

REPLY SUBMISSION OF
THE PROVINCIAL COURT
JUDGES ASSOCIATION OF
BRITISH COLUMBIA

to the

2019 JUDICIAL COMPENSATION
COMMISSION

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

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1. Set out below is the Judges' Association's written reply to the Government's Submission, filed May 29, 2019. For ease of reference, we refer below to the page and paragraph numbers in the Government's brief. The Judges' Association reserves the right to respond further in oral argument.

2. In its submissions to the 2016 JCC the Government wrote (at paragraph 5):

The work of Provincial Court Judges and Judicial Justices is important. In these proceedings, the Government will neither seek to minimize the role of these judicial officers, nor take an adversarial approach to the Commission process.

However, by contrast, the Submissions filed by the Government for this Commission appear designed to minimize the role of the Provincial Court and the work undertaken by its judges. In short, the Government's Submissions give the appearance of an unfortunate change in tone in relation to their perception of the Court.

3. The Government's proposals would leave the salaries of BC judges significantly behind those of their most important comparators, as identified by past JCCs, a position that cannot be justified based on all of the factors, including BC's strong and diversified economy and healthy fiscal position. Further, while the Government purports to favour a salary increase in each of the years within this Commission's mandate, its proposal could result in a salary decrease, extending into the second year of this JCC's mandate, if the recommendations of the 2016 JCC are eventually implemented through the judicial review process. The difficulties of the Government's proposed approach are detailed below.

Overview of the Government's Position

4. At paragraph 3 and following, the Government refers to the "statutory mandate" of the Commission. Superseding the statutory duties set out in the *Judicial Compensation Act* is the Commission's constitutional mandate, which is to protect judicial independence and depoliticize the setting of judicial compensation to the greatest extent possible. In

fulfilling this important constitutional role, the Commission must consider objective factors, not political expediencies, in identifying appropriate compensation for judges.

Bodner, supra, Joint Book of Authorities, Tab 5, para 33

5. Some key difficulties in the Government's analysis include the following points, which are explored further the course of this Reply Submission.

- The Government's Submission leaves an inaccurate impression of both the comprehensive jurisdiction of the Court and the heavy and unrelenting workload of its judges.
- The Government would have consideration of the need to attract and retain highly qualified applicants end with its observation that "sufficient" highly qualified candidates have been attracted in recent years. The Submissions of the Chief Judge of the Provincial Court of British Columbia, and the Judicial Council of British Columbia both emphasize that this factor is forward-looking and provide a careful analysis of the declining number of applicants to the Provincial Court. This 2019 JCC must ensure that compensation is set at a level that does not create a financial disincentive for highly qualified potential applicants over the coming three years.
- The Government proposes that the general wage increases set out in its negotiating mandate for public sector employees should be adopted for judges, relying on the analysis in *PEI Reference* to argue that similar treatment is preferred. *PEI Reference* speaks to potential application of an "across the board measure" to judges, by which it was referring to a legislated rollbacks of public sector wages. No "across the board measure" exists in BC. The Government is engaged in collective bargaining and has identified for those bargaining on its behalf a goal of negotiating 2% general wage adjustments. While it has achieved this goal with many public sector employees, it has also agreed to provide those groups with a myriad of other benefits which increase overall compensation by more than 2%. Not only is a bargaining mandate not an "across the board measure" of the kind contemplated in *PEI Reference*, the Government's proposals to limit increases for judges to 2% per annum would mean disadvantageous, not similar, treatment as compared with public sector employees generally.
- The Government downplays the obvious strength of the provincial economy and its own financial position. Further, its focus is on the modest surpluses that are forecast, which are the culmination of political decisions about government priorities. Consistent with the mandate of the JCC to

depoliticize the setting of judicial compensation, the assessment of the province's economic situation and the government's fiscal position is more appropriately assessed using objective measures such as the credit ratings established by the independent bond rating agencies, the Net Debt to GDP Ratio, etc.

- The Government employs an inconsistent approach in considering the various factors. It focuses within BC in considering the economic and fiscal circumstances, glossing over the fact that BC is leading the country economically and is in an elite group of provinces from an economic and fiscal perspective. It acknowledges that it focuses on that elite group (and Manitoba) when it comes to public sector compensation comparisons, and properly acknowledges that a comparison with provinces such as Quebec and the Atlantic Provinces is inappropriate given their lack of similarity to BC. However, when it comes to judges' salaries, it points to all provinces to argue that BC judges' salaries are not out of step. Consistent with the reasoning of past JCCs, the most important comparators for all these purposes are clearly the provinces of Alberta, Saskatchewan and Ontario.

Justice System in British Columbia

6. At pages 8 and following, the Government's Submission downplays the critical role of the Provincial Court within the justice system. While the Judges' Association relies on and will not repeat the detailed description of the Court's work and jurisdiction set out in its main Submission, the following aspects of the Government's Submission require correction or comment.

7. Quite apart from their civil and family jurisdiction, judges of the Provincial Court of British Columbia are well-recognized by members of the Bar as experts in criminal law. Where accused may elect to be tried in the Provincial Court or the Supreme Court, they overwhelmingly choose the Provincial Court. While a limited number of offenses are reserved to the Supreme Court's jurisdiction (by section 469 of the *Criminal Code*), judges of the Provincial Court routinely deal with most other serious offences, such as robbery, aggravated assault, kidnapping and attempted murder. Provincial Court judges also deal with applications to designate an offender as a "dangerous offender", where a possible indeterminate sentence is arguably the most serious sentence in Canadian criminal law.

