



**SUBMISSIONS OF THE CANADIAN BAR ASSOCIATION
(BRITISH COLUMBIA BRANCH)**

TO THE

BRITISH COLUMBIA

2013

JUDGES COMPENSATION COMMISSION

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PREFACE

The Canadian Bar Association (British Columbia Branch) (the “CBA”) has been requested to make submissions to provide its distinct perspective regarding judicial compensation for Provincial Court judges to the British Columbia 2013 Judges Compensation Commission (the “Commission”).

Formed in 1896, the purpose of the CBA is to:

- enhance the professional and commercial interests of our members;
- provide personal and professional development and support for our members;
- protect the independence of the judiciary and the Bar;
- promote access to justice;
- promote fair justice systems and practical and effective law reform; and
- promote equality in the legal profession and eliminate discrimination.

The CBA nationally represents approximately 38,000 members and the British Columbia Branch itself has over 6,900 members. Our members practice law in many different areas. The CBA has established 77 different sections to provide a focus for lawyers who practice in similar areas to participate in continuing legal education,

research and law reform. The CBA has also established standing committees and special committees from time to time to deal with issues of special interest to the CBA.

In 2004, 2007 and 2010, the CBA made submissions to the Commission regarding compensation for Provincial Court judges.

EXECUTIVE SUMMARY

These Submissions provide the CBA's recommendations on eight matters before the Commission. First, the CBA recommends that the Commission apply the applicable constitutional principles in order to ensure an effective process characterized by government goodwill, a depoliticized judicial compensation process and judicial independence through fair and reasonable judicial compensation.

Second, the CBA recommends that the Commission consider the Provincial Court judge's work environment as the Province's "people's court", its heavy caseload, the need to for judges to travel and the unique demands imposed on Provincial Court judges in working with large numbers of unrepresented litigants.

Third, the CBA recommends that the Commission recommend that the Senior Judges Program not be expanded.

Fourth, the CBA recommends that the Commission find that the government's current financial position allows for fair and reasonable compensation for Provincial Court

judges. In addition, the CBA recommends that the Commission take into account the “Judicial Independence: (And What Everyone Should Know About It)” and the Memorandum of Understanding in the Commission’s consideration of the current financial position of the government.

Fifth, the CBA recommends that the Commission accept that the public interest is not properly served where there is a significant disparity between the remuneration for judges of the Provincial Court and the justices of the Supreme Court. The CBA further recommends that the Commission should take this factor into consideration in its determination of fair and reasonable judicial remuneration.

Sixth, the CBA recommends that the Commission consider that competitive compensation must be provided in order to attract qualified applicants to the Provincial Court Bench.

Seventh, the CBA recommends that the Commission apply the applicable laws of British Columbia, including its concurrent jurisdiction with the Supreme Court and the expanded jurisdiction of the Provincial Court to ensure that judicial independence is protected by the fair and reasonable determination of judicial compensation.

Eighth, and finally, the CBA recommends that the Commission consider other relevant matters, including: pensions, benefits, and cost of living allowance indexed for inflation. The CBA further recommends that the Commission recommend that the government

pay all reasonable costs incurred by the Provincial Court Judges' Association of British Columbia (the "PCJA") in preparing and making its submissions to the Commission.

FAIR PROCESS TO DETERMINE JUDICIAL COMPENSATION

Under the *Judicial Compensation Act*, S.B.C. 2003, c. 59 (the "Act"), the Commission must report to the Minister of Justice on all matters respecting the remuneration, allowances and benefits of judges or judicial justices and make recommendations with respect to those matters covering the next three fiscal years.¹

The Act further requires the Minister of Justice to submit the Commission's report to the Legislative Assembly. Under the Act, the Legislative Assembly may reject one or more of the recommendations made in the report as being unfair or unreasonable, and set the remuneration, allowances or benefits to be substituted for those proposed by the rejected Commission's recommendations.

Section 5(5) of the Act lists the factors the Commission must consider in recommending judicial compensation:

- (a) the current financial position of the government;
- (b) the need to provide reasonable compensation to judges;
- (c) the need to maintain a strong court by attracting qualified applicants;

¹ Unofficial copy available at: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_03059_01.

- (d) the laws of British Columbia;
- (e) any other matter the commission considers relevant.

Constitutional Principles Applied to the Function of Judicial Compensation Commissions

In addition to the factors listed in the Act, the Supreme Court of Canada in *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 (the “*PEI Reference*”) laid down the legal principles for governments to follow to set judicial compensation.² The CBA intervened in the *PEI Reference*.

These constitutional principles also apply to the Act to inform the factors listed in section 5(5) of the Act.

