> The 2019 JCC considered that the “provinces’ current and expected economic conditions as well as the current and expected fiscal position of the Government support our view that it is unreasonable that British Columbia Provincial Court judges are not paid more closely in line with the salaries of the provinces that have the soundest and most similar economies and government finances.”<sup>51</sup>

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<sup>44</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, pages 18, 29

<sup>45</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 29

<sup>46</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 7

<sup>47</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 20

<sup>48</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 25

<sup>49</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 26

<sup>50</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 30

<sup>51</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 30

59. The 2019 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 an actuary).<sup>52</sup> Although the 2019 JCC was alive to the statutory formula on costs, it found that this formula would "often be unreasonably low", that the constitutionally mandated process was best served by the full participation of all parties, and that given Government's participation was publicly funded and resourced "[i]t is only fair that the judiciary should be in a roughly equal position for the purposes of this process".<sup>53</sup>

60. The 2019 JCC recommended the following salaries for *puisne* judges:

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

### **The Government Rejected the Salary and Costs Recommendations of the 2019 JCC**

61. In the 2020 Response dated July 6, 2020, the Attorney General of British Columbia proposed that the Legislative Assembly reject the 2019 JCC's recommendations in respect of salary and costs.<sup>54</sup>

62. The Government offered two rationales for departing from the JCC's salary recommendations:

- a. The COVID-19 pandemic has significantly changed the economic conditions in British Columbia (s. 5(5)(e)) and the financial position of the government (s. 5(5)(f)); and
- b. The JCC misapplied the factor of "changes in the compensation of others paid by provincial public funds in British Columbia" (s. 5(5)(d)).<sup>55</sup>

63. In respect of costs, Government reiterated submissions that were made to and

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<sup>52</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, pages 33-34

<sup>53</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 33

<sup>54</sup> Government Response to 2019 JCC report re PCJs, Joint Book of Documents, **Tab 19**, pages 6-16

<sup>55</sup> Government Response to 2019 JCC report re PCJs, Joint Book of Documents, **Tab 19**, pages 6-15

substantively addressed by the JCC, namely that:<sup>56</sup>

- a. Costs are provided for in the *JCA*;
- b. The purpose of the *Act* is to create clarity and certainty for the parties;
- c. It is not unreasonable for the parties to bear a nominal amount of costs for participating in the process, over which Government has no control;
- d. The legislative formula is reasonable having regard to past commission processes.

64. Government proposed to substitute lower salaries and less payment for reasonable costs and legal fees and disbursements.

65. On July 8, 2020, pursuant to s. 6(2) of the *Act*, the Legislative Assembly so resolved. It substituted salaries of \$276,000 effective on April 1, 2020, \$282,250 effective April 1, 2021 and \$288,500 effective April 1, 2022.

	April 1, 2019	April 1, 2020		April 1, 2021		April 1, 2022	
	Base \$	\$	% incr.	\$	% incr.	\$	% incr.
<b>PCJA submission to JCC<sup>57</sup></b>	\$270,000	\$310,000	14.81 %	\$316,200	2.00%	\$322,524	2.00%
<b>JCC recommendation<sup>58</sup></b>	\$270,000	\$287,000	6.30%	\$297,000	3.48%	\$307,000	3.37%

<sup>56</sup> Government Response to 2019 JCC report re PCJs, Joint Book of Documents, **Tab 19**, pages 15-16

<sup>57</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 15.

<sup>58</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 15.

<b>Government submission to JCC<sup>59</sup></b>	\$270,000	\$275,400	2.00%	\$280,908	2.00%	\$286,526	2.00%
<b>Legislative Assembly resolution<sup>60</sup></b>	\$270,000	\$276,000	2.22%	\$282,250	2.26%	\$288,500	2.21%

66. Thus, in respect of salary, the dollar and percentage increases requested by the parties, recommended by the JCC, and implemented by Government was as follows:

67. The Judges' Association again sought judicial review. That judicial review was argued September 19-21, 2022 and judgment remains reserved.

#### **D. The Role and Jurisdiction of this Judicial Compensation Commission**

68. This JCC is tasked with making recommendations for "reasonable compensation" for both judges and judicial justices for the four fiscal years commencing April 1, 2023.

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

70. 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,

<sup>59</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 15.

<sup>60</sup> Government Response to 2019 JCC report re PCJs, Joint Book of Documents, **Tab 19**, pages 6-7.

make its own recommendations on that basis.<sup>61</sup>

71. One thing that is not a question for the Court on judicial review, is whether the economic and fiscal concerns expressed in Government's Response to the 2019 JCC Report respecting the Judges in fact materialized and/or whether the COVID-19 pandemic had additional unforeseen consequences that were not factored into the Government's response. As the 2015 Decision of the Court of Appeal made clear, such developments are properly considered by the subsequent JCC, not the Courts:

[35] The 2013 JCC process began with the Legislature's position on the 2010 recommendations, which had accepted a small salary increase. It was appropriate to do so. The process is ongoing (*Bodner* at paras. 14 and 15). Sometimes, the result may be to over-compensate judges based on unforeseen financial circumstances that subsequently develop, as, arguably, was the case in 2007. Because the accepted 2007 salary levels were based on an optimistic financial forecast that changed, no increase was sought or recommended for 2010. On other occasions the compensation may fall short.

[36] Subsequent commissions can and do address these situations...<sup>62</sup>

72. Further, as the outcome of the 2019 JCC process remains unknown, it is particularly important for this 2022 JCC to make its own assessment of reasonable compensation in light of what actually transpired between 2019 and 2022 and in light of what is likely to transpire in the years that are the subject of this JCC's mandate. Rather than treat historical question of what actually transpired between 2019 and 2022 separately, the Judges' Association addresses in the context of the existing statutory factors addressing the economic and fiscal circumstances of the province.

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

73. 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 95% of criminal cases in

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<sup>61</sup> *Bodner*, [para 15](#)

<sup>62</sup> 2015 Decision of the Court of Appeal, [paras. 35-36](#)

the province and has expansive family and civil law jurisdiction.<sup>63</sup> 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.

74. 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.

### **A. Historical Overview**

75. 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.

76. 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,<sup>64</sup> 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,<sup>65</sup> and the average applicant has 23 year experience in the practice of law prior to their appointment.<sup>66</sup>

77. As of March 31, 2021, the Court had 124 full-time judges and 27 part-time judges including those who work in the Senior Judges program.<sup>67</sup> 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.

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<sup>63</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 3; Provincial Court of BC Annual Report 2021/22, Judges' Book of Documents, Tab 10, page 5

<sup>64</sup> *Provincial Court Act*, RSBC 1996, c 379 [**Provincial Court Act**], [s. 6\(2\)](#)

<sup>65</sup> Judicial Council of BC Annual Report 2021, Joint Book of Documents, **Tab 2**, page 18

<sup>66</sup> Judicial Council of BC Annual Report 2021, Joint Book of Documents, **Tab 2**, page 22

<sup>67</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 7

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.<sup>68</sup>

78. Provincial Court judges preside in 85 court locations throughout the Province, 43 of which are staffed and include registry services. Staffed court registries are open to the public from 9 am to 4 pm Monday to Friday, excluding statutory holidays, Easter Monday and Boxing Day. The remaining locations are circuit court sites which are staffed on court hearing days only (documents cannot be filed at these locations). 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.<sup>69</sup> Although circuit court travel time was limited in 2020 to protect remote communities from risk of infection from COVID-19, or because court facilities would not allow physical distancing, in-person proceedings gradually resumed as government was able to assess and equip circuit court locations with adequate safety measures.<sup>70</sup> Circuit court is challenging, as Regional Administrative Judge Victor Galbraith explains in the Provincial Court of BC Annual Report 2021/22:

The Norther Region is distinguished by its weather, its geography, and its sparse population. Some of our circuit courts sit weekly and some, every four months. Northern judges may drive more than 20,000 km a year. With heavy snow and temperatures sinking to mid -40's in the winter, white knuckle driving and the ever-present risk of colliding with large animals are commonplace. “Fly in” circuits bring their own challenges.<sup>71</sup>

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<sup>68</sup> *Provincial Court Act*, [s. 9.1](#)

<sup>69</sup> 2010 JCC Report, Joint Book of Documents, **Tab 29**, page 19

<sup>70</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 26

<sup>71</sup> Provincial Court of BC Annual Report 2021/22, Judges' Book of Documents, Tab 10, page 51



## B. Broad and Comprehensive Jurisdiction

79. As the 2019 JCC noted, “The Provincial Court of British Columbia has one of the broadest and most comprehensive jurisdictions of any Provincial Court in Canada”.<sup>72</sup> Indeed, the 2013, 2016 and 2019 JCCs 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”.<sup>73</sup>

80. 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 2020-2021 fiscal year for instance, 156,241 new cases were initiated in the Provincial Court. Excluding the 76,070 new traffic and bylaw cases, the total number of new cases was 80,171. Of those new cases, 60% involved adult and youth criminal cases (58% adult and 2% youth), 22% involved family matters, 9% involved civil matters, and 9% involved child protection matters.<sup>74</sup> 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*.

81. Although the caseload of the Court has decreased in all divisions between 2016/17 and 2021/22, the caseload numbers should be interpreted with caution due to the temporary suspension of some court operations during the COVID-19 pandemic.<sup>75</sup> The caseload numbers also do not fully capture the work of the Court in this period during which the Court was required to initiate seismic changes in order to respond to a pandemic that necessitated finding new ways to provide access to the Court while safeguarding public health.<sup>76</sup>

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<sup>72</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 10; see also Provincial Court of BC Annual Report 2021/22, Judges’ Book of Documents, Tab 10, page 14

<sup>73</sup> 2013 JCC Report, Joint Book of Documents, **Tab 24**, page 15; 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 17; 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 10

<sup>74</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 8; see also Provincial Court of BC Annual Report 2021/22, Judges’ Book of Documents, Tab 10, page 8

<sup>75</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 42

(bottom); Provincial Court of BC Annual Report 2021/22, Judges’ Book of Documents, Tab 10, page 31

<sup>76</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, pages 1-2, 9-24 (bottom)

## **Adult Criminal and Youth Jurisdiction**

82. 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 95% 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 and the offence is punishable by 14 years or more of imprisonment, either the Crown prosecutor or the accused person may request that a preliminary inquiry or hearing be held in Provincial Court.

83. The Provincial Court has jurisdiction and adjudicates a full range of *Criminal Code* and drug offences. The offences include homicides, serious personal injury offences including sexual assaults, serious economic and drug offences including conspiracies with complex evidentiary issues including the application of the *Charter of Rights*. The Supreme Court of Canada 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.

84. 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.

85. 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**

86. The Provincial Court deals with two main areas of family law.
87. 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.
88. 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 exceeds that of the Supreme Court.<sup>77</sup>
89. Only BC, Alberta, Quebec and the Northwest Territories have granted this wide ranging family jurisdiction to Provincial Court judges.<sup>78</sup>
90. 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. Even during the state of emergency declared by the provincial government in March 2020, the Court continued to hear urgent family matters first by phone, then virtually in May, and in-person hearings resumed in June.<sup>79</sup>
91. The COVID-19 pandemic gave rise to a host of new issues in family law cases. In an effort to improve the delivery of family law services, the Court developed an expedited 2-step process for people whose income had decreased due to the pandemic to apply to vary child or spousal support.<sup>80</sup> A committee of judges formed the Family Law Committee. This Committee was particularly busy implementing the new *Provincial Court Family Rules*

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<sup>77</sup> British Columbia Supreme Court Annual Report 2021, Excerpt, Judges' Book of Documents, **Tab 11**, page 52; Provincial Court of BC Annual Report 2021/22, Judges' Book of Documents, **Tab 10**, page 31

<sup>78</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.

<sup>79</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, pages 9-10, 20

<sup>80</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 13

in May 2021 and advising on new procedures. It also advised the Court on family law issues, including procedures for urgent matters during the period when in-person hearings were suspended and provided updates on case law about COVID-related family law issues.<sup>81</sup>

92. As well and despite the pandemic, the Court continued to innovate. In December 2020, the Court launched the “Early Resolution and Case Management” approach to family disputes and a free virtual mediation service in Surrey.<sup>82</sup> This approach has been used in Victoria since May 2019 and plans to implement it in Surrey were expedited to provide the benefits of this approach to BC’s busiest family court by December 2020.<sup>83</sup> The final evaluation of this approach in Victoria was published in January 2022 and found that 69% of families were able to resolve their dispute without litigation. The Court hopes to continue to expand this approach.<sup>84</sup>

### **Child Protection Jurisdiction**

93. 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.

94. 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.

95. While there are fewer child protection cases than criminal and civil cases, the time

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<sup>81</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 26; Provincial Court of BC Annual Report 2021/22, Judges’ Book of Documents, **Tab 10**, page 9

<sup>82</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 15

<sup>83</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 26-27

<sup>84</sup> Provincial Court of BC Annual Report 2021/22, Judges’ Book of Documents, **Tab 10**, page 3

spent on each case is, on average, many times greater than that spent on criminal or civil 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. These are often the most difficult cases to be adjudicated as they are hotly contested with the judge ultimately determining whether a child should be removed from their family and placed for adoption.

**Civil Jurisdiction**

96. 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).

97. British Columbia 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)

98. 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.

99. 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.

100. 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.

101. Under the Small Claims Rules developed by the Provincial Court (which were amended in 2021/22 to increase options to attend remotely)<sup>85</sup> 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. This was accelerated during the pandemic.

102. 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

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<sup>85</sup> Provincial Court of BC Annual Report 2021/22, Judges' Book of Documents, **Tab 10**, pages 3, 10

this pilot project.

103. The Government has established a Civil Resolution Tribunal (“**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 CRT. The decrease in the number of new small claims files in the Provincial Court appears to be related, at least in part, to the change in jurisdiction. However, again, the numbers must be approached with caution because of the COVID-19 pandemic.<sup>86</sup> As well, 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*.

### **C. Continuing Judicial Education**

104. 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.”<sup>87</sup>

105. Continuing education for judges typically 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

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<sup>86</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 43

<sup>87</sup> 2010 JCC Report, Joint Book of Documents, **Tab 29**, page 21

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 (“**NIJ**”). Costs and travel expenses are paid from a judge’s professional development allowance.