As such, it is simply inaccurate for the Government to suggest, at paragraph 39, that the Supreme Court deals with “most serious criminal cases”.

8. The Government’s Submission leaves the impression that the advent of the Civil Resolution Tribunal has reduced the workload of individual judges. As detailed in the Submission of the Chief Judge of the Provincial Court of British Columbia (paragraph 27), the reduced number of cases commenced in the Provincial Court may mean that cases will be heard sooner in the long run. However, it has no correlation to the workload of individual judges. Given the significant backlog of cases, the workload for individual judges remains extraordinary, and the stress and pressures on individual judges are ever increasing, complicated by the frequency of appearances by self-represented litigants.

9. The advent of the Civil Resolutions Tribunal (“CRT”) has had another impact, which is obscured by the Government’s description of this change. As noted, the Court no longer hears small claims for less than \$5001, except in the case of a *de novo* appeal from a decision of the CRT. The result for judges is that a higher proportion of their docket involves complex and serious matters.

10. At paragraph 30, the Government lists the number of published written reasons for judgment in a year, by the Provincial Court, and suggests that written reasons are drafted for judges “when cases require more time to consider and explain decisions clearly”. While judges of the Provincial Court do publish written reasons, they also routinely (and more often) prepare lengthy and complex reasons which are delivered orally in the presence of the accused. While this is the preference for some judges of the Court, it is also a practical necessity for many because of the limited administrative support that is available to judges of the Provincial Court. Unlike for judges of the BC Supreme Court, there is no requirement that Provincial Court judges publish written reasons for their decisions.

11. At paragraph 40, the Government refers to the 28 community locations attended by justices of the Supreme Court of British Columbia. With respect, the travel expected of Supreme Court justices pales in comparison to the onerous travel requirements for

judges of the Provincial Court, who sit in 80 communities around the province (see para 62-63 in Judges' Association's main Submission). The Judicial Council noted the need for Provincial Court judges to "drive many miles after dark, frequently in poor weather, in order to preside in the more remote locations of the Court" (para 55). The Chief Judge explained that judges spend a considerable number of days per year on travel status; judges assigned to chambers in the northern region can spend 50% of their sitting time on travel status (para 37).

12. At paragraph 44, the Government describes many of the activities that Supreme Court justices engage in outside of the courtroom. As detailed in the Judges' Association's Submission, the same is true of Provincial Court judges as well.

13. At paragraph 48 and following, the Government properly touts the success of the specialized courts for which the Provincial Court of British Columbia are well known and, in so doing, refers to them as a "specific policy direction". The Provincial Court has been the driving force behind these innovations and plays a leading role in ensuring their success as part of the Court's commitment to improving the administration of justice.

Previous Commissions

14. At paragraph 64, the Government argues that this Commission is not "bound" by the decision of prior commissions, but "may review their work". The Reports of past Commissions are an essential foundation for the work of this Commission. The Reports are not "binding" because each Commission makes recommendations in unique circumstances and for a unique period. However, the analyses of past Commissions are important context for this Commission and should inform its analysis.

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

15. As to the summary of past JCCs set out in the Government's Submission at pages 30-36 and 42-43, the Association relies on the detailed discussion of the 2010-2016 JCCs in British Columbia that begins at page 8 in its main Submission. At paragraph 115, the

Government refers to the Government's Response to the 2016 JCC. However, it fails to mention that the Government's reasons for rejecting the recommendations of the 2016 JCC are the subject of an on-going judicial review application. As explained in detail in the Judges' Association's Submission, the practical reality is that this 2019 JCC knows the range, but not the final outcome, of judicial salaries for the years 2017, 2018 and 2019.

16. At page 30, the Government includes a chart comparing the increases recommended by past Commissions with the increases implemented over the relevant period, with a calculation of the total change. The relevance is unclear; no explanation is offered. Past commissions considered that certain increases were appropriate and some of the increases were accepted as appropriate by Government. In the case of the 2016 JCC, which recommended a greater increase than was implemented by Government, the outcome remains to be determined through the on-going judicial review process.

The Government's Submission Regarding the Legislated Criteria

17. As the Government indicates at paragraph 122, the 2019 JCC is obliged to consider all the legislated criteria (as well as any others it deems relevant). As the Government argued to the 2016 JCC, it may be that, in particular circumstances, one criterion is more important than another. The consideration and weighing of the various factors must be explained in the Commission's Report.

The Need to Attract and Retain Highly Qualified Applicants

18. At paragraphs 125 to 126, the Government agrees that the compensation package must be sufficient to attract highly qualified applicants. However, instead of examining what would be required in order to ensure sufficiency in the coming three years, it discounts this as a factor supporting increased compensation by suggesting there has been no "unmet need" in the past and that the judicial complement is stable.

19. The Submission of the Judicial Council of British Columbia cites a drop in the number of recommended applicants (from an average of 44.3 in the years 2016-2018 down to 27 recommended applicants by December 2018), as well as the need to attract more applicants from outside the Lower Mainland. When it comes to the number of applicants, only 40.2% of all applicants were approved after the interview between 2013 and 2018, a percentage that has dropped to 38.2% for the years 2016 through 2018. The Judicial Council expresses the view that the Court is losing applicants to the Supreme Court, possibly due to the lower remuneration among other factors. The analysis presented by the Judicial Council supports the Judges' Association's requests for compensation that will ensure the ability of the Court to continue to attract highly qualified candidates and retain and motivate those who have already accepted an appointment.