These applicable constitutional principles emerging from the *PEI Reference* are:

- salaries of Provincial Court judges may be reduced, increased or frozen, subject to prior recourse to a special process, which is independent, effective and objective, for determining judicial remuneration (para. 133);
- under no circumstances is it permissible for the judiciary to engage in negotiations over remuneration with the executive or representatives of the legislature (para. 134);

² See <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/1541/1/document.do>.

- any reduction to judicial remuneration, including *de facto* reductions through the erosion of salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge (para. 135);
- financial security is a means to the end of judicial independence, and is therefore for the benefit of the public (para. 193);
- the same principles that apply to salaries for judges apply equally to judicial pensions and other benefits (para. 136);
- judges, although they must ultimately be paid from the public purse, are not civil servants since civil servants are part of the executive, and judges, by definition, are independent of the executive (para. 143);
- if a government rejects the recommendations of a judicial compensation commission, the government must “articulate a legitimate reason” why it has chosen to depart from the recommendations of the commission (para. 183);
- if judicial review is sought after a government rejects the recommendations of a judicial compensation commission, a reviewing court must inquire into the reasonableness of the factual foundation of the claim (para. 183);
- there should be no negotiation for remuneration between the judiciary and the executive and legislature because negotiations for remuneration from the public

purse are “indelibly political”, but it is proper for Provincial Court judges to convey their concerns and make submissions to government regarding the adequacy of current levels of remuneration (para. 134); and

- judges’ salaries must not fall below the basic minimum level of remuneration for the office of a judge (para. 135) that is “adequate, commensurate with the status, dignity and responsibility of their office” (para. 194).

Constitutional Principles Applied Since The *PEI Reference*

Since the *PEI Reference*, the Supreme Court of Canada has reaffirmed the constitutional principles set out in the *PEI Reference*.

In 2005, the Supreme Court of Canada released its decision, *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, [2005] 2 S.C.R. 286 (“*Bodner*”).³

The CBA intervened in *Bodner*.

³ See <http://csc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/2277/1/document.do>.

In *Bodner*, the Supreme Court of Canada held that the principles stated in the *PEI Reference* remain valid (para. 13).

In *Bodner*, the Supreme Court of Canada reiterated principles articulated in the *PEI Reference* that:

- judicial independence is “the lifeblood of constitutionalism in democratic societies” (para. 4);
- judicial independence is “necessary because of the judiciary’s role as protector of the Constitution and the fundamental values embodied in it, including the rule of law, fundamental justice, equality and preservation of the democratic process” (para. 4);
- judicial independence has two dimensions: first, the individual dimension, which relates to the independence of a particular judge and the second, the institutional dimension, which relates to the independence of the court the judge sits on; “Both dimensions depend upon objective standards that protect the judiciary’s role” (para. 5);
- the “judiciary must both be and be seen to be independent” (para. 6);
- “[j]udicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice” (para. 6); and

- key components of judicial independence are: security of tenure, administrative independence and financial security (para. 7).

The Supreme Court of Canada stated in *Bodner* that a commission must focus on identifying the appropriate level of remuneration for the judicial office in question and address all relevant issues in a flexible manner (para. 14).

Regarding a government's response to the commission's recommendations, the *Bodner* decision requires a government to give weight to the commission's recommendations, and provide a complete response to them (para. 23). A government may depart from a commission's recommendations, if the government provides complete and legitimate reasons and that deal with a commission's recommendations in a meaningful way that will meet the standard of rationality (para. 25).

Regarding the level of judicial review of a government's decision to not follow a commission's recommendations, the *Bodner* decision provides that the court must focus on the government's response and on whether the purpose of the commission process has been achieved.

Further, the reviewing court should apply a three-stage test for determining the rationality of the government's response:

1. Has the government articulated a legitimate reason for departing from the commission's recommendations?
2. Do the government's reasons rely upon a reasonable factual foundation? and
3. Viewed globally, has the commission process been respected and have the purposes of the commission — preserving judicial independence and depoliticizing the setting of judicial remuneration — been achieved? (para. 31).

In 2012, *Bodner* was applied by the BC Supreme Court in *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*.⁴ The PCJA obtained an order quashing the BC Legislative Assembly's 2011 resolution rejecting many of the recommendations of the 2010 British Columbia Judges Compensation Commission (the "2010 Commission"). The PCJA also obtained a declaration that the government's response to the 2010 Commission did not conform to the standards set out in the Act.

In applying the *Bodner* test, the BC Supreme Court found that the government did not have empirical evidence to support a legitimate reason for departing from the 2010 Commission's recommendations regarding pensions (paras. 91 and 92). Further, the court found that the government's "net zero" public sector compensation mandate as a basis of refusal of the 2010 Commission's recommendation for a salary increase for judges was not a rational reason and violated *Bodner* (paras. 106 and 107).

⁴ 2012 BCSC 1022 (CanLII) (<http://canlii.org/en/bc/bcsc/doc/2012/2012bcsc1022/2012bcsc1022.pdf>).