106. The pandemic challenged the Court to replace its interactive in-person judicial education conferences and workshops with equally engaging virtual programs.<sup>88</sup>

107. The program of five days of mandatory continuing judicial education is designed and delivered through the Court’s Education Committee. When the May 2020 in-person conference was cancelled in accordance with public health advice, that Committee refocused and presented a virtual conference in December 2020.<sup>89</sup>

108. Likewise, the in-person Family Law Boot Camp for new judges was cancelled and replaced by virtual sessions in 2021.<sup>90</sup>

109. 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. The Criminal Law Committee was able to provide its four day Criminal Law Boot Camp workshop on bail, trial and sentencing issues, including Gladue principles, virtually.<sup>91</sup>

110. In 2021/22 the Court returned to full conferences. The Court also developed additional education programs for judges including the Sexual Offence Trials Workshop, the Criminal Law Bootcamp, two Family Law Bootcamps, three Judgment Writing Workshops, virtual Lunch and Learn webinars, and technological training.<sup>92</sup>

111. To supplement these programs, judges used scheduled education leave to attend

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<sup>88</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 33

<sup>89</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, pages 15, 33

<sup>90</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 33

<sup>91</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 33

<sup>92</sup> Provincial Court of BC Annual Report 2021/22, Judges’ Book of Documents, **Tab 10**, page 18



online education programs particularly while court operations were reduced in 2020.<sup>93</sup>

112. In addition to their judicial work in and out of the courtrooms, Provincial Court judges volunteer in their non-sitting time to serve on diverse Boards, organizations and committees. They deliver hundreds of speaking engagements, coach and judge law school mock trials, teach and preside at a variety of ceremonies.<sup>94</sup>

#### **D. Innovation and Reform**

113. Past JCCs have consistently recognized that the Judges of the Provincial Court are leaders in reform and innovation in the interests of the public they serve.

114. 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.<sup>95</sup>

115. 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.<sup>96</sup>

116. 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."<sup>97</sup>

117. As noted above, this strong commitment to reform and innovation was particularly noteworthy during the COVID-19 pandemic. Indeed, Government itself "commends the

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<sup>93</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 33

<sup>94</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 30; Provincial Court of BC Annual Report 2021/22, Judges' Book of Documents, **Tab 10**, page 20

<sup>95</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 22

<sup>96</sup> 2013 JCC Report, Joint Book of Documents, **Tab 24**, page 19

<sup>97</sup> 2010 JCC Report, Joint Book of Documents, **Tab 29**, page 21

Provincial Court on its efforts... to ensure the court functions as effectively and efficiently as possible in these unprecedented times.”<sup>98</sup>

118. 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.

119. 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 2021/22 fiscal year, as a result of the pandemic, 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.<sup>99</sup>

120. 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.

121. 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 2020/21 fiscal year, the Court moved very quickly to retool its program delivery model from in-person sessions to

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<sup>98</sup> Government Response to 2019 JCC Report re PCJs, Joint Book of Documents, **Tab 18**, page 3

<sup>99</sup> Provincial Court of BC Annual Report 2021/22, Judges’ Book of Documents, **Tab 10**, pages 42, 46

virtual counselling and therapy. They lent table computers to participants who needed them and developed ways to reinstitute random urine screening and one-on-one counselling safely. Beginning in May 2020, the Court conducted virtual hearings and 37 participants were undertaking court-supervised treatment as of March 31, 2021.<sup>100</sup>

122. 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. Although it moved temporarily to the “hub court” for the Vancouver region in the spring, the DCC continued to provide both remote and in-person support and services to clients, focusing on health, housing, financial assistance, COVID-19 information, and public safety. On resuming operation in its own location in June, it modified procedures to ensure physical distancing.<sup>101</sup>

123. At times during the year many of DCC’s programs were suspended to avoid transmitting COVID-19. The Street Crew that usually performs community work service in the Downtown Eastside was less active than usual, but DCC’s Art Therapy program resumed operation in May 2020. And in January 2021, DCC began a new Dental Hygiene program. Supervised dental hygiene students from the University of BC provide information, referrals, and dental hygiene kits.<sup>102</sup>

124. The Victoria Integrated Court (“**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

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<sup>100</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 25

<sup>101</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 26

<sup>102</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 26

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.

125. After in-person sittings of the VIC were suspended in March 2020, its clients appeared in regular criminal courts for several months, at first often by telephone and then, for those with access, by video. The designated VIC Crown and defence counsel continued to oversee and manage VIC files and arranged to have matters put before a judge with experience in VIC when possible. In September, VIC resumed weekly sittings with in-person attendance only when necessary, due to courtroom space limitations. Some participants appear in person and some by video. Probation officers and bail supervisors not previously able to attend began to attend by video, a positive outcome of the Court's use of MS Teams.<sup>103</sup>

126. A new integrated court opened in Kelowna in 2021.<sup>104</sup>

127. Judges and service providers have initiated local domestic violence courts using different models since 2009.<sup>105</sup> These specialized courts are found in Duncan and Nanaimo. As well, in the Okanagan, particular days are scheduled for domestic violence cases and domestic violence remand court with a dedicated Crown counsel team was established in Surrey to expedite these cases.

128. First Nation or Indigenous courts were developed by the Court in response to the Supreme Court of Canada's decision in *R. v. Gladue*, [1999] 1 S.C.R. 688 wherein McLachlin C.J. recognized "the tragic history of the treatment of aboriginal peoples within the Canadian criminal justice system". (para 34) Although Indigenous people make up less than 5% of the Canadian population, they account for over a third of the prison population. As it was accepted that the traditional criminal justice system does not well serve the needs of either Indigenous offenders or their communities, members of the court set about to

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<sup>103</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 26

<sup>104</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 25; Provincial Court of BC Annual Report 2021/22, Judges' Book of Documents, **Tab 10**, page 22

<sup>105</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 25

ameliorate the situation. In 2006 the first Indigenous court was opened in New Westminster, and with the opening of the First Nations Court in Hazelton in 2021, there are now eight Indigenous or First Nations courts operating in British Columbia including, Kamloops, North Vancouver, Duncan, Nicola Valley (Merritt) & Prince George, and Williams Lake.<sup>106</sup>

129. The Indigenous courts have been developed in consultation with local First Nations, the community at large, police, Community Corrections, Crown counsel, defence lawyers, and other support service groups like the Native Courtworker & Counselling Association of British Columbia. These courts provide a holistic and restorative approach to sentencing, incorporating customs and traditions of Indigenous peoples going back thousands of years, including 'circle sentencing' with all present participating in determining a healing program for the offender. While each court has developed participants and procedures to meet its communities' needs and traditions, these courts share certain elements. Critical to the courts success is the participation of First Nations Elders who are trained in court procedures and sentencing principles, and provide advice to the court, the offender and the victim.

130. The Indigenous courts in British Columbia are recognized nationally for their work in assisting Indigenous offenders and local communities with their rehabilitation, and engaging a reconciliation process which has enhanced the respect for the Court within the Indigenous communities they serve. Provincial court judges from other jurisdiction frequently visit British Columbia to observe the Indigenous courts in order to introduce similar courts in their respective jurisdictions.

131. The Provincial Court also launched or continued several initiatives in the 2020/21 and 2021/22 fiscal years to help meet its goals of accessibility and openness.

132. For example, the Court produced scores of Notices, Practice Directions, Announcements and updates to inform the public, media, litigants and lawyers about COVID-related changes in operations and procedures. The court expanded its use of video technology by rolling out training for judges and court staff across BC on the use of MS Teams, and working with government and police agencies to start the process of installing

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<sup>106</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 15, 25

equipment in detachments so bail hearings could be conducted by MS Teams where lack of equipment was a barrier.<sup>107</sup>

133. The Court collaborated on a Northern Bail Project to test a centralized model in which bail hearings take place in virtual courtrooms beginning in April 2021.<sup>108</sup> Early evaluation was positive and the Court expanded the model to the Interior Region.<sup>109</sup>

134. Initial results from virtual pre-trial case management conferences adopted in 2020/21 indicated that they led to a high file resolution rate, saving many days of trial time and considerably reducing trial delays. Those conferences were continued in 2021/22.<sup>110</sup>

135. In July 2021, the Court launched a user-friendly online self-resolution tool to help people explore information about a ticket anonymously using <sup>111</sup>step-by-step guided pathways.

136. The Court also worked with the CBA BC Branch and the BC Trial Lawyer's Association to present a webinar answering questions about MS Teams proceedings and other aspects of the Court's pandemic response. It published a Guide to Virtual Proceedings.<sup>112</sup>

137. The Court added podcasts to its ongoing public engagement through eNews blog articles, a Twitter account, and plain language website with guides and resources for litigants. All communication metrics increased from the previous year.<sup>113</sup>

138. The Court announced innovative measures to resume traffic, ticket and bylaw trials with adequate physical distancing in June 2020. Such hearings were held in large spaces offsite at universities and schools and in evening sittings or staggered daytime hearings at some court locations.<sup>114</sup>

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<sup>107</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 20

<sup>108</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 20

<sup>109</sup> Provincial Court of BC Annual Report 2021/22, Judges' Book of Documents, **Tab 10**, pages 3, 11

<sup>110</sup> Provincial Court of BC Annual Report 2021/22, Judges' Book of Documents, **Tab 10**, page 3

<sup>111</sup> Provincial Court of BC Annual Report 2021/22, Judges' Book of Documents, **Tab 10**, page 9

<sup>112</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 10

<sup>113</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 8

<sup>114</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 11

139. 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 2020/21, 11 Allard Law students spent a term working with Provincial Court Judges for academic credit.<sup>115</sup>

140. 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**

141. No Commission could be expected to make recommendations about appropriate compensation in a vacuum. Indeed, the whole concept of compensation being "reasonable" (in the language of the *Act*) or "appropriate" (in the language of *Bodner*) 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.

142. Following the amendments which came into force in advance of this JCC process, 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 4 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;

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<sup>115</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents, **Tab 1**, page 13

- (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 4 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.<sup>116</sup>

143. 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.

144. 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”.<sup>117</sup>

145. 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

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<sup>116</sup> *Judicial Compensation Act*, [s.5\(5\)-5.2](#)

<sup>117</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 42



commission to commission. (Emphasis Added)<sup>118</sup>

146. 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*.<sup>119</sup>

#### **A. Prospective Nature of the Process**

147. 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.

148. As explained above, the prospective design of BC’s process does not prevent this Commission from considering unforeseen circumstances that may have arisen during the years covered by the previous JCC’s mandate and which have resulted in either over or under compensation of judges.<sup>120</sup>

149. The prospective design of BC’s process does mean 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 for the years covered by its own mandate. 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 (or the Government in its response) and the actual facts of what occurred.

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

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<sup>118</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 42

<sup>119</sup> *Bodner*, [para 67](#)

<sup>120</sup> *Bodner*, [paras. 14-15](#); 2015 Decision of the Court of Appeal, [paras. 34-37](#)

## **B. Statutory Factors**

151. We discuss here the principles that should be considered in respect of each statutory factor before turning to a more detailed justification of the recommendations sought by the Judges' Association.

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

152. In considering the first factor identified in s. 5(5)(a) of the *Act*, this JCC should weigh the following 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**

153. 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.

154. 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.

155. 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.

156. 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.<sup>121</sup>

157. 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.

158. 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.”<sup>122</sup>

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

### **The Number of Applicants**

160. 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.

161. 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

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<sup>121</sup> 2004 JCC Report excerpt, Judges’ Book of Documents, **Tab 6**, page 25; *PEI Reference*, [para 170](#)

<sup>122</sup> 2004 JCC Report excerpt, Judges’ Book of Documents, **Tab 6**, page 24

qualified.

162. 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.

163. The Judicial Council of BC Annual Report 2020 was prepared during the 50<sup>th</sup> anniversary of that organization and contains data on trends over longer periods of time.<sup>123</sup> That review shows that in 2020, compared to the ten year average, there was a significant decrease in the number of judicial applications received.<sup>124</sup>

164. The Judicial Council of BC Annual Report 2021, likewise noted a further decrease to 24 from 30 applicants in the previous year. The number of applicants was again significantly lower than the ten year average.<sup>125</sup>

165. In its 2020 Annual Report, the Judicial Council of BC fairly notes that there is no evidence of reasons for the variations in annual number of applicants; however, such variations do sometimes coincide with identifiable events. For example, in 2017 a large influx of applications was received following the announcement of the new online application system which urged applicants to submit their paper applications before the launch date. The application numbers also increased in both 2001 and 2006, years when the JCC hearings resulted in substantial increases in Judges' compensation.<sup>126</sup>

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

166. 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 focused on the need to attract the best possible candidates to the Bench.

167. The Judicial Council of British Columbia includes among its criteria for appointment

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<sup>123</sup> Judicial Council of BC Annual Report 2020, Joint Book of Documents, **Tab 3**, page 11 (top)

<sup>124</sup> Judicial Council of BC Annual Report 2020, Joint Book of Documents, **Tab 3**, pages 4, 35 (top)

<sup>125</sup> Judicial Council of BC Annual Report 2021, Joint Book of Documents, **Tab 2**, page 2, 19 (top)

<sup>126</sup> Judicial Council of BC Annual Report 2020, Joint Book of Documents, **Tab 3**, page 11 (top)

a “[s]uperb legal reputation”<sup>127</sup>. 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.”<sup>128</sup>

168. 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.”<sup>129</sup>

169. 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.”<sup>130</sup>

170. It is notable that in 2017, 60 applications were received, a number that is significantly higher than the 10 year average.<sup>131</sup> 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.

171. The 2019 JCC noted that the “dip in applicants in 2018 and the fact that by early July 2019 there were only 16 applicants are somewhat worrisome” but concluded that “to date, the Court has not had a problem attracting enough highly qualified candidates”. Nevertheless, the JCC cautioned “we are aware that this could become a problem if compensation does not keep pace with other options open to this unique and highly qualified group”.<sup>132</sup> It concluded that this factor supported “maintaining the salary at least at

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<sup>127</sup> Judicial Council of BC Annual Report 2021, Joint Book of Documents, **Tab 2**, page 14 (bottom)

<sup>128</sup> 2010 JCC Report, Joint Book of Authorities, **Tab 29**, page 30

<sup>129</sup> 2013 JCC Report, Joint Book of Documents, **Tab 24**, page 44

<sup>130</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 45

<sup>131</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>132</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 17

its current levels, which means that there must be at least inflationary increases for the three years under review.”<sup>133</sup>

172. Of course, and as we discuss in greater detail below, judicial salaries were not maintained at current levels in real terms. The final number of applicants in 2019 was 37.<sup>134</sup> That number fell in 2020 to 30 and fell again in 2021 to 24.<sup>135</sup>

173. It is difficult to comment upon the *quality* of the applications. However, every measurable outcome except appointments was low in 2021 compared to the ten year average— in particular: applications received, applications reviewed, applicants approved for interview, and applicants interviewed. Although the figures reported reflect the Council’s activities in the calendar year specified and may include reviews and interviews carried over from the previous year, each of these outcomes has been lower than average in each of 2019, 2020 and 2021 (with the exception of applications reviewed which was one higher than average in 2020).<sup>136</sup>

### **Legal Diversity**

174. The Judicial Council attempts to ensure that the diversity of BC’s population is reflected on the Provincial Court bench. It analyzes factors such as the applicants’ gender, age, ethnicity, residential region, and type of practice.<sup>137</sup>

175. Here we focus on diversity of legal experience which is essential because of the Court’s broad criminal, civil and family jurisdiction. 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 reasonable to what one might reasonably expect to earn in practice.