20. On the issue of stability, the Government cites at paragraphs 135 that an average of 8.6 judges have been appointed each year over the last 10 years. It is apparent from the Chief Judge's Submission that the landscape has shifted considerably. The Chief Judge notes that an average of 14 judges have been appointed each year over the last three years and that she expects to see a continued "high number of annual appointments" going forward. The increased number of judicial appointments required each year, combined with the declining number of applicants, supports the Judges' Association's requests to reduce the gap with the compensation paid to federally appointed judges to ensure that the Provincial Court can compete for applicants.

21. While it refers to the diversity of applicants at page 51-52, the Government fails to acknowledge that the legal diversity of applicants has been an ongoing concern for the Court in recent years. The Judges' Association relies on its main Submission, beginning at page 47, which discussed the need for this 2019 JCC to ensure the Court's attractiveness, particularly to applicants from the private sector.

Changes to the Jurisdiction of Judges

22. The Judges' Association agrees with the Government's statement, at paragraph 154, that there has not been a significant change in the type or scope of matters that are

dealt with by Provincial Court judges. As noted, if anything, the result of the CRT is that a greater proportion of the cases heard by individual judges involve the challenging and difficult matters that are the main work of the Court.

Compensation in Respect of Similar Judicial Positions in Canada

23. In 2015, the Government amended section 5 of the *Judicial Compensation Act* to require consideration of the compensation provided in respect of similar judicial positions in Canada, having regard to the differences between those jurisdictions and British Columbia.

24. The Government asserts that this third factor demands consideration of which judicial positions are “most similar” to the positions of a Provincial Court judge. To be clear, the factor demands consideration of “similar judicial positions, having regard to the differences between those jurisdictions and British Columbia”. Accordingly, while other provincial and territorial court judges are the “most similar” judicial positions, it is important to also consider federally appointed judges, who also occupy “similar judicial positions”. Past JCCs have consistently accepted the relevance of federally appointed judges and have also considered that BC judges exercise among the broadest jurisdiction of all provincial court judges across the country.

2004 JCC Report, Joint Book of Documents, Tab 5, page 19

25. At paragraph 159, the Government argues that a formulaic relationship with federally appointed judges would be “inappropriate”. To be clear, no formulaic relationship is proposed. The importance of this comparator and the reasoning of past JCCs on this point is discussed in detail in the Judges’ Association’s Submission at pages 42 and page 53.

26. At paragraph 161, the Government asserts that a decision of the New Brunswick Court of Appeal supports that the federal courts should not be a “primary comparator”. That decision was appealed to the Supreme Court of Canada as part of the *Bodner*

decision. In upholding the Government's rejection of the JRC's salary recommendation as legitimate in accordance with the *Bodner* test, the Supreme Court of Canada explained that "while the Commission can consider the remuneration of federally appointed judges", that one factor "cannot be determinative".

Bodner, supra, Joint Book of Authorities, Tab 5, para 72

27. The Judges' Association's reliance on the salaries of s. 96 judges as a relevant consideration is entirely consistent with the reasoning of the Supreme Court of Canada in *Bodner*. It is also consistent with the reasoning of past JCCs in BC, including the four that have sat post-*Bodner* (i.e. the 2007, 2010, 2013 and 2016 JCCs).

28. At paragraph 162, the Government notes that New Brunswick and Ontario "have chosen to set their judges' salaries at a fixed percentage of superior judges' salaries". The Government suggests, wrongly, that this was a "policy choice" made by those governments and states that the Government believes that BC's compensation should be set based on the relevant factors that apply in BC. The New Brunswick government accepted the recommendations of the 2016 Judicial Remuneration Commission which, just as in BC, was obliged to consider the objective factors identified in its governing statute, in making its recommendations.¹ In Ontario, the 9th and 10th Provincial Judges Remuneration Commission was obliged to consider the factors identified in section 25 of the *Framework Agreement on Judges' Remuneration*, Ontario Regulation 407/93, in making its recommendations on judicial salaries.² Those salary recommendations were binding on the Ontario government according to s.27 of that Regulation.

29. In both New Brunswick and Ontario, just as in every other province, the Commissions made recommendations only for the specific period of their mandate. The next Commission in either jurisdiction will decide on the appropriate judicial salary for the

¹ *Provincial Court Act*, RSNB 1973, c. P-21, section 22.021(6)

² The Report of the 9th and 10th Provincial Judges Remuneration Commission is at Tab 14 in the Judges' Association's Documents.

period of its mandate, based on its consideration of the relevant factors given the circumstances before it. That these Commissions chose to express their recommendations in the form of a linkage to federal salaries in no way limits how future Commissions may choose to express their recommendations.

30. JCCs have looked to the compensation paid to judges in other jurisdictions because of the similarity of the work and the judicial role. Whether a particular province or territory is a reasonable comparator for another depends how the jurisdictions compare from an economic and fiscal standpoint. Once deemed to be a reasonable comparator, the focus is on comparing the actual compensation paid, recognizing that the compensation in each jurisdiction is set based on factors unique to it.

31. The consistent decisions of past BC JCCs to focus the compensation paid to judges in Alberta, Ontario and, more recently, Saskatchewan, has never been based on what factors were considered by the JCCs in those jurisdictions. Each province has had its own JCC process, which makes recommendations based on factors unique to that province. Accordingly, the mere fact that the most recent Ontario Commission chose to calculate its judicial salaries for certain years based on increasing percentages of the federal judges' salary in no way affects the validity of this comparator.