The BC Supreme Court ordered special costs against the government for the government's failure to adhere in good faith to the constitutional principles underlying the judicial compensation process. Macaulay, J. held:

[15] In my view, the government's conduct relating to the important constitutional process of setting judicial remuneration as well as its conduct during the judicial review proceeding deserve judicial rebuke. I reach this conclusion reluctantly but have kept in mind that the effectiveness of the process necessarily depends on the goodwill of government. The secretive resort to unconstitutional considerations during the framing of the government response is entirely inconsistent with the obligation of government as was its failure to be forthright during the proceeding.

[16] In the result, the Legislative Assembly made its decision not understanding how Cabinet arrived at its decision. The public, the PCJA and the court are all entitled to more from the AG and the government.⁵

The CBA recommends that the Commission apply the applicable constitutional principles provided in the *PEI Reference*, clarified in *Bodner* and applied in *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)* in order to ensure an effective process characterized by government goodwill, a depoliticized judicial compensation process and judicial independence through fair and reasonable judicial compensation.

⁵ 2012 BCSC 1420 (<http://www.canlii.org/en/bc/bcsc/doc/2012/2012besc1420/2012besc1420.pdf>).

PROVINCIAL COURT JUDGES' WORK ENVIRONMENT

Past commissions have all acknowledged that Provincial Court judges have a challenging work environment.

The 2001 Commission called the Provincial Court, the “people’s court”; that “name reflects the high volume of cases it hears and the fact that the Provincial Court is the only court many residents of the province will ever deal with directly.”⁶

The 2004 Commission observed that many judges “travel extensively to provide the full range of criminal, civil and family justice in a great many locations throughout the province”.⁷

The 2007 Commission identified that, “the work of the Provincial Court is such that its judges are the personification of justice for the vast majority of British Columbians”.⁸

The 2010 Commission found that working with the large number of unrepresented litigants “demands that Provincial Court judges possess the qualities of patience, humility and compassion, and a keen understanding of human nature.”⁹

⁶ Page 10, see <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/210694/2001finalreport.pdf>.

⁷ Page 13, see <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/371904/finalreport.pdf>.

⁸ Page 10, see <http://www.ag.gov.bc.ca/public/judges-compensation/2007FinalReport.pdf>.

⁹ Page 19, see <http://www.ag.gov.bc.ca/judicial-compensation/info/2010-JCC-FinalReport.pdf>.

The CBA recommends that the Commission consider the Provincial Court judges' work environment, that it is the Province's "people's court", its heavy caseload, the need to for judges to travel and the unique demands imposed on Provincial Court judges in working with large numbers of unrepresented litigants.

In addition to previous Commissions' findings, in 2012, Mr. Cowper, Q.C., the Chair of the BC Justice Reform Initiative, released his final report and made findings about the work of the Provincial Court judges:

Leaders of the Provincial Court have advanced farsighted and significant reforms over the past 15 years. These proposals and initiatives have included rules to promote early resolutions, the reduction of backlogs, the development of public performance measures for the Court, the development of problem-solving and specialized courts such as the Downtown Community Court (DCC) and the Victoria Integrated Court (VIC), and the development of a vision and mission statement for the Court.¹⁰

Another aspect of the Provincial Court judges' work environment is the Senior Judges Program. The Senior Judges Program allows a Provincial Court judge to retire from full-time work, begin receiving his or her pension, but then to continue sitting as a part-time (or supernumerary) judge. A judge can be on the Senior Judges Program for 7 years, or up to the retirement age of 75, whichever occurs first.

Unlike federally appointed justices, there is no BC legislation that defines a fixed complement of full-time Provincial Court judges. Although there are plans in place, since

¹⁰“A Criminal Justice System for the 21st Century” (August 2012) at page 8 (<http://www.ag.gov.bc.ca/public/justice-reform/CowperFinalReport.pdf>).

the development by the Ministry of Justice and Attorney General of British Columbia of the White Paper on Justice Reform, Part One: A Modern, Transparent Justice System (“White Paper One”) to put in place a complement by March 2014.¹¹ Instead, judges are appointed at the discretion of the Minister of Justice and Attorney General from the list of approved candidates supplied by the Judicial Council.

Under the Senior Judges Program, Provincial Court senior judges work effectively 0.45 part-time over the course of a year. Two senior judges are included in the Full Time Equivalent (“FTE”) calculations used by the government for budgeting purposes. Therefore, as the number of senior judges increase, there are fewer full-time judges remaining on the Bench.