176. 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 counsel prior to their

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<sup>133</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 18

<sup>134</sup> Judicial Council of BC Annual Report 2021, Joint Book of Documents, **Tab 2**, page 33 (top)

<sup>135</sup> Judicial Council of BC Annual Report 2021, Joint Book of Documents, **Tab 2**, page 33 (top)

<sup>136</sup> Judicial Council of BC Annual Report 2021, Joint Book of Documents, **Tab 2**, page 33 (top)

<sup>137</sup> Judicial Council of BC Annual Report 2021, Joint Book of Documents, **Tab 2**, page 18 (top)

appointment.

177. 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 evidence on which to suggest the proportions have changed significantly.

178. While 78% of practicing lawyers are private practitioners, these lawyers represented only 50% of applicants in 2021. By contrast, only 4% of practicing lawyers are Crown prosecutors, yet they represented almost 38% of applicants to the Provincial Bench.<sup>138</sup>

179. And the Judicial Council of BC's Annual Report 2020 makes clear that the over-representation of Crown counsel in the applicant pool to the bench has been steadily increasing, on average. Looking at five year increments, the Judicial Council of BC noted that between 1996-2000 Crown comprised 12% of applicants. By 2016-2020, they made up 35% of applicants.<sup>139</sup> The percentage of applicants from private practice has declined over time and the percentage of Crown counsel has increased. These percentage changes are largely a result of a decrease in the number of applicants coming from private practice.<sup>140</sup>

180. Although the 2019 JCC stated in its Report that there was no clear evidence that the salary of Provincial Court Judges is a disincentive to highly qualified lawyers in private practice applying for appointment,<sup>141</sup> other JCC Reports have given greater consideration to the lack of diversity in the applicants to the bench. For example, the concern about the lack of diversity in the applicants was raised by the Judicial Council before the 2010 JCC,

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<sup>138</sup> Judicial Council of BC Annual Report 2021, Joint Book of Documents, **Tab 2**, page 36 (top). The Judges' Association has previously been 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.

<sup>139</sup> Judicial Council of BC Annual Report 2020, Joint Book of Documents, **Tab 3**, page 14 (top)

<sup>140</sup> Judicial Council of BC Annual Report 2020, Joint Book of Documents, **Tab 3**, page 15 (top)

<sup>141</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 17

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.”<sup>142</sup>

181. The more recent numbers show that applications overall have decreased since the matter was considered by the 2019 JCC and that Crown counsel continue to be over-represented compared to lawyers in private practice applying for appointment. 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.

### **Section 96 Courts**

182. 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. This is addressed below in the context of “compensation provided in respect of similar judicial positions.” 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.

183. Given the fact that s. 96 courts 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, both the 2016 and 2019 JCC were “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”.<sup>143</sup>

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<sup>142</sup> 2010 JCC Report, Joint Book of Documents, **Tab 29**, page 31

<sup>143</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 17; 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 45



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

184. 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. The impact of this change is difficult to interpret because of the caution which all of the 2020/2021 results must be interpreted due to the temporary suspension of some court operations during the COVID-19 pandemic.<sup>144</sup> To the extent changes now under consideration become apparent 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**

185. The 2010 JCC 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.<sup>145</sup>

186. 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

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<sup>144</sup> Provincial Court of BC Annual Report 2020-21, Joint Book of Documents **Tab 1**, page 42

<sup>145</sup> 2010 JCC Report, Joint Book of Documents, **Tab 29**, page 26

cases can be quite disturbing and traumatic to the parties but also to the judge.

187. 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.

188. Consistent with the findings of both the 2016 and 2019 JCC, the Judges' Association submits that the compensation of other judges in Canada is an "important consideration" in determining reasonable compensation.<sup>146</sup> This is because 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. It is particularly useful when considered alongside the economic and financial positions of other provinces.

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

189. While the compensation paid to federally appointed judges is relevant under the factor which speaks to "similar judicial positions" in Canada (indeed within BC itself),<sup>147</sup> it is also relevant under s. 5(5)(a) of the Act and the need to attract highly qualified applicants as s. 96 courts and provincial courts compete for the same applicants.

190. 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.<sup>148</sup> Indeed, as the 2016 JCC noted, the 2013 JCC considered that the

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<sup>146</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 20; 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 47

<sup>147</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 20; 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 47

<sup>148</sup> *Bodner*, [para 72](#)

disparity in compensation is an “important factor in determining reasonable compensation for Provincial Court judges, but it is not an overriding one”.<sup>149</sup> To be clear, and as the 2019 JCC found, 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.<sup>150</sup>

191. 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.<sup>151</sup> 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.

192. 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.”<sup>152</sup>

193. 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

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<sup>149</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 48; 2013 JCC Report, Joint Book of Documents, **Tab 24**, page 38

<sup>150</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 20

<sup>151</sup> E.g. 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 19-20.

<sup>152</sup> 2010 JCC Report, Joint Book of Documents, **Tab 29**, page 29; 2013 JCC Report, Joint Book of Documents, **Tab 24**, page 38; 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 48

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>153</sup>

194. 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.<sup>154</sup>

195. 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. British Columbia's Provincial Court judges are currently paid a salary equal to 77.5% of the salary paid to federally appointed judges working in British Columbia (\$288,500 versus \$372,200), a dollar gap of \$83,700 in salary alone. We address the even larger gap when pensions are considered below. If the 2019 JCC's recommendation for 2022 is ultimately implemented, the salary would become \$307,000, which is 82.3% of the federal salary and a dollar gap of \$65,700. It is notable that even the 2019 JCC's salary recommendation for 2022 would have resulted in an unintended relative erosion of BC judges' salaries because inflation has been significantly higher than the JCC's estimated 2%.<sup>155</sup> By comparison, and we discuss other provinces in more detail below, in Ontario and Saskatchewan, judges' salaries are linked to s. 96 court salaries and are expressed as a percentage of that salary of 95.2% and 95%, respectively.<sup>156</sup>

196. The Judges' Association's proposed 2023 salary of \$350,863 would restore the base salary for BC judges to a reasonable relationship with federal salaries and thereby reduce

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<sup>153</sup> While [section 6\(2\)](#) of the *Provincial Court Act* 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. In practice, successful applicants have approximately 22 years at the Bar prior to their appointment. Judicial Council of BC Annual Report 2021, Joint Book of Documents, **Tab 2**, page 14, 31 (bottom)

<sup>154</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 17; 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 45; 2013 JCC Report, Joint Book of Documents, **Tab 24**, page 44; 2010 JCC Report, Joint Book of Documents, **Tab 29**, page 33

<sup>155</sup> BC Statistics Earnings and Employment Trends, Joint Book of Documents, **Tab 48**, p. 2; 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 29

<sup>156</sup> Cross-jurisdictional Table of Judges Salaries, Joint Book of Documents, **Tab 24**, page 2 notes 4 and 6

the financial disincentive for potential applicants to the Provincial Court. Its proposal for a salary adjustment equivalent to the CPI each year thereafter would ensure that the salary gap does not widen significantly throughout this JCC's mandate. As we explain in more depth below, the proposed salary of \$350,863 would be approximately 91% of federal judges' salaries (the discrepancy would be larger if pensions are considered).<sup>157</sup>

197. 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 can accumulate a full judicial annuity (pension) after only 15 years of service. 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.<sup>158</sup>
- (b) A federally appointed judge's annuity is calculated based on a higher salary than the salary paid to a Provincial Court judge.<sup>159</sup>
- (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.<sup>160</sup>
- (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.<sup>161</sup>

198. A detailed comparison of the relative values of the annuity paid to federally appointed

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<sup>157</sup> We explain below that to arrive at the relative federal salary for 2023, we have used the 2022 judicial salary multiplied by Canada's CPI for 2021 of 3.4%: see BC Stats – Earnings and Employment Trends (November 2022), Joint Book of Documents, **Tab 48**, p. 2.

<sup>158</sup> Sauvé Report, Appendix C, Judges' Book of Documents, **Tab 3**, pages 13, 15

<sup>159</sup> Sauvé Report, Judges' Book of Documents, **Tab 3**, page 6

<sup>160</sup> Sauvé Report, Judges' Book of Documents, **Tab 3**, page 2

<sup>161</sup> Sauvé Report, Judges' Book of Documents, **Tab 3**, page 2

judges and the pension provided to BC’s Provincial Court judges is set out in a Report prepared for the Judges’ Association by André Sauvé, actuary, dated December 2022. As it stands currently, with the salary of \$288,500 that the Government substituted effective April 1, 2022, the compensation value of the retirement benefits determined as a level percentage of pay over the working lifetime of a typical judge is on average 43.1%. For federally appointed judges, it is 66.4%.<sup>162</sup>

199. Using those figures and an estimate of the federal judicial salary for 2023, it is readily apparent that the Judges’ Association’s proposed increase to \$350,863 effective April 1, 2023, will still leave a substantial gap in the compensation payable to federally appointed judges. The total compensation of each can be calculated as follows:

Jurisdiction	Estimated/Proposed Salary for 2023	Weighted Average Pension Value as % of Salary (as per Sauvé)	Total Compensation	Remaining Dollar Difference with JA Proposal
BC (Judges proposal)	\$350,863	43.1%	\$502,084	-
Federal <sup>163</sup>	\$384,648	66.4%	\$640,054	\$137,970

200. It is time for this significant gap in compensation to be substantially reduced.

201. 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.<sup>164</sup> The 2019 JCC cautioned that recruitment could become a problem if compensation did not “keep pace with other options open to this unique and highly qualified group”.<sup>165</sup> Since then, compensation has not kept pace and BC Judges have fallen farther and farther behind and application numbers have fallen.

<sup>162</sup> Sauvé Report, Judges’ Book of Documents, **Tab 3**, page 5

<sup>163</sup> To arrive at this salary we have used the 2022 judicial salary multiplied by Canada’s CPI for 2021 of 3.4%: see BC Stats – Earnings and Employment Trends (November 2022), Joint Book of Documents, **Tab 48**, p. 2

<sup>164</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 45; 2013 JCC Report, Joint Book of Documents, **Tab 24**, page 44; 2010 JCC Report, Joint Book of Documents, **Tab 29**, page 33

<sup>165</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 17

202. 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"."<sup>166</sup>

203. 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."<sup>167</sup>

204. 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,

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<sup>166</sup> 2013 JCC Report, Joint Book of Documents, **Tab 24**, pages 42-43

<sup>167</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 43

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.”<sup>168</sup>

205. 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.”<sup>169</sup>

206. Three additional Provincial Court judges had left the Court for an appointment to the BC Supreme Court, including the former Chief Judge, at the time of the 2019 JCC.<sup>170</sup> While the 2019 JCC was not prepared to conclude that the number of appointments to the Supreme Court justified a conclusion that the Provincial Court was not attracting sufficient numbers of highly qualified applicants, it again highlighted the need for compensation to “keep pace with other options open” to this group.<sup>171</sup>

207. 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.

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

208. 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.

209. 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

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<sup>168</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 44

<sup>169</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 45

<sup>170</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 17

<sup>171</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 17



aspects of judicial compensation are salary and pension. Judicial salaries are compared in the chart that forms Tab 34 in the Joint Book of Documents. The jurisdictions are presented in ordinal rank except that due to a last minute change to the judicial salaries in PEI, that province should be listed above British Columbia. In other words, BC judges now rank 10<sup>th</sup> of the 13 jurisdictions (including federally appointed judges).

210. The Sauvé Report 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. The Sauvé Report is discussed in greater detail below in Part IV. 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.

211. 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 in Part IV.

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

212. 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.<sup>172</sup>

213. This factor was introduced following amendments to the *JCA* in 2015. The 2016 JCC was therefore the first JCC to consider this provision as currently worded. The 2016 JCC expressed some caution in its approach to this factor, writing:

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 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.

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<sup>172</sup> 2021 Decision of the Court of Appeal, [para. 59](#)

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 is setting its fiscal policy, must be avoided.<sup>173</sup>

214. The JCC's analysis of this factor was the subject of judicial commentary in the judicial review of the government's response to the 2016 JCC recommendations. The Court of Appeal was critical of the 2016 JCC for giving "no apparent weight to *changes* in the compensation of others paid from the public purse."<sup>174</sup> This Commission should therefore not rely on the 2016's JCC analysis as a model for approaching this factor.

215. The Court of Appeal's 2021 Decision post-dated the 2019 JCC Report. Thus, the 2019 JCC did not have the benefit of the Court's analysis in approaching this factor. In its response to the 2019 JCC recommendations, the Government was critical of the 2019 JCC's approach to this factor.<sup>175</sup> While the Judges' Association's view is that this criticism is unwarranted, that response is currently the subject of judicial review before the BC Supreme Court.

216. Therefore, this Commission should ensure that it approaches this factor with care and due regard to the Court of Appeal's 2021 Decision. It should make its own assessment of this factor without heavy reliance on the analysis of previous JCCs.

217. It is under this factor that evidence of *changes* in compensation of others paid by provincial public funds must be assessed.

218. As the Government itself conceded in its response to the 2019 JCC recommendations, "Judges need not receive identical raises to those received by others paid from public funds, but if others paid from provincial public funds are being held to raises of a certain level on account of government expenditure management policies, salary

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<sup>173</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 53

<sup>174</sup> 2021 Decision of the Court of Appeal, [para. 59](#)

<sup>175</sup> Government Response to 2019 JCC Report re PCJs, Joint Book of Documents, **Tab 19**, pages 10-14

increases for judges should account for this context.”<sup>176</sup>

219. The evidence before the Commission is that out of 184 Collective Agreements and Compensation Arrangements<sup>177</sup> ten agreements with unionized employees in the BC Public Sector had been settled/ ratified by December 2022 and eight tentative agreements had been reached for the first three years covered by this Commission’s mandate.<sup>178</sup>

220. No agreements or tentative agreements have been reached, and no information is provided, in respect of what changes in compensation others paid by provincial public funds may expect or receive in the fourth year of this Commission’s mandate. This factor would therefore have a minimal role to play in determining reasonable remuneration for the fourth year of this Commission’s mandate and is also unreliable in terms of considering what an average increase over the 4 year term of this Commission’s mandate might be.