32. At paragraph 166 to 167, the Government makes the point that the timing and process for determining judicial salaries differs across the jurisdictions but claims that "it will not be possible for the Commission to make its recommendations with reference to specific comparisons". As BC is one of the few jurisdictions that conducts the JCC process entirely prospectively, this is not an unusual situation by any means. As detailed in the Judges' Association's Submission, while the specific salaries that will be paid in the comparator jurisdictions are not known, reasonable predictions can be made and ought to be relied upon.

33. At paragraph 168, the Government again makes the point that JCCs in each jurisdiction take into account different factors (unique to the jurisdiction) in making their recommendations. This has always been the case and prevailed even when the 2007

JCC accepted the Government's argument that the BC judges' salaries should rank third among the jurisdictions (2007 JCC Report, Joint Book of Documents, Tab 6, page 8).

34. Regarding the other points raised in paragraph 168:

- In Saskatchewan, past JCCs have consistently recommended salaries which exceed the national average, with the result that the legislative provision which prohibits implementation of a salary less than the national average has never been relied upon.
- Whatever comparisons are appropriately considered when determining the salaries of federally appointed judges is an issue for the federal Judicial Compensation and Benefits Commission and not for this 2019 JCC. This 2019 JCC should consider the compensation that is offered to Supreme Court justices who work in BC, to ensure that the Provincial Court continues to be able to compete for applicants from the same pool of BC lawyers.
- The points with respect to the salaries paid to Ontario and New Brunswick judges are addressed above at paragraph 28 in this Reply Submission.

35. The Government's paragraphs 169 and 170 repeat arguments made earlier. There is no arbitrariness in considering the compensation paid to federally appointed judges among the other factors identified in the *Judicial Compensation Act*. Indeed, the comparison is required by two of the factors identified in s.5(5)(a) and (c) of the *Judicial Compensation Act*, the attraction and retention factor and the comparison with the compensation paid to similar judicial positions. The Government's proposed approach would go against the governing legislation and the reasoning of successive JCCs.

BC Judges' Salaries Have Fallen Behind Their Important Comparators

36. At paragraph 171, the Government departs from the approach it has taken before past JCCs and argues that "ordinal rankings" are less informative, and that "most provinces" remunerate their judges at "fairly similar levels". While the Government acknowledges that it focuses on the western provinces plus Ontario for the purposes of comparisons for public sector employees (paragraph 200), it includes all ten provinces in the comparison of judicial salaries. Although the scale of the Government's line graph on

page 62 presents a misleading visual, the actual numbers show that BC's judicial salary of \$270,000 is well below those of judges in Ontario (\$310,337 for 2019), Alberta (\$293,991 for 2016), and Saskatchewan (\$304,074 for 2019). As detailed in the Sauvé Report discussed in the Judges' Association's Submission, the differences in compensation are even greater when the value of the judicial pension is also considered.

Chart of Judicial Salaries, Joint Book of Documents, Tab 15

37. The Government's claim that there is a "close correlation" in the judicial salaries amongst the majority of the provinces is also inaccurate. A careful review of the judicial salaries reveals three tiers of judicial salaries: Ontario, Alberta, and Saskatchewan in the top, Manitoba, Quebec and PEI and in the middle, and the Atlantic provinces in the bottom. Again, Quebec and the eastern provinces are not appropriate comparators for BC for the reasons acknowledged at paragraph 200 in the Government's Submission. Manitoba has never been considered by (or even suggested to) past JCCs as a reasonable comparator for British Columbia. The appropriate comparators for BC, from an economic and fiscal perspective, are Alberta, Saskatchewan and Ontario. There is indeed a close correlation among *those* top tier judicial salaries, yet BC's judicial salary trails far behind. For the many reasons set out in the Judges' Association's Submissions, BC's judicial salary belongs in close proximity with the judicial salaries paid in those top tier provinces.

38. At paragraph 177, the Government acknowledges that comparators are important in order to ensure that BC's judicial salaries are not out of step. As detailed in the Judges' Association's Submission, the comparisons confirm that the salaries for BC judges have fallen far behind those of their most important comparators. Given the strength of the BC economy and the Government's fiscal position, the time has come to make the necessary adjustment.

Changes in the Compensation of Others Paid by Provincial Public Funds

39. At paragraph 181, the Government purports to quote from the Submission of the Alberta Provincial Judges' Association to the 2013 JCC, stating that it provides "[a] succinct summary of the value of comparing judicial compensation to others in the public sector". Only an excerpt is provided, the full version of which reveals that the submission was in fact addressing a different point: the limited value of comparisons to the *level of increases* (i.e. not actual compensation) received by employees paid from the public purse, keeping in mind the different factors relevant to the setting of judicial compensation and the need to depoliticize the setting of judicial compensation (which consideration does not apply to the public sector).

40. The full passage of the Submission filed by the Alberta Provincial Judges' Association reads:

217. Subsection 13(j) of the Commission Regulation obliges this 2013 JCC to consider "the level of increases provided to other programs and persons funded by the government". It is important to appreciate that this criterion refers to the level of increases provided to other programs and persons funded by the Government and not to the actual salary levels of public servants. It is well understood that judges are not civil servants. Accordingly, and given the uniqueness of the judicial role, comparisons with the actual salaries received by civil servants are of no, or little, value.