In our submissions, “Justice in Time” to Mr. Cowper, Q.C., the Chair of the BC Justice Reform Initiative, in June 2012, we have set out the impact of the increase in senior judges (from 0 as of April 1, 2001 then increase to 45 as of April 1, 2012) on the number of full-time judges (145 as of April 1, 2001 then down to 107 as of April 1, 2012).¹²

The FTE calculations used by the government do not reflect the actual ability of the Provincial Court to schedule senior judges and these FTE calculations understate the effective complement of judges available to hear the increasingly complex cases that

¹¹ See pages 12, 15, 21, 23 and 24 (<http://www.justicebc.ca/shared/pdfs/WhitePaperOne.pdf>).

¹² See page 15 (http://www.cba.org/BC/Initiatives/pdf/CBABC_Submission-Justice_In_Time-Jun_6_2012.pdf).

come before the court. In some regions there are more part-time senior judges than full-time judges. As a result, the impacts on scheduling, obtaining hearing dates, the inability to get multi-day hearings heard on consecutive days and general delay have been significant.

Further, if a fixed complement of judges is based on the government FTE calculations, and not based on a fixed complement of full-time judges, then the problems described here will be exacerbated, especially if the complement is assessed province-wide and regional anomalies (such as there being more senior judges than full-time judges in some regions) are not taken into account.

Even using the government's FTE calculations, there has been a reduction in judicial resources since 2001. As we stated in our "Justice in Time" submissions:

The effective reduction in the number of Provincial Court judges makes meaningful case management less and less likely. Effective judicial case management requires that individual judges be seized of cases at an early point in the proceedings so they can then play an informed role in managing the case and urging the parties, in an appropriate way, to focus the preliminary inquiry or to narrow the issues for greater efficiency should the matter proceed to trial. Regrettably, with effectively fewer judges, such in-depth participation by a judge, who will have even more cases to manage, is highly unlikely.¹³

The government believes that, by hiring more part-time senior judges, it has eliminated the need to hire additional full-time Provincial Court judges, thereby saving money by not replacing judges. However, if the trend of increasing the complement of senior

¹³ Page 16.

judges continues, in 10 years at least half the Provincial Court Bench will be composed of senior judges, which will only exacerbate the current significant scheduling problems.¹⁴

The cost savings come about because the government does not have to pay the pension contributions of senior judges because they have already retired.

The CBA understands that, if the senior judge program remains at a 7-year term, the projections are that there will be an increase in the number of senior judges in the short term, and then those numbers should start to decline in the future.

As we submitted in our submissions “Justice in Time”, the CBA does not support the expansion of the Senior Judges Program in order to increase the complement of Provincial Court judges.¹⁵ Any expansion of the Senior Judge Program at the expense of the appointment of full-time judges will see the scheduling, backlog and reduction in access challenges facing the Provincial Court continue to be exacerbated in the future.

The Senior Judges program has the potential to be as effective as the supernumerary federally appointed justice program as long as use of senior judges do not result in the reduction of the number of full-time judges appointed by government. Otherwise, we will see the scheduling, backlog and reduction in access challenges facing the Provincial Court continue to be exacerbated in the future.

¹⁴ Page 17 in “Justice in Time”.

¹⁵ *Ibid.*

The CBA recommends that the Commission recommend that the Senior Judges Program not be expanded at this time and that future expansion not be considered, until such time as there is a fixed complement of judges in place, or a mechanism to determine a fixed complement of judges, as recommended in the CBA's submissions in "Justice in Time".

CURRENT FINANCIAL POSITION OF THE GOVERNMENT

Section 5(5)(a) of the Act requires the Commission to consider the current financial position of the government.

Following the legal principles set down by the Supreme Court of Canada, the government needs to be mindful that judicial independence is not just a government priority, it is a constitutional duty. A useful definition of what judicial independence is, has recently been stated by the Chief Justices of the British Columbia Court of Appeal, the Supreme Court and the Chief Judge of BC on March 15, 2012: "Judicial Independence: (And What Everyone Should Know About It)." ¹⁶

¹⁶ *Judicial Independence (And What Everyone Should Know About It)*, Court of Appeal of BC, Supreme Court of BC, and Provincial Court of BC
(http://www.courts.gov.bc.ca/about_the_courts/Judicial%20Independence%20Final%20Release.pdf).

In our 2012 submissions to the Ministry of Justice and Attorney General of British Columbia regarding White Paper One, the CBA adopted this statement of the Chief Justices and Chief Judge of BC on judicial independence.¹⁷

In April 2013, the Minister of Justice And Attorney General of British Columbia and the Chief Justices and Chief Judge of BC entered into a memorandum of understanding (the “MOU”).¹⁸ The purpose of the MOU is to describe the roles and responsibilities of the Attorney and the Chief Justices and Chief Judge of BC in the administration of the courts. The administration of the courts involves spending public monies for the administration of justice and the operation of the courts.