221. The agreements that have been settled/ ratified or tentatively agreed to, were reached under the “2022 Shared Recovery Mandate”. In respect of changes to *general wages* (as opposed to *compensation* which is what the *JCA* requires that this Commission consider), that mandate includes:

- a. Year 1 – a flat increase of \$0.25/hour which provides a greater percentage increase for lower paid employees, plus 3.24%;
- b. Year 2 – 5.5% plus a potential Cost of Living Adjustment to a maximum of 6.75%;
- c. Year 3 – 2% plus a potential Cost of Living Adjustment to a maximum of 3%
- d. A negotiable Flexible Allocation of up to 0.25% in years 1 and 2 to support mutually beneficial outcomes for both parties.<sup>179</sup>

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<sup>176</sup> Government Response to 2019 JCC Report re PCJs, Joint Book of Documents, **Tab 19**, page 11

<sup>177</sup> Provincial Bargaining Update (December 2022), Joint Book of Documents, **Tab 42**, page 1

<sup>178</sup> Public Sector Bargaining Mandates & Agreements (2022), Joint Book of Documents, **Tab 43**, page 1

<sup>179</sup> Public Sector Bargaining Mandates & Agreements (2022), Joint Book of Documents, **Tab 43**, page 1

222. Thus, this Commission can conclude that some unionized employees are being provided with *wage* increases of at least 10.74% in the first three years of this Commission’s mandate. As well, unionized employees will receive more still because of the flat \$0.25/hour increase in Year 1 and this will be more significant when expressed as a percentage for some employees than others. Government has recognized the need to protect wages from cost of living erosion. Finally, in Years 2 and 3 unionized employees may in fact get more because of the flexibly allocation of an additional 0.25% in years 1 and 2.

223. An example of a group of unionized employees receiving more than 10.74% in *wage* increases are those employees covered by the Legal Aid BC Tentative Agreement. In addition to the 10.74% wage increases, these employees will see increases of \$455 per year of call in Year 1. In 2024 (Year 3), Legal Aid BC employees will see a flat \$450 increase to the grid prior to the corresponding wage increase.<sup>180</sup> Again, it is difficult to express these dollar increases as a percentage because the impact will vary depending on the employees base salary.

224. In respect of the negotiable flexible allocation of up to an additional 0.25% in years 1 and 2, Government has explained that this is akin to the additional 0.25% of total compensation available under the 2019 bargaining mandate which Government maintains was not included in the calculation of average increases for BCGEU employees.<sup>181</sup> Despite that it was not included in the average provided by Government, some of that funding was apparently used for additional targeted compensation increases to address specific recruitment and retention issues and the same use can be made of the new additional funding.<sup>182</sup> A recognition by Government that where wages have fallen behind increases beyond the base provided in the current bargaining mandate may be required.

225. In addition to the minimum 10.74% wage increases contemplated by the “2022 Shared Recovery Mandate”, unionized employees are typically eligible for annual step-

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<sup>180</sup> Part 1 News Release re Ratified Agreement for Legal Aid BC, Joint Book of Documents, **Tab 45**, page 1, 2

<sup>181</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, page 8

<sup>182</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, page 8

increases in which pay increases follow an automatic, set schedule of increases based on the “step” the employee is at in a particular salary range.<sup>183</sup>

226. What has proved to be more difficult is obtaining reliable evidence about what changes to compensation *excluded employees and others* paid from public funds have received. Government has explained the difficulties in assembling this information including that:

- a. There are no central repositories or other ready-made reports that contain the information requested on compensation and changes to compensation paid by the Province to the various non-unionized employees and related groups;<sup>184</sup>
- b. Non-unionized employees are entitled to performance-based increases or performance based in-range pay progression which is discretionary and may be implemented part way through a fiscal year;<sup>185</sup>
- c. There are also three legacy instances of payment structures that involve either bonus payments or, alternatively, holdbacks.<sup>186</sup>

227. Nevertheless, one example of a non-unionized group receiving more than 10.74% in wage increase are legal aid lawyers. Following the 2019 JCC recommendations, Government was critical of the 2019 JCC for giving weight to the increase received by legal aid lawyers without considering that tariff rates for legal aid lawyers had only been raised once before this since 1991.<sup>187</sup>

228. This JCC should therefore expressly consider that context. However, the Judges’ Association’s position is that this context is not very helpful because the *JCA* does not ask

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<sup>183</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, page 2

<sup>184</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, page 1

<sup>185</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, page 2

<sup>186</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, pages 2-3

<sup>187</sup> Government Response to 2019 JCC Report, Joint Book of Documents, **Tab 19**, page 13

this Commission to consider the *frequency* with which groups may receive a change in compensation, but rather what change in compensation is actually made. What the previous change to the legal aid tariff demonstrates is that when compensation paid by provincial public funds has become unreasonably low, government may depart from its bargaining mandate to address this. Although many others paid from provincial public funds were held to approximately 2% increases in 2019, Legal Aid Lawyer tariffs were increased by up to 35%.<sup>188</sup>

229. In 2022, and despite this recent 35% increase, the result of applying the “2022 Shared Recovery Mandate” to the Legal Aid tariff, is that legal aid lawyers will see an additional increase to the tariff of between 11.34% and 13.76% over the next three years.<sup>189</sup> In other words, and although the Government declined to provide these figures in the table of its summary of compensation and changes to compensation paid to others from public funds,<sup>190</sup> for some the Legal Aid tariff will have increased by more than 48% over the 6 year period starting with 2019.

230. Public services excluded staff salary ranges were also increased by more than the “2022 Shared Recovery Mandate” for Year 1. Specifically, they were increased by 4% for 2022/23 and excluded employees may also receive performance based increases up to 4% for a total of 8%.<sup>191</sup> Government has provided no evidence about what increases may be expected by this group in subsequent years.<sup>192</sup>

231. Family physicians have also been offered changes in compensation of greater value than those set out in the “2022 Shared Recovery Mandate”. In particular, the Province reached an agreement with the Doctors of British Columbia to provide compensation consistent with the “2022 Shared Recovery Mandate”. *In addition*, it agreed to provide

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<sup>188</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, pages 1, 7

<sup>189</sup> Part 2 Assn of Legal Aid Lawyers Announcement re Tariff Agreement, Joint Book of Documents, **Tab 45**, page 2

<sup>190</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, page 1

<sup>191</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, page 7

<sup>192</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, page 7

additional funding to family physicians to cover overhead costs.<sup>193</sup> Again, this additional compensation was offered to attract and retain family physicians in the province.<sup>194</sup>

232. The Assistant Deputy Attorney Generals (Civil and Criminal) have, since 2017, consistently received salary increases in excess of the public sector bargaining mandate. Of particular relevance to this Commission, the increases have been as follows:

- a. 2019/20 = 3% + \$25,000
- b. 2020/21 = 2% + \$25,000
- c. 2021/22 = 0% + \$55,000<sup>195</sup>

233. According to the Public Accounts published in each of those fiscal years, the total salary for Assistant Deputy Attorney Generals (Civil and Criminal) were as follows:

- 2019/20: criminal: \$228,893, civil: \$229,340
- 2020/21: criminal: \$229,213, civil: \$246,952
- 2021/22: criminal: \$257,615, civil: \$240,820<sup>196</sup>

234. Thus, the additional increases of between \$25,000 and \$55,000 significantly exceeded the public sector bargaining mandate in each of those years.

235. Another challenge for this Commission in applying this factor is that because the Province has tied compensation paid to certain employees to Judges, the reasoning becomes somewhat circular. For example, for the period from 2007 to 2018 Crown counsel received increases in salary consistent with those provided to Provincial Court Judges, plus

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<sup>193</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, page 8

<sup>194</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, Appendix K

<sup>195</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, page 10

<sup>196</sup> Public Accounts 2019/2020, Excerpt, Judges' Book of Documents, **Tab 12**; Public Accounts 2020/2021, Excerpt, Judges' Book of Documents, **Tab 13**; Public Accounts 2021/2022, Excerpt, Judges' Book of Documents, **Tab 14**

an additional 1.27%.<sup>197</sup> From 2019 forward, Crown counsel continue to receive increases consistent with those provided to Provincial Court Judges but without the additional 1.27% annually.<sup>198</sup>

236. As noted, Crown counsel salaries have been tied to Provincial Court Judges salaries, and up until 2019, Legal Services Branch Legal Counsel salaries were tied to Crown counsel.<sup>199</sup>

237. However, these increases do not paint a full picture because in addition to compensation payable based on years of call, legal counsel may apply to be considered for early entry to salary levels based on merit, some are grandfathered into a merit-based salary scale, and still more may be assigned to certain work that the Deputy Attorney General designates as warranting a temporary salary increase, or hold a role that entitles them to more pay.<sup>200</sup>

238. In British Columbia, all of the following positions receive, pursuant to various Government enactments, the same salary as the Chief Judge of the Provincial Court:

- a. The Chief Electoral Officer,
- b. Ombudsperson,
- c. Auditor General,
- d. Conflict of Interest Commissioner,
- e. Information and Privacy Commissioner,
- f. Police Complaint Commissioner, and

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<sup>197</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, page 4

<sup>198</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, page 4

<sup>199</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, page 5

<sup>200</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, pages 4-5



g. the Representative for Children and Youth.<sup>201</sup>

239. The Province has not indicated whether or not this is an exhaustive list of positions whose salaries are tied to Judges. While there is therefore little to be gained by examining the *change* in the compensation paid to these publicly funded positions, what is striking is how much more generous the compensation for these positions is in British Columbia, when compared to our most relevant comparators. We address this below in discussing the economic and financial position of government.

240. As noted, there is no evidence that anyone paid from provincial public funds is being held to raises of any particular level in Year 4.

241. Despite being asked by the Judges' Association to provide it, the Government has provided very limited evidence of what other changes in *compensation* unionized employees may receive in this period. It is clear from the Deputy Minister 2 Total Compensation (April 2022) that some others paid from provincial public funds receive a substantial portion of their *compensation* in forms other than wages such as pension plans, statutory, health and disability benefits.<sup>202</sup> Government has advised that "since the 2019 JCC, there have been several material changes to certain allowances, expenses and benefits for unionized employees, non-unionized employees and other groups".<sup>203</sup> Leaving aside those that also apply to judges, some significant changes include those made to the Flexible Benefits Program. By way of non-exhaustive example, in 2023, the extended health lifetime maximum has increased from \$500,000 to \$3 million per person, which includes coverage for out of province and out of country medical emergencies for business and personal travel; the annual maximum for counselling services has increased from \$500 per covered individual per year to \$750 per covered individual per year; fees for routine eye exams have been increased from \$75 to \$100 maximum every 24 months for adults who are age of 19 and older; the minimum amount of basic life insurance has increased from \$80,000 to \$100,000. The employer pays the premiums on the base \$100,000 and the

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<sup>201</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, pages 9-10

<sup>202</sup> Total compensation Deputy Minister (April 2022), Joint Book of Documents, **Tab 44**, page 1

<sup>203</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, page 3

employee pays the premiums for any insurance over the base minimum; massage therapy is increasing from \$500 per year, per person to \$750 per year, per person; physiotherapy is increasing from \$500 per year, per person to \$750 per year, per person.<sup>204</sup>

242. The value of the changes in *compensation* received by Legal Aid BC should also be viewed in light of the improvements to dental, health, leave and other benefits covered by the agreement.<sup>205</sup> As well, the Legal Aid BC agreement leaves open that there may be additional changes following a joint proposal that presents the wage disparity concerns facing LABC staff lawyers and suggestions for how to address those concerns.<sup>206</sup> Legal Aid Lawyers also received additional changes including money for continuing professional development, travel bursary funds, payment to support the bargaining process, and money for hiring articulated students.<sup>207</sup>

243. As noted above, and as the Government itself rightly acknowledges, Judges need not receive identical raises to those received by others paid from provincial public funds. In referencing the changes in compensation, 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. This Commission's responsibility is to consider all of those factors. Salary increases for judges should account for the context in which they are made including government's expenditure management policies, and its willingness to depart from those policies when circumstances make reliance upon them unreasonable.

244. In approaching this factor, this Commission should consider that when viewed as an indicator of the willingness of the Government as a whole to pay and to correct unreasonableness, the levels of the increases provided to other groups are a useful consideration against which the Government's position about reasonable salaries for judges can be tested.

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<sup>204</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, Appendix A page 1

<sup>205</sup> Part 1 News Release re Ratified Agreement for Legal Aid BC, Joint Book of Documents, **Tab 45**, pages 2-7

<sup>206</sup> Part 1 News Release re Ratified Agreement for Legal Aid BC, Joint Book of Documents, **Tab 45**, page 6

<sup>207</sup> Part 2 Assn of Legal Aid Lawyers Announcement re Tariff Agreement, Joint Book of Documents, **Tab 45**, page 2

245. 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.<sup>208</sup>

246. 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.<sup>209</sup>

247. While the Government is the only party to this process with ability to further elucidate the total compensation paid and the other guarantees made, it has chosen to provide very limited information on which this Commission might meaningfully assess this factor.

248. 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 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 certain groups to the salary increases received by judges. Government has been repeatedly criticized for this choice which undermines confidence in this constitutionally mandated process.

249. In 2010, Government considered the impact to its expenditures in respect of the broader public sector in responding to the 2010 JCC’s recommendations in March, 2011.

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<sup>208</sup> *Newfoundland Association of Provincial Court Judges v. Newfoundland*, 2000 NFCA 46, [para 191](#)

<sup>209</sup> Report of the 2011 Manitoba Judicial Compensation Committee (excerpt only), Judges’ Book of Documents, **Tab 8**, page 73

As noted above, in the case of the 2010 JCC, the Court found that government failed to deal with the process and the issues in good faith. In light of those larger costs consequences, in the place of the recommendations of the JCC, the government imposed its bargaining position with public sector unions upon the judges. Following a judicial review of that response, the Court used the following terms to describe the government's conduct in defending its response: "unusual and questionable",<sup>210</sup> "misleading",<sup>211</sup> "evidenced, at best, a lack of good faith",<sup>212</sup> "[a]t worst it is a deliberate information shell game",<sup>213</sup> "inappropriate",<sup>214</sup> "does not demonstrate the necessary respect for the process",<sup>215</sup> "not legitimate."<sup>216</sup> The Court awarded special costs against the Attorney General.<sup>217</sup>

250. 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."<sup>218</sup>

251. Government has not heeded this caution. Instead, numerous linkages between provincial court judges' salaries and other public sector salaries persist. This Commission must consider changes in compensation paid to others from provincial funds, yet

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<sup>210</sup> First Judicial Review, [para. 60](#)

<sup>211</sup> First Judicial Review, [para. 61](#)

<sup>212</sup> First Judicial Review, [para. 81](#)

<sup>213</sup> First Judicial Review, [para. 81](#)

<sup>214</sup> First Judicial Review, [para. 81](#)

<sup>215</sup> First Judicial Review, [para. 82](#)

<sup>216</sup> First Judicial Review, [para. 92](#)

<sup>217</sup> *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, [2012 BCSC 1420](#)

<sup>218</sup> 2013 JCC Report, Joint Book of Documents, **Tab 24**, page 36

Government has itself undermined the utility of this factor.