218. The levels of the increases provided to other programs or persons funded by the Government show what increases the Government has been prepared to agree to for public sector groups which engage in collective bargaining. These levels also show what the Government has, itself, decided it will pay to employees who do not bargain collectively.

219. The levels of increases must be viewed as evidence of the willingness of the Government to pay and accordingly, its own assessment of its financial position. We note that a province such as Alberta cannot reasonably argue that it does not have the ability to pay 138.5 judges and masters. The budget for their payroll represents only a minute proportion of the overall budget for the Department of Justice, never mind the budget of the Government as a whole. Accordingly, when considered as an indicator of the willingness of the Government to pay, the levels of the increases provided to other groups are a useful consideration against which

the Government's position about appropriate salaries for judges can be tested. In referencing the levels of increases, however, one must of course recognize that pay for these other groups is not set in reference to the particular factors set out in the Commission Regulation that governs this process. Further, the levels of increases for these other groups may well be affected, to greater or lesser degrees, by the strength of the bargaining power enjoyed by the group in question.

220. To the extent that the Government may propose a particular increase for judges on the basis that its finances prevent it from offering more, the increases it provided to other groups can be a useful reference point in assessing the validity of its claim. As Lamer CJC clearly articulated in PEI Reference, decisions about the use of public funds are inherently political and the purpose of the JCC is to act as an institutional sieve to depoliticize, to the greatest extent possible, the setting of judicial compensation. [citations omitted]

41. The reference to the 2013 JCC's analysis at paragraph 182 in the Government's Submission is also misleading. The 2013 JCC noted that because judges could not negotiate with the executive, the JCC could not look to the results of bargaining to find out what the market would bear and needed to look instead to "objective markers of reasonableness". The Commission went on:

It does so by looking at comparator groups. It has considered the salaries and wage growth/decline of a number of comparator groups including federally appointed judges, provincial court judges of other provinces, BC public sector executives (deputy ministers and assistant deputy ministers) and private sector wages within British Columbia.

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

PEI Reference Does Not Support Adherence to Government's Bargaining Mandate for Public Sector Employees

42. At paragraphs 183 to 189, the Government advances a flawed argument that the analysis in *PEI Reference* supports that "similar treatment to others [paid by the public purse] helps sustain the perception of judicial independence". To be clear, the situations before the Court in *PEI Reference* involved unilateral reductions in pay for judges, which occurred as part of legislated pay reductions that also applied to the entire public service,

without the reduction for judges being first considered by a JCC. The majority in *PEI Reference* determined that appropriate judicial compensation must be determined based on consideration of “objective factors, not political expediencies”. The majority was clear that a proposal by government that judges should participate in an “across the board measure” must be put before a JCC and justified in light of objective factors.

PEI Reference, supra, Joint Book of Authorities, Tab 4, paras 166 and 173

43. The Government’s bargaining mandate is not an “across the board measure” of the type considered in *PEI Reference*. A bargaining mandate is subject to negotiation with public sector employees who, unlike judges, are free to exert pressure on the Government through the collective bargaining process. As discussed below, the results of recent collective bargaining with public sector groups demonstrate that the outcome is highly dependent on the priorities of each group and its power at the bargaining table.

44. As the Supreme Court of Canada confirmed in *Bodner*, the purpose of the JCC process is to depoliticize the setting of judicial compensation. While the compensation of public sector employees can be driven by political considerations, the compensation paid to judges must be determined based on objective factors, not political expediencies. The JCC’s focus must be on recommending appropriate judicial compensation based on the objective factors identified in the *Judicial Compensation Act*.

45. Accordingly, while the Government has chosen to make proposals to the JCC that are governed by the mandate it is advancing at the collective bargaining tables with public sector employees, it must justify making those same proposals for judges in light of the objective factors set out in the *Judicial Compensation Act*. For the reasons set out in the Judges’ Association’s Submissions, fair consideration of the objective factors supports a much higher increase than the 2% per annum proposed by Government for the year 2020.

Increases Received by Public Sector Employees

46. On page 71, the Government compares the “average annual salary increases” received by various public sector employee groups with the increases received by judges. The reference to “average” makes it clear that there is no consistent pattern. No mention is made of the other monetary aspects of the relevant collective agreements, the details of which are largely unknown to the Judges’ Association. Unlike judges, many of the individual employees reflected in the graph would have received salary increases beyond the salary increases shown, due to moving up within their classification or being promoted to another classification. For judges, the chart presumably reflects the increases imposed by the Government for the years 2017 and 2018, rather than the greater increases that were recommended by the 2016 JCC (and which may still be implemented following the judicial review process).

47. At paragraphs 196 to 198, the Government provides information about the compensation levels of certain tribunal appointees. As noted at paragraph 41 above, these have not been a comparator for past JCCs, which have instead made comparisons to executive level compensation in the public sector (including, *inter alia*, deputy ministers and assistant deputy ministers).

48. At paragraph 199, the Government asserts that it does not have a policy respecting the desired rank of the province in respect of inter-provincial compensation levels. The British Columbia Public Sector Employers’ Council Secretariat provides Public Sector Executive Compensation Disclosure Statements each year on its website. In reviewing the most recent disclosures available (for the 2017/2018 fiscal year), it is apparent that both the BC Public Service and the BC Liquor Distribution Branch continue to cite the following policy for setting executive compensation:

The province’s target position for executive compensation in the public sector market is to be from 3rd to 5th nationally amongst the provincial and federal governments. A determination is made respecting the appropriate ranking based on demographic and labour market trends, and economic variables.