The government will need to be mindful of the ruling in *Provincial Court Judges’ Association of British Columbia v. British Columbia (Attorney General)* that “the continuing invocation and repetition by government at all stages of the process primarily consisting of the “net-zero” mantra is neither legitimate nor rational under *Bodner*.” (para. 74).

¹⁷ Page 8, see http://www.cba.org/BC/Initiatives/pdf/CBABC_Response_to_White_Paper_final_December_12_2012.pdf.

¹⁸ Memorandum Of Understanding Between The Minister Of Justice And Attorney General Of British Columbia And The Chief Justice Of British Columbia And The Chief Justice Of The Supreme Court Of British Columbia And The Chief Judge Of The Provincial Court Of British Columbia (April 3, 2013). Available at: [http://www.courts.gov.bc.ca/supreme_court/announcements/2013/Memorandum%20of%20Understanding%20\(April%203%202013\).pdf](http://www.courts.gov.bc.ca/supreme_court/announcements/2013/Memorandum%20of%20Understanding%20(April%203%202013).pdf).

The government currently has a balanced budget.¹⁹

The CBA recommends that the Commission find that the government's current financial position allows for fair and reasonable judicial compensation. In addition, the CBA recommends that the Commission take into account the "Judicial Independence: (And What Everyone Should Know About It)" and the MOU in the Commission's consideration of the current financial position of the government.

REASONABLE COMPENSATION TO JUDGES

Section 5(5)(b) of the Act requires the Commission to consider the need to provide reasonable compensation to Provincial Court judges.

A key factor in determining proper compensation for Provincial Court judges is attracting candidates of the highest quality and, once appointed, motivating and retaining those individuals for the duration of their professional careers.

As required by the *PEI Reference*, judicial compensation must be "adequate, commensurate with the status, dignity and responsibility of their office (para. 194). In

¹⁹ BC Balanced Budget 2013, Backgrounder: Fiscal Plan 2013-2014 and 2015-2016 (February 19, 2013)(http://www.bcbudget.gov.bc.ca/2013/backgrounders/2013_background_fiscal_plan.pdf).

British Columbia the position of a Provincial Court judge is accorded respect by the public at large.

Just prior to appointment, most judges are senior lawyers, earning the highest income they will earn as lawyers. Many of these lawyers are business owners and lose flexibility and choice of their work environment once they become employees as judges.

Once appointed, judges cannot practise any other business, profession or occupation. Many judges are often required to travel. For the vast majority of judges, their judicial compensation is the sole source of income for themselves and their families.

Consequently, judges should be given fair and reasonable compensation to ensure their financial security that, in turn, ensures judicial independence.

Compensation to Supreme Court Justices and Judges of the Provincial Court

Both the 2007 and 2010 Commissions recognized that a wage disparity between Provincial Court judges and Supreme Court justices exists. The 2007 Commission found that wage gap should be minimized, while the 2010 Commission found that Provincial Court judges, like their Supreme Court counterparts, should have their salaries indexed against inflation.²⁰

²⁰ Pages 8 and 33, see 2010 Commission Final Report.

Justices of the Supreme Court have an annual compensation of \$295,500²¹ while Provincial Court judges are paid today what they were paid in 2010: \$231,138.²² Provincial Court judges are paid \$64,362 less each year than Supreme Court Justices. This wage gap has increased since the last Commission in 2010, when the difference was \$40,262.²³ The CBA submits this wage gap cannot stand.

Both the Provincial Court and Supreme Court compete for the same pool of qualified candidates from the Bar. Those lawyers who are well-qualified and suited to the Provincial Court, may very well reasonably choose to apply to the Supreme Court since they will earn \$64,362 more each year. Consequently, the difference in compensation may very well inhibit the recruitment of the best possible candidates to the Provincial Court Bench.

Following the *PEI Reference*, financial security is part and parcel of judicial independence and benefits the public.

The public interest is properly served where there is **not** a significant disparity between the remuneration for judges of the Provincial Court and the justices of the Supreme Court.

²¹ As of April 1, 2013 for federally appointed justice, see <http://www.fja.gc.ca/appointments-nominations/considerations-eng.html#Remuneration>.

²² Page 8 of the 2010 Commission.

²³ Page 11 of the 2010 Commission. Calculated as \$40,262 being the difference between \$271,4000 (Supreme Court Justice) and \$231,138 (Provincial Court Judge).

The CBA recommends that the Commission accept that the public interest is not properly served where there is a significant disparity between the remuneration for judges of the Provincial Court and the justices of the Supreme Court. The CBA further recommends that the Commission should take this factor into consideration in its determination of fair and reasonable judicial remuneration.

QUALIFIED APPLICANTS TO THE JUDICIARY

Section 5 (5)(c) of the Act requires the Commission to consider the need to maintain a strong court by attracting qualified applicants.