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

252. British Columbia's economy is "resilient", "balanced" and "stable" and its financial position is "solid" when considered in light of the recent experience in BC and also in relation to the economies of the other Canadian jurisdictions.<sup>219</sup> As discussed in detail below, British Columbia experienced an economic downturn as COVID-19 emerged in 2020. However, British Columbia's recovery was rapid and above the Canadian average. The current and predicted economic conditions of the British Columbia economy are positive and support the Judges' Association's requests for increased compensation.

253. 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 December 2022 ("**McKinnon Report**"), is relied on here.

254. 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 "the Canadian economy has fared well in comparison with other advanced economies".<sup>220</sup> The immediate impact of the COVID disruption in 2020 was slightly greater in Canada partly because of our higher trade levels and the sharp decline in resource prices. Although Canada's economy was negatively impacted by COVID in 2020, by the end of 2021, Canada quickly began to recover and had restored all the employment losses and GDP to its pre-COVID levels.<sup>221</sup>

255. The International Monetary Fund ("IMF") forecasts that Canada "will perform somewhat better than its peers through to 2027."<sup>222</sup> Canada's net debt as a percent of GDP has been lower than the G-7 average in each of 2018 and 2021 and is forecasted to remain so in 2027.<sup>223</sup> Low

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<sup>219</sup> McKinnon Report, Judges' Book of Documents, **Tab 1**, pages 11, 13-14, 16-17, 25, 31, 33-35

<sup>220</sup> McKinnon Report, Judges' Book of Documents, **Tab 1**, p. 10

<sup>221</sup> McKinnon Report, Judges' Book of Documents, **Tab 1**, p. 5-6

<sup>222</sup> McKinnon Report, Judges' Book of Documents, **Tab 1**, p. 4

<sup>223</sup> McKinnon Report, Judges' Book of Documents, **Tab 1**, p. 4-7

levels of debt or financial leverage give Canada flexibility to increase spending dramatically in the face of urgent needs and the cost of carrying the debt is noticeably lower.<sup>224</sup>

256. The disruptions to European energy flows and international grain markets occasioned by the Russian invasion of Ukraine have benefited Canada.<sup>225</sup>

257. The McKinnon Report describes the state of the British Columbia economy and concludes that it “has grown faster than the country as a whole” and maintained lower unemployment rates than the country as a whole for the past decade.<sup>226</sup>

258. Looking at the annual change in real GDP for BC and Canada, McKinnon confirms the comparative strength of British Columbia and hence of the provincial government’s financial capacity.<sup>227</sup> In every year from 2014 to 2021, British Columbia had better growth than that experienced in the country as a whole. Even during the COVID downturn, the decline in British Columbia’s GDP was less than Canada’s and British Columbia’s subsequent recovery was larger.<sup>228</sup>

259. The McKinnon Report compares the unemployment rate in BC with other jurisdictions and notes the “solid performance of the B.C. labour market. For the past twenty years, the provincial unemployment rate has stayed at or below the national rate”.<sup>229</sup> Even when the unemployment rate rose during the COVID disruptions, it remained below the national average and dropped back to lower levels more rapidly than did the national unemployment rate.<sup>230</sup>

260. The McKinnon Report reflects on the structure of the provincial economy and considers that the diversity of British Columbia’s economy reduces volatility and means greater confidence in projections about British Columbia’s expected financial position.<sup>231</sup>

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<sup>224</sup> McKinnon Report, Judges’ Book of Documents, **Tab 1**, pp. 7-8

<sup>225</sup> McKinnon Report, Judges’ Book of Documents, **Tab 1**, p. 4-5

<sup>226</sup> McKinnon Report, Judges’ Book of Documents, **Tab 1**, p. 13

<sup>227</sup> McKinnon Report, Judges’ Book of Documents, **Tab 1**, p. 10

<sup>228</sup> McKinnon Report, Judges’ Book of Documents, **Tab 1**, p. 10-11

<sup>229</sup> McKinnon Report, Judges’ Book of Documents, **Tab 1**, p. 11

<sup>230</sup> McKinnon Report, Judges’ Book of Documents, **Tab 1**, p. 11-12; see also Wood Report, para. 14

<sup>231</sup> McKinnon Report, Judges’ Book of Documents, **Tab 1**, p. 13-14

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.<sup>232</sup>

261. 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 supply-chain disruption”.<sup>233</sup>

262. 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 economic shock that affects a specific sector of the economy”. As such, it is a “balanced and resilient economy”.<sup>234</sup>

263. The Government’s Point in Time Report on the Current and Expected Economic Conditions in British Columbia and the Current and Expected Financial Position of Government as of December 2022 is to similar effect. Deputy Minister Wood rightly acknowledges that “[e]conomic conditions rebounded in 2021 from the initial negative economic impact of the COVID-10 pandemic.”<sup>235</sup>

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

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<sup>232</sup> McKinnon Report, Judges’ Book of Documents, **Tab 1**, p. 15

<sup>233</sup> McKinnon Report, Judges’ Book of Documents, **Tab 1**, pp. 16, 17

<sup>234</sup> McKinnon Report, Judges’ Book of Documents, **Tab 1**, p. 17

<sup>235</sup> Wood Report, para 9.

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

265. Section 5(5)(f) of the Act requires this JCC to consider the current and expected financial position of the Government over the four 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.

266. 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.

267. McKinnon has produced a table that demonstrates that although British Columbia experienced deficits in 2019/20 and 2020/21, "there was a rapid restoration of the province's finances with a substantial surplus in 2021/22 and a very large surplus now projected for the current fiscal year."<sup>236</sup>

268. Another indicator of a government's confidence in its finances is its capital spending. McKinnon notes that over the past several years government has chosen to increase capital spending even while recovering from a recession. This "confirms the healthy position of the government's finances".<sup>237</sup>

269. A further way to consider the financial position of government is to look at fiscal capacity or the ability to raise taxes or fees without deterring investment or having British Columbia residents pay significantly more than residents of other provinces. McKinnon notes that compared to other provinces, British Columbia has "comparative fiscal capacity" which adds to resilience and "underscores the solid financial position of government."<sup>238</sup>

270. Provincial debt indicates the cumulative position of the government over time. Provincial debt has returned to normal levels after the COVID disruption. British Columbia has moved from having the third lowest debt in the country in 2018, to the lowest debt in

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<sup>236</sup> McKinnon Report, Judges' Book of Documents, **Tab 1**, pp. 17; see also Wood Report, paras. 24-25

<sup>237</sup> McKinnon Report, Judges' Book of Documents, **Tab 1**, pp. 23-24

<sup>238</sup> McKinnon Report, Judges' Book of Documents, **Tab 1**, pp. 24-25



the country in 2022.<sup>239</sup>

271. Public sector pension plans are an indication of future obligations of the province. These plans are fully funded with a significant margin.<sup>240</sup>

272. A final consideration are the independent evaluations of the province's financial situation by bond rating agencies. McKinnon concludes "B.C.'s ratings are remarkable" noting the professional and independent evaluation of each bond agency puts B.C first in their rankings as compared to other provinces. No other province receives a rating as high as B.C's rating from any of the bond rating services. And these ratings were made *before* British Columbia improved key financial measures in its quarterly budget update.<sup>241</sup>

273. 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.

274. 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.<sup>242</sup>

275. The Province's caution has two components. First, 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 was used as a ceiling in creating the Budget, to prevent the Government from making overly optimistic forecasts. However, in the most recent Budget the Ministry of Finance's forecast ranges for 2022/23 through 2024/25 are 0.2 percentage points *below* the Council's forecast for each year of the forecast period.<sup>243</sup>

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<sup>239</sup> McKinnon Report, Judges' Book of Documents, **Tab 1**, pp. 25-28

<sup>240</sup> McKinnon Report, Judges' Book of Documents, **Tab 1**, p. 29

<sup>241</sup> McKinnon Report, Judges' Book of Documents, **Tab 1**, pp. 29-31

<sup>242</sup> McKinnon Report, Judges' Book of Documents, **Tab 1**, p. 19

<sup>243</sup> McKinnon Report, Judges' Book of Documents, **Tab 1**, pp. 19-20

276. Second, the Ministry of Finance publishes “budget prudence measures” that allot very large sums to contingency accounts to cover unexpected events or expenses.<sup>244</sup> The budget prudence measures over the coming fiscal years are billions of dollars in each budget year.<sup>245</sup>

277. 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.

### **C. Other Relevant Factors**

278. Subsection 5(5.2) of the *Judicial Compensation Act* also directs this 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 JCC.

## **PART IV: RECOMMENDATIONS**

### **A. Salary**

279. The Judges’ Association seeks the following recommendations in respect of salary:

1. Effective April 1, 2023 the annual salary for puisne judges shall be increased to \$350,863; and
2. Effective on each of April 1, 2024, April 1, 2025 and April 1, 2026, the salaries for puisne judges shall be further increased by the Consumer Price Index (“**CPI**”) per annum.

280. It is respectfully submitted that a fair consideration of the relevant objective factors supports that there ought to be a significant salary correction for the fiscal year 2023. 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 correct the salary to a level which is fair and

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<sup>244</sup> McKinnon Report, Judges’ Book of Documents, **Tab 1**, p. 20

<sup>245</sup> McKinnon Report, Judges’ Book of Documents, **Tab 1**, pp. 23-24

reasonable. Once so corrected for 2023, the proposal is for only minor adjustments in each of 2024, 2025 and 2026, which will protect against salary erosion and will maintain a reasonable relationship with the appropriate comparators throughout the mandate of this JCC.

281. 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**

282. Based on the salaries substituted by the Government for those recommended by the 2019 JCC, puisne judges are currently paid a salary of \$288,500, which was effective April 1, 2022. That salary is just marginally higher than the salary recommended for **2020** by the 2019 JCC. If the recommendations of the 2019 JCC are eventually implemented, the 2019 salary will rise to \$307,00.

283. 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.

### **Salary History 2011-2022**

284. The recent history of judicial salaries in BC is complex, given the Government's rejection of the salary recommendations of the last four JCCs since 2010 and the ensuing litigation. A table summarizing the recommendations and the outcomes of the 2010, 2013, 2016 and 2019 JCCs (to the extent known) is provided at Tab 17 of the Joint Book of Documents.

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

286. For the reasons set out below, the uncertainty over the salaries flowing from the 2019 JCC recommendations is largely beside the point and should not cause this 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 the prior period.

### **2023 Salary**

287. The Judges' Association submits that a salary of \$350,863, effective April 1, 2023, is reasonable as it takes into account all of the objective factors that must be considered by this 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**

288. Section 5(5)(a) of the *Judicial Compensation Act* requires consideration of "the need to maintain a strong court by attracting highly qualified applicants".

289. The 2019 JCC expressed that the "dip in applicants in 2018" and the apparently lower number of applicants in 2019 was "somewhat worrisome".<sup>246</sup> In both 2020 and 2021, the Judicial Council of BC has reported further declines in the number of applicants to the Provincial Court. The number of applicants in each year was below the ten year average.<sup>247</sup>

290. It is difficult to comment upon the *quality* of the applications. However, there is reason for concern because nearly every measurable outcome except appointments was low in 2021 (and 2020 and 2019) compared to the ten year average – in particular: applications received, applications reviewed, applicants approved for interview, and applicant's interviewed.<sup>248</sup>

291. There is also less legal diversity now than in years previous. The percentage of

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<sup>246</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 18

<sup>247</sup> Judicial Council of BC Annual Report 2021, Joint Book of Documents, **Tab 2**, page 2, 15

<sup>248</sup> Judicial Council of BC Annual Report 2021, Joint Book of Documents, **Tab 2**, page 29

applicants from private practice has declined over time and the percentage of Crown counsel has increased. These percentage changes are largely a result of a decrease in the number of applicants coming from private practice.<sup>249</sup> In 2021, while only approximately 4% of practicing lawyers are Crown prosecutors, they represented almost 38% of applicants to the Provincial Bench.<sup>250</sup>

292. It is difficult to conclusively prove the reason for the decline in number of applications received, applicants approved for interview, and applicant's interviewed. Likewise, it is difficult to prove the reason for the decline in legal diversity on the bench. However, whatever the cause of the decline, history shows that an increase in remuneration will likely result in more applications to the bench.<sup>251</sup>

### **Comparison with Federally Appointed Judicial Salaries**

293. 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*.

294. The 2013 JCC 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.<sup>252</sup>

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<sup>249</sup> Judicial Council of BC Annual Report 2020, Joint Book of Documents, **Tab 3**, page 10

<sup>250</sup> Judicial Council of BC Annual Report 2021, Joint Book of Documents, **Tab 2**, page 32. 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.

<sup>251</sup> Judicial Council of BC Annual Report 2020, Joint Book of Documents, **Tab 3**, page 7

<sup>252</sup> 2013 JCC Report, Joint Book of Documents, **Tab 24**, page 47

295. The 2016 JCC recommended salaries on the basis, in part, that “the gap [with federal salaries] would be closed somewhat.”<sup>253</sup> 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 amounted to only 83%. The relationship 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.

296. The gap is even wider now that the recommendations of the 2019 JCC have once again been rejected by Government. British Columbia Judges earn only 77.5% of the 2022 federal salary instead of the 82.5% they would be earning if the JCC’s recommendations had been accepted.<sup>254</sup> The Court on judicial review will not be considering whether this is reasonable compensation for judges. The scope of review is much more limited. Only this Commission can determine whether this disparity is reasonable.

297. The current salary for a federally appointed judge is \$372,200. The 2023/24 federal judges’ salary is not yet known. However, 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 IAI in the previous calendar year.

298. Making the conservative assumption that the IAI for Canada in 2022 is 3.4%, federal judges’ salaries will rise to \$384,648 in 2023/24. The proposed salary of \$350,863 would be 91% of federal judges’ salaries. The discrepancy would be larger if the value of pensions is considered:

Jurisdiction	Estimated/Proposed Salary for 2023	Weighted Average Pension Value as % of Salary (as per <i>Sauve</i> )	Total Compensation	Remaining Dollar Difference with JA Proposal
BC (Judges proposal)	\$350,863	43.1%	\$502,084	-

<sup>253</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 61

<sup>254</sup> Summary Chart of Salary Outcomes from Past JCC’s, Joint Book of Documents, **Tab 17**; see also Cross-jurisdictional Table of Judges Salaries, Joint Book of Documents, **Tab 34**

Federal <sup>255</sup>	\$384,648	66.4%	\$640,054	\$137,970
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299. 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.