See: <https://www.publicsectorcompensation.gov.bc.ca/executive-compensation-disclosures/2017-2018/93148/Liquor-Distribution-Branch-ECD-2018.pdf> (page 2) and <https://www.publicsectorcompensation.gov.bc.ca/executive-compensation-disclosures/2017-2018/92862/BC-Public-Service-Agency-ECD-2018.pdf> (page 4)

49. The 2019 Executive Compensation Disclosure Guidelines explain at page 1:

The common compensation philosophy initiated in 2015 remains in place across the B.C. public sector, which means compensation decisions must be based on the core principles of performance, differentiation, accountability, and transparency. Since September 2018, employers have had the authority to utilize a more flexible approach to making decisions within the bounds of their approved compensation or implementation plans with restrictions remaining on the CEO and VP levels. While not a general wage increase, this process to provide modest adjustments continues to remain in place and is funded from the employers' existing budgets.

A copy of the Guidelines can be found at:

<https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/services-policies-for-government/public-sector-management/psec/public-sector-exec-comp-disclosure-guidelines.pdf>

50. At paragraph 201, the Government provides outdated comparative data (from 2015/2016) for four among the hundreds of different classifications of public sector employees. Presumably this information was of use to those groups when they engaged in their most recent round of collective bargaining. As discussed below, one of the classifications shown, child protection workers, received a special adjustment in the recent round of collective bargaining which may well have reflected that their compensation had fallen behind that of relevant comparators.

Current Public Sector Mandate – Unionized Employees

51. At paragraphs 202 to 206, the Government describes its *Sustainable Services Negotiating Mandate* which applies for unionized employees. It provides for three-year collective agreements with general wage increases of 2% in each year. In addition, it provides for the “ability to negotiate conditional and modest funding that can be used to

drive tangible service improvements for British Columbians”. The value of this negotiating ability becomes clear when reports on the recent agreements are reviewed.

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

52. In addition to general wage increases of 2% per year over three (3) years, BC Government Employees’ Union members will receive a lump sum payment of up to \$575 relating to savings in MSP premiums, as well as temporary market adjustment increases for certain classifications (i.e. sheriffs, corrections officers, child protection workers, etc.), wage grid increases for administrative services members, as well as benefit increases, including an increase to the extended health lifetime maximum payable amounts. The parties have also renewed an Memorandum of Understanding providing for job protection from layoff for members covered by the public service agreement. As noted, child protection workers were among the four different categories of employees for which the Government provided 2015/2016 wage data showing them behind in wages compared to such workers in Alberta and Ontario.

BCGEU Highlights of the Agreement – BCGEU Ratification Bulletin, July 2018, Judges’ Association Documents, **Tab 21**

53. Resident Doctors of BC and the Government have agreed, in addition to a total of 6% in general wage increases over three (3) years, to an additional 2.8% increase over the term of the agreement in recognition of rising business expenses and benefits (for a total of 8.8%). Further, any physician who earned more than \$75,000 in any of the last three years will receive a one-time payment of \$7,500 in recognition of increases in business costs. Further, beginning in 2020, the Government will fund a new premium on certain visits to doctors’ offices (i.e. visits and consultations, examinations and counselling services). Depending on how many premiums are collected, some doctors may receive thousands of dollars in extra payments.

“New BC doctors contract could shape teacher negotiations”, Global News, March 20, 2019, Judges’ Association Documents, **Tab 22**

54. The new agreement for nurses in BC compels health authorities to increase staffing by filling hundreds of nursing positions or otherwise pay existing nurses new premiums ranging from \$3 to \$5 an hour. According to the Union, these premiums could cost the Government as much as \$100 million a year. The amount is not included in the costs of the contract and is an “unfunded liability” to health employers, so costs would come out of hospital and/or other budgets allocated by the provincial government. Further, nurses will be paid an end-of-shift bonus for completing administrative work beyond their scheduled shift. For the first 15 minutes of such work (usually done as nurses are handing off patients to the next shift), nurses will be paid at their straight time rate of pay, and at the overtime rate for any additional time.

“BC Nurses negotiate pricey premium designed to force additional hiring”,
Vancouver Sun, January 10, 2019, Judges’ Association Documents, **Tab 23**

55. The Facilities Bargaining Association and Health Employers Association of BC agreed to general wage increases within the Government’s mandate but also negotiated increases to shift premiums for evenings nights and weekend shifts, as well as a one time funding increase of \$1 million to the Facilities Subsector Education Fund.

“Health Employer and Facilities Bargaining Association ratify three-year agreement”, February 11, 2019, Judges’ Association Documents, **Tab 24**

56. Health Sciences Professionals and Health Employers Association of BC have agreed, in addition to general wage increases within the Government’s mandate, to increases for on-call and call-backs (i.e. to double time), as well as increases to transportation allowance and travel expenses, and the dedication of \$10 million to fund the first step of a wholesale restructuring of the classification system.

Report from Chief Negotiator, Highlights of 2019-2022 HSPBA Agreement,
Judges’ Association Documents, **Tab 25**, pages 6-18

57. In the previous round of bargaining, the Government also negotiated, in addition to general wage increases, additional wage increases equal to one-half of any percentage

gain in real Gross Domestic Product above the forecast of the Economic Forecast Council for the relevant calendar year (which amount is referred to as the “Economic Stability Dividend”). Those increases are still being provided in 2019, as many employees received a 0.75% increase through the Economic Stability Dividend in April 2019.