The proper and efficient operation of the judicial system depends on a high level of judicial competence. In order to attract qualified applicants, judicial compensation must be competitive. Provincial Court judges should be appointed from a wide cross-section of the Bar accounting for gender, age and location (both urban and rural) and ethnic diversity. Qualified applicants should be drawn from all areas of legal practice, including from the barrister and solicitor sides of the Bar and the private and public Bar. Applicants to the Provincial Court should be skilled and experienced and be of exceptional ability.

The CBA recommends that the Commission consider that competitive compensation must be provided in order to attract qualified applicants to the Provincial Court Bench.

LAWS OF BRITISH COLUMBIA

Section 5(5)(d) of the Act requires the Commission to consider the laws of British Columbia.

The Provincial Court is responsible for making decisions, conducting hearings and judicial conferences under the laws of British Columbia that are set out below. As a consequence, Provincial Court judges are required to keep abreast of the many changes to the laws of British Columbia and must be prepared, at any time, to hear matters in Provincial Court in any of these areas of law.

The laws of British Columbia include the Act and other relevant legislation as noted below.

The *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46 provides that the Provincial Court has jurisdiction over child protection matters.²⁴

The *Family Maintenance Enforcement Act*, R.S.B.C. 1996, c. 127 provides that the Provincial Court has exclusive jurisdiction to enforce maintenance orders, and to determine questions of paternity.²⁵

²⁴ Unofficial copy available at: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96046_01.

²⁵ Unofficial copy available at: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96127_01.

The *Provincial Court Act*, R.S.B.C. 1996, c. 379 provides for the jurisdiction of the Provincial Court including: adult criminal, youth, civil, family, traffic and bylaw cases.²⁶ The *Provincial Court Act* also provides for the appointment of judges, their duties, and term of office.

The *Small Claims Act*, R.S.B.C. 1996, c.430 provides that the Provincial Court's jurisdiction regarding small claim matters is to a maximum of \$25,000 and permits that amount to be increased up to \$50,000.²⁷

The Canadian *Youth Criminal Justice Act* (S.C. 2002, c.1) gives the Provincial Court exclusive jurisdiction over criminal matters involving young offenders.²⁸

Concurrent Jurisdiction Of The Provincial Court With The Supreme Court

²⁶ Unofficial copy available at: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96379_01.

²⁷ Section 1 of the Small Claims Court Monetary Limit Regulation (B.C. Reg. 179/2005) prescribes the monetary limit of \$25,000. Section 21 of the *Small Claims Act* permits a regulation to be made to increase the monetary limit to a maximum of \$50,000. Unofficial copy available at: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96430_01.

²⁸ Official copy available at: <http://www.laws-lois.justice.gc.ca/PDF/Y-1.5.pdf>.

In addition to the list of laws cited above that are applicable to the Provincial Court, since the last determination of judicial compensation in 2010, the government has enacted legislation that provides for concurrent jurisdiction of the Provincial Court with the Supreme Court. This legislation is often complex and ranges over many different areas of law, requiring deft interpretation by Provincial Court judges who must hear these matters.

Section 17 of the *Athletic Commissioner Act*, S.B.C. 2012, c. 29 (Bill 50) permits the athletic commissioner to enforce payment of gate receipts in either the Supreme Court or Provincial Court. Also, section 30 of the *Athletic Commissioner Act* permits the athletic commissioner to enforce payment of administrative penalties in either the Supreme Court or Provincial Court.²⁹

Section 58 of the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 (Bill 44) permits the Provincial Court to enforce a final decision filed in Supreme Court.³⁰

²⁹ *Athletic Commissioner Act* is in force May 30, 2013 (B.C. Reg. 170/2013). Unofficial copy available at: http://leg.bc.ca/39th4th/3rd_read/gov50-3.htm.

³⁰ *Civil Resolution Tribunal Act*, except for section 71 (in force March 15, 2013, BC Reg. 108/2013), is not yet in force. Unofficial copy available at: http://leg.bc.ca/39th4th/3rd_read/gov44-3.htm.

Section 109.6 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473 permits enforcement of administrative penalties in either the Supreme Court or Provincial Court.³¹

Section 21 of the *Metal Dealers And Recyclers Act*, S.B.C. 2011, c. 22 (Bill 13) permits enforcement of administrative penalties in either the Supreme Court or Provincial Court.³²

Section 117 of the *Pension Benefits Standards Act*, S.B.C. 2012, c. 30 (Bill 38) permits enforcement of administrative penalties in either the Supreme Court or Provincial Court.³³

Expanded Jurisdiction Of The Provincial Court

In addition to the laws of British Columbia, and the concurrent jurisdiction with the Supreme Court, since 2010, the government has passed relevant statutes that have continued to expand the jurisdiction of the Provincial Court. As with concurrent

³¹ The *Utilities Commission Act* as amended by section 44 of the *Energy And Mines Statutes Amendment Act, 2012*, S.B.C. 2012, c. 27 (Bill 30)(section 44 is in force November 9, 2012, B. C. Reg. 316/2012). Unofficial copy of Bill 30 available at: http://leg.bc.ca/39th4th/3rd_read/gov30-3.htm.