300. Because the salaries of federally appointed judges are adjusted annually based on the IAI for Canada and the Judges' Association is proposing adjustments based on British Columbia's CPI, 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 is reasonable throughout the mandate of this JCC.

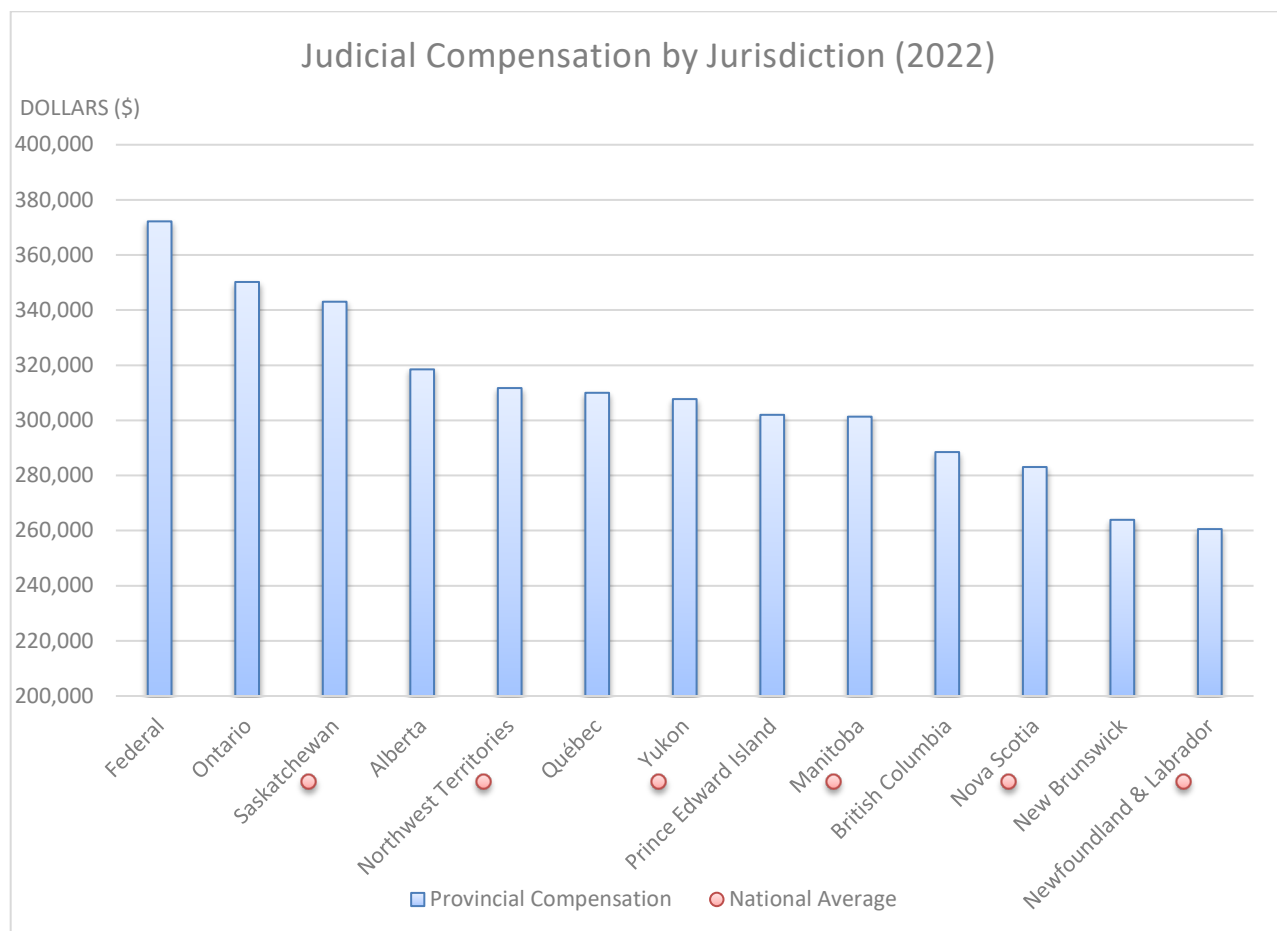
**Comparison with Similar Judicial Positions**

301. In 2022/23, as the chart at Tab 34 of the Joint Book of Authorities makes clear, British Columbia judicial salaries rank **10<sup>th</sup>** of the 13 jurisdictions, ahead of only three maritime provinces of Nova Scotia, New Brunswick and Newfoundland & Labrador. BC Judges' salaries are also below the national average.

302. The difference is graphically expressed here:

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<sup>255</sup> To arrive at this salary we have used the 2022 judicial salary multiplied by Canada's CPI for 2021 of 3.4%: see BC Stats – Earnings and Employment Trends (November 2022), Joint Book of Documents, **Tab 48**, p. 2



303. The 2019 JCC considered it reasonable that British Columbia judges be in fourth or fifth place among all of the jurisdictions.<sup>256</sup> When the Government rejected the 2019 JCC’s recommendations, it stated that the substituted salary would place British Columbia Judges fifth amongst provinces.<sup>257</sup> Even if federal judicial salaries and the territories are excluded, BC Judges would now be in seventh position. That is an unexpected outcome of the past three years.

304. In its July 2020 response to the 2019 JCC recommendations, Government stated that the JCC’s conclusion “that the province’s economic and financial position is sound, and will remain sound over the next three years, must be considered in light of the worsening of the province’s economic position”.<sup>258</sup> Although Government stated that detailed economic

<sup>256</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 30

<sup>257</sup> Government Response to 2019 JCC Report re PCJs, Joint Book of Documents, **Tab 19**, page 14

<sup>258</sup> Government Response to 2019 JCC Report re PCJs, Joint Book of Documents, **Tab 19**, page 8



forecasting was not available at the time of its response, it pointed to the economic slowdown due to COVID-19 and the projected impacts on revenue, the budget, GDP and unemployment rates as rendering “the recommended increase for judges’ salary as out of step with the current and expected economic and financial position of BC”.<sup>259</sup>

305. However, as we have shown above, the impacts of COVID on British Columbia’s economic and fiscal circumstances when compared to its impact on the economic and fiscal circumstances of other jurisdictions did not justify British Columbia Judges falling so far behind their most relevant comparators. In particular:

- a. In each year covered by the 2019 JCC Report, British Columbia outperformed Canada as a whole in terms of the annual change in real GDP. In contrast, for example, Saskatchewan’s GDP declined in each of 2019, 2020 and 2021 – the only province to do so;<sup>260</sup>
- b. In each year covered by the 2019 JCC Report, British Columbia’s unemployment rate remained below the national average and dropped back to lower levels more rapidly than did the national unemployment rate;<sup>261</sup>
- c. Although British Columbia experienced deficits in 2019/20 and 2020/21, the province’s finances were rapidly restored with a substantial surplus realized in 2021/22;<sup>262</sup>
- d. Government chose to increase capital spending in each of 2019, 2020, and 2021 which indicates financial capacity;<sup>263</sup>
- e. In 2018, BC had the third lowest debt-to-GDP ratio of any province and by 2022, it had the lowest debt-to-GDP ratio of any province.<sup>264</sup>

306. In light of the comparative economic and financial position of British Columbia, a

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<sup>259</sup> Government Response to 2019 JCC Report re PCJs, Joint Book of Documents, **Tab 19**, page 10

<sup>260</sup> McKinnon Report, p. 10-11, 15

<sup>261</sup> McKinnon Report, p. 12

<sup>262</sup> McKinnon Report, p. 17-18

<sup>263</sup> McKinnon Report, p. 23

<sup>264</sup> McKinnon Report, p. 28

reasonable salary would place British Columbia Judges nearer the top of the range.

307. The group of provinces in the top tier of judicial salaries are Alberta, Saskatchewan and Ontario. The 2019 JCC agreed with the Judges' Association that "Alberta, Saskatchewan and Ontario are the most appropriate comparators overall for British Columbian judges".<sup>265</sup> As the Table at Tab 34 of the Joint Book of Documents demonstrates, the salaries of BC judges have fallen well below the salaries of judges in those comparator jurisdictions.

308. The Judges' Association's proposal would properly and appropriately correct this and 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 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.

309. 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.<sup>266</sup>

310. 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

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<sup>265</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 20

<sup>266</sup> 2007 JCC Report, Excerpt, Judges' Book of Documents, **Tab 7**, page 17

current and future judicial salaries in those provinces, to facilitate a comparison going forward.

311. 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.

<b>Jurisdiction</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>2022</b>	<b>2023</b>
<b>BC (actual)</b> (recommended)	\$270,000 <i>\$281,251</i>	\$276,000 <i>\$287,000</i>	\$282,250 <i>\$297,000</i>	\$288,500 <i>\$307,000</i>	<b>\$350,863</b>
<b>Alberta</b>	\$309,500	\$318,500	<i>\$322,004</i>	<i>\$332,308</i>	<i>\$338,954</i>
<b>Saskatchewan</b>	\$304,074	\$312,286	\$316,971	\$343,045	\$353,590
<b>Ontario</b>	\$310,337	\$321,000	\$344,000	\$350,212	<i>\$361,000</i>

312. The proposal made the very conservative assumption that Alberta provincial court judicial salaries would increase by CPI. Alberta’s CPI for each of 2021 and 2022 was 1.1% and 3.2%, respectively.<sup>267</sup> For 2023 we assumed a CPI increase of 2%. That led to a salary of \$338,954 for 2023.

313. Saskatchewan Provincial Court Judges will receive \$353,590 because the 2020 Saskatchewan JCC recommended that Saskatchewan judicial salaries be set at 95% of the salary paid the previous year to federally appointed judges in each of 2022 and 2023.<sup>268</sup>

314. Ontario Provincial Court Judges salaries were set to be 95.27% of section 96 judges effective April 1, 2021 and then to be increased by the IAI annually until the new JCC.<sup>269</sup> They are presently paid \$350,212 and will receive an IAI increase this year (3.1%) putting them at \$361,000.

315. An average of the salaries for these three main comparators is \$351,181 for 2023.

<sup>267</sup> <https://www.alberta.ca/salary-disclosure.aspx>

<sup>268</sup> Report and Recommendations of the 2020 Provincial Court Commission of Saskatchewan, December 2020, Excerpt, Judges’ Book of Documents, **Tab 9**, page 12

<sup>269</sup> Cross-jurisdictional Table of Judges Salaries, Joint Book of Documents, **Tab 34**, note 6.

The salary proposed for 2023 is \$350,863 and is even lower than this conservative average.

316. Given the analysis contained in the McKinnon Report, including that BC has lower unemployment rates than any province (including Alberta, Saskatchewan and Ontario),<sup>270</sup> a more diversified economy than Alberta, Saskatchewan and Ontario resulting in less economic uncertainty,<sup>271</sup> and that British Columbia has the best credit ratings by all bond rating services of any province (including Alberta, Saskatchewan and Ontario),<sup>272</sup> it is fair and reasonable that the salary for BC judges be in close proximity to that paid to judges in Alberta, Saskatchewan and Ontario. 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 reasonable.

317. It is also reasonable when considered in light of the comparative salaries paid to others pegged to judges in other jurisdictions.

318. For example, the Chief Judge in BC received the following remuneration in each of 2019/2020; 2020/2021 and 2022/2023:

- 2019/2020: \$301,194
- 2020/2021: \$307,753
- 2021/2022: \$317,452<sup>273</sup>

319. As noted above, in British Columbia the Chief Electoral Officer, Ombudsperson, Auditor General, Conflict of Interest Commissioner, Information and Privacy Commissioner, Police Complaint Commissioner, and the Representative for Children and Youth are all tied to the salary paid to the Chief Judge of the Provincial Court.<sup>274</sup> We could not find any

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<sup>270</sup> McKinnon Report, Judges' Book of Documents, **Tab 1**, p. 13

<sup>271</sup> McKinnon Report, Judges' Book of Documents, **Tab 1**, p. 16

<sup>272</sup> McKinnon Report, Judges' Book of Documents, **Tab 1**, p. 31; see also Wood Report, para 33

<sup>273</sup> Public Accounts 2019/2020, Excerpt Judges' Book of Documents, **Tab 12**; Public Accounts 2020/2021, Excerpt, Judges' Book of Documents, **Tab 13**; Public Accounts 2021/2022, Excerpt, Judges' Book of Documents, **Tab 14**

<sup>274</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, pages 9-10

comparative data for positions of Police Complaint Commissioner, and the Representative for Children and Youth. However, in each of BC’s closest comparator provinces, with the exception a couple of positions in Ontario, each of the remaining positions appears to receive substantially less remuneration.<sup>275</sup>

	2019/2020	2020/2021	2021/2022
<b>Chief Electoral Officer</b>			
<b>Alberta</b>	\$236,236.22 <sup>276</sup>	\$293,361.81 <sup>277</sup>	No 2022 data.
<b>Saskatchewan</b>	\$236,160 <sup>278</sup>	\$239,538 <sup>279</sup>	\$239,555 <sup>280</sup>
<b>Ontario</b>	\$265,834.82 <sup>281</sup>	\$260,353.06 <sup>282</sup>	No 2022 data.

<sup>275</sup> In the data that follows, we have relied on Public Accounts for British Columbia and Saskatchewan and Public Sector Disclosure for Alberta and Ontario. This presents a difficulty because Public Accounts by fiscal year whereas Public Sector Disclosure is reported by calendar year.

<sup>276</sup> Alberta Public Sector Body Compensation Disclosure re Chief Electoral Officer 2020 and 2021, Judges’ Book of Documents, **Tab 15**. Compensation includes salary and, where applicable, cash out of vacation and taxable benefits related to employer provided automobile and life insurance. Other compensation, includes the employer’s share of non-cash benefits and contributions or payments made on behalf of the employees including Canada pension plan, employment insurance, pension, supplementary retirement plans, medical and dental, and disability plans.

<sup>277</sup> Alberta Public Sector Body Compensation Disclosure re Chief Electoral Officer 2020 and 2021, Judges’ Book of Documents, **Tab 15**

<sup>278</sup> Saskatchewan Public Accounts, 2019-20 re Chief Electoral Officer, Judges’ Book of Documents, **Tab 16**.

<sup>279</sup> Saskatchewan Public Accounts, 2020-21 re Chief Electoral Officer, Judges’ Book of Documents, **Tab 16**.

<sup>280</sup> Saskatchewan Public Accounts, 2021-22 re Chief Electoral Officer, Judges’ Book of Documents, **Tab 16**.