Report from Chief Negotiator, Highlights of 2019-2022 HSPBA Agreement,
Judges’ Association Documents, **Tab 25**, page 8

58. As outlined in the Judges’ Association’s Submission at page 82 and following, the general wage increases are only the starting point for individual employees who may also receive step or merit increases, or promotions to other classifications with a higher rate of pay. In the absence of a complete understanding of the financial terms of the comprehensive agreements, information about general wage increases negotiated or granted in the public sector can be considered only in the very general sense of being an indicator that the Government itself considered that it can afford to increase compensation. Beyond that, the specific increases that are appropriate for judges must be considered in light of the factors that are uniquely applicable to the determination of judicial compensation. Indeed, unlike for judges, there is no requirement that public sector compensation be “reasonable”.

Current and Expected Economic Conditions in BC

59. Beginning at page 80, the Government acknowledges that there has been a period of robust expansion in the economy but seeks to emphasize that the forecast is for modest growth over the coming years.

60. At paragraphs 208-210, the Government refers to a number of downside risks to the current economic outlook and cherry-picked certain weaknesses cited in the Bank of Canada’s April 24, 2019 policy statement. The May 29, 2019 policy document from the Bank of Canada is more positive:

Recent Canadian economic data are in line with the projections in the Bank’s April Monetary Policy Report (MPR), with accumulating evidence

that the slowdown in late 2018 and early 2019 is being followed by a pickup starting in the second quarter. The oil sector is beginning to recover as production increases and prices remain above recent lows. Meanwhile, housing market indicators point to a more stable national market, albeit with continued weakness in some regions.

...

Overall, recent data have reinforced Governing Council's view that the slowdown in late 2018 and early 2019 was temporary, although global trade risks have increased. In this context, the degree of accommodation being provided by the current policy interest rate remains appropriate. In taking future policy decisions, Governing Council will remain data dependent and especially attentive to developments in household spending, oil markets and the global trade environment.

Bank of Canada Media Release, May 29, 2019:

<https://www.bankofcanada.ca/wp-content/uploads/2019/05/fad-press-release-2019-05-29.pdf>

61. As acknowledged in paragraph 211, the downside risks highlighted by the Government are all recognized and considered in the Government's budget process and forecasts. The Government's position therefore incorporates a "double discount" in assessing the economic conditions: it builds significant prudence into its forecasts to account for downside risks, but then asks the Commission to take into account the risks a second time. As Mr. McKinnon opines in his Report, the Commission can be confident in the forecasts given the prudent approach taken by the Government in preparing them.

62. At paragraph 213, the Government states, correctly, that growth forecasts were reduced in the early months of this year with the result that the forecasts for 2020 and beyond are now 0.2% lower than earlier estimates. The Government's budget process set the forecasts at a full 0.5% lower than the earlier estimates, which means that changes are well within the safety margin that is built into the Government's budgeting. In referring to specific indicators, the Government cites the value of residential home sales as among the indicators that were "weaker than expected". This is an odd characterization given that, at least in part, this was a consequence of actions by both federal and provincial governments which were specifically designed to cool a heated housing market.

63. At paragraph 214, the Government refers to aging demographics as a “significant risk”, a term which usually connotes something unforeseeable. The changing demographics of the country are extremely well known to economic forecasters, and are projected with accuracy well beyond any time frame relevant to the Commission’s work.

64. At paragraph 216, the Government refers to the unemployment rate being 4.7% as of March 2019. By the April 2019 numbers (Labour Force Survey), BC’s unemployment rate has dropped even lower, to 4.3%, which is well below the rates of the next lowest provinces (Manitoba and Quebec), which are at 5.0%

65. As to the chart on page 85, the comparison with PEI judges is entirely misleading given BC’s decision to freeze judicial salaries in 2005 and provide a very significant catch-up increase in 2006 (i.e. from \$161,250 to \$198,000 in 2006). If the comparison is made for the years 2006 to 2018, the salaries of BC judges rose only 36.4% as compared with 45.9% for PEI judges (i.e. the national average). The following is a revision of the Government’s chart from page 85, to take into account the period 2006-2018, which shows the extent to which BC judges have lagged behind their counterparts in salary increases over the period:

	Cumulative Change between 2006 and 2018
Consumer Price Index BC	18.78%
Average Weekly Wage Rate (BC)	34.39%
Average Weekly Wage Rate (Canada)	36.58%
Provincial Court Judges (BC)	36.4% (or 39.95% if the 2016 JCC’s recommendations are eventually implemented)
Provincial Court Judges (PEI national average)	45.9% (takes into account outdated or uncertain salaries for 4 jurisdictions)

Chart of Judicial Salaries, Joint Book of Documents, Tab 15

Employee Wages by Occupation, annual:
<https://www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=1410034001#timeframe>

CPI Annual Average, not seasonally adjusted, Table No. 18-10-0005-01
 (Statistics Canada):
<https://www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=1810000501>

Current and Expected Financial Position of Government

66. At paragraph 218, the Government puts undue emphasis on the size of Government surpluses, rather than focusing on more objective indicators such as the debt and the independent assessment of the province's credit-worthiness as assessed by the bond rating agencies.

67. The graph at page 86 illustrates two things:

- the strength and resilience of BC's diversified economy in returning to sizeable surpluses following the deficit in 2012/13; and
- that the Government has exceeded its prudent forecasts in every single year since then.