³² *Metal Dealers And Recyclers Act* is in force July 23, 2012 (B.C. Reg. 101/2012). Unofficial copy available at: http://leg.bc.ca/39th4th/3rd_read/gov13-3.htm.

³³ The *Pension Benefits Standards Act* is to come into force by future regulation. Unofficial copy available at: http://leg.bc.ca/39th4th/3rd_read/gov38-3.htm.

jurisdiction with the Supreme Court, the range of this expanded law is varied and complex. As a result, it requires of the Provincial Court judge hearing these matters to learn and apply the law from many different areas of law.

Section 3 of the *Emergency Intervention Disclosure Act*, S.B.C. 2012, c. 19 (Bill 39) permits an individual to apply to the Provincial Court for a testing order.³⁴

On March 18, 2013, the *Family Law Act*, S.B.C. 2011, c. 25 (Bill 16) replaced the three decades old *Family Relations Act*.³⁵ This comprehensive change in family law has expanded the jurisdiction of the Provincial Court.

The following provisions of *the Family Law Act* have increased the jurisdiction of the Provincial Court and were not in the former *Family Relations Act*.

- replacing agreements (s. 7);
- dispute resolution (ss. 8 and 9);
- parenting coordinators (Division 3, ss. 14-19);
- orders declaring parentage (s. 31);
- applications may be heard in party's absence (s. 200); and
- orders respecting disclosure (s. 212).

³⁴ Act is in force March 2, 2013 (B.C. Reg. 33/2013). Unofficial copy available at: http://leg.bc.ca/39th4th/3rd_read/gov39-3.htm.

³⁵ *Family Law Act* is in force March 18, 2013 by B.C. Regs. 28/2012, 131/2012, 276/2012, 347/2012, 348/2012, 42/2013. Unofficial copy available at: http://leg.bc.ca/39th4th/3rd_read/gov16-3.htm.

Section 213 of the *Family Law Act* was in the former *Family Relations Act*, but under the *Family Law Act*, the Provincial Court has expanded duties regarding enforcing orders respecting disclosure. Section 194 of the *Family Law Act* permits overlapping court jurisdiction as between the Provincial Court and the Supreme Court. As well, section 195 of the *Family Law Act* permits the Provincial Court to enforce specified Supreme Court orders.

Sections 89.1 to 89.6 of the *Offence Act* expand the sentencing options provided to judges.³⁶

Section 257 of the *South Coast British Columbia Transportation Authority Act*, S.B.C. 1998, c. 30 permits the Provincial Court to review an arbitrator's decision and section 258 of the same Act permits the Provincial Court to enforce payment obligations.³⁷

Section 18 of Chapter 15 of the Schedule to the *Tla'amin Final Agreement Act*, S.B.C. 2013, c. 2 (Bill 4) permits the Provincial Court or the Supreme Court, as the case may

³⁶ The *Offence Act* was amended by section 6 of the *Offence Amendment Act, 2011*, S.B.C. 2012, c. 1 (Bill 4). Bill 4 came into force on June 1, 2012 (B.C. Reg. 122/2012)). Unofficial copy of Bill 4 available at: http://leg.bc.ca/39th4th/3rd_read/gov04-3.htm.

³⁷ Sections 257 and 258 of the *South Coast British Columbia Transportation Authority Act* were added by section 16 of the *South Coast British Columbia Transportation Authority Amendment Act, 2012*, S.B.C. 2012, c. 33 (Bill 51)(section 16 in force September 12, 2012 (B.C. Reg. 189/2012)). Unofficial copy of Bill 51 is available at: http://leg.bc.ca/39th4th/3rd_read/gov51-3.htm.

be, to hear applications challenging the validity of Tla'amin Laws.³⁸ Section 161 of Chapter 15 provides that the Provincial Court has jurisdiction to hear prosecutions of offences under Tla'amin Law. Section 27 of Chapter 22 of the Schedule to the *Tla'amin Final Agreement Act* provides that the Enrolment Appeal Board may apply to the Provincial Court for an order to require individuals to appear before this Board.³⁹

Section 3.34 of Chapter 3 of the Schedule to the *Yale First Nation Final Agreement Act*, S.B.C. 2011, c.11 (Bill 11) provides that the Provincial Court has jurisdiction to hear prosecutions of offences under Yale First Nation Law.⁴⁰

Section 25.6 of Chapter 25 of the Schedule to the *Yale First Nation Final Agreement Act* provides that the Enrolment Appeal Board may apply to the Provincial Court for an order to require individuals to appear before this Board.⁴¹

The CBA recommends that the Commission apply the applicable laws of British Columbia, including the concurrent jurisdiction with the Supreme Court and the

³⁸ Chapter 15 the Schedule to the *Tla'amin Final Agreement Act* is to come into force by future regulation. Unofficial copy available at: http://www.leg.bc.ca/39th5th/3rd_read/gov04/gov04-3.htm.

³⁹ Chapter 22 of the Schedule to the *Tla'amin Final Agreement Act* is in force on Royal Assent March 14, 2013.

⁴⁰ Chapter 3 of the Schedule to the *Yale First Nation Final Agreement Act* is to come into force by future regulation. Unofficial copy available at: http://leg.bc.ca/39th3rd/3rd_read/gov11-3.htm.

⁴¹ Chapter 25 of the Schedule to the *Yale First Nation Final Agreement Act* is in force on Royal Assent June 2, 2011.

expanded jurisdiction of the Provincial Court to ensure that judicial independence is protected by the fair and reasonable determination of judicial compensation.

OTHER RELEVANT MATTERS

Section 5(5)(e) of the Act requires the Commission to consider any other matter the Commission considers relevant.

The CBA submits that other relevant matters for the Commission to consider include pensions and other benefits. The CBA submits that following the *PEI Reference*, the same legal principles that apply to salaries for judges apply equally to judicial pensions and other benefits (para. 136).

Judicial compensation for Provincial Court Judges should be indexed to the cost of living so that sitting judges do not experience erosion in their salaries as a result of inflation.

The CBA submits that other relevant matters for the Commission to consider include costs. Like the CBA, the PCJA is a non-profit organization with limited funding. Since the beginning of the judicial compensation process under the Act, previous commissions have recommended that government reimburse the PCJA for its costs and the government has accepted those recommendations each time. It is reasonable and proper to continue to follow this past practice of previous commissions and the

government and have the government pay all reasonable costs incurred by the PCJA in preparing and making its submissions to the Commission.

As a result, the CBA recommends that the Commission consider other relevant matters, including: pensions, benefits and cost of living allowance indexed for inflation. The CBA further recommends that the Commission recommend that the government pay all reasonable costs incurred by the PCJA in preparing and making its submissions to the Commission.

SUMMARY OF RECOMMENDATIONS

In these Submissions, the CBA has made the following recommendations:

RECOMMENDATION #1:

The CBA recommends that the Commission apply the applicable constitutional principles provided in the *PEI Reference*, clarified in *Bodner* and applied in *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)* in order to ensure an effective process characterized by government goodwill, a depoliticized judicial compensation process and judicial independence through fair and reasonable judicial compensation.

RECOMMENDATION #2:

The CBA recommends that the Commission consider the Provincial Court judges' work environment regarding that it is the Province's "people's court", its heavy caseload, the need to for judges to travel and the unique demands imposed on Provincial Court judges in working with large numbers of unrepresented litigants.

RECOMMENDATION #3:

The CBA recommends that the Commission recommend that the Senior Judges Program not be expanded.

RECOMMENDATION #4:

The CBA recommends that the Commission find that the government's current financial position allows for fair and reasonable judicial compensation. In addition, the CBA recommends that the Commission take into account the "Judicial Independence: (And What Everyone Should Know About It)" and the MOU in the Commission's consideration of the current financial position of the government.

RECOMMENDATION #5:

The CBA recommends that the Commission accept that the public interest is not properly served where there is a significant disparity between the remuneration for judges of the Provincial Court and the justices of the Supreme Court. The CBA further recommends that the Commission should take this factor into consideration in its determination of fair and reasonable judicial remuneration.

RECOMMENDATION #6:

The CBA recommends that the Commission consider that competitive compensation must be provided in order to attract qualified applicants to the Provincial Court Bench.

RECOMMENDATION #7:

The CBA recommends that the Commission apply the applicable laws of British Columbia, including the concurrent jurisdiction with the Supreme Court and the expanded jurisdiction of the Provincial Court to ensure that judicial independence is protected by the fair and reasonable determination of judicial compensation.

RECOMMENDATION #8:

The CBA recommends that the Commission consider other relevant matters, including: pensions, benefits and cost of living allowance indexed for inflation. The CBA further recommends that the Commission recommend that the government pay all reasonable costs incurred by the PCJA in preparing and making its submissions to the Commission.

CONCLUSION

The CBA has a proud tradition of speaking out and protecting the independence of the judiciary.

Consequently, we urge this Commission to recommend to the government that the Provincial Court Judges be fairly and reasonably compensated in order to uphold, preserve and protect the independence of the judiciary in British Columbia.

All of which is respectfully submitted.

Kerry L. Simmons
President
Canadian Bar Association BC Branch