<sup>281</sup> Ontario Public Sector Salary Disclosure 2020 and 2021 re Chief Electoral Officer, Judges’ Book of Documents, **Tab Data** is for 2020 calendar year.

<sup>282</sup> Ontario Public Sector Salary Disclosure 2020 and 2021 re Chief Electoral Officer, Judges’ Book of Documents, **Tab 17**. Data is for 2020 calendar year.

	2019/2020	2020/2021	2021/2022
<b>Ombudsperson</b>			
<b>Alberta</b>	\$281,651.34 <sup>283</sup>	\$279,883.46 <sup>284</sup>	No data.
<b>Saskatchewan</b>	\$222,000 <sup>285</sup>	\$257,000 <sup>286</sup>	\$225,000 <sup>287</sup>
<b>Ontario</b>	\$312,127.81 <sup>288</sup>	\$312,419.80 <sup>289</sup>	No 2022 data.
<b>Auditor General</b>			
<b>Alberta</b>	\$259702.79 <sup>290</sup>	\$257878.19 <sup>291</sup>	No 2022 data.
<b>Saskatchewan</b>	\$232,000 <sup>292</sup>	\$235,000 <sup>293</sup>	\$284,000 <sup>294</sup>
<b>Ontario</b>	\$379,113.98 <sup>295</sup>	\$385,023.45 <sup>296</sup>	No 2022 data.

<sup>283</sup> Alberta Ombudsman's Compensation Disclosure, Judges' Book of Documents, **Tab 18**. Compensation includes salary, taxable benefits related to life insurance premiums and, where applicable, vacation payout, pension, and vehicle modifiers. Other compensation includes the employers non-cash benefits and contributions made on behalf of the employee, including EI and pension.

<sup>284</sup> Alberta Ombudsman's Compensation Disclosure, Judges' Book of Documents, **Tab 18**. Compensation includes salary, taxable benefits related to life insurance premiums and, where applicable, vacation payout, pension, and vehicle modifiers. Other compensation includes the employers non-cash benefits and contributions made on behalf of the employee, including EI and pension.

<sup>285</sup> Saskatchewan Public Accounts, Judges' Book of Documents, **Tab 19**.

<sup>286</sup> Saskatchewan Public Accounts, Judges' Book of Documents, **Tab 19**.

<sup>287</sup> Saskatchewan Public Accounts, Judges' Book of Documents, **Tab 19**.

<sup>288</sup> Ontario Public Sector Salary Disclosure 2020 and 2021 re Ombudsperson, Judges' Book of Documents, **Tab 20**. Benefits are not defined.

<sup>289</sup> Ontario Public Sector Salary Disclosure 2020 and 2021 re Ombudsperson, Judges' Book of Documents, **Tab 20**. Benefits are not defined.

<sup>290</sup> Compensation Disclosure re Auditor General, Judges' Book of Documents, **Tab 21**.

<sup>291</sup> Compensation Disclosure re Auditor General, Judges' Book of Documents, **Tab 21**.

<sup>292</sup> Saskatchewan Public Accounts re Auditor General, , Judges' Book of Documents, **Tab 22**.

<sup>293</sup> Saskatchewan Public Accounts re Auditor General, , Judges' Book of Documents, **Tab 22**.

<sup>294</sup> Saskatchewan Public Accounts re Auditor General, , Judges' Book of Documents, **Tab 22**.

<sup>295</sup> Ontario Public Sector Salary Disclosure 2020 and 2021 re Auditor General, Judges' Book of Documents, **Tab 23**.

<sup>296</sup> Ontario Public Sector Salary Disclosure 2020 and 2021 re Auditor General, Judges' Book of Documents, **Tab 23**.

	2019/2020	2020/2021	2021/2022
<b>Conflict of Interest Commissioner</b>			
<b>Alberta</b>	\$182,125.19 <sup>297</sup>	\$196,108.58 <sup>298</sup>	No 2022 data.
<b>Saskatchewan</b>	\$220,092 <sup>299</sup>	\$207,456 <sup>300</sup>	\$239,555 <sup>301</sup>
<b>Ontario</b>	\$262,179.16 <sup>302</sup>	\$261,575.21 <sup>303</sup>	No 2022 data.
<b>Information and Privacy Commissioner</b>			
<b>Alberta</b>	\$258,095.54 <sup>304</sup>	\$257,065.39 <sup>305</sup>	No 2022 data.
<b>Saskatchewan</b>	\$236,000 <sup>306</sup>	\$238,000 <sup>307</sup>	\$234,000 <sup>308</sup>
<b>Ontario</b>	\$105,872.78- \$344,933.29 <sup>309</sup>	\$264,511.55 <sup>310</sup>	No 2022 data.

<sup>297</sup> Office of the Ethics Commissioner of Alberta Salaries and Benefits Disclosure, Judges' Book of Documents, **Tab 24.** .

<sup>298</sup> Office of the Ethics Commissioner of Alberta Salaries and Benefits Disclosure Judges' Book of Documents, **Tab 24.**

<sup>299</sup> Saskatchewan Public Accounts 2019-20 to 2021-22 re Conflict of Interest Commissioner, Judges' Book of Documents, **Tab 25.**

<sup>300</sup> Saskatchewan Public Accounts re Conflict of Interest Commissioner, Judges' Book of Documents, **Tab 25.**

<sup>301</sup> Saskatchewan Public Accounts re Conflict of Interest Commissioner, Judges' Book of Documents, **Tab 25.**

<sup>302</sup> Ontario Public Sector Salary Disclosure 2020 and 2021 re Conflict of Interest Commissioner, . Judges' Book of Documents, **Tab 26.**

<sup>303</sup> Ontario Public Sector Salary Disclosure 2020 and 2021 re Conflict of Interest Commissioner, . Judges' Book of Documents, **Tab 26.**

<sup>304</sup> Office of the Information and Privacy Commissioner of Alberta's Compensation Disclosure, Judges' Book of Documents, **Tab 27.**

<sup>305</sup> Office of the Information and Privacy Commissioner of Alberta's Compensation Disclosure, Judges' Book of Documents, **Tab 27.**

<sup>306</sup> Saskatchewan Public Accounts 2019-20 to 2021-22 re Information and Privacy Commissioner, Judges' Book of Documents, **Tab 28.**

<sup>307</sup> Saskatchewan Public Accounts 2019-20 to 2021-22 re Information and Privacy Commissioner, Judges' Book of Documents, **Tab 28.**

<sup>308</sup> Saskatchewan Public Accounts 2019-20 to 2021-22 re Information and Privacy Commissioner, Judges' Book of Documents, **Tab 28.**

<sup>309</sup> Ontario Public Sector Salary Disclosure 2020 and 2021, Judges' Book of Documents, **Tab 29.**

<sup>310</sup> Ontario Public Sector Salary Disclosure 2020 and 2021, Judges' Book of Documents, **Tab 29..**

320. It leaves the impression that BC Judges salaries, relative to others paid by the BC provincial purse, are in need of correction when considered in relation to their counterparts in other relevant jurisdictions.

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

321. The Sauvé Report 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.<sup>311</sup> 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.<sup>312</sup>

322. 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 39.8% of salary to a high of 44.2% of salary. The weighted average value, which takes into account demographics of the entire complement of British Columbia judges, is 43.1% 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:<sup>313</sup>

Jurisdiction	Weighted Average Compensation Value
British Columbia	43.1%
Alberta	40.5%
Saskatchewan	49.4%
Ontario	62.2%
Federal	66.4%

<sup>311</sup> Sauvé Report, Judges Book of Documents, **Tab 3**, p. 1  
<sup>312</sup> Sauvé Report, Judges Book of Documents, **Tab 3**, p. 4  
<sup>313</sup> Sauvé Report, Judges Book of Documents, **Tab 3**, p. 5.



323. As the Sauvé Report confirms, at the current salary of \$288,500, 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	
	Dollar Difference	% Difference
Alberta	\$24,213 (using the 2020 salary for Alberta)	8.4%
Saskatchewan	\$69,648	24.1%
Ontario	\$108,456	37.6%
Federal	\$144,303	50%
Average	\$86,655	30.0%

324. Once the Alberta salary for 2021 and 2022 is established, the gap with compensation paid to Alberta judges is likely to increase further.

325. Using the figures set out in the Sauvé Report, it is readily apparent that the Judges’ Association’s proposed increase to \$350,863 effective April 1, 2023, will still leave a substantial gap in the compensation payable to judges in the other jurisdictions, with the possible exception of Alberta, 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 2023	Weighted Average Pension Value as % of Salary (as per Sauve)	Total Compensation	Remaining Dollar Difference with JA Proposal
BC (Judges proposal)	\$350,863	43.1%	\$502,084	-
Alberta (assuming CPI)	\$338,954	40.5%	\$476,230	(\$25,854.95 )

stments) adju				
Saskatchewan	\$353,590	49.4%	\$528,263	\$26,179
Ontario	\$361,000	62.2%	\$585,542	\$83,458
Federal <sup>314</sup>	\$384,648	66.4%	\$640,054	\$137,970

326. 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 Judges' Association contends that the vacation entitlement for British Columbia judges should be increased in the future, no such change is proposed to this JCC.

327. 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 salary proposals are modest, fair and reasonable.

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

328. 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. For the reasons that are set out in Part III above, and as the Government itself acknowledged, "Judges need not receive identical raises to those received by others paid from public funds". Instead, it is a factor for this Commission to consider along with the others. In considering this factor, it is also important to appreciate that the Government has not provided this Commission with a full picture that would allow careful consideration of this factor.

329. There is no evidence about what changes in compensation others paid by provincial

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<sup>314</sup> To arrive at this salary we have used the 2022 judicial salary multiplied by Canada's CPI for 2021 of 3.4%: see BC Stats – Earnings and Employment Trends (November 2022), Joint Book of Documents, **Tab 48**, p. 2

public funds in British Columbia will receive in the fourth year of this Commission's mandate. There is little meaningful evidence about what changes in *total compensation* others paid by provincial public funds in British Columbia will receive.

330. Instead, Government has relied most heavily on its public sector bargaining mandate and the handful of agreements that have been ratified or tentatively made under that mandate. It has also relied on some limited aggregate data about excluded employees. Because of the gaps in the evidence put forward by the Government, it cannot safely be concluded that anyone will be held to the Government's 2022 Shared Recovery Mandate for the full term of this Commission's mandate – indeed, the 2022 Shared Recovery Mandate is expressly limited to the next three years.

331. Even on this limited evidence, this Commission can conclude that Government is currently:

- a. Offering larger general wage increases than it has in recent years;
- b. Prepared to proactively protect wages (at least to some extent) from inflationary erosion;
- c. Prepared to depart from its bargaining mandate to recognize merit, recruitment or retention problems, and salary inversion or disparity issues.

332. The Government's 2019 Sustainable Services Negotiating Mandate, was used for bargaining with public sector unions during the last JCC term and provided for three-year collective agreements with general wage increases of 2% in each year. Despite this mandate, and despite the pandemic, the evidence before this Commission is that some people paid from provincial public funds received increases in compensation that exceeded this amount. These groups included, among others, legal aid lawyers (35% increase) and Assistant Deputy Attorney Generals (5% + \$105,000). Legal aid lawyers received this increase to address that they had not received any increases in 13 years. Assistant Deputy Attorney Generals received this increase "to address salary inversion with Crown counsel managers". In other words, in both cases, compensation had gotten out of step and this necessitated departure from the negotiating mandate.

333. The Government's 2022 Shared Recovery Mandate, which is currently being used for bargaining with public sector unions, provides for three-year collective agreements with general wage increases of at least 10.74% in the first three years of this Commission's mandate.<sup>315</sup> All employees will receive larger increases than this because of the flat increase offered in year 1, and all will likely receive larger increases than this because of probability that a cost of living adjustment will be made in years 2 and 3.

334. There is also evidence before this Commission that some groups have *already* received increases in compensation that exceed this 10.74%, notably, among others, Legal Aid BC employees, certain BCGEU members, and family physicians. The Legal Aid BC increases appear to flow from a recognition that "wage rates for comparable staff lawyer classifications" are of concern.<sup>316</sup> For certain BCGEU members, additional increases were approved to address specific recruitment and retention issues.<sup>317</sup> For family physicians, the increases were approved to stabilize longitudinal family practice by supporting overhead costs.<sup>318</sup> Again, increases above the negotiating mandate were approved to correct compensation that was getting out of step with the needs of recruitment or with comparable positions elsewhere.

335. What is clear from the submissions that have been made above is that the remuneration of BC judges has fallen significantly behind remuneration paid to judges in their most appropriate comparator jurisdictions. Yet BC's public service as a whole does not appear to be so comparatively disadvantaged. If BC judges' wages were commensurate with their appropriate comparators, then increases in line with government's negotiating mandate might very well have been the subject of a joint submission. However, the time has come for an appropriate correction to be made now to rectify the vast disparity that currently exists.

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<sup>315</sup> Public Sector Bargaining Mandates & Agreements (2022), Joint Book of Documents, **Tab 43**, page 1

<sup>316</sup> Part 1 New Release re Ratified Agreement for Legal Aid BC, Joint Book of Documents, **Tab 46**, page 6

<sup>317</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, page 8

<sup>318</sup> Summary of Changes to Compensation for Excluded Employees and Others, Joint Book of Documents, **Tab 46**, Appendix K, p. 89

336. As well, the general wage increases for others paid from Provincial funds are only the starting point for individual employees who may also receive step-increases (for unionized employees), performance-based increases or performance based in-range pay progression (for non-unionized employees), bonuses or holdbacks (for a small number of legacy employees), or promotions to other classifications with a higher rate of pay.

337. The Judges' proposal of \$350,863, effective April 1, 2023 is an increase of 21.6% above their current salary in Year 1. The Judges' proposal for increase in line with CPI in Years 2, 3 and 4, is consistent with the Government's own recognition that wages should be protected from erosion (at least to some extent) in Years 2 and 3. The Judges' proposed correction amounts to an average of 5.4% per year plus protection from erosion over the four-year period of.

**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**

338. Significant detail regarding these factors is set out above 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.

339. The economy is strong and stable, 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. 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.

340. As was the case in 2016 and 2019, 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.<sup>319</sup>

**2024-2026 Adjustments**

341. Beyond the increase proposed for 2023, the Judges’ Association proposes that salaries be adjusted by CPI in each of the remaining years of this Commission’s mandate.

342. 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 average weekly earnings. The judges’ proposal adopts this approach.

343. The 2019 JCC reasoned that increases of about 2% would “keep salaries stable in real terms”<sup>320</sup> and something more than that was required in light of the other statutory factors. The Government’s substituted salaries were as follows:

	<b>April 1, 2019</b>	<b>April 1, 2020</b>		<b>April 1, 2021</b>		<b>April 1, 2022</b>	
	<b>Base \$</b>	<b>\$</b>	<b>% incr.</b>	<b>\$</b>	<b>% incr.</b>	<b>\$</b>	<b>% incr.</b>
<b>JCC recommendation</b>	\$270,000	\$287,000	6.30%	\$297,000	3.48%	\$307,000	3.37%
<b>Legislative Assembly resolution</b>	\$270,000	\$276,000	<b>2.22%</b>	\$282,250	<b>2.26%</b>	\$288,500	<b>2.21%</b>

344. The Consumer Price Index (“CPI”) in British Columbia in 2021 was 2.8% and thus it exceeded the increase given to Judges. The CPI in BC for 2022 will again significantly

<sup>319</sup> 2010 JCC Report, Joint Book of Documents, **Tab 29**, page 26; 2013 JCC Report, Joint Book of Documents, **Tab 24**, page 35 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 57; 2019 JCC Report, Joint Book Documents, **Tab 19**, pages 25-26

<sup>320</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, p. 29

exceed the increase given to Judges.<sup>321</sup>

345. There is nothing in the Government's Response to the 2019 JCC recommendations to suggest that it intended to *decrease* judicial salaries. Yet that was the unexpected effect of its substituted salaries. The Government's Response to the 2019 JCC recommendations stated that the substituted salaries put BC fifth amongst the provinces.<sup>322</sup> In fact its substituted salary put BC Judges 10<sup>th</sup> overall in 2019 and seventh if the federal and territorial court judges are excluded.<sup>323</sup> That was not Government's intention and should be corrected. That will not be addressed on any judicial review.

346. 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 now 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.<sup>324</sup>

347. In summary, the 2023 salary of \$350,863 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 2023 salary would place their remuneration in the same general range as that of judicial salaries in Alberta, Saskatchewan and Ontario (although at least two and possibly all of those provinces would still be ahead of BC). The proposal for CPI adjustments in each of 2024, 2025 and 2026 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.

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<sup>321</sup> BC Stats – Earnings and Employment Trends (November 2022), Joint Book of Documents, **Tab 48**, p. 2

<sup>322</sup> Government Response to 2019 JCC Report re PCJs, Joint Book of Documents, **Tab 19**, page 14

<sup>323</sup> Cross Jurisdictional Table of Judges Salaries, Joint Book of Documents, **Tab 34**

<sup>324</sup> *PEI Reference*, [para 195](#)

## **B. Interest on Retroactive Salary**

### **Association's Request:**

- If the Commission recommendation for a salary increase that would take effect on or after April 1, 2023 gives rise to a retroactive payment, the amount of that retroactive payment should bear interest at the prejudgment interest rate from April 1, 2023 until the date on which the increased remuneration is established and at the post-judgment rate from that date until the date of the retroactive payment.

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

348. 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 4 fiscal years.

349. This 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.

350. As the 2019 JCC rightly recognized in its report, "[t]his language, in our view, is broad and includes the ability to recommend that interest be paid on retroactive salary payments".<sup>325</sup> The Government accepted the 2019 JCC's recommendation in respect of interest.<sup>326</sup>

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<sup>325</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, p. 34; see also *Manitoba Provincial Judges' Assn. v. Manitoba*, [2012] M.J. No. 105 (Q.B.) [paras 127 to 133](#); *Manitoba Provincial Judges' Assn. v. Manitoba*, [2013] M.J. No. 279 (C.A.) ("Decision of Steel J.A"), [para 136](#)

<sup>326</sup> Government Response to 2019 JCC Report re PCJS, Joint Book of Documents, **Tab 19**, page 15



## **The Purpose of an Interest Award**

351. 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, in which the Court considered whether a trial judge had jurisdiction to award compound interest.<sup>327</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:

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. ...

352. 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

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<sup>327</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 *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601, [para. 55](#).

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.]

353. 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.

354. 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.

### **C. Costs**

- 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

### **Statutory Authority to Make Costs Recommendation**

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

356. A recommendation concerning costs is within this 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...".

357. 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";<sup>328</sup>
- (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 Association's participation."<sup>329</sup>
- (c) "The Commission found the Association's participation in this Commission to be helpful and appropriate and, most importantly, necessary to an effective and objective process."<sup>330</sup>

358. The 2013 JCC also proposed to rule on the reasonableness of the costs incurred, in the event the parties could not agree.<sup>331</sup> The recommendation was accepted by the Government and, as there was no dispute about the reasonableness, taxation by the JCC proved unnecessary.<sup>332</sup>

359. 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:

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<sup>328</sup> 2013 JCC Report, Joint Book of Documents, **Tab 24** page 53

<sup>329</sup> 2013 JCC Report, Joint Book of Documents, **Tab 24** page 53

<sup>330</sup> 2013 JCC Report, Joint Book of Documents, **Tab 24** page 54

<sup>331</sup> 2013 JCC Report, Joint Book of Documents, **Tab 24** page 54

<sup>332</sup> Government Response to 2013 JCC Report, Joint Book of Documents, **Tab 25**, page 7

- (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).

360. 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.<sup>333</sup> The 2016 JCC disagreed and recommended that 100% of the reasonable costs should be paid.

361. 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;<sup>334</sup>
- (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;<sup>335</sup>
- (c) the judiciary is the third branch of government, yet does not have the executive branch's access to the government's resources;<sup>336</sup>
- (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;<sup>337</sup>
- (e) JCCs in other jurisdictions have made recommendations that governments pay 100% or significant portions of the reasonable costs incurred by judges;<sup>338</sup>

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<sup>333</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 69

<sup>334</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 69

<sup>335</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 69

<sup>336</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 69

<sup>337</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 69

<sup>338</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 69

- (f) the Judges' Association's participation in the process was "helpful and appropriate and, most importantly, necessary for an effective and objective process".<sup>339</sup>

362. The costs recommendation of the 2016 JCC was rejected by Government, which substituted the costs payable pursuant to statute.<sup>340</sup> The Judges' Association challenged this rejection, along with the rejection of the judicial salary recommendations, in its judicial review.

363. In adjudicating a judicial review in respect of the response to the recommendations of the 2016 JCC, Chief Justice Hinkson reasoned:

[99] I am unable to find that the Legislative Assembly's rejection of the 2016 JCC's recommendation with respect to costs fails to meet the standard of rationality set out in *Bodner*. While the statutory formula can be overridden by the government through regulation, that represents an exception to the norm created by the legislation. To depart from the legislated norm is a step which, in my view, is a matter for the legislative branch of government to consider, and not a matter into which the judicial branch of government should intrude.<sup>341</sup>

364. The Judges' Association did not appeal this aspect of Chief Justice Hinkson's order.

365. The 2019 JCC Report again recommended:

The Government pay 100% of the reasonable costs of the legal fees and disbursements of the Provincial Court Judges Association of British Columbia, including the costs for experts.<sup>342</sup>

366. It concluded that "a cap of \$110,000 for a four-day hearing, along with the costs of retaining and instructing expert witnesses and preparing the volumes of material that were filed will often be unreasonably low".<sup>343</sup> It went on to explain:

The constitutionally mandated commission process is best served by the full participation of judges and judicial justices. Full indemnity for reasonable costs encourages that participation. Government uses external counsel who is paid out

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<sup>339</sup> 2016 JCC Report, Joint Book of Documents, **Tab 21**, page 69

<sup>340</sup> Government's Response to the 2016 JCC, Joint Book of Documents, **Tab 22**, pages 6, 15-16

<sup>341</sup> *Provincial Court Judges' Association v British Columbia (Attorney General)*, 2020 BCSC 1264, [para. 99](#) (emphasis added).

<sup>342</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 33

<sup>343</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 33

of the public purse. In addition, government, unlike the judiciary, has resources and personnel available to assist it to advance its position. It is only fair that the judiciary should be in a roughly equal position for the purposes of this process.<sup>344</sup>

367. The Government rejected this recommendation of the 2019 JCC on the basis that:

- a. Costs are provided for in the *JCA*;
- b. The purpose of the *Act* is to create clarity and certainty for the parties;
- c. It is not unreasonable for the parties to bear a nominal amount of costs for participating in the process, over which Government has no control;
- d. The legislative formula is reasonable having regard to past commission processes.<sup>345</sup>

368. The Judges' Association sought judicial review of this rejection on the basis that the Government had impermissibly reiterated submissions that were made and substantively addressed by the JCC.

369. In the alternative, the Judges' Association argued that if Chief Justice Hinkson's judgment (cited above) meant that the effect of the amendment to the *JCA* was that the JCC may *never* recommend a formula other than that set out in the *JCA* in respect of costs so that simple reliance on the *Act* is a sufficient basis to reject the JCC's recommendations, then the amendment required recourse to the JCC process in light of s. 11(d) of the *Charter* and the constitutional principle of judicial independence.

370. At the hearing of the 2019 JCC judicial review (which is still under reserve), the Government confirmed that it did not take the position that the JCC may never recommend a formula other than that set out in the *JCA*. Instead, Government said the Legislature was free to place limits on the JCC's jurisdiction to make costs recommendations and whatever the source of the Government's authority to do so, it probably had to meet the standard articulated in *Campbell*.<sup>346</sup> We will have more to say about this standard below.

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<sup>344</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 33

<sup>345</sup> Government Response to 2019 JCC Report, Joint Book of Documents, **Tab 19**, pages 5, 15-16

<sup>346</sup> *R. v. Campbell*, [1999] 2 S.C.R. 956 [**Campbell**], [para. 5](#)

371. Thus, the question for this Commission is under what circumstances may it depart from the formula set out in the *JCA* and are those circumstances met in this case.

372. Section 7.1(2) of the *Act* establishes a norm for a formula for the payment of reasonable costs. However, section 7.1(3) provides:

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

373. The Government's position during the judicial review of rejection of the 2019 JCC recommendations was that in order to exercise this discretionary authority, a material change in the JCC process is required.

374. The Judges' Association asks this Commission to reject that interpretation.

375. With the exception of the appointment of commissioners and the delivery of the report, the *JCA* is not prescriptive of the JCC process. It leaves that to the Commission to sort out.

376. If a material change from past practice was required, the Legislature would have said so either in subsection 7.1(3) or by setting out what the JCC process must entail in the legislation.

377. The *Act* does not do that. Instead, it provides the JCC with discretion to control its own process and establishes a broad discretionary authority for the Lieutenant Governor in Council to set higher amounts for reasonable cost than those established in the statutory formula.

378. The 2019 JCC was clearly of the view that an exercise of that discretion was required because the statutory formula resulted in an amount that - using the language of the report - was "**unreasonably** low" in light of the nature of hearing before it.

379. The language of *reasonableness* resonates with subsection 7.1(1) of the *JCA* and should be a sufficient basis to set a higher amount than the statutory maximum.

380. It is also clear from the 2019 JCC report that it was of the view that an exercise of that discretion was required because of concerns of **fairness**. It reasoned: "It is only **fair**

that the judiciary should be in a roughly equal position for the purposes of this process.”<sup>347</sup>

381. This language of *fairness* and *reasonableness* resonates with reasoning of the Supreme Court of Canada in *Campbell* (which as noted was relied on by the Attorney General at the judicial review) in which the Supreme Court of Canada held that “the composition and procedure established for the hearings before the independent effective and objective commissions may vary widely. So will the approach to the payment of the representational costs of the judges.” The Court went on to explain that “whatever may be the approach to the payment of costs it should be fair, equitable and reasonable.”<sup>348</sup>

382. The Judges’ Association submit that section 7.1 of the *Act* maintains this Commission’s jurisdiction to make a recommendation to depart from the formula in the *JCA* in light of the statutory standard of *reasonableness* which flows from the standard articulated by the Supreme Court of Canada in *Campbell* being whenever it is required so that “the payment of costs [is] fair, equitable and reasonable.”

### **Rationale for Recommending Costs**

383. The rationale for payment by Government of the costs incurred by the Judges’ Association in participating in the JCC process is rooted in concepts of fairness, equitability and reasonableness.

384. 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.

385. The Government uses any number of civil servants paid from the public purse and 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

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<sup>347</sup> 2019 JCC Report, Joint Book of Documents, **Tab 18**, page 33

<sup>348</sup> *Campbell*, [para. 5](#)



should be burdened by personally funding its participation in the process. This *unfairness* is only highlighted by the Government's response to the 2019 JCC recommendation which highlighted the *per judge* cost of paying the difference between the statutory formula and its actual costs for participation in the process. No one was asked to calculate the *per MLA* formula for government's participation in the process.

386. 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.

387. 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 2022 JCC is of the view that the participation of the Judges' Association was reasonably necessary to enable the Commission to fulfil its constitutional mandate, and to the extent it is of the view that the evidence provided by the experts retained by the Judges' Association was reasonably necessary to enable it to fulfill its mandate, it should recommend that Government pay the Judges' Association's full reasonable costs.

388. Given the complexity of the history in British Columbia, including the specific circumstances surrounding the 2010, 2013, 2016, 2019 JCCs and their outcomes, the Judges' Association is confident that this 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.

389. 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 and the Supreme Court of Canada's reasoning in *Campbell*.

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

390. 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.

391. 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.

392. 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.

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

394. 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. The Manitoba 2020 JCC made recommendations for the period of April 2020 to March 2023. It recommended that the Government of Manitoba should pay 75% of the Judges' Association's reasonable legal costs to a maximum aggregate payment of \$55,000 and 100% of the Judges' Association's disbursements, including the costs of experts to a maximum of \$30,000. That recommendation was accepted by the Standing Committee on Legislative Affairs, which further recommended the same to the Legislative Assembly.

395. 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. The 2017 JCC, which reported in

2019, made recommendations for the years 2017 to 2021. 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 after litigation in the Supreme Court of Newfoundland and Labrador. A new report was due December 1, 2022. However, as the assembly did not sit in December, it has not yet been considered yet.

396. 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. The 2016 JCC, which reported in 2018, recommended that the Government pay 100% of Judges' Association's general representation costs incurred to participate in the Commission process. This recommendation was rejected by the Government. The Government ultimately paid 50% of the general representation costs to a maximum of \$30,000.

397. 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. The 2020 JCC made no recommendations as to costs.

398. 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%. For the 2014-2018 Commission and the 2018-2022 Commission, heard together, the parties 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).

399. For all of the foregoing reasons, the Judges' Association urges this JCC recommend that the Government of British Columbia pay 100% of the Judges' Association's reasonable legal fees and disbursements, including the cost of experts.

**All of which is respectfully submitted this 12 day of January, 2023.**

  
ALISON M. LATIMER, KC  
Counsel for the Judges' Association