Current Fiscal Plan

68. The Government outlines its fiscal plan beginning at page 87. The JCC is bound to make recommendations in light of the objective factors identified in the Act. It is the Judges' Association's position that, given the healthy financial position of the Government, the focus should be on objective considerations like fiscal capacity rather than the Government's fiscal strategy. The McKinnon Report at Tab 4 in the Judges' Association Documents provides this more objective view.

Provincial Debt

69. In its discussion of debt at paragraph 229, the Government makes no mention of its debt position relative to other jurisdictions. As detailed in the McKinnon Report, BC's Taxpayer Supported Debt as a percentage of GDP ranks third among the provinces (at 15.6%), with only Alberta and Saskatchewan lower. The next lowest province is Nova Scotia, at 35.2%. Ontario's figure is a 41.8%.

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

Fiscal Plan – Risks and Prudence

70. As to the Government's paragraph 232, the Government's prudent budgeting process takes into account risks that are both within and outside the Government's control. Given the prospective nature of the JCC process, the JCC has no alternative but to rely on reasonable forecasts in respect of the economic and other objective factors identified in the *Judicial Compensation Act*. Fortunately, the economic and fiscal forecasting methods adopted by the Government have a proven track record of being sound and reliable.

The Government's Submission to the Commission regarding Judges

71. The Judges' Association has addressed above each of the Government's arguments that are summarized in paragraph 237 and will not repeat those submissions here. In particular, the Judges' Association has demonstrated through its submissions that the compensation paid to BC judges is significantly out of step, when considered in light of its reasonable comparators.

72. The Government calls for only "minor adjustments" to judicial salaries of 2% per annum. Indeed, with the CPI predicted to increase by 2.1% in 2020, followed by 2% in each of 2021 and 2022, the proposal would mean that judges' salaries would barely keep pace with increases in the cost of living, particularly if applied on the lower base that resulted from the Government's rejection of the recommendations of the 2016 JCC.

73. In proposing the 2% per annum adjustments, the Government does not address the uncertainty with respect to the 2019 salary. As discussed in the Judges' Association's Submission at pages 71-72, the starting point could change from the current 2019 salary of \$270,000 to \$281,251, the 2019 figure recommended by the 2016 JCC. That the Government proposes 2% without regard to the starting point reveals that its proposal is driven by adherence to the Government's bargaining mandate for the public sector.

74. Quite apart from the fact that 2.0% per annum is not justified in light of the relevant factors, there is an arbitrariness inherent in a proposal for a percentage increase. If such a recommendation were to be fairly applied, given the uncertainty over the outcome of the 2016 JCC process, the recommendation would need to contemplate that the percentage would be applied from whatever the 2016 starting point is eventually determined to be. When one considers the potential outcomes of the 2016 JCC process, it is apparent that each potential outcome would produce quite different results over the course of this JCC’s mandate. The following chart illustrates the point and also compares the Association’s proposal:

2019 Salary	2020 Salary	2021 Salary	2022 Salary
\$270,000 (substituted by Government)	\$275,400 (2% proposed by Government)	\$280,908 (2% proposed by Government)	\$286,526 (2% proposed by Government)
\$281,251 (recommended by 2016 JCC)	\$286,876 (2% proposed by Government)	\$292,614 (2% proposed by Government)	\$298,466 (2% proposed by Government)
Association’s proposal	\$310,000	\$316,200	\$322,524

75. As the chart above highlights, under the Government’s proposal, if applied to \$270,000, both the 2020 and 2021 salaries would be lower than the 2019 figure recommended by the 2016 JCC. This would mean a salary decrease if the 2016 JCC’s recommendations are eventually implemented. As detailed in the Judges’ Association’s Submission, the relevant factors support an increase for 2020 that is well beyond the 2% proposed by Government, whatever the starting point.

76. The Judges’ Association argued in its Submission that the starting point is largely beside the point for two reasons:

- the task of the JCC is not to determine what percentage increase should be applied to the salary currently being paid; and,
- most importantly, the objective factors set out in the Act support a salary that is higher than any of the alternatives that could result once the final 2019 salary is known.

77. To avoid the pitfalls which befell the 2013 JCC process, the Judges' Association urges this JCC to follow the approach of the 2016 JCC and determine the appropriate salary figure for the years 2020 and following, not appropriate percentage increases. The Judges' Association proposes that this 2019 JCC should consider the potential outcomes of the 2016 JCC process as part of the background to its Report and make its own assessment of appropriate compensation for the period of its mandate (i.e. April 1, 2020 - March 31, 2023).

78. In summary, the Judges' Association maintains that the best approach is for this 2019 JCC to refer to the uncertainty about the starting point but make its own recommendation of salary figures, not percentage increases. Again, each JCC needs to make its own assessment in its own context. To the extent there was any basis in the past to "restrain" judicial salaries (such as in 2010, when the Judges' Association itself proposed a 2-year freeze), it no longer exists today.

Flexible Benefits Proposal

79. The Judges' Association takes no position in respect of the Government's proposal for changes to the Flexible Benefits Plan for judges.

Per Diem Travel Reimbursement

80. The Judges' Association supports the Chief Judge's proposal that the *per diem* travel reimbursement rates be increased to the same rate as may exist from time to time for MLAs. That proposal is found at pages 40-42 of the Chief Judge's Submission.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13TH DAY OF JUNE, 2019



Susan Dawes